

TELECONFERENCING UNDER THE BROWN ACT

In recent years, the California Legislature has considered various enactments to move municipalities fully into the information age. Although an amendment to the Public Records Act requiring full electronic access to city documents in electronic format appears likely to fall short of adoption in 1999 (AB 1099 - Shelley), a future enactment of these rules appears inevitable. Recent regulations relating to CEQA already encourage direct electronic public access to notices and documents. (CEQA Guidelines §§ 15062, 15075, 15085, 15201, 15202, 15205, and 15206.)

The Brown Act has also been amended to allow cities to take advantage of information age technologies for the conduct of public meetings. In comprehensive 1994 amendments, and through minor amendments in 1997 and 1998, the Legislature greatly expanded the ability of cities to conduct their business by teleconference. The 1994 amendments (codified in Government Code Section 54953 and hidden under the heading "Meetings to be open and public; attendance") allowed only "video teleconferencing", a term that required potentially costly audio and video participation by members of the city council¹ and the public at each location. The 1997 law -- supported by both the California Newspaper Association and the League -- provides greater flexibility and freedom to use the full range of conferencing technologies available.

1. Basic Provisions.

The Brown Act allows a city council to use any type of teleconferencing in connection with any meeting. (Gov't Code § 54953(b).) "Teleconference" is defined as "a meeting of a individuals in different locations, connected by electronic means, through either audio or video, or both." In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the law otherwise applicable. (Id.) Section 54953(b) contains the following specific requirements:

- Teleconferencing may be used for all purposes during any meeting.
- At least a quorum of the city council must participate from teleconferencing locations within the city's jurisdiction.
- Each teleconference location must be identified in the notice and agenda of the meeting.
- Agendas must be posted at each teleconference location.
- Each location must be accessible to the public.

¹ Although the Brown Act term "legislative body" applies to various city decision-making bodies (Gov't Code § 54952), I use "city council" herein because city attorneys most frequently interact with this body.

- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location.
- All votes must be by rollcall.

These requirements are explained in detail below.

- a. At least a quorum must teleconference from locations within the city.

The 1998 amendments to Section 54953 provide that at least a quorum of the city council must participate from locations within the city. (Gov't Code § 54953(b)(3).) The 1999 amendments allow local agencies to provide teleconference locations for the public where no member of the legislative body is present. (Gov't Code § 54953(b)(4).)

Although some opponents to the 1997 amendments argued that it is important to have at least a quorum in one room where the public can present face-to-face testimony, the 1998 and 1999 amendments make it clear that council members may participate from outside the city and that although a quorum must be within the city limits, they need not participate at the same location. The Southern California Association of Governments took the position in 1997 that this approach enhances public participation. SCAG argued that with regard to meetings in large jurisdictions or meetings of multi-jurisdictional regional bodies, the public's opportunity to participate is enhanced if, for example, citizens do not have to travel across town to a city council meeting or to a neighboring jurisdiction to attend a regional transit board meeting. This view prevailed in the final version of the amendments.

- b. Each audio/video teleconference location must be identified in the notice and agenda of the meeting.

The Act requires public notice of all audio/video teleconferencing events. This prevents a council member who is running late to audio/video teleconference in lieu of actual attendance if public notice of the teleconference location was not given in the agenda. Although the law is not specific as to what "identification" is required in the notice, cities should give the teleconferencing location, the street address, any suite or office number, and could even provide maps to the location. (An online agenda could provide a link to "Yahoo! Maps" or some other navigational device.)

- c. Agendas must be posted at all teleconferencing locations.

Section 54953(b)(3) requires that agendas be posted at all teleconferencing locations. The Act does not provide specific guidance on this requirement, but where practical, the agendas should probably be posted both outside the main facility of a teleconference location at a main entrance (e.g., outside an office building) and outside the specific teleconference location (e.g., outside the particular room or office door).

Agendas should, of course, remain visible at these locations. They should not be posted behind doors that are frequently ajar or behind counters, so as to be out of average reading distance.

d. Each audio/video teleconference location must be made accessible to the public.

While this requirement may not seem to be an obstacle, it may prove troublesome when deciding the means by which to teleconference. Because public access is not always possible, this requirement precludes some locations, such as car telephones or offices not accessible to the public. All telephones used for teleconferencing must have a functioning speaker to enable public access, even if there are no members of the public present at a particular location. The meeting must be conducted so that participants by audio alone are clearly identified.

