



Serially? Seriously. Avoiding the Perils and Pitfalls of Serial Meetings in the Digital Age

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The Brown Act in the Digital Age

In 1952, a *San Francisco Chronicle* 10-part series entitled “Your Secret Government,” exposing the secret meetings conducted by local governments was published.¹ In response, legal counsel for the League of California Cities drafted state legislation to create a new state open meeting law.² Assembly Member Ralph M. Brown carried the legislation, which Governor Earl Warren signed into law on 1953.³ The act, which came to be known as the Ralph M. Brown Act, or the Brown Act for short, added Chapter 9 [§§ 54950-58] to the California Government Code.

At the time the Brown Act was created, only about half of U.S. households owned a television set.⁴ By 1960, four out of every five U.S. households had a telephone.⁵ In the 1970s, technology had evolved to the point that individuals - mostly hobbyists and electronics buffs - could purchase unassembled personal computers, but early computers could not perform many of the useful tasks that today’s computers can.⁶ In 1984, the percentage of U.S. households with home computers was 8%. In 2013, that figure was 85%, with 74% of all households having Internet access.⁷ Although many American households still have desktop computers with wired Internet connections, many others also have laptops, smartphones, tablets, and other devices that connect people to the Internet via wireless modems and fixed wireless Internet networks, often with mobile broadband data plans.⁸ In 2015, nearly two-thirds of Americans owned a smartphone⁹ and 65% of adults used social networking sites, up from 7% in 2005.¹⁰

The proliferation of technology in the past three decades has resulted in the growth of individual and household ownership of personal computers, cell phones, and mobile electronic devices. These technologies have increased the speed, volume, and

¹LEAGUE OF CALIFORNIA CITIES, *OPEN & PUBLIC V: A GUIDE TO THE RALPH M. BROWN ACT* 9 (2016), <https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx>.

² *Id.*

³ *Id.*

⁴ MITCHELL STEPHENS, *History of Television*, GROLIER ENCYCLOPEDIA, <https://www.nyu.edu/classes/stephens/History%20of%20Television%20page.htm> (last visited June 27, 2016).

⁵ U.S. CENSUS, *Telephones*, HISTORICAL CENSUS OF HOUSING TABLES, <https://www.census.gov/hhes/www/housing/census/historic/phone.html> (last visited June 27, 2016).

⁶ HISTORY CHANNEL, *INVENTION OF THE PC*, <http://www.history.com/topics/inventions/invention-of-the-pc> (last visited June 27, 2016).

⁷ U.S. CENSUS BUREAU, *COMPUTER AND INTERNET USE IN THE U.S.*, <http://www.census.gov/hhes/computer> (last visited June 27, 2016).

⁸ *Id.*

⁹ Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR., Apr. 1, 2015, <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015>.

¹⁰ Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CTR., Oct. 8, 2015, <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015>.

frequency in which individuals communicate at home, work and school. The power of social networking is such that, the number of worldwide users is expected to reach some 2.5 billion by 2018, around a third of Earth's entire population.¹¹

While social media has enabled individuals, groups, businesses, and societies to become globally connected, local agencies must address emerging legal issues related to social media that conflict with the Brown Act. The main problem with the Brown Act is that it was created in an era where communication vehicles were much more limited and it was easier to hide from the public eye.¹² In 1953, the only way the public could practically interact with their elected officials was through these periodic in-person meetings.¹³ An article noted how technology has affected how local officials communicate: "Local public officials are often frequent and zealous users of technology and social media. Given the rapid speed with which people can now send e-mails and text messages and post comments online, a casual e-mail conversation between two city council members or an offhand comment on a newspaper website may quickly and inadvertently turn into a 'meeting' under the Brown Act."¹⁴

I. Legislative Intent of the Ralph M. Brown Act

The legislative intent of the Brown Act was expressly declared in its original statute¹⁵:

The Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

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

¹¹ *Social Networks – Statistics & Facts*, STATISTA, <http://www.statista.com/topics/1164/social-networks> (last visited June 27, 2016).

¹² Seth Rosenblatt, *Let's bring the Brown Act into the 21st century*, EDSOURCE, Jan. 21, 2013, <https://edsource.org/2013/lets-bring-the-brown-act-into-the-21st-century/25885>.

¹³ *Id.*

¹⁴ Kara Ueda, *The Brown Act and the Perils of Electronic Communication*, WESTERN CITY, June 2011, <http://www.westerncity.com/Western-City/June-2011/The-Brown-Act-and-the-Perils-of-Electronic-Communication>.

¹⁵ Ch. 1588, Regular Sess. (Cal. 1983).

“Open meetings in the context of the Brown Act are meant to require that discussions occur in front of a public audience and provide the public with an opportunity to attend and participate.”¹⁶ The Brown Act only applies to “local agencies” and “local legislative bodies.” A “local agency” is a county, city, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, agency, or local public agency.¹⁷ A “legislative body” includes the governing body, commission, committee, board, or other body of a local agency. Thus, the Brown Act applies to city councils, which are the local governing body of the city. The Brown Act also applies to boards and commissions.

