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**Too Much Sun?:**

**Emerging Challenges Presented By California & Federal Open Meeting  
Legislation to Public Policy Consensus Building Processes**

By

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## **ABSTRACT**

Public policy consensus building processes, which have been heralded as truly democratic processes promoting citizen involvement in government decision making, are increasingly subject to state and federal open meeting laws. While both open meeting laws and consensus building processes were developed with the laudable intent of enhancing the legitimacy of governmental processes, it has been alleged that application of the former to the latter poses significant challenges for consensus building bodies. Through a case study focusing on the impacts of the Federal Advisory Committee Act (the FACA) and California's Brown and Bagley-Keene Acts on consensus building processes managed by the Center for Collaborative Policy (the CCP), this thesis explores the interplay between open meeting laws and consensus building processes. It surfaces several different categories of challenges that open meeting laws present to consensus building processes, as well as discusses the potential geneses of these challenges. It also offers recommendations for addressing these challenges through education, further research and legislative reform.

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## Chapter 1

### INTRODUCTION

Over the last several decades, agencies and entities at the federal, state, regional, and local levels have begun turning to consensus building processes in order to develop good public policy. Consensus building processes are processes which bring together stakeholders with a wide array of interests, usually under the direction of a mediator or facilitator in long term dialogue to seek consensus on policy issues of common concern.<sup>1</sup> Rather than looking myopically at arguments about predetermined positions, making decisions based on majority rule and focusing on unilateral wins, members of consensus building processes view issues kaleidoscopically, allowing all interests to be heard and respected.<sup>2</sup>

In general, consensus building bodies are subject to fewer legal requirements than traditional bodies responsible for the development of public policy. Typically, the agreements made by consensus building bodies are not official or binding. As a result, whereas policy matters and disputes that go before courts and administrative agencies are often subject to elaborate and specific procedural requirements, consensus building

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<sup>1</sup> See generally Judith Innes and David Booher, *Consensus Building Processes and Complex Adaptive Systems: A Framework for Evaluating Collaborative Planning*. 65 J. AM. PLAN. ASS'N 412, 412-23 (1999); LAWRENCE SUSSKIND AND PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC* (1996); Lawrence Susskind and Liora Zion, *Can America's Democracy Be Improved?* Draft Working Paper of the Consensus Building Institute and the MIT-Harvard Public Disputes Program August 2002.

<sup>2</sup> ROGER FISHER AND WILLIAM URY. *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991); Barbara Gray *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* (1991); LAWRENCE SUSSKIND AND JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 19 (1987).

processes are usually exempt from such requirements.<sup>3</sup> However, depending on the manner and purpose for which they are convened, consensus building processes may be subject to state or federal open meeting laws.

Open meeting laws, which are also sometimes referred to as sunshine laws, open door laws, freedom of access acts, right to know laws, or public meeting laws,<sup>4</sup> require that meetings of federal, state and local legislative bodies be open to the public. While both open meeting laws and consensus building processes were developed with the laudable intent of enhancing the legitimacy of governmental processes, it has been alleged that application of the former to the latter poses significant challenges for those working in the consensus building field.

This thesis's primary aim is to identify and understand the alleged challenges that open meeting laws present to consensus building processes in California, as well as trace the roots of those challenges. It does this primarily by looking at how consensus building processes facilitated by The Center for Collaborative Policy (the CCP), one of the country's leading agencies specializing in public policy mediation and facilitation, are impacted by three open meeting laws: California's Brown and Bagley-Keene Acts and the Federal Advisory Committee Act (the FACA).

Whereas the FACA governs federal advisory committees, the Brown and Bagley-Keene Acts are California laws that govern the acts of local and state bodies. The Brown Act applies to local entities and requires, in most instances, public commissions, boards, councils and other local legislative bodies taking action to hold open meetings.

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<sup>3</sup> See generally Dwight Golann & Eric Van Loon. *Legal Issues in Consensus Building*, in THE CONSENSUS BUILDING HANDBOOK, 495, 495-522 (Lawrence Susskind, et al. eds., 1999).

<sup>4</sup> ANN TAYLOR SCHWING, OPEN MEETING LAWS 3 (2d ed. 2000).



Similarly, the Bagley-Keene Act applies to state entities and requires, in most instances, state legislative bodies taking action to hold open meetings.

