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ENFORCING THE BROWN ACT:
Legal Tools for Government in the Sunshine

presented by

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I. Introduction

This paper provides an overview of the remedies provided by the Ralph M. Brown Act, Government Code, sections 54950 et seq.,[1] the open meeting law applicable to local governments in California.

The Brown Act provides a comprehensive scheme of enforcement tools, including criminal remedies in appropriately narrow circumstances, taping of closed sessions to deter misconduct in agencies where that has been shown, civil actions to void action taken in violation of the Brown Act in appropriate settings, actions to adjudicate past actions, actions for prospective civil and equitable relief, and provisions for awards of attorneys' fees and costs to prevailing parties. This paper will review each in turn.

II. Criminal Enforcement of the Brown Act

Some courts have stated that the preferred remedy for violations of the Brown Act is not invalidation of action taken, but rather criminal enforcement:

> Ordinarily, acts of a legislative body in violation of the Brown Act are not invalid; they merely subject the member of the governing body to criminal penalties.

(*Bollinger v. San Diego Civil Service Com*. (1999) 71 Cal.App.4th 568 (*citing Griswold v. Mt. Diablo Unified Sch. Dist*. (1976) 63 Cal.App.3d 648, 657–658 and §§ 54959, 54957).) Despite these statements, criminal prosecutions are rare and research reveals not a single appellate case involving such a prosecution.

This likely flows from the very difficult burden of proof imposed upon the prosecutor by Government Code section 54959, which defines the statutory crime as follows:

> Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.

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[1]Unspecified section references in this paper are to the Government Code.

Neither the courts nor the Attorney General have provided authoritative guidance regarding the sweep of this section. **Open & Public IV** — a consensus statement of the meaning of the Act published by local government organizations, public advocacy organizations and the California Newspaper Publishers Association — interprets it this way:

> A criminal violation has two components. The first is that there must be an overt act — a member of a legislative body must attend a meeting at which **action is taken** in violation of the Brown Act.
>
> "Action taken" is not only an actual vote, but also a collective decision, commitment or promise by a majority of the legislative body to make a positive or negative decision. If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.
>
> A violation occurs for a tentative as well as a final decision. In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act — not whether that member has voted with the majority or minority, or has voted at all.
>
> The second component of a criminal violation is that action is taken with the intent of a member "to deprive the public of information to which the member knows or has reason to know the public is entitled" by the Brown Act.

(League of California Cities, Open & Public IV: A Guide to the Ralph M. Brown Act at pp. 47–48 (2d edition, revised July 2010).)[2]

These are the familiar "*actus reas*" and "*mens rea*" elements — or overt act and state of mind — taught in law school criminal law classes. The act is obvious enough — the taking of action during a meeting in violation of the act. The mental element is the intent to withhold information from the public without authority to do so. Accordingly, an action taken in an open meeting at which members of the public are present would be outside the criminal penalty provision of the Brown Act. Thus, the issue will likely arise in invalid closed

[2] Open & Public IV is available online at <http://www.cacities.org/UploadedFiles/LeagueInternet/86/86f75625-b7df-4fc8-ab60-de577631ef1e.pdf> (last viewed 5/25/15).

sessions or, perhaps, outside formal meetings entirely, as in improper serial or daisy-chain meetings, if the phrase "a meeting of the legislative body" as used in this section covers such "meetings."[3]

The mental element is somewhat more elusive — the prosecutor must show that the member of the legislative body intended to deprive the public of

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[3] The cases most often cited for the rule that serial meeting and daisy-chain meetings violate the act arose before the Act was amended to expressly define the term "meeting" in 1993. (*E.g., Stockton Newspaper, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518 (both cited in **Open & Public IV** at p. 7, fns. 11 & 13). Section 54952.2, subdivision (a) defines the term "meeting" as "any congregation of a majority of the members of a legislative body **at the same time and location, including teleconference location** to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body." (Emphasis added.) Paragraph (b) of that same section proscribes serial or daisy-chain meetings, but not by amplifying the definition of "meeting," but by prohibiting that conduct. Accordingly, a literal reading of Act would eliminate criminal penalties for serial or daisy-chain meetings. However, this statute is not to be parsed narrowly. As the Fourth District Court of Appeal put it:

> [W]e are mindful that as a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 [construing open-meeting requirements].) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.)

(*International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 294.)

The counter argument, of course, would be that the criminal penalty provision of the Brown Act is not a "civil statute" and that due process requires criminal statutes to be construed narrowly so that no one is charged of a crime of which he or she is not given fair notice by the statute. Accordingly, this remains an open issue.

information and that he or she knew or should have known that doing so was improper. If the act occurs at a closed session that the agency's counsel has opined to be lawful, it may be difficult to prove the latter point. Thus, as is true of the Political Reform Act, incorrect legal advice can undermine the enforcement of laws that protect the public interest. The efforts of the League of California Cities and similar organizations to sharpen and maintain the skills of local government counsel under the Brown Act are therefore especially important.