The initial Brown Act included open meeting notification requirements and provisions for closed sessions. The Brown Act has since been expanded and has served as the model for the Bagley-Keene Act for state government.

a. Definition of a “Meeting”

A “meeting” means “any congregation of a majority of the member of a legislative body at the same time and location, including teleconference locations, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.” Cal. Gov’t Code § 54952.2 (West 2016).

“Deliberation” refers to not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. *Page v. Mira Costa Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 502 (2009). The California Supreme Court has stated that deliberative action includes a “collective decision-making process” and “deliberative gathering.” *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 376 (1993), quoting *Sacramento Newspaper Guild*, 263 Cal. App. 2d, 47, 48 (1968). It also includes “informal sessions at which a legislative body commits itself *collectively* to a particular future decision concerning the public business.” *Roberts*, 5 Cal. 4th at 376, quoting *Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95,102 (1985).

“Action taken” means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance. Cal. Gov’t Code § 54952.6 (West 2016).

A local agency employee or official may answer questions or provide information outside of a meeting as long as that person does not communicate the comments or positions of members of the legislative body to other members. Cal. Gov’t Code §

¹⁶ Oona Mallett. *Who’s Afraid of the Big, Bad Wolfe? A Call for a Legislative Response to the Judicial Interpretation of the Brown Act*, 39 MCGEORGE L. REV. 1073, 1076 (2008).

¹⁷ CAL. GOV’T CODE § 54951.

54952.2(b)(2) (West 2016). The following types of interaction of a local body do not constitute a “meeting” for the purposes of the Brown Act¹⁸:

- Individual contacts between a member of a legislative body and another person that does not violate the meeting requirement (e.g., a member contacting a constituent); or
- Attendance by a majority of a local body, provided that a majority does not discuss business among themselves within the body’s subject matter jurisdiction at any of the following events:
 - Conferences;
 - Open, publicized meetings to address a community topic;
 - Open and noticed meeting of another local body;
 - Ceremonial or social events; or,
 - Open and noticed meeting of a standing committee of that body.

b. Serial meeting

A majority is prohibited from using “a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action” on business within its subject matter jurisdiction outside of a meeting. Cal. Gov’t Code § 54952.2(b)(1) (West 2016). A series of private meetings (known as serial meetings) by which a majority of the members of a legislative body commit to a decision or engage in collective deliberation concerning public business violates the Brown Act’s open meeting requirement. *Page*, 180 Cal. App. 4th at 503-04. The California Supreme Court has emphasized that “the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement.” *Id.* at 504, quoting *Roberts, supra*, 5 Cal. 4th at p. 376. The Attorney General has opined that “while the Brown Act makes exceptions for specified matters – such as litigation, employee discipline, and negotiations for real estate transactions – these exceptions must be construed narrowly, in favor of the public's right of access to public information.” 94 Cal. Op. Att’y Gen. 82 (2011).

c. Ways to Create a Serial Meeting

In general, a serial meeting occurs through a (1) “hub- spoke” or (2) “daisy-chain.”

¹⁸ CAL. GOV’T CODE § 54952.2(c).

i. **Hub-Spoke**

A hub-spoke distribution is a system of connections arranged like a wire wheel. One individual member acts as the hub, or the center of the wheel and feeds and receives information to and from other members. “The hub-spoke version of a meeting occurs when one board member, or representative of a board member, individually contacts other members to discuss an item of business or transaction.”¹⁹ “When a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred.”²⁰ This centralized network system allows one person to coordinate messages and create a concerted plan to engage in public business through a series of communications that violates the Brown Act.

ii. **Daisy-Chain**

“The daisy-chain meeting occurs when one member calls another to discuss business and the second member calls a third to discuss the conversation, and so on.”²¹ “For example, a chain of communications involving contact from member A to member B who then has communications with member C would constitute a serial meeting in the case of a five-person body.”²² This sequence of relaying information from one person to the next, like a chain link, is similar to the game of “telephone,” and violates the Brown Act.

d. Individual Contact between Members of the Public and Members of a Local Legislative Body

Individual contacts or conversations between a member of a legislative body and any other person do not violate the Brown Act. Cal. Gov’t Code § 54952.2(c)(1) (West 2016). According to the Attorney General’s office, in its 2003 Pamphlet on the Brown Act²³:

The purpose of this exception appears to be to protect the constitutional rights of individuals to contact their government representatives regarding issues which concern them. To harmonize this exemption with the serial meeting prohibition, the term “any other person” is construed to mean any other person other than a board member or agency employee. Thus, while this provision exempts from the [Brown] Act’s coverage conversations between board members and members of

¹⁹ Mallett, *supra* note 16, at 1076.

²⁰ CALIFORNIA ATTORNEY GENERAL’S OFFICE, THE BROWN ACT: OPEN MEETINGS FOR LOCAL LEGISLATIVE BODIES 11 (2003).