The Brown Act, now a half a century old, was signed into law in 1953 by Governor Earl Warren. Following a ten-part series entitled, “Your Secret Government” in the San Francisco Chronicle, Mike Harris, the reporter for the series, and Richard Carpenter, an attorney from the League of California Cities, pushed for a more open government by drafting a bill on open meetings. The bill was carried by, and eventually named after, Modesto Assemblyman Ralph M. Brown,<sup>5</sup> who had personally experienced the harm of private decision making while working as an attorney when a decision made in favor of his client at an open meeting was overturned in a private session held immediately after the meeting.<sup>6</sup>

The legislative intent of the Brown Act is clearly spelled out in the opening section of the law. It states that all public commissions, boards, councils and other public agencies exist to aid in the conduct of the people’s business and therefore are required to act and deliberate in public.<sup>7</sup> In addition, it explicitly states that the people of California insist on remaining informed and do not yield their sovereignty to the agencies which serve them.<sup>8</sup> And finally, it states that public servants do not have the right to decide what is or isn’t good for the public to know.<sup>9</sup>

In 1967, fourteen years after the Ralph M. Brown Act was signed into law, the Bagley-Keene Act was enacted. Modeled after the Brown Act, the Bagley-Keene Act

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<sup>5</sup> LEAGUE OF CALIFORNIA CITIES, OPEN AND PUBLIC II 1 (2000).

<sup>6</sup> Telephone Interview with William Bagley, Former Legislator (May 13, 2003).

<sup>7</sup> Cal Gov Code §54950 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

was also promulgated to encourage openness in government decision making.<sup>10</sup> In fact, the intent language of the Bagley-Keene Act is nearly identical to that of the Brown Act. However, as noted earlier, whereas the Brown Act covers local legislative bodies, the Bagley-Keene Act covers state bodies.

Lastly, there is the FACA. The FACA requires, in most instances, federal executive officials who use an advisory committee to assist them in discharging their responsibilities to do so openly and publicly. The law was enacted in 1972 during the “good government” initiative of the early-and mid-1970s with the intent of keeping Congress and the public informed about the numbers, purposes, memberships, and activities of groups established or utilized to offer recommendations to the President or to officers or employees of the federal government.<sup>11</sup>

The FACA legislation is the product of several decades of iterations in Congress addressing the large growth in advisory committees. It was passed after the Government Operations Committees of both the House and the Senate held investigatory hearings on the subject. Whereas the House hearings surfaced a concern about governmental waste, the Senate hearings initially focused on the undue influence stemming from the advisory-committee practice.<sup>12</sup> The Senate determined that the undue influence could be attributed to two factors: (1) the fact that committee membership often reflected only one point of view and (2) the fact that advisory groups often operated in relative secrecy.<sup>13</sup>

In response to the concerns about securing advisory bodies with a diversity of viewpoints, the FACA includes provisions that require balanced committee memberships,

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<sup>10</sup> Telephone Interview with William Bagley, *supra* note 6.

<sup>11</sup> Stephen P. Croly and William Funk, *The Federal Advisory Committee Act and Good Government*. 14 Yale J. on Reg. 451, 452 (1997).

<sup>12</sup> *Id.* at 460.

<sup>13</sup> *Id.* at 463.

prevent an advisory committee from meeting unless the meeting is called by or approved of by a designated officer or employee of the Federal Government and mandate that advisory committee meetings be convened and adjourned by a designated officer or employee of the Federal Government. In addition, the Act requires that a designated officer or employee of the Federal Government approve of all advisory committees' agendas, with the exception of presidential advisory committees.<sup>14</sup>

In response to the concerns about secret decision making, the FACA requires that all advisory meetings be open to the public, that timely notice of meetings be published in the Federal Register, and that the Administrator prescribe rules for other types of notice. In addition, the FACA gives the public the right to participate in advisory committee meetings by appearing before committees or filing statements with committees. The FACA also requires that accurate and detailed meeting minutes be taken and kept by the committee and that they be available for public inspection and copying, unless they are subject to one of the exemptions from public release contained in the Freedom of Information Act (the FOIA).<sup>15</sup>

In order to show the interplay between these three open meeting laws and consensus building processes, I begin this piece by grounding the reader in consensus building theory. Next, I examine what has been said in mediation, facilitation and legal literature about the interplay between open meeting laws and consensus building processes. I then suggest the ways in which this piece might compliment and add to the literature already on point. From there, I offer my research methodology and approach to the case study I use to develop this piece.

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<sup>14</sup> *Id.* at 464.

<sup>15</sup> *Id.* at 464-65.

I then discuss and analyze the findings of the CCP study. Using the text of the California and federal laws, cases on point and relevant literature, as well as examples compiled from interviews and observations from the field, I document the ways in which these challenges surface and play out. I suggest that there are three categories of challenges: procedural, deliberative and fiscal. I also opine that the challenges within each of these categories can be traced to three geneses: the level of understanding mediators and facilitators have about open meeting laws, how open meeting legislation is read and interpreted by convening agency counsel and the legislation itself. I posit that while the challenges stemming from the first two geneses may be surmountable, those stemming from the latter may require legislative reform. Using and building off of the literature touched on earlier in the thesis, I discuss why I believe this to be so.

I conclude this thesis by drawing conclusions and making recommendation about what can be done to mitigate and/or eliminate the challenges posed by open meeting legislation. Within this discussion, I highlight immediate ways of addressing some of these challenges as well as point out the areas where further research is needed before proceeding with the proffered recommendations.