The mere fact that an action took place with inappropriate secrecy might be sufficient to raise an inference of intent to withhold information from the public. On the other hand, any action taken to disclose the action — as by making payments on a public warrant register, reporting action out of closed session, discussing it in a later public session, etc. would seem to raise the counter inference.

Note, too that only members of legislative bodies, and not those who interact with them — such as applicants, counsel, and other staff — are subject to the criminal provision. (Gov. Code, § 54959; *see also Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1122 (only member of legislative body may "take action"). Of course, those who conspire with a member of a legislative body to commit, or who abet, a criminal violation may be charged with those crimes. These criminal doctrines, however, are beyond the scope of this paper.

In short, criminal remedies are not the most common means to protect the public's interest in knowing what its governments are doing. However, the prospect of criminal penalties is daunting for anyone and especially so for those who depend on the public's trust to succeed in their work. Thus, this narrow criminal provision casts a wide shadow in the work of local governments.

There is at least one other criminal statute that may be relevant in this arena, as demonstrated by an early Brown Act case that sought to address the Act's earlier omission of an express criminal remedy. *Adler v. City Council* (1960) 184 Cal.App.2d 763, was an effort to overturn a planning decision on the ground that all but one of Culver City's Planning Commissioners had attended a dinner at a private club in Beverly Hills with the applicant, arranged by the City's Planning Director as a "fact-finding" exercise. While such conduct would clearly violate the Brown Act as now written and might well support a decision to void the action following demand and failure to cure, the Second District viewed the matter differently in those early days of open meeting laws. The court refused to set aside the zoning action, stating that the Brown Act then provided:

> no penalty for infraction and no method of enforcement. Ordinarily this implies absence of intent to make the statute mandatory, existence of intent to leave it in the discretionary class. 'The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement.' Of course, violation of a directory statute does not result in invalidity of the action so taken. However, in view of the public purpose of the Brown Act, which is directed toward the conduct of public officials, we believe that section 1222, Government Code, and section 177, Penal Code are here applicable and give mandatory complexion to the act. Government Code, section 1222: 'Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.' Penal Code, section 177: 'When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.'
>
> This is one of those instances in which the prescribed penalty for violation of the law precludes all others.

(*Id*. at pp. 774–775.)

While Penal Code § 177 has been renumbered as § 19.4, Government Code § 1222 remains as adopted in 1943. It would seem that the last sentence of the language quoted from *Adler* controls here: because the Brown Act provides a specific criminal penalty, the general rule of Government Code § 1222 is therefore inapplicable. Nonetheless, that section remains potentially relevant to this discussion.

One other aspect of the Brown Act is also relevant to criminal practice. Section 54953.1 of the Act provides:

> The provisions of this chapter shall not be construed to prohibit the members of the legislative body of a local agency from giving testimony in private before a grand jury, either as individuals or as a body.

This provision has not been authoritatively construed. **Open & Public IV** suggests that it is merely an exception to the definition of a closed session meeting "because the body would not be meeting to make decisions or reach a consensus on issues within the body's subject matter jurisdiction." (**Open & Public IV** at p. 41 & fn. 38.) It is uncertain whether it provides a limitation on the rules of closed session confidentiality discussed further below.

III. Minutes and Tapes of Closed Sessions

Section 54957.2 of the Act authorizes the keeping of minutes and recordings of closed sessions and authorizes local governments to enact ordinances compelling subsidiary bodies to keep such records:

> (a) The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each closed session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be kept confidential. **The minute book shall be available only to members of the legislative body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction wherein the local agency lies.** Such minute book may, but need not, consist of a recording of the closed session.
>
> (b) An elected legislative body of a local agency may require that each legislative body all or a majority of whose members are appointed by or under the authority of the elected legislative body keep a minute book as prescribed under subdivision (a). (Emphasis added.)

As the emphasized language makes clear, there is a danger to this form of record keeping: the records created may serve to undermine the agency's own legal interests. From the narrow perspective of the agency's own interest, such minutes and tapes would seem of little benefit, as notes of counsel or some other record of actions taken, authority granted, etc. can be made that allows the

agency to track what it has decided without generating records which it does not need and that might fall into the wrong hands or otherwise be abused.

On the other hand, taping has a powerful impact on what is said during closed sessions. If the medium is not the message, as Marshall McLuhan would have it, the real and potential audiences for any message surely affect its content. It is open to question whether the taping of closed sessions will so affect the deliberative process as to empower appointed staff at the expense of elected officers, who may be disinclined to state their views frankly while the tape is running. If legal counsel cannot get a frank assessment of litigation options from elected officials due to tape-induced reticence, for example, his or her own judgment may loom the larger.