²¹ Mallett, *supra* note 16, at 1076.

²² California Attorney General’s Office, *supra* note 20, at 11.

²³ California Attorney General’s Office, *supra* note 20, at 13.

the public, it does not exempt conversations among board members, or between board members and staff in a daisy-chain or hub-spoke manner to develop a collective concurrence.

A Brown Act violation can still occur when a constituent is involved in orchestrating a collective concurrence among a legislative body. If a resident contacts his council member regarding a constituent issue and secures the member's support for a water conservation plan, then there is no Brown Act violation pursuant to Cal. Gov't Code § 54952.2(c)(1). However, if the constituent contacts (assuming a 9 member body) at least five council members and conveys to one member that four other council members are already in support of the measure and states that the Member's support will ensure the proposal succeeds, the interaction is in danger of triggering a "hub-spoke" serial meeting. It is up to the member, who is likely more knowledgeable about the Brown Act, to halt the conversation. While there are obvious practical hurdles to proving such communications have occurred, Councilmembers should be vigilant in discouraging such constituent communications and should remember that it is the Councilmember, not the constituent, who is subject to the law and who will be held accountable for the violation of the law if discovered. And, as discussed below, word can travel fast and wide in the digital world and in the world of a public official, even the perception of misconduct can all too often define reality.

e. Common Ways to Create a Serial Meeting Violation Prior to Social Media

i. In-Person

A series of individual meetings that lead to a collective concurrence violates the Brown Act. State law has abrogated a court decision that held otherwise. In 2006, in *Wolfe v. City of Fremont*, the plaintiff city resident alleged that a city manager violated the Brown Act by meeting individually with a majority of council members on a proposed policy governing police response to residential home invasion alarms to obtain their support and collective concurrence. *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 538-39 (2006), *as modified on denial of reh'g* (Nov. 30, 2006), *overturned due to legislative action*. The court affirmed the trial court's decision in favor of the defendant city manager. *Id.* at 547. The court reasoned that serial individual meetings that do not result in a "collective concurrence" do not violate the Brown Act. *Id.*, n. 6. "Accordingly, if city council members discuss a policy in private meetings without asking or telling each other how they will vote, their actions will not violate the Brown Act despite the fact that the deliberations are conducted outside a publicly noticed meeting."²⁴

²⁴ Mallett, *supra* note 16, at 1081.

Subsequent state legislation, SB 1732 (Romero), Chapter 63, Statutes of 2008, abrogated *Wolfe* and disapproved the *Wolfe* court’s holding to the extent it construes the prohibition against serial meetings as a “series of individual meetings by members of a body [that] actually result[s] in a collective concurrence rather than also including the process of developing a collective concurrence as a violation.”²⁵

Therefore, under current state law, a series of individual meeting that lead to a collective concurrence violates the Brown Act.

ii. Telephone

A series of individual telephone conversations that lead to a collective concurrence violates the Brown Act. In *Stockton Newspapers, Inc.*, plaintiff newspaper agency alleged that a local redevelopment agency attorney contacted members of the agency through a series of individual telephone conversations to secure a collective commitment to approve the transfer of real property for a planned waterfront development. *Stockton Newspapers, Inc.*, 171 Cal. App. 3d at 99. The court held that the series of telephone contacts constituted a meeting within and violated the Brown Act. *Id.* at 98-99. The court reasoned that the ease by which personal contact is established by use of the telephone and its common use to conduct business rendered a physical presence of the members of a legislative body to establish an informal meeting unnecessary. *Id.* at 102. If face-to-face contact of the members of a legislative body were necessary for a “meeting,” the objective of the open meeting requirement of the Brown Act could all too easily be evaded. *Id.*

Therefore, serial meetings conducted via telephone violate the Brown Act.

iii. E-mails

A series or chain of individual e-mails that lead to a collective concurrence violates the Brown Act. In an Attorney General Opinion, counsel concluded that:

A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency’s Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

²⁵ SB 1732, Ch. 63, Reg. Sess. (Cal. 2008).

The opinion noted that the use of e-mails to develop a “collective concurrence” for a future action item includes “any exchange of facts,” “substantive discussions ‘which advance or clarify a member’s understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue’ regarding an agenda item.” 84 Cal. Op. Att’y Gen. 30 (2001). The Attorney General opinion stated that there is “no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. *Id.* If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b) [of the Cal Gov’t Code].”*Id.* Due to the ease of forwarding e-mails, a “daisy-chain” serial meeting is likely to occur by e-mail.²⁶

Unfortunately, with the reply-all button so readily accessible, creating an “exchange of facts” is all too easy. One way to manage this is to blind copy all recipients other than agency staff on an email. This will prevent elected officials from even accidentally replying to all original recipients and creating a serial communication. While this analysis is hard to reconcile with the reality of e-mail and smart phone communication, this should not discourage staff from conducting business with a council via email. Email is an efficient means to communicate with elected officials regarding factual information relating to agenda items or issues of interest. However, staff and elected officials should be mindful of the content of their responses, careful when replying, and aware of the potential for creating a “daisy-chain” serial meeting.