## Chapter 2

# LITERATURE REVIEW

### **Introduction**

This literature review begins by situating consensus building processes in the public policy development arena. I look at how consensus building processes are defined, how they differ from traditional methods of public policy development and why they are critical for the development of good public policy. This basic foundation on consensus building processes is essential to later discussion on how open meeting laws impact consensus building processes.

Once the foundational framework on consensus building has been established, I turn to mediation, facilitation and legal literature and look at what has been said about the interplay between open meeting legislation and consensus building processes. This literature offers a solid overview of the reasons for and against applying open meeting laws to consensus building processes. In addition, it provides an overview of some of the challenges that arise when meetings must be held open and, in some cases, offers suggestions on how to handle these challenges.

### **Consensus Building Processes and Public Policy Dialogue**

#### ***What Are Consensus Building Processes?***

While myriad definitions for consensus building processes exist, in this thesis I use the term consensus building processes to refer to processes that bring together stakeholders with a wide array of interests, usually under the direction of a mediator or

facilitator, in a long term dialogue to seek consensus on issues of common concern.<sup>16</sup> Under the definition I have adopted, consensus has been reached “when everyone agrees that they can live with they can live with whatever is proposed after every effort has been made to meet the interests of all stakeholding parties.”<sup>17</sup>

Recent literature suggests that consensus building processes generally fall into one of three broad categories: negotiated rule making, mediation of public disputes and policy dialogue.<sup>18</sup> This thesis focuses on consensus building processes involving policy dialogue, which is defined as a series of proactive conversations between large numbers of interested stakeholder representatives involving efforts to formulate priorities and strategies for handling a problem or an issue before a conflict actually arises.<sup>19</sup>

In order for genuine consensus building policy dialogue to work and produce feasible and well informed public policy decisions, participants of the consensus building process must be capable of engaging in authentic dialogue- “dialogue that allows all agents to speak openly and in an informed way about their interests and understandings and ensures all are listened to and taken seriously by others.”<sup>20</sup> Empirical research and theory indicate that without authentic dialogue, people will never truly reach a point of shared understanding or identify with a common system or community.<sup>21</sup> Moreover, in the absence of authentic dialogue, opportunities for reciprocity will be passed by, critical

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<sup>16</sup> Innes and Booher, *supra* note 1; Susskind & Field, *supra* note 1; Susskind and Zion, *supra* note 1.

<sup>17</sup> Lawrence Susskind, *What's Wrong With Robert's Rules Of Order For Groups, Organizations, And Ad Hoc Assemblies That Want To Operate By Consensus*, in THE CONSENSUS BUILDING HANDBOOK, 3,7 (Lawrence Susskind, et al. eds., 1999). This definition is not unlike the definition assigned to the Latin word *consentire*, in which the word *consensus* is etymologically rooted, which translates to, “to think and feel together.” Merriam-Webster On-line, (visited June 5, 2003) at <http://www.m-w.com/cgi-bin/dictionary?consensus>.

<sup>18</sup> Susskind and Zion, *supra* note 1 at 21.

<sup>19</sup> *Id.*

<sup>20</sup> David Booher and Judith Innes, *Network Power in Collaborative Planning* 21 J. PLAN. & RES. 221, 229 (2002).

<sup>21</sup> *Id.*

information remains unearthed, and there is less of a likelihood that the interested stakeholders will come up with a creative solution or approach to the public policy issue at hand.<sup>22</sup>

In *Networks in Collaborative Planning*, Booher and Innes elaborate on the definition of authentic dialogue. They state that Habermas,<sup>23</sup> consensus building practitioners,<sup>24</sup> and other consensus building scholars<sup>25</sup> all converge on four basic conditions of authentic dialogue: (1) sincerity, (2) accuracy, (3) comprehensibility, and (4) legitimacy.<sup>26</sup> Below, building off of what has already been said by Booher and Innes, I discuss and expand on what is meant by each of these conditions:

### **1. Sincerity:**

The first basic condition critical to authentic dialogue is sincerity. Participants must feel comfortable and safe articulating their honest opinions and feelings.<sup>27</sup> Creating environments where people learn to trust one another and can safely challenge assumptions and alternative ideas without the fear of external coercion engenders sincerity. It is also partially developed through creating environments, such as joint fact

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<sup>22</sup> *Id.*; See also generally D. JOHNSON & F. JOHNSON, JOINING TOGETHER: GROUP THEORY AND GROUP SKILLS (1997).

<sup>23</sup> See generally J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY VOL. 1 (Thomas McCarthy trans., 1981).

<sup>24</sup> SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, BEST PRACTICES FOR GOVERNMENT AGENCIES: GUIDELINES FOR USING COLLABORATIVE AGREEMENT-SEEKING PROCESSES (1997).