Thus, although San Franciscans have approved an initiative ordinance to require such taping (and require eventual disclosure of many such tapes),[4] at present the taping of closed sessions is more often a threatened penalty than a recommended practice. Indeed, section 54960, subdivision (a) provides:

> The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body, subject to Section 54960.2, or to determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to audio record its closed sessions as hereinafter provided.

Further, section 54960, subdivision (b) authorizes a court to impose the taping of closed sessions:

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[4] San Francisco Administrative Code, Appendix 47, Section 68.1 as amended by the Sunshine Ordinance of 1999. Such an ordinance is authorized by section 54953.7 of the Act, which authorizes local governments to provide "greater access to their meetings than prescribed by the minimal standards set forth in this chapter."

> upon a judgment of violation of Section 54956.7 [closed sessions for license applicants with criminal records], 54956.8 [closed sessions for real property negotiations], 54956.9 [closed sessions for pending litigation], 54956.95 [closed sessions for claims against joint powers agencies], 54957 [closed sessions for personnel matters], or 54957.6 [closed sessions for labor negotiations].

Section 54960, subdivision (c) provides specific rules for the handling and discovery of closed session tapes created pursuant to paragraphs (a) and (b) – i.e., for tapes created when taping is imposed as punishment for violations of the Act. The tapes are to be retained by a custodian designated by the agency. (Section 54960, subds. (c)(1) & (c)(2)(A).) The tapes are to be disclosed only for use in an action alleging violation of the Act. (*Id*., subd. (c)(2)(A).) The party seeking such discovery must make a motion before an appropriate court with notice to the affected local government. (*Ibid*.) The notice must include "an affidavit which contains specific facts indicating that a violation of the act occurred in the closed session." (*Id*., subd. (c)(2)(B)(ii).) If the court believes good cause has been shown, it "may then review in camera the recording of that portion of the closed session alleged to have violated the act." (*Id*., subd. (c)(3).) The statute continues:

> If, following the in camera review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this chapter, the court shall, in its discretion, make a certified transcript of the portion of the recording a public exhibit in the proceeding.

(*Id*., subd. (c)(4).) Express protection for attorney-client privileged communications appears in section 54950, subdivision (c)(5).

Other than as permitted by this section, of course, it is a violation of law for any person to disclose confidential information obtained from a closed session discussion without authority to do so. Section 54963 was added to the Act in 2002 to so state. Earlier authorities for that proposition include 80 Ops. Calif. Att'y Gen'l 231 (1997) ("A local school board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed."); *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334 ("Disclosure

of closed session proceedings by members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act.").

Enforcing the duty to maintain closed session confidences is, of course, problematic, notwithstanding the following language of section 54963:

> (a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10[5] to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.
>
> (b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.
>
> (c) **Violation of this section may be addressed by the use of such remedies as are currently available by law, including, but not limited to**:
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> (1) **Injunctive relief** to prevent the disclosure of confidential information prohibited by this section.
>
> (2) **Disciplinary action against an employee** who has willfully disclosed confidential information in violation of this section.

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[5] This very specific list of closed sessions protected the Act can be the basis of an argument that a closed session authorized by other authority, such as Health & Safety Code section 32155 (Healthcare District closed sessions re trade secrets) are not subject to these penalties under the canon of statutory construction known as *expressio unius est exclusio alterius.* (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) That was unlikely to have been the legislative intent and the older authorities will be useful if such an argument is raised.

> (3) **Referral** of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the **grand jury**. (Emphasis added.)

The Attorney General has concluded that a local ordinance imposing misdemeanor penalties for violating closed session confidences would be preempted. (76 Ops. Calif. Att'y Gen'l 289 (1993).) In that opinion and in 80 Ops. Calif. Att'y Gen'l 231, 237 (1997), the Attorney General suggested that remedies for such misconduct might include excluding a violator from future closed sessions, seeking an injunction against further disclosures, or seeking a grand jury allegation of "willful or corrupt misconduct in office" pursuant to Government Code section 3060. These last two judicial remedies are, of course, slow and costly.