Similarly, city staff must ensure that logistical problems do not occur in providing public access. For example, if a member is audio/video teleconferencing from his office, someone must be present to allow the public entry to the office building if it is normally locked after hours. If the office is in a location where the public is not welcome, then audio/video teleconferencing cannot occur at that location. Similarly, vacationing members wishing to teleconference must realize that the public must have access to the member's hotel room or cruise ship cabin and receive notice of that opportunity in the agenda. Presumably, the "no free admission" clause of Section 54952.2(c)(2) applies to members of the public wishing to join a member in a teleconference at these exotic locations as long as physical access is available.

The more difficult issues arise in accommodating council members confronted with hospital confinement, immunocompromising diseases, or treatments that limit public exposure. Although it appears safe to assume that dual teleconferencing facilities in the same building (e.g., one teleconference setup in an ill member's garage and another setup in his bedroom) would satisfy the spirit if not the letter of this requirement, this arrangement, unfortunately, has not gone unchallenged. In this and similarly compromised situations, counsel should be certain to obtain and document the concurrence of public speakers in the Brown Act arrangement at each location before assuming it is safe to proceed.

e. The agenda must provide the opportunity for the public to address the city council directly at each teleconference location.

This provision requires some cooperation among teleconference sites. It requires that all audio and video hookups ensure that all members of the city council can hear and respond to public comments from all locations. It requires that the public hear all council deliberations.

f. All votes must be taken by rollcall.

The Act requires that all votes, regardless of topic, be taken by rollcall. With a large body – a regional air quality board, for example – this may be cumbersome. Where it is clear on routine items such as agenda approval that all members are in accord, it may be possible to ask whether there is any dissent, and if there is none, to dispense with a member-by-member roll call.

2. New issues.

These new amendments raise several issues that require further definition at the implementation stage.²

a. Quorums and locations.

As noted above, former law provided that legislative bodies could only use video teleconferencing to hear public comment and to deliberate. Under former law, a council member was not present for the purposes of a quorum and therefore, could not vote if she teleconferenced with audio equipment such as a telephone.

The 1997 legislation not only allows the use of audio or video equipment for the purposes of teleconferencing, but allows the council to conduct all meeting functions by audio or video teleconference. Council members are present for the purposes of a quorum, are able to vote, deliberate, hear public testimony and participate in all council functions by remote location.

Further, there is no limit on the numbers of council members who may fully participate in a meeting by teleconferencing. But, as mentioned above, a least a quorum of the city council must participate from locations within the city. Conceivably, all members of the council can conduct a lawful meeting from their individual offices or homes, provided the statutory procedures are met.

b. Due process considerations.

Under former law, before a council member could participate in a meeting by video teleconference, the city was required to adopt “reasonable regulations” to protect the statutory and constitutional rights of citizens appearing before the council. The new law no longer requires cities to adopt reasonable regulations, but states that they shall “conduct teleconference meetings in a manner that protects the statutory and constitutional rights” of citizens. (Gov’t Code § 54953(b)(3).)

This provision has interesting ramifications where substantive or procedural due process rights are at stake. For example, in land use proceedings, maps or photographs may be crucial to a council’s decision on an application or to a neighbor’s appreciation of

² Michael Jenkins raised several additional issues still lacking legislative or court direction in “1998 Brown Act Amendments”, City Attorneys Department Meeting, Spring 1999.

the decision's ramifications. Although video teleconferencing, a simultaneous telecopy, or some other digital transmission of an exhibit to each location would probably provide adequate due process, it may be difficult to protect these rights when only audio teleconference equipment is used. In the same vein, disciplinary proceedings or permit revocations may hinge on witnesses' demeanor not adequately conveyed through still images. In these situations, city councils should probably refrain from any action until its voting members are physically present at duly authorized meetings.

c. Attorney/client confidentiality.

Protection of attorney/client confidences requires additional precaution where closed sessions are held by teleconference. The broad range of sophistication in technology presents a broad range of risks.