<sup>25</sup> See generally C.J. FOX AND H.T. MILLER, POSTMODERN PUBLIC ADMINISTRATION: TOWARDS DISCOURSE (1996); see also LAWRENCE SUSSKIND, SARAH MCKEARNAN, AND JENNIFER THOMAS-LARMER, THE CONSENSUS BUILDING HANDBOOK (1999); JOHN DRYZEK, DISCURSIVE DEMOCRACY: POLITICS, POLICY AND POLITICAL SCIENCE (2000); Innes and Booher, Public Participation in Planning, New Strategies for the 21<sup>st</sup> Century (Unpublished Working Paper 2000-07 on file with the authors and the University of California, Berkeley Institute of Urban and Regional Development).

<sup>26</sup> Booher and Innes, *supra* note 20 at 229.

<sup>27</sup> *Id.* at 230; See also generally K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963).

finding subcommittees and small working groups, which allow members of a consensus building process to work together over long periods of time<sup>28</sup> and instill diverse members' confidence in one another.<sup>29</sup>

Allowing individuals with similar interests to caucus in smaller groups, review positions, test tentative agreements, and draw support for proposals also creates the trust required for sincere dialogue.<sup>30</sup> In addition, such trust is built by allowing time in meetings to allow for small-group discussions, shared meals, and other opportunities for informal conversations, as well as offering opportunities for consensus building bodies to get together outside of a formal meeting setting, such as on a field trip.<sup>31</sup> Once this trust is established and people with diverse interests and viewpoints are able to talk honestly and straightforwardly with one another, both communicative rationality and emancipatory rationality are achieved,<sup>32</sup> ultimately resulting in authentic dialogue.

## **2. Accuracy:**

Accuracy means that participants in the dialogue must be fully informed.<sup>33</sup> In order to assure accuracy of the information being discussed, there must first be full disclosure by all parties of relevant information. Full disclosure may be encouraged early on in a process by agreeing in the ground rules that all data revealed in the consensus building process cannot be used by opponents in future court proceedings if negotiations

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<sup>28</sup> Booher and Innes, 2002 *supra* note 20 at 230.

<sup>29</sup> Susskind, *supra* note 17 at 30; John Ehrmann and Barbara Stinson, *Joint Fact Finding and the Use of Technical Experts* in THE CONSENSUS BUILDING HANDBOOK, 375, 375-399 (Lawrence Susskind, et al. eds., 1999).

<sup>30</sup> Gray *supra* note 2 at 80.

<sup>31</sup> Susan Carpenter, *Choosing Appropriate Techniques and Strategies* in THE CONSENSUS BUILDING HANDBOOK, 61, 61-97 (Lawrence Susskind, et al. eds., 1999).

<sup>32</sup> See generally J. HABERMAS, *supra* note 23.

<sup>33</sup> Booher and Innes, *supra* note 20 at 230.



break down.<sup>34</sup> Full disclosure may also be encouraged by having a mediator or facilitator points out where there is an inequality of information and highlights for participants the value of peer education in understanding one another's perspectives and positions.<sup>35</sup> Furthermore, full disclosure may be fostered by agreements within collaborative processes to exchange data for knowledge of others' specific objections to the data.<sup>36</sup>

In addition, accuracy requires that agents engaging in dialogue share meaning. Sharing meaning does not mean that participants of a dialogue adopt the positions of others, but rather, it means that when others are speaking they are able to share the meaning the speaker assigns to his or her subject matter.<sup>37</sup> Through sharing meaning, participants are able to unveil the intellectual content of each other's assumptions and positions without getting emotionally involved. For some, this is the ultimate "vision of dialogue."<sup>38</sup> In order to encourage this, mediators and facilitators often encourage members of consensus building processes to engage in joint fact finding.<sup>39</sup> Such exercises not only make it easier for participants to talk with one another, but make it easier for people to develop solutions and approaches to public policy matters that can be both implemented and sustained.

### **3. Comprehensibility:**

Comprehensibility is achieved when individuals engaging in dialogue not only make sincere statements about their positions, but also place those statements in a context

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<sup>34</sup> Gray *supra* note 2 at 128.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; See also Susskind, *supra* note 17 at 27.

<sup>37</sup> Booher & Innes, *supra* note at 230.

<sup>38</sup> *Id.*; See also D. BOHM, THOUGHT AS A SYSTEM (1992).

<sup>39</sup> Booher & Innes, *supra* note 20; Susskind, *supra* note 17 at 30; Ehrmann and Stinson, *supra* note 29 at 375-399.

that others can understand.<sup>40</sup> Some practitioners do this through role playing and storytelling or through questions directed at the speaker about the meaning and implications of their statements.<sup>41</sup> Other practitioners ensure comprehensibility by encouraging participants to engage in active listening, whereby those listening to the statements made by another are required to recite and paraphrase what they hear the speaker saying.<sup>42</sup> This allows both the speaker and the listener the opportunity to contextualize an issue.