Therefore, serial meetings conducted via e-mail violate the Brown Act.

iv. Cell Phones & Text Messages

A series of cell phone text messages that lead to a collective concurrence violates the Brown Act. According to a 2013 article, “The use of texting during city council meetings seems to be a growing problem in California, and would seem to undermine both the spirit, if not the law, of the Brown Act and Public Records Act.”²⁷ It seems that e-mail communications that would violate the Brown Act would similarly apply to “text messages between various members of a particular board or council.”²⁸ Text messages sent to council members during an open meeting would qualify as secretive because members of the public are not privy to the content of the text message.²⁹ If a group text message or a series of text messages include a majority of the board or council members and relate to the deliberations at hand, then the board or council has violated the Brown

²⁶ Ueda, *supra* note 14.

²⁷ *A&A: Councilmembers texting during meeting a Brown Act Violation?*, FIRST AMENDMENT COALITION, May 23, 2013, <https://firstamendmentcoalition.org/2013/05/aa-councilmembers-texting-during-meeting-a-brown-act-violation>.

²⁸ *Id.*

²⁹ *Id.*

Act. In addition, since text messages could qualify as “other writings” distributed to at least a majority of the members, the messages would be subject to the California Public Records Act.³⁰

It is undetermined whether private communications on personal electronic devices are subject to the California Public Records Act. In *City of San Jose v. Super. Ct. (Smith)*, the plaintiff submitted a public records request for “all voicemails, emails or text messages sent or received on private electronic devices” used by the Mayor, members of the City Council, or their staff. *City of San Jose v. Super. Ct. (Smith)*, 169 Cal. Rptr. 3d 840, 843 (2014). The City had disclosed records sent or received on private electronic devices using these *public officials’ City accounts*, but it refused Smith’s request for communications sent or received on these individuals’ personal electronic devices using their private accounts (e.g., a message sent from a private gmail account using the person’s own smartphone or other electronic device).³¹ The Court of Appeal reasoned that the writings sought by the plaintiff were not “prepared, owned, used, or retained” by a “local agency” as called for by Cal. Gov’t Code section 6252 within the California Public Records Act. *Id.* at 855. The City cannot, for example, “use” or “retain” a text message sent from a council member’s smartphone that is not linked to a City server or City account. *Id.* at 850. The case is currently pending in the California Supreme Court, which granted review of the case. We await Supreme Court direction on the important issue.

II. Legal Issues with Digital and Social Media

The Internet and various social media apps and websites provide abundant opportunities for elected officials to post their opinions, thoughts and general comments about city issues. Local journalists and news and community bloggers report on city meetings and events and even provide a running commentary of council and commission meetings as they happen. And most newspapers have websites where members of the public and local officials can — and frequently do — comment on the articles. When these entries or articles are especially timely or controversial, they practically invite comments by interested residents and local officials.

As of the time of preparing this presentation, no court has specifically ruled on the Internet or social media posts in regards to Brown Act requirements. However, the same serial meeting rules that apply to e-mail may likely apply to other digital and social online conduct such as texting, tweeting, liking, swiping, and commenting on stories and third party blogs and posts.

³⁰ *Id.*

³¹ Mark S. Askanas, *Messages on Government Officials’ Personal Devices and Private Accounts Not Subject to California Public Records Act*, JACKSON LEWIS, Mar. 31, 2014, <http://www.jacksonlewis.com/resources-publication/messages-government-officials-personal-devices-and-private-accounts-not-subject-california-public-records>.

a. Definitions of Digital and Social Media

i. Digital Media

Digital media is defined primarily as digital tools we use to communicate.³² The term media generally includes all the tools people use to connect and share ideas across distances, across time and to more people at once than would be possible with just a voice and body. Although the broad definition could include interpersonal and non-mass media, like the telephone, digital media specifically relates to the use of computers. The digital media world encompasses computers, the software to run them, and the movement and storage of digital information via networks and storage (hard drives and cloud services).³³

But digital media is not simply communication through media using digital tools. While the radio streaming online and a reading a newspaper on a tablet qualify as digital media, such a broad definition fails to include two important elements that have been made possible by the combination of computers, software, and networks: interactivity and group forming.³⁴

Interactivity is made possible because computer networks allow users to specify where a message is to go, and get a return message right away. This is a feature that is built into the telephone, but most mass media are one-way, or broadcast, media. Digital media networks are a horse of a different color. A user can still send the same message to many people (streaming radio, movies or viewing a web page), but it also creates interaction such as choosing and rating shows or posting pictures and comments on another's social media outlet.³⁵

The second unique feature of digital media is that people participating in a network can organize themselves into groups around any sort of topic.³⁶ This feature has enormous value since it assists individuals to coordinate, communicate, and collaborate on a variety of issues, from organizing a birthday party to a company meeting in multiple cities.

ii. Social Media

The interactivity and group forming capabilities of digital media unleash tremendous communication potential for communities and several potential pitfalls for elected officials under constraints of the Brown Act.