- Video teleconferencing over dedicated telephone lines. This type of teleconferencing is provided over dedicated ISDN telephone lines. Access is not shared with other users and the information passes only through conventional, secure data lines provided by the phone company. These communications are the most secure, providing security equivalent to traditional telephone communications.
- Wide area networks. These are services not provided through dedicated lines, but by a provider willing to make a portion of its wide area network (WAN) available for teleconferencing. The WAN provider employs data encryption as the means of deterring interception of the communication. Because the lines are shared, confidentiality is not assured. However, some providers will guarantee security.
- Virtual private networking. This type of teleconferencing is available in many off-the-shelf forms and can be employed with common PC's. It can provide audio coupled with serial still pictures or video "streaming" where a relatively uninterrupted video image is transmitted. Although this technology is very inexpensive, faulty encryption or the involvement of too many hosts – common Internet problems – can compromise the lawyer's duty to protect and maintain client confidentiality.

While the attorney/client privilege in Section 954 of the Evidence Code is generally protected where an electronic eavesdropper intercepts a communication, communicating by means that others could easily intercept is evidence that the communication was not intended to be confidential. (See, Jack L. White, "You've Got Mail!", City Attorneys Department Meeting, Spring 1999.)

3. Practice tips.

The city attorney should not assume that teleconference procedures will go unscrutinized. On the contrary, it is probably safe to assume that for each council member who feels sufficiently compelled to take the extra steps to patch in, there is an antagonist who would rather see the council member not participate. In order to protect council action from invalidation under the Brown Act, it is important make sure the extra steps are documented.

This is doubly important where the city attorney might be called upon later to provide an opinion on the validity of the council proceeding or action. One city attorney called upon to issue an opinion letter for a bond issue, prepared the attached script to read into the record documenting that the agenda posting, setup of teleconference facilities, attendance, and rollcalls complied with the Brown Act.

SCOTT C. SMITH

Mr. Smith wishes to acknowledge the assistance of colleagues Hayley Peterson, Steve Deitsch, and Steve DeBaun in preparing these materials.

SAMPLE SCRIPT FOR TELECONFERENCING PUBLIC MEETINGS
UNDER BROWN ACT
(Gov't Code Section 54953)

PRIOR TO ROLL CALL:

Prior to roll call, I would like to make clear for the record of this meeting, and it should be reflected in the minutes, that at least a portion of this City Council and Redevelopment Agency meeting is conducted pursuant to California Government Code Section 54953, in that Mayor Pro-Tem Hansen is on the Viking Standard Cruise Ship in or off the Coast of Mexico, and Council member Kensington is in Edinburgh, Scotland. Both Mayor Pro-Tem Hansen and Council member Kensington are participating by speaker phone. In accordance with the Ralph M. Brown Act, each teleconference location has been identified in the notice and agenda for this meeting.

Madame Clerk, it would now be appropriate for you to conduct roll call, after which I would ask the Mayor to recognize me in order to confirm certain matters for the record.

[ROLL CALL]

I would now like to request that Mayor Pro-Tem Hansen respond to the following questions:

- (1) Mayor Pro-Tem Hansen, can you hear me well?
- (2) Were you able to hear our proceedings on this end up until now?
- (3) Do you have a copy of the agenda for this meeting?
- (4) Have you posted the agenda at the location where you are?
- (5) Is your location reasonably accessible to the public, such that any member of the public could participate in this teleconference from your location if he or she wished to do so?
- (6) Is there any member of the public there with you who would like to participate in the public comment portion of this meeting, or otherwise address any agenda item for this meeting?

Next, I would like to request that Council member Kensington respond to the following questions:

[REPEAT THE SAME QUESTIONS]

I would now like to ask that any member of the City Council and Board of the Redevelopment Agency speak up at this time if such Council member and Board Member has not been able to clearly hear either Mayor Pro-Tem Hansen or Council member Kensington. Hearing no comment, the record should reflect that all Council members and Agency Board members present have indicated that they were able to hear both Mayor Pro-Tem Hansen and Council member Kensington clearly.

I would next like to ask Mayor Pro-Tem Hansen whether he has been able to hear Council member Kensington.

I would next like to ask Council member Kensington whether he has been able to hear Mayor Pro-Tem Hansen.

I would next request that any Council member and Agency Board Member, including Council members Hansen and Kensington, speak up at this time if such Council member and Board Member has any reason to believe, based on voice recognition or otherwise, that those persons representing themselves to be either Council member Hansen or Council member Kensington are not truly so. Hearing no comment, the record should reflect that no Council member has expressed doubt that Council members Hansen and Kensington are the parties participating by teleconference with Council members and Board Members present here.

I would now like to advise the Mayor and Council members and the City Clerk, that any votes taken during the teleconference portion of this meeting must be taken by roll call.