Comprehensibility also requires that all stakeholders be equally heard. Consensus building processes ensure that people are equally heard in several ways. One way this is done is by hiring a neutral mediator or facilitator to convene the consensus building process.<sup>43</sup> Another way this is done is by allowing participants to take part in setting and affirming ground rules that cover topics such as the rights and responsibilities of participants, behavioral guidelines, how to handle interactions with the media, decision making procedures and strategies for handling disagreement.<sup>44</sup> In addition, consensus building processes encourage open ears and open minds by asking that members participate in active listening, “disagree without being disagreeable,”<sup>45</sup> and encouraging members to brainstorm and draft proposals collectively.<sup>46</sup>

Comprehensible dialogue results not only in people being heard, but often clarifies the issues and/or conflicts at hand. People often enter a consensus building process with one understanding and after engaging in comprehensible dialogue leave

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<sup>40</sup> Booher and Innes, 2002 *supra* note 20 at 230.

<sup>41</sup> Innes and Booher, *supra* note 1.

<sup>42</sup> See generally FISHER AND URY, *supra* note 2.

<sup>43</sup> Carlson, *Convening* in THE CONSENSUS BUILDING HANDBOOK, 169, 181 (Lawrence Susskind, et al. eds., 1999).

<sup>44</sup> Susskind, *supra* note 17 at 26.

<sup>45</sup> Susskind, *supra* note 17 at 28,

<sup>46</sup> *Id.*

with another.<sup>47</sup> Out of comprehensible dialogue, people are able to recognize and accept each others' positions and take joint action on some issues, while leaving other issues to be addressed at a later time.<sup>48</sup>

#### **4. Legitimacy:**

Legitimacy is established when participants in a dialogue accurately represent the interests at stake and stand for the interests of their respective communities.<sup>49</sup> In order to ensure that stakeholders legitimately represent the entire spectrum of interests, mediators and facilitators managing consensus building processes generally conduct a comprehensive assessment of all of the stakeholder interests and invited representatives of all of these interests to participate in the consensus building process.<sup>50</sup> This is done through a series of initial interviews with individuals who are essential actors and obvious stakeholders, as well as by asking individuals who participate in the organizational meetings of consensus building processes to identify missing actors likely to affect the success of the process.<sup>51</sup>

In addition, the ground rules established in consensus building processes often include provisions to assure that stakeholders stay in regular communication with their respective constituencies, which sustains legitimacy through-out the process. The purpose of the communication is to share information covered in the process and bring ideas and

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<sup>47</sup> Booher and Innes, *supra* note 20 at 231.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 230.

<sup>50</sup> Susskind, *supra* note 17 at 20-22.

<sup>51</sup> *Id.*; Susskind and Thomas-Larmer, *Conducting a Conflict Assessment* in THE CONSENSUS BUILDING HANDBOOK 99, 108-116 (Lawrence Susskind, et al. eds., 1999).; Carlson *supra* note 43 at 187-190; KENNETH CLOKE, *MEDIATING DANGEROUSLY* 182 (2001).

information back to the process.<sup>52</sup> Given that consensus building processes often result in changed perspectives by stakeholders, absent regular communication with constituencies, stakeholders may risk loss of legitimacy to represent them.

These four conditions are described in detail because they are returned to later in the thesis in a discussion on the ways in which open meeting laws present deliberative challenges to consensus building processes.

### ***How Do Consensus Building Processes Differ From Traditional Means of Public Policy Development?***

Traditional forums for public policy development and disputes often result in deadlock and important problems remain unsolved.<sup>53</sup> The opportunities that these forums offer for public participation often pit members of the public against one another and antagonize citizens.<sup>54</sup> In general, these traditional means of public policy development result in members of the public feeling alienated from the political system and contribute to public disengagement from civic activities.<sup>55</sup>

In court, public policy is developed through adversarial adjudication, which encourages the counsel of interested parties to manipulate, tell half-truths, deny responsibility, and withhold crucial information when doing so is in the best interest of their clients.<sup>56</sup> It has been suggested that while the rule of law has been effective in

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<sup>52</sup> Susan Carpenter, *supra* note 31, at 88-89.

<sup>53</sup> SUSSKIND & CRUIKSHANK *supra* note 2 at 19.

<sup>54</sup> Innes and Booher, *supra* note 25 at 3.