The suggestion that an offending councilmember could be excluded from future closed session relies upon *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.2d 1050. There, a councilmember sought a writ of mandate to compel the Town to release to him a tape recording of a closed session from which he had voluntarily absented himself to avoid a conflict of interest violation under the Political Reform Act. The trial court refused the writ and the Sixth District affirmed, concluding that the councilman's duty under the Political Reform Act to abstain from participating in a decision in which he had a financial interest impliedly required that he not be permitted access to closed session discussion of the matter. While the case may be broadly read to allow exclusion of councilmembers whenever their legal interests in a matter to be discussed are adverse to the agency's, the Attorney General's suggestion that it provides authority to exclude councilmembers who have previously violated closed session privileges seems broad indeed.[6]

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[6] Although beyond the scope of this paper, it is worth noting that taking action against an elected official for misconduct in office raises a thicket of difficult issues involving due process, the separation of powers, and rights of free expression under the California and federal Constitutions. Note, for example, the solicitousness for rights of expression evident in this provision of section 54960:

> The district attorney or any interested person may commence an action by mandamus, injunction or declaratory relief … to determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of

Moreover, the statute has express carve-outs from its remedial provisions:

(d) Disciplinary action pursuant to paragraph (2) of subdivision (c) shall require that the employee in question has either received training as to the requirements of this section or otherwise has been given notice of the requirements of this section.[7]

(e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:

(1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.

(2) **Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action**.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

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its members is valid or invalid under the laws of this state or of the United States.

[7] For this reason, it is wise to orient elected officials and others who participate in closed sessions to their responsibilities and to provide them a copy of the Brown Act. See also section 54952.7: "A legislative body of a local agency may require that a copy of this chapter be given to each member of the legislative body and any person elected to serve as a member of the legislative body who has not assumed the duties of office. An elected legislative body of a local agency may require that a copy of this chapter be given to each member of each legislative body all or a majority of whose members are appointed by or under the authority of the elected legislative body."

> (f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code. (Emphasis added.)

The exception for expressing an opinion that the Brown Act was violated in closed session seems an especially wide door for violations of closed session privilege as not all opinions are reasonable.

Accordingly, absent a decision to routinely tape closed sessions to accomplish local policy objectives, such tapes are required only by court order to correct or prevent violations of the Act. Such tapes are to be maintained in confidence and made public only under the procedures set forth in the Act. The potential for erroneous release of such tapes, and the consequences for the deliberative process, however, suggest the Legislature was wise to restrict routine taping to the remedial context and not to make taping a rule of general application.

IV. Voiding an Action Taken in Violation of the Brown Act

The Brown Act's civil enforcement mechanisms can be categorized as forward-looking (injunction and other relief designed to prevent further violations) or backward-looking (seeking to avoid an action taken in violation of the Act). Let us begin by looking to the limited circumstances in which an action taken in violation of the Act may be invalidated.

Government Code section 54960.1, subdivision (a) provides the basic authority to invalidate a local government action for noncompliance with the Brown Act:

> The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953 [basic open meeting requirement], 54954.2 [agenda requirement], 54954.5 [closed session agenda descriptions], 54954.6 [notice and hearing requirements for new or increased taxes or assessments], 54956 [special meeting notice and agenda requirements] or 54956.5 [emergency meetings]

> is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.

Note, however, that the Brown Act violation alleged must relate to "an action taken by a legislative body" in violation of one of the cited sections. The mere fact that a Brown Act violation occurred with respect to a matter will not support invalidation of action properly taken in a meeting noticed consistently with the Act. In *Centinela Hospital Association v. City of Inglewood* (1990) 225 Cal.App.3d 1586, a hospital challenged land use entitlements granted to a competing psychiatric facility on the ground that the City Attorney had allegedly held illegal discussions with a majority of the Council before the Council conducted a public hearing and voted to authorize the land use. In light of the procedural posture of the case, the court accepted the allegation of improper out-of-meeting discussions, but found no basis to invalidate the entitlement because the allegedly improper discussions did not lead to an "action taken" and the action challenged was admittedly taken in a properly noticed meeting. (*Id*. at pp. 1598–1599.)

Similarly, *Moreno v. City of King* (2005) 127 Cal.App.4th 17 ruled the demand-for-cure provision inapplicable to an employee's claim of violation of his right under section 54957, subdivision (b)(2) to notice of closed session discussion of specific charges against him.

Before a suit to invalidate an action may be brought, however, the would-be plaintiff must provide a timely, written demand for a cure or correction of the alleged violation. (Section 54960.1, subd. (b).) "The demand shall be in writing and clearly describe the challenged action of the legislative body and nature of the alleged violation." *(Ibid.)* The demand is timely if made within 90 days of the action complained of, or within 30 days if the action took place in open session but on an off-agenda item. (Section 54960.1, subd. (c)(1).)

> Within 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or … of its decision not to cure or correct the challenged action.

(Section 54960.1, subd. (c)(2).) Inaction is deemed failure to cure or correct and the time in which to sue commences 30 days after the government receives the demand for cure. (*Id*., subd. (c)(3).) Any action challenging a cure, or a decision

not to cure, must be filed within 15 days of receipt of the agency's notice.[8] (*Id*., subd. (c)(4).) A decision to cure raises no inference the disputed action was unlawful. (*Id*., subd. (f).)