³² "What is Digital Media?" *Centre For Digital Media*. <https://thecdm.ca/program/digital-media>

³³ *Id.*

³⁴ *Id.*

³⁵ Mullen, Eileen. "What is Digital Content?" *E Content Magazine*. (December 19, 2011) <http://www.econtentmag.com/Articles/Resources/Defining-EContent/What-is-Digital-Content-79501.htm>

³⁶ *Id.*

Social media is a commonly used term to describe interaction on websites and apps like [Facebook](#), [Twitter](#), [Instagram](#), [Snapchat](#), and others. Social media are web-based communication tools that enable people to interact by both sharing and consuming various content and participating in social networking. This is a broad definition—but social media is a very broad concept, and the types of communication and networking apps evolves on a daily basis.³⁷

Common social media features include but are not limited to: (1) user accounts or the ability to log in and identify oneself for identification in interactions with others; (2) a profile page to represent the individual logged in and generally including a photograph, biographical information, links to websites or recent posts, and other recent activity; (3) connections such as friends, followers, topics identified by hashtags and likes; (4) feeds which provide real-time information about activity; (5) the ability to personalize a user profile and other settings to control the personal information and activity presented to others; (6) notifications to constantly update users regarding specific information or activities of others; (7) the ability to post content such as photographs, videos, or comments; and (8) the opportunity to comment or vote including a “like” button or swipe indicator or a section to post written comments.³⁸ For example, blogs are one of the oldest forms of social media. The key features that make blogs part of social media are their user accounts, comment sections and networks.

b. Common Types of Digital and Social Media and Potential Ways to Create a Serial Meeting Violation in the Digital Age

i. Blogs and Comments

A blog is a “website that contains online personal reflections, comments, and often hyperlinks provided by the writer.”³⁹ Bloggers have the opportunity to reach hundreds or even thousands of people each and every day. Blogs are used for many purposes. Businesses use blogs to communicate and interact with customers and other stake holders. Newspapers use blogs to offer a new channel for their writers and readers. Individuals create blogs to share their expertise or day to day life with the world.

The common features that differentiate blogs from regular websites area combination of the following:

- content is published in a chronological fashion;
- content is updated regularly;
- readers have the ability to comment;
- other blog authors can interact via trackbacks and pingbacks; and

³⁷ “Social Media.” *WhatIs.com*. <http://whatis.techtarget.com/definition/social-media>

³⁸ *Id.*

³⁹ “Blog.” *Merriam-Webster*. (2015) http://www.merriam-webster.com/dictionary/blog?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

- content is syndicated via RSS feeds.⁴⁰

Blog comments allow readers to interact with the blogger as well as other readers. Most blogs allow a space at the end of each post for a blog reader to leave a comment. The blog commenting space is important because it adds an interactive element to the blog.⁴¹ Blog comments are what make a blog interactive and social. The most popular blogs have a very interactive community who voice their opinions on posts frequently.⁴² Leaving blog comments allows readers to join in on the conversation about a topic that interests them. People who leave comments on a blog can also leave links to other blogs or websites or their own blogs to further the conversation.

ii. Facebook and what it means to “like” a post

Facebook is a social networking website that allows users to create profiles, upload photos and video, send messages and keep in touch with friends, family, and colleagues. Within each member's personal profile is a wall which is similar to a virtual bulletin board where users can post text, video or photos.⁴³ An interactive album feature allows the member's contacts, known as “friends” to comment on other user’s photos and identify users in the photos. Facebook also allows a user to post status updates like a mini blog.⁴⁴

Unlike a regular blog, Facebook offers users the option to keep all communications visible to everyone, block specific connections, or keep all communications private.⁴⁵ Users communicating privately can use an email-like component called messenger.⁴⁶

Clicking “like” below a post on Facebook is an easy way to communicate approval without leaving a comment.⁴⁷ In *Bland v. Roberts*, Daniel Carter, an employee of a Virginia sheriff’s office, “liked” the standing sheriff’s opponent during an election and was subsequently fired (along with several others who had made similar infractions).⁴⁸ He sued, asserting “liking” was a First Amendment right.⁴⁹ The court was faced with whether the simple act of clicking a button actually showed thought and/or expression on the part of the user.

⁴⁰ “5 Major Differences Between A Blog and Website.” *My Blogger Tricks*.

<http://www.mybloggertricks.com/2011/11/5-major-differences-between-blog-and.html>

⁴¹ “What are Blog Comments?” *Brick Marketing, Full Service SEO Solutions Firm*.

<http://www.brickmarketing.com/define-blog-comments.htm>

⁴² Gunelius, Susan. “What Are Blog Comments?” *About Tech*.

<http://weblogs.about.com/od/partsofablog/qt/BlogComments.htm>

⁴³ “Facebook.” *WhatIs.com*. <http://whatis.techtarget.com/definition/Facebook>

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ “What Does It Mean To Like Something on Facebook?” *Facebook*.