<sup>55</sup> *Id.* at 4; *See also generally* PUTNAM, ROBERT, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

<sup>56</sup> Cloke, *supra* note 51 at 168.

preventing dictatorship and tyranny, it is not necessarily the final answer, or the best one, for a democratic society.<sup>57</sup> Litigation is often costly and time consuming not only for those directly involved, but for society at large. Taxpayers, administrative agencies and our judicial system, all end up paying heavily for litigated public policy disputes.<sup>58</sup> In addition, when public policy matters are litigated, not all parties who are likely to be affected by the outcome are represented in the proceeding. Agreements between a few of the interested stakeholders do not necessarily represent the common good and may result in unjust and unsustainable policy.<sup>59</sup>

Traditional agency rulemaking also discourages authentic public participation in public policy development. For example, the Administrative Procedure Act (APA), which governs federal agency rulemaking, merely requires that proposed rules be published in the Federal Register and that interested parties be given the opportunity to comment on the proposed rules.<sup>60</sup> While the APA requires that agencies take “relevant” information into “consideration,” it does not require that they base their decisions on the opinions of members of the public.<sup>61</sup> Similarly, public hearings at state and local levels, which purportedly allow opportunities for citizens to get involved in government decision making are not hospitable to deliberative dialogue.

Consensus building processes, in contrast, are illustrative of a new paradigm of citizen participation in government, where citizens, government entities and special interests represent diverse and varied interests and work with each other within a

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<sup>57</sup> *Id.* at 164

<sup>58</sup> Gray *supra* note 2 at 48-50.

<sup>59</sup> *Id.* at 51.

<sup>60</sup> 5 U.S.C. §553 (2003).

<sup>61</sup> *Id.*; See also Cary Coglianese, *The Internet and Public Participation in Rulemaking*. 70 Conference Paper: Democracy in the Digital Age. Information and Society Project. Yale Law School. April 3-5, 2003.

network, sharing information and ideas with each other and with the broader public.<sup>62</sup> Unlike the old paradigm for citizen participation in public policy development, which is based on the idea of direct communication between individual citizens and the government,<sup>63</sup> the new paradigm is interactive and is constantly evolving.<sup>64</sup>

Noteworthy, and relevant to later discussion, is the fact that in this new model, not all entities within the network are required to directly communicate with one another.<sup>65</sup> Individuals and entities may decide only to connect with other individuals and entities with which they share an interest, or may choose not to connect with any other individuals or entities at all. Yet, even with gaps in the communication, there is a flow of information through the system.<sup>66</sup>

Another factor that distinguishes consensus building processes from traditional public policy development is the opportunities that consensus building processes present for innovation. Rather than following the rigid formality of Robert's Rules of Order, consensus building processes are flexible and malleable, allowing their leaders to tap into creative methods of facilitation.<sup>67</sup> As discussed above, in addition to assembling people in traditional meeting settings, consensus building processes are making increasing use of field trips, educational workshops and electronic communication to gather people, harvest ideas and generate dialogue. Mediators and facilitators also rely on small group workshops and caucuses with participants to work out the details of broad proposals or agreements. As a result, unlike traditional forums for public policy development,

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<sup>62</sup> Innes and Booher, *supra* note 25 at 17.

<sup>63</sup> Sherry Arnstein, *A Ladder of Citizen Participation*. 35 J. AM. PLAN. ASS'N, 216-24 (1969); Diane Day, *Citizen Participation in the Planning Process: An Essentially Contested Concept?* 11 J. PLAN. LIT. 421-32 (1997).

<sup>64</sup> Innes and Booher *supra* note 25 at 17.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 18.

<sup>67</sup> Susskind, *supra* note 17 at 5.

individuals participating in consensus building processes often retain ownership of solutions and relationships between stakeholders are improved.<sup>68</sup>

Finally, consensus building processes are different from traditional decision making processes in that they promote the essential elements of deliberative democracy as they are described by Bohman in *Public Deliberation*.<sup>69</sup> First, they involve bringing decision making into the public sphere. Second, they address social inequalities by bringing all interested stakeholders to the table, rather than just those who can afford to deliberate. And third they involve interplay between “emerging publics”- those that form institutions and those that are managed by institutions.<sup>70</sup>

### ***Why Are Consensus Building Processes Important For Good Policy Outcomes***

Consensus building processes are important because they enhance the quality of “public judgment.”<sup>71</sup> When people are able to come to quality public judgment they are able to develop opinions that exhibit thoughtfulness, the ability to weigh alternatives, and genuine engagement with the issue presented. In addition, “they are able to place more emphasis on the normative, valuing, ethical side of questions than on the factual informational side.”<sup>72</sup>

Because of their comprehensive approach to decision making, consensus building processes are deemed to reflect a societal response to changing conditions in increasingly

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<sup>68</sup> Gray, *supra* note 2 at 21; Booher and Innes, *supra* note 20.

<sup>69</sup> See generally JAMES BOHMAN, PUBLIC DELIBERATION (2000).

<sup>70</sup> *Id.* at 20.

<sup>71</sup> DANIEL YANKELOVICH, COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD 5 (1991).