The courts apply a "substantial compliance" standard not only to implementation of the Brown Act, but also to a demand for a cure. (*See, e.g., Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116–1117 (discussing elements of suit under § 54960.1(a)); *Bell v. Vista Unified Sch. Dist.* (2000) 82 Cal.App.4th 672, 684 (demand faxed to District on day suit filed substantially complied with demand requirement).

However, not every purported cure is sustained by the courts. *Moreno v. City of King, supra*, 127 Cal.App.4th 17 found the City's discussion of a terminated employee's claim under the Government Claims Act to be insufficient to cure failure to give him advance notice that specific charges of misconduct against him would be disclosed in closed session as required by section 54957, subdivision (b)(2). Similarly, an illegal closed session with a college board president to mediate his claims against some boardmembers was not cured by issuing a notice identifying the president as a litigant and issuing minutes showing the board had reconsidered and approved the settlement agreement during the mediation. (*Page v. Mira Costa Community College Dist*. (2009) 180 Cal.App.4th 471.)

Under these rules, it would seem appropriate in most circumstances to provide a cure when demanded. If the cure requires no more than re-agendizing and re-discussing a matter and doing so raises no inference of misconduct and eliminates a risk of suit, why not do so? Of course, there may be circumstances where a demand is obviously frivolous, the political cost of a cure is high, or it is not feasible to cure an action. Nonetheless, from the perspective of minimizing legal (as opposed to political) risk, granting a cure would seem the preferred strategy.

Section 54960.1, subdivision (d) states the legal standard for a suit seeking to invalidate an action taken in violation of the Brown Act. The local agency prevails and its action is not voided if:

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[8] Thus, a local government would do well to provide any written notice of its action on a demand for a Brown Act cure by certified mail or other means that allow proof of the date notice is received.

(1) the agency acted in substantial compliance with the Brown Act;
(2) the action taken was in connection with debt;
(3) "[t]he action taken gave rise to a contractual obligation, including a contract let by competitive bid other than compensation for services in the form of salary or fees for professional services, upon which a party has, in good faith and without notice of a challenge to the validity of the action, detrimentally relied;"
(4) the action was taken in connection with the collection of a tax; or
(5) if the plaintiff complains of inadequate notice pursuant to "subdivision (a) of Section 54954.2, Section 54956, or Section 54956.5" had actual notice of the matter to be discussed 72 hours before a regular meeting, 24 hours before a special meeting, or at any time before an emergency meeting.

Section 54960.1, subdivision (e) provides that suit to void a local government action for an alleged Brown Act violation "shall be dismissed with prejudice" if the action "has been cured or corrected by a subsequent action of the legislative body." This allows a cure or correction taken after the 30-day period established by section 54960.1, subdivision (c)(2) and is akin to the rule that a court must apply the law in effect when it acts. Thus, it is not too late to cure an alleged Brown Act violation even after a suit is filed.

The courts have added judicial gloss to this standard. It is not enough to demonstrate some technical noncompliance with the Act to win a judicial determination that the action was invalid and, as discussed further below, attorneys' fees and costs. Some prejudice must also be shown.

> Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily "invalidate a decision. [Citation.] Appellants must show prejudice." (*Cohan v. City of Thousand Oaks, supra*, [(1995)] 30 Cal.App.4th [547] at pp. 555–556, 35 Cal.Rptr.2d 782 [no prejudice shown from violation of § 54954.2, subd. (a), which "requires that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda"].)

(*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1410.)

V. Adjudicating Past Violations of the Brown Act

In 2012, the Legislature added a new remedy to the Brown Act, the right to demand an "unconditional commitment" to cease a past practice under the Brown Act. (Section 54960.2.) The remedy is available to "[t]the district attorney or any interested person" who must first mail or fax a "cease and desist letter" "to the clerk of secretary of the legislative body being accused of the violation" "clearly describing the past action of the legislative body and nature of the alleged violation." (*Id*., subd. (a)(1).) Such a demand must be made within nine months of an alleged violation. (*Id*., subd. (a)(2).) The legislative body has 30 days to respond to a cease-and-desist letter although a later response may still obviate subsequent suit, but will oblige the agency for the plaintiff's attorneys' fees and costs. (*Id*., subd. (b).) Such a response may be "an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate this chapter" in substantially the form specified in section 54960.2, subdivision (c)(1). (*Id*., subd. (c)(1).) Such an unconditional commitment "shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda." (*Id*., subd. (c)(2).)

> Nothing in this subdivision shall be construed to modify or limit the existing ability of the district attorney or any interested person to commence an action to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body.

(*Id*., subd. (c)(3).)