<https://www.facebook.com/help/110920455663362>

⁴⁸ *Bland v. Roberts*, 730 F. 3d 368 (4th Cir. 2013), p. 372.

⁴⁹ *Id.* at 373.

Because this click of a button “literally cause[d] to be published the statement that the user ‘likes’ something, which is itself a substantial statement”,⁵⁰ the court found it did. Clicking the “like” button on Facebook is speech. The court stated it was insignificant whether the user had typed the message or clicked the button causing a thumbs-up icon and Facebook generated message to appear.⁵¹ In the digital era of social media, the communicative use of the “like” button on Facebook makes it clear how a rather simple function can take on expressive contours. In the Brown Act context, how a single click on a post about something within an elected official’s subject matter jurisdiction could be found to form a part of the deliberative process. A single click by “friends” that constitute the majority of the legislative body could easily be found to be a Brown Act violation, and one that is well documented and broadly broadcast at that.

iii. Snapchat

Snapchat is a mobile app that allows users to capture videos and pictures that are deleted after a few seconds.⁵² When a user decides to send a message they get to decide whether it will live for one to ten seconds on the recipient’s device. Once the time allotted has run, the message is most likely deleted from both devices and even from Snapchat’s records.

Snapchat itself does not allow users to save received messages. But most cell phones allow users to capture a photo of the screen at any time, thereby creating a long lasting copy of the message. Additionally, there is a way to restore deleted Snapchat pictures on some devices.⁵³

The fleeting life span of Snapchat’s temporary communications make it attractive to some senders. However, law enforcement may still access basic information about users via subpoenas and search warrants.⁵⁴ Basic information does not include the actual content though, just the fact that a message was sent. But for the Brown Act, the timing of a communication, for instance, between councilmembers during a council meeting, may be sufficient to prove unlawful, private communication. The actual content of the Snapchats are much less likely to be available to law enforcement or the public.⁵⁵ Snapchat deletes all other content based information from its servers as soon as both

⁵⁰ *Id.* at 386.

⁵¹ *Bland v. Roberts*, 730 F. 3d 368.

⁵² Magid, Larry. “What is Snapchat and Why Do Kids Love It and Parents Fear It?” *Forbes*. (May 1, 2013) <http://www.forbes.com/sites/larrymagid/2013/05/01/what-is-snapchat-and-why-do-kids-love-it-and-parents-fear-it/#5a3fa6112551>.

⁵³ *Id.*

⁵⁴ Hoppe, Ian. “Does Law Enforcement Have Access to Your Snapchat Photos? A Simple Guide.” *Alabama Media Group*. (November 14, 2014). http://www.al.com/business/index.ssf/2014/11/snapchat_subpeona.html

⁵⁵ *Id.*

parties have seen the content.⁵⁶ If the receiving party does not open the chat, the content of the message is deleted from their servers 30 days after initially sent.⁵⁷

Snapchat is currently at the forefront of social media evolution and enables users to communicate more like they communicate in real life, with specific people and for specific periods times. Thus, violations of the Brown Act occurring via Snapchat are more akin to speaking directly to a majority of a local governing body in person or over the phone.

iv. Twitter

Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages.⁵⁸ Users post tweets, which may contain photos, videos, links and up to 140 characters of text.⁵⁹ These messages are posted to the user's profile, sent to their followers, and are searchable on twitter search.⁶⁰

A tweet is any message posted to Twitter.⁶¹ The user can select whether tweets are public or private. If tweets are public, anyone who runs a search for a keyword in those tweets may be able to see that message.⁶² If a message begins with @username, it is a reply to another user.⁶³ Direct Messages are private messages sent from one Twitter user to another Twitter user or a group of users; and does not appear in public for anyone else to read.⁶⁴ A retweet is a tweet that is forwarded to a user's followers.⁶⁵ Basically, a re-posting of another's tweet. Twitter's Retweet feature allows users to quickly share messages with groups.

For example, Council Member A, of a five member city council, tweets a comment about an upcoming agenda item. Council Members B and C, who follow Council Member A on twitter, retweet the first comment in an effort to encourage the public to attend the meeting. Depending on the content of the original tweet, once the tweets were posted, has a majority of the council "met" about the item without proper notice to the public? Arguably they have, even though the messages themselves are public and the public may immediately respond.

v. Instagram

According to Instagram, the picture sharing app "is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ "Getting Started with Twitter." *Twitter*. <https://support.twitter.com/articles/215585#>

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ "New User FAQs." *Twitter*. <https://support.twitter.com/articles/13920#>

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

then choose a filter to transform the image into a memory to keep around forever.”⁶⁶ Users capture photos and post them online and have the option to include a message. All photos are public by default, which means they are visible to anyone using Instagram. Users can opt to make their profiles private which allows only user selected followers to see their photos.⁶⁷ Similar to the Facebook button, users can tap to “like” or comment on other user’s photos.⁶⁸