<sup>72</sup> *Id.*

networked societies where power and information are widely distributed.<sup>73</sup> Consensus building processes offer the potential for people not only to find common ground (where interests overlap), but to reach higher ground where sustainable relationships are formed from participants' shared commitment to behavior that both demonstrates and encourages respect, trust and mutuality.<sup>74</sup>

Successful consensus building processes not only have a present impact on good public policy development, but also may impact future public policy development as well. Scholars in the consensus building field point out that in successful consensus building processes, stakeholders who in the past always found themselves at loggerheads with one another may develop social and political capital, develop shared understandings, end stalemates, learn and change from their conversations with one another, become more innovative and find themselves working together in the future.<sup>75</sup>

As consensus building public policy dialogues proliferate and more individuals acquire the know-how to communicate constructively and obtain the skills to collaborate, they develop an increased capacity for authentic dialogue.<sup>76</sup> There is substantial evidence that people who get involved in consensus building processes prefer them to the more traditional, confrontational, bureaucratic, or log-rolling behind-the-scenes methods.<sup>77</sup> As a result, these individuals will likely continue to get involved in government decision making in the future.

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<sup>73</sup> Innes and Booher, *supra* note 1.

<sup>74</sup> FRANKLIN E. DUKES, MARY PISCOLISH AND JOHN B. STEPHENS, REACHING FOR HIGHER GROUND 7-8 (2000).

<sup>75</sup> Innes and Booher, *supra* note 1; Sarah Connick and Judith E. Innes, *Outcomes of Collaborative Water Policy Making: Applying Complexity Thinking to Evaluation*, 46 J. ENVTL. PLAN. & MGMT. 177, 177-197 (2003).

<sup>76</sup> Innes and Booher, *supra* note 25 at 16.

<sup>77</sup> *Id.*



In addition, deliberative democracy theorists posit that through becoming accustomed to exchanging views with one another through authentic dialogue, citizens will have increased access to relevant knowledge needed for good public policy outcomes. This, in turn, will lead to decisions that incorporate a concern for the general well being of others while satisfying individual underlying interests.<sup>78</sup>

### **The Application of Open Meeting Legislation to Consensus Building Processes**

While the literature on consensus building processes is robust, the literature on open meeting laws and consensus building processes is quite trifling. The legal literature on point is limited to discussion of the FACA and negotiated rulemaking and does not address the Brown or Bagley Keene Acts. Similarly, the mediation and facilitation literature is limited in that it is geared more towards making people aware of the laws and the challenges they present than towards grappling with how to reconcile open meeting laws with consensus building processes.

Legal literature on point discusses the reasons for and against applying open meeting laws to consensus building processes in the context of the FACA and negotiated rulemaking. Law review articles written by Faure<sup>79</sup> and Perritt<sup>80</sup> summarize, although do not necessarily adopt, the arguments for applying open meeting laws to consensus building processes.

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<sup>78</sup> See generally James Fishkin, *Realizing Deliberative Democracy: Virtual and Face to Face Possibilities*. Conference Paper: Democracy in the Digital Age. Information and Society Project. Yale Law School. April 3-5, 2003.; AMY GUTMAN AND DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); James Bohman, *The Coming of Age of Deliberative Democracy*, 6 J. POL. PHIL. 399-423 (1998); Dryzek *supra* note 25.

<sup>79</sup> David Faure. The Federal Advisory Committee Act: Balanced Representation and Open Meetings in Conflict with Dispute Resolution, 11 Ohio St. J. on Disp. Resol. 489 (1996).

<sup>80</sup> Perritt, Henry H., Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo. L.J. 1625 (1986).

In the context of addressing whether open meeting laws should apply to subgroups and subcommittees of FACA advisory bodies, Faure notes that some people believe that where public interests are at stake there is an automatic right to public participation. He explains that proponents of open consensus building processes distinguish the right to confidentiality in private negotiations from the right to confidentiality in public policy development and argue that while there is a right to privacy in the former, the right does not apply to the latter.<sup>81</sup>

Faure's article also points out that there are those who believe that requiring meetings to be open enhances the legitimacy of the consensus building process in the public's eye.<sup>82</sup> He states that some claim that where meetings are held in private, people become suspicious of consensus building processes and begin to lose trust for those advocating and participating in the meeting. In contrast, where consensus building processes assume an open forum, the public feels included in the decision making process,<sup>83</sup> feels as if nothing has been hidden from them, and is less likely to challenge the outcomes. Faure also discusses how some believe that consensus building processes should be open to the public because open processes ensure that all of the information necessary for making a decision is in the room. Where meetings are closed, there is the potential that certain information or advice will not be taken into consideration.<sup>84</sup>

Both Faure and Perritt suggest that open meetings may help neutralize the power imbalances between interested parties.<sup>85</sup> Perritt notes that open meetings may benefit

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<sup>81</sup> Faure, *supra* note 79 at 504-5.