The benefit of such an unconditional commitment is obvious: it ends the risk of suit and protects the agency from litigation costs, including the plaintiff's attorneys' fees and costs. The consequences are significant, too, however. Beyond the obvious political cost of such a public confession of error, the statute provides:

> (d) If the legislative body provides an unconditional commitment as set forth in subdivision (c), the legislative body shall not thereafter take or engage in the challenged action described in the cease-and-desist letter, except as provided in subdivision (e). **Violation of this subdivision shall constitute an independent violation of this chapter, without regard to whether the challenged action would otherwise violate this chapter**. An action

alleging past violation or threatened future violation of this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section.

(e) The legislative body may resolve to rescind an unconditional commitment made pursuant to subdivision (c) by a majority vote of its membership taken in open session at a regular meeting as a separate item of business not on its consent agenda, and noticed on its posted agenda as "Rescission of Brown Act Commitment," provided that not less than 30 days prior to such regular meeting, the legislative body provides written notice of its intent to consider the rescission to each person to whom the unconditional commitment was made, and to the district attorney. Upon rescission, the district attorney or any interested person may commence an action pursuant to subdivision (a) of Section 54960. An action under this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section.

Thus, the unconditional commitment becomes a binding obligation of the agency until properly rescinded and it can be enforced by an injunction action without necessity for a new cease-and-desist demand letter. It can be rescinded only by a properly agendized item of business after notice to the person for first issued the cease and desist demand and to the district attorney. Thereafter, the former cause of action for injunction relief springs back to life and the unconditional commitment becomes a mere tolling action, not a defense.

Although the cease and desist demand has obvious attractions to plaintiffs who are prepared to sue, the most common and simplest Brown Act enforcement mechanism is the demand-and-cure process of section 54960.1. Any interested person, including a District Attorney, can use it. This process allows prompt resolution of disputes and will most often lead to renewed opportunity for public participation in local government because there will be few circumstances where the path of least resistance is not a cure or correction. Thus, it seems that the demand-and-cure provision of section 54960.1 is the best means of enforcing

the Act because it is prompt, inexpensive, available to those without counsel, and does not require lengthy and expensive judicial proceedings.

Now let us turn to the remaining civil remedy under the Act — judicial actions to declare that an agency has violated the Brown Act and to restrain further violations — and to the related issue of attorneys' fees and costs.

VI. Prospective Relief Under the Brown Act

Section 54960, subdivision (a) authorizes a district attorney[9] or any interested person to seek judicial relief to restrain further Brown Act violations by an agency found to have done so. The provisions of this section regarding the compelled taping of closed sessions are discussed above. Unlike the criminal remedy discussed above, an action can be found to violate the Brown Act, and an injunction against further violations entered, without proof that an action was taken or that the offending members of the legislative were aware that their conduct violated the act. (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287 ["Civil remedies are available to prevent further or future violations and do not require knowledge or action taken."].) Nor does the Act require a demand before suit is filed:

> These time requirements and cure and correct provisions are contained only in section 54960.1 and not in section 54960. We interpret this to mean that these provisions apply only when a party seeks to have a particular action of a legislative body declared null and void and not when suit is brought under section 54960 to determine the applicability of the Act to past conduct or threatened future actions of the legislative body. Therefore, contrary to appellant's assertions, the District Attorney in this case could have filed an action at any time seeking declaratory or injunctive relief under section 54960.

(*Id*. at p. 1288 (citations omitted).)

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[9] The Attorney General had previously opined that District Attorneys were not within the phrase "any interested person" found in section 54960, subdivision (a) and were restricted to criminal actions under section 54959. (62 Ops. Calif. Att'y Gen'l 150 (1979).) The Legislature subsequently amended the Act to clarify District Attorneys' standing under section 54960.

The ripeness doctrine is but loosely applied in actions seeking a declaration that a local government has violated the Brown Act. It is not necessary to allege a pattern and practice of violations; the allegation of a single violation can be sufficient to sustain such an action:

> Contrary to city's argument, the ripeness doctrine does not require that to obtain declaratory relief CAUSE allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred.

(California Alliance for Utility etc. Education v. City of San Diego (1997) 56 Cal.App.4th 1024, 1029; see also *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904 [injunctive relief justified by proof of past closed session actions related to present or future ones].) The existence of an actual controversy can be inferred from the mere fact of an agency's refusal to concede that it has not violated the Brown Act. (*Ibid*.) Thus, the pleading burden for a would-be plaintiff under section 54960 is light indeed.

Further, the standing requirement under this section is virtually non-existent. The Third District Court of Appeal permitted a journalists' union to challenge the exclusion of individual reporters from a meeting of the Sacramento County Board of Supervisors and members of one of the county's bargaining units, writing:

> The right to disclosure is an attribute of citizenship, not possessed in any increased degree by persons or groups whose interest in access to news is economic. Section 54950's broad declaration of the public's right to disclosure should logically extend standing to any county elector. Had the county raised the issue in the trial court, amendment of the complaint to add appropriate parties and allegations would have been little more than a matter of mechanics. Under the circumstances, there is substantial compliance with section 54960.