Since Instagram is all about visual sharing, are these pictures sufficient to be considered protected speech or speech at all? The adage that a picture is worth a thousand words is certainly correct here. A unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet in 1996.⁶⁹ Instagram holds the ability to deliver visual expression to many recipients quickly and conveniently and creates a platform for the sharing visual cues with people all over the world. Instagram is currently used for social and political reform efforts.⁷⁰ Photos documenting social issues, such as famine in South Sudan, are frequently used to communicate issues and shape social opinions.⁷¹ And, politicians already use Instagram to spread politics to a variety of demographics and communicate with potential voters.⁷² Within the Brown Act context, a picture of a project site or a simulation of a project with a brief note conveying support or opposition, liked by a majority of a legislative body considering the project could certainly violate the Brown Act and may also raise ex parte due process concerns.

c. Social Media Legal Issues Relating to the Brown Act

The speed at which a comment or post on a blog, Facebook, Snapchat, Instagram or other online forum or platform can travel, the number of people the content can reach, and the interactivity among users creates potential danger when considering the application of the Brown Act. Online discussion of city business by a quorum of the legislative body arguably becomes a meeting with the mere click of a button. Should a council member post a blog entry about an upcoming agenda item, which is then commented on or retweeted, liked, photographed and posted by other council members, a discussion among the elected officials ensues electronically on the Internet.

Whether this constitutes a Brown Act violation remains to be determined. The fact that the forums described above are public and allow the public to also comment on statements by the councilmembers seems to suggest the council was not holding “secret” meetings. But the discussion of city issues also did not occur pursuant to a noticed

⁶⁶ “FAQ.” *Instagram*. <https://www.instagram.com/about/faq/>

⁶⁷ *Id.*

⁶⁸ Moreau, Elise. “What is Instagram.” *About Tech*. (March 28, 2016). <http://webtrends.about.com/od/prof4/a/What-Is-Instagram-Wiki.htm>

⁶⁹ *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997).

⁷⁰ Google sites. “Instagram and Nonverbal Communication” <https://sites.google.com/site/tomcom125/instagram-as-a-form-of-mass-nonverbal-communication>

⁷¹ *Id.*

⁷² *Id.*

meeting under the Brown Act.⁷³ Instead, the council used a series of electronic communications to discuss and deliberate on an item within their subject matter jurisdiction.

And, openness of a conversation to the public is not the critical factor under the Brown Act. This discussion about city business, whether in person with a majority of the council, over the phone, via email or text would not comply with the Brown Act. As discussed above, the main problem faced with the Brown Act and digital and social media is that the Act was drafted when communication was much more limited and it was significantly easier to have private conversations. New technology offers elected officials great communication potential with little effort, but public officials may inadvertently find themselves in the midst of an e-mail conversation or conversation thread with other members of their commission or city council without any such intent, or much thought or effort. While it may seem behind the times or even counter to the concept of enhanced public transparency, such communications nonetheless present significant risks of Brown Act violations.

i. Open Meeting Law Issues

A June 2009 study by the Public Policy Institute of California reveals these interesting trends:

- 76 percent of Californians have access to the Internet;
- Rural Californians are as likely to use the Internet as urban Californians and almost as likely to have access to high speed Internet;
- Latinos are less likely to use information technology than whites, blacks, and Asian Pacific Islanders;
- Those with disabilities also are less likely to use a computer and the Internet;
- Renters are less likely to have access to the Internet and broadband technology than homeowners; and
- Access also varies by income as well.⁷⁴

The potential to inadvertently hold a “meeting” as defined by the Brown Act is startling and should give city attorneys second thought when advising elected officials about their use of social media. As discussed above, when a government body meets, the meeting is to be open to the public, in a public location, with no restrictions on who may attend and where open discussion is allowed. Statutes and rules are designed to ensure that fair notice is given to the public of what will be discussed at a public meeting so the individual citizen can make an informed decision on whether or not he or she wants to

⁷³ See also 84 Ops. Cal. Atty. Gen. 30 (2001) (opinion of the attorney general that the Brown Act does not allow a quorum of a legislative body to discuss agency business over e-mail even if those e-mails are made publicly available and posted to the agency’s website).

⁷⁴ Baldassare, Mark, Bonner, Dean, Petek, Sonja, and Shrestha, Jul. “Just the Facts: California’s Digital Divide.” *Public Policy Institute of California Statewide Surveys*. (June 2013). http://www.ppic.org/content/pubs/jtf/JTF_DigitalDivideJTF.pdf

attend that particular meeting. Additionally the rules are to govern conduct so that an orderly meeting can be held.⁷⁵

With so many people having access to digital and social media, it is ironic that elected officials discussing a topic in public on social media may be a violation of the Brown Act. One could argue that social media platforms are significantly more open, transparent and accessible than a council meeting at city hall. Yet, local officials should be wary of commenting on any other official's social media content out of a fear that more than one other official doing so would unintentionally create a "serial" meeting.