(*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 46; see also *McKee v. Orange Unified School Dist*. (2003) 110 Cal.App.4th 1310 [plaintiff had standing to bring Brown Act enforcement action even though he resided in another county]; *SEIU, Local 99 v. Options-A Child Care and Human Services Agency* (2011) 200 Cal.App.4th 869 [union had standing to

enforcement Brown Act compliance provision of agreement to fund non-union social service provider].)

However, standing was denied a Councilmember to sue his own Council to enforce its rule against late-night discussion. (*Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 [affirming SLAPP relief on ground that Councilmember lost citizen standing by taking office].)

On its face, section 54960 authorizes a court not only to impose a closed-session taping requirement to prevent further Brown Act violations, but also:

(1) to impose an order sufficient to stop or prevent violations or threatened violations of the Act by members of a legislative body;
(2) to determine the applicability of the Act to ongoing actions or threatened further actions of the legislative body; or
(3) to determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid.

These remedies are broad, flexible and available to a District Attorney or "any interested person" and subject to a very low pleading burden. Accordingly, where judicial enforcement of the act is necessary, it would seem that civil action under section 54960 is to be preferred to the draconian, and more difficult to prove, criminal suit under section 54959.

VII. Attorneys' Fees and Costs

Section 54960.5 authorizes the award of attorneys' fees and costs to a successful plaintiff in a civil action to void an action taken in violation of the Act or to restrain further violations of the Act:

> A court **may** award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 [declaratory or prospective relief], 54960.1 [suit to invalidate an action] or 54960.2 [suit to determine validity of past action] where it is found that a legislative body of the local agency has violated this chapter. Additionally, when an action brought pursuant to Section 54960.2 is dismissed with prejudice because a legislative body has provided an unconditional commitment pursuant to paragraph (1) of subdivision (c) of that section at any time after the 30-day period

> for making such a commitment has expired, the court **shall** award court costs and reasonable attorney fees to the plaintiff if the filing of that action caused the legislative body to issue the unconditional commitment. The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency. (Emphasis added.)

As the use of the term "may" implies, a court is authorized, but not obliged, to award fees and costs to a successful plaintiff in a civil enforcement action under the Brown Act under sections 54960 and 54960.1. (*E.g., Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 800; *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1120 ("The award pursuant to this statute is not mandatory; it is entrusted to the trial court's discretion.").) However, one court has described a trial court's discretion to deny fees to a successful plaintiff as "fairly narrow." (*Galbiso v. Orosi Public Utility Dist*. (2008) 167 Cal.App.4th 1063, 1077.) Fees are mandatory upon dismissal of an action under section 54960.2 after an agency makes a post-suit unconditional commitment to cease a questioned practice.

The showing to win a cost and fee award pursuant to section 54960.5 is not influenced by the showings of broader public benefit required of a fee award under Code of Civil Procedure section 1021.5. This flows from the purpose of the cost and fee provision of the Brown Act is to facilitate civil enforcement of the Act:

> the Brown Act provides specific legislative authorization for attorney's fees in actions brought to enforce a public policy in a context where actual recoverable damages are likely to be trivial. The damage is to the public integrity, and the fees are designed to make it economically feasible to rectify that damage by private legal means.

(*Common Cause v. Stirling* (1981) 119 Cal.App.3d 658, 664.) However, the appellate courts have provided some guidance for the exercise of the trial court's discretion in this regard:

> Our comments, however, should not be interpreted as indicating that a trial court must award attorney's fees to a prevailing plaintiff in every Brown Act violation. A court must still thoughtfully exercise its power under section 54960.5 examining all the circumstances of a given case to determine whether awarding fees

> under the statute would be unjust with the burden of showing such inequity resting on the defendant. For example, in *Aho v. Clark* (9th Cir. 1979) 608 F.2d 365, an order denying attorney's fees under the Civil Rights Act was affirmed because the award of fees might have altered the consequences of the settlement reached by the parties, defendants were already in the process of remedying the program at issue and attorney's fees were not essential to attract competent counsel. (*Id*. at pp. 366–368; *see also Zarcone v. Perry* (2d Cir. 1978) 581 F.2d 1039, 1044 *cert. den*. (1979) 439 U.S. 1072).) Without limitation, some other considerations which the court should weigh in exercising its discretion include the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.

(*Id*. at 665.) Thus, while the Brown Act gives the trial courts discretion to award fees and costs in appropriate circumstances, there must be some evidence that the suit was warranted and that the fee award accomplished a public purpose.

The trial court is obliged to state a rationale for a fee award:

> Given the important public purposes underlying the Brown Act, the requirements of due process, and the need to make a record for appellate review, we conclude that pursuant to section 54960.5, a trial court must specify with particularity the basis for the awarding costs or attorney fees. The trial court must set forth the factual basis for the award either in a formal order, a minute order, or in the reporter's transcript of the hearing on the motion.