However, not all social media discussions are public and not everyone may be heard either. Until the Brown Act catches up with the digital era, it is best to caution elected officials from participating in discussion on social media. Posting their own comment may be safest, but liking, retweeting, and commentating on other official's sites and posts may be a violation of the Brown Act.

ii. First Amendment Issues

In 1996, in the landmark case *Reno v. ACLU*, a unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet. While the First Amendment does not give anyone the right to say whatever they want, whenever they want, to whomever we want, it similarly does not justify violations of the Brown Act.

Local officials typically use social media to post information showing their position and activity for constituents. Social media is used successfully to publicize information about election day polling places and results, as well as important city functions. However, the interactivity provides the public and other members with a vehicle to respond which may be both critical of the official and trigger a "meeting" according to the Brown Act.

There may be technological ways to limit how much conversation occurs on a user's page though. However, it would be ill advised for an elected official to delete any posts other than their own from a site they or the City host.

iii. Public Resources Issues

Another consequence of the mass information accessible as a result of digital and social media is the lack of control an official or agency may have over distribution of information. While more individuals can contribute, elected officials should be mindful of their use of public resources to maintain social media connections. There are existing restrictions on use of public resources for personal and political purposes. Specifically, California law prohibits elected officials from using public resources for personal or

⁷⁵ Oona Mallett. *Who's Afraid of the Big, Bad Wolfe? A Call for a Legislative Response to the Judicial Interpretation of the Brown Act*, 39 McGeorge L. Rev. 1073, 1076 (2008).

campaign gains.⁷⁶ “Personal purposes” refers to actions for personal enjoyment, private gain or advantage or an outside endeavor not related to business. “Personal purposes” do not include the incidental and minimal use of public resources, such as an occasional telephone call.⁷⁷ While an occasional personal message or post may not pose a significant problem, public officials and employees should be cautious about using city digital media to promote campaigns and personal issues.

iv. Public Records Retention

Considering how a local entity can track elected official’s and the agency’s use of social media for records retention purposes is overwhelming. Yet, more and more agencies are increasingly using social media platforms to engage with and inform the public.⁷⁸ This activity may create records that must be captured and managed to comply with records retention requirements.⁷⁹ Not only is it difficult to identify what data should be saved, but technology changes so rapidly it makes it difficult to anticipate how to adapt to the next new app. And, comments and conversations on these platforms only enhance the likelihood that a digital Brown Act violation may come back to haunt an elected official when captured and disclosed in a PRA request.

d. Advising Agency Officials and Staff to Best Avoid Creating Serial Meetings

A review of the above discussion shows generally that human interaction via digital and social media does not fit neatly within the confines of the Brown Act. It may seem that clicking a key or tapping a button does not register the same trace of expression and communication as does the written or spoken word. Instead, the reach of communication through social media and the ability to converse in seconds, in public, from anywhere exposes the limitations of the Act. Since even clicking “like” on Facebook is considered a statement of expression, officials must think twice before participating in social media platforms.

⁷⁶ See *Stanson v. Mott*, 17 Cal. 3d 206, 210-11 (referring to expenditure of staff "time and state resources" to promote passage of bond act); *Vargas v. City of Salinas*, 46 Cal. 4th 1, 31-32 (2009). See also *People v. Battin*, 77 Cal. App. 3d 635, 650 (4th Dist. 1978) (county supervisor's diversion of county staff time for improper political purposes constituted criminal misuse of public monies under Penal Code section 424), *cert. denied*, 439 U.S. 862 (1978), *superseded on other grounds by People v. Conner*, 34 Cal. 3d 141 (1983); Cal. Gov't Code § 8314.

⁶ Cal. Gov't Code § 8314(a).

⁷⁷ Cal. Gov't Code § 8314(b)(1).

⁷⁸ National Archives and Records Administration. *White Paper on Best Practices for the Capture of Social Media Records*. (May 2013). <http://www.archives.gov/records-mgmt/resources/socialmediacapture.pdf>

⁷⁹ *Id.*

Given that the Brown Act and the courts have barely dipped into the technology pool by addressing emails, it is best for public officials to take a conservative approach with other social media. While a social media presence is certainly acceptable and may even be expected for a successful campaign, officials should avoid commenting, liking, tweeting, retweeting, or posting regarding topics within the jurisdiction of the governing body on which they sit. Posting general city information without personal comment or opinion is acceptable as it is likely posted publicly elsewhere. Posting a picture of the official at a city event without comment on any other city affairs is a safe bet too. But a seemingly innocent engagement in public or private social media discussion online may find the official charged with a Brown Act violation.

And as always, it is prudent for everyone to keep in mind that anything posted via the Internet may someday be found. From picture evidence of questionable behavior at best to interesting internet dating profiles, and angry retorts to an off color joke, everything should be considered accessible. Best practices for posting online should prioritize respect, honesty, clarity, and especially for elected officials, transparency. Importantly, there are methods to engage in social media without triggering Brown Act concerns. Until the law is able to converge with technology, public officials should be mindful of accidentally holding an online meeting.