(*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1121.)

Where a Brown Act violation is pled jointly with other causes of action, fees may be awarded under section 54960.5 on the Brown Act cause of action alone and the trial court is required to apportion fees and costs as required for fee awards under Code of Civil Procedure section 1021.5 and other fee-award statutes. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686.) Fees and costs may also be granted under section 54960.5 for appellate litigation. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 781*; International*

Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal.App.4th 287, 303.)

The second paragraph of section 54960.5 authorizes a court to award fees and costs to a defendant local government in limited circumstances:

> A court may award court costs and reasonable attorney fees to a defendant in any action brought pursuant to Section 54960 or 54960.1[10] where the defendant has prevailed in a final determination of such action and **the court finds that the action was clearly frivolous and totally lacking in merit**. (Emphasis added.)

Given this high standard, fee awards to defendant local governments are rare. (*E.g., Frazer v. Dixon Unified School Dist*., 18 Cal.App.4th 781, 800 (1993) (reversing fee award to defendant school district); *Sutter Sensible Planning, Inc. v. Board of Supervisors*, 122 Cal.App.3d 813, 826 (1981) (affirming trial court's refusal to award fees to respondent county).) Making such awards available but infrequently serves the broad purposes of the Brown Act and, perhaps, reflects the differential access of many local government officials and their adversaries to legal counsel.

One case in which fees and costs were awarded to a defendant is *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109. There, the plaintiff alleged city officials, a private law firm, and one of its members violated the Brown Act by discussing the plaintiff's prior suits against the City without properly agendizing them. The trial court ruled against the plaintiff on each of his claims and entered an award of fees and costs in favor of all defendants. The Second District Court of Appeal reversed the cost and fee award as to the City officials for a clearer statement of the basis for the award, but sustained the award — and added a fee award for the appeal — to the outside counsel, finding the action against those defendants sufficiently frivolous to justify the award:

> Outside counsel defendants sought, and were awarded, costs in the trial court. We have affirmed that award, and we find that Boyle's

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[10] Note the absence of a reference to section 54960.2 here. This will be given meaning even if there is no obvious rationale to allow fees to the local government in an unsuccessful suit under sections 54960 and 54960.1 but not in such a suit under section 54960.2.

> appeal as to the outside counsel defendants was totally lacking in merit. Given the requirements for a complaint alleging violations of the Brown Act as stated in section 54960.1, no reasonable attorney would have named outside counsel defendants in the complaint. The outside counsel defendants are not a legislative body of a local agency; therefore no 'action taken' by outside counsel defendants occurred, and Boyle made no timely demand that outside counsel cure or correct the action allegedly taken in violation of the Brown Act. As to outside counsel defendants, therefore, this court grants their request for attorney fees and costs on appeal, and remands the matter to the trial court for its determination, upon proper application, of the amount of those attorney fees and costs.

(*Id*. at pp. 1121–1122 (citations omitted).)

This discussion suggests a high standard for fee awards to Brown Act defendants ("no reasonable attorney would have named outside counsel defendants in the complaint") as does section 54960.5 ("clearly frivolous and totally lacking in merit") and appears to have been influenced by the relative parity between the plaintiffs and the outside counsel defendants (who lack immediate access to the public fisc), a parity not likely to be found when dealing with local government officers.

VIII. Conclusion

The Brown Act, then, provides a comprehensive remedial scheme to ensure its enforcement. Criminal remedies are given a properly narrow sweep, although in practice these have a substantial deterrent effect over a broader range of conduct, as few public officials wish to be accused of, much less charged with, a crime. Similarly, government action can only infrequently be overturned on the basis of a Brown Act violation, reflecting the interests in finality in government action and the reliance interests of innocent third parties. Nor does the Act require the taping of closed session deliberations, allowing ample room for appropriate government deliberations on matters properly discussed in closed session. Instead, taping is an option to be chosen by local policy makers (as by San Francisco's voters) or a remedy to be imposed when a violation of closed session rules has been proven.

On the other hand, prospective civil enforcement of the Act, determination that past practices violate the Act, and declaratory relief are freely

available under minimal standards of standing and ripeness and, for the successful plaintiff, an award of fees and costs may be likely. Fees and costs can be awarded against a plaintiff only in very narrow circumstances, thus further encouraging this form of Brown Act enforcement.

Of course, the best means to enforce the civil laws that apply to local governments is for those officials to be given adequate information and training on the complex laws that govern their conduct and for adequate access to counsel to be provided as well. Local government counsel become, in effect, the primary and most efficient means by which our society enforces its expectations of local government officials. This is as it should be, but it also serves as a reminder to public lawyers of the high standards we must maintain and of the consequences for local democracy if we do not.