<sup>82</sup> *Id.* at 504.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 503; Perritt, *supra* note 80 at 1639.

groups possessing less influence with agency decision makers,<sup>86</sup> and Faure states that some believe that in environmental disputes, relatively powerless citizen groups may use open meeting laws to access the media and gain additional support from the public.<sup>87</sup> According to Perritt, even if a negotiation session ultimately has zero public attendance, the fact that those involved in decision making know that the public and the press have access to the meeting may help balance the power.<sup>88</sup>

Finally, Faure discusses the argument, made by proponents of open meeting laws, that in order for people to be able to appeal the decisions born out of consensus making bodies (even if the ultimate decision is made in another forum), all stages of consensus building processes need to be open and transparent. If consensus building processes are closed, individuals excluded from the process who choose to challenge the outcome of that process, will face the challenge of attempting, in a short time, to overturn a decision that is the product of a usually very lengthy process.<sup>89</sup> Similarly, excluded parties might not be able to access, or might face difficulties accessing, the information that the participants in the consensus building process used to reach their decision.<sup>90</sup>

The above considerations have been weighed against the disadvantages of opening the meetings of consensus building bodies to the public. In addition to being addressed by both Faure and Perritt in their articles, the downsides to applying open meeting laws to consensus building processes are artfully captured in Philip Harter's

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<sup>86</sup> *Id.*

<sup>87</sup> Faure, *supra* note 79 at 504.

<sup>88</sup> Perritt, *supra* note 80 at 1639.

<sup>89</sup> Faure, *supra* note 79 at 505 *citing* Goldberg, 1992 p. 289.

<sup>90</sup> *Id.*

seminal piece, which looks specifically at the disadvantages of openness in traditional rulemaking and advocates for consensus building through negotiated rulemaking.<sup>91</sup>

Harter's piece touches on some of the concerns addressed earlier in the review of mediation and facilitation literature. Harter points out that when debate is taking place in the public eye, parties often take extreme positions and may feel compelled to advocate for a position that they do not actually favor in order to preserve the option of advocating for that position in the future.<sup>92</sup> In addition, he comments that where a decision making process is open to the public, others have pointed out that there may be a disincentive to reveal all relevant data.<sup>93</sup>

Whereas Perritt's article has a neutral tone and addresses the impact of open meeting laws on consensus building processes as one of many factors that needs to be taken into consideration in reading the Administrative Conference of the United State's evaluation of negotiated rulemaking, Faure's article is focused specifically on open meeting laws and consensus building processes. Ultimately, Faure takes a position similar to Harter with respect to the application of the open meeting provisions of the FACA to consensus building processes. He asserts that there is a need for privacy at certain points in a consensus building process. After he explores the arguments for and against the application of open meeting laws to consensus building processes, he concludes that the open meeting provisions of the FACA should not apply to subcommittees and subgroups of an advisory body.<sup>94</sup>

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<sup>91</sup> Harter, Philip. *Negotiating Regulations: A Cure for Malaise* 71 Geo. L.J. 1 (1982). Some of these arguments are also discussed in Faure, 1996, who relies entirely on Harter in formulating his arguments related to the need for privacy in consensus building processes.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 19-20; Faure, *supra* note 79 at 506.

<sup>94</sup> Faure, *supra* note 79.

Unlike his outline of arguments for and against the application of open meeting laws to consensus building processes, which are quite helpful in grounding oneself in this debate, Faure's discussion and conclusion in this work are now dated and provide little guidance, as most subgroups and subcommittees are now considered exempt from the FACA.<sup>95</sup> In general, the FACA requirements are now read flexibly enough to allow for necessary private conversations.<sup>96</sup>

In the mediation and facilitation literature, perhaps one of the earliest pieces to address the impact of open meeting laws on public policy consensus building processes is Susskind and Cruikshank's *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes*.<sup>97</sup> In this piece, the impacts of the FACA, as well as other open government legislation are criticized for slowing and sometimes halting consensus building efforts.<sup>98</sup> In addition, the authors suggest that the open meeting laws impose certain limitations on public officials who might want to participate in consensus building processes.<sup>99</sup> However, the authors do not entertain discussion on how best to address these issues.

Another piece that touches on the topic is the *Consensus Building Handbook*, arguably the most widely read publication on consensus building. The *Handbook* addresses the impact of open meeting laws on consensus building processes primarily by highlighting the importance of considering open meeting legislation when designing and implementing consensus building processes. One of the *Handbook's* contributors

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<sup>95</sup> Croly and Funk, *supra* note 11.

<sup>96</sup> Mee, *Comment: Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?* 25 B.C. Envtl. Aff. L. Rev. 213, 218 (1997)

<sup>97</sup> SUSSKIND & CRUIKSHANK *supra* note 2.

<sup>98</sup> *Id.* at 37.

<sup>99</sup> *Id.* at 138, 193-194.

comments that confidentiality arrangements in consensus building processes must take account of open-meeting and sunshine laws if public officials are involved.<sup>100</sup>

Another of the *Handbook's* authors talks about open meeting laws in the context of an advisory piece on how to handle outside scrutiny associated with “excessively public” meetings.<sup>101</sup> He notes that the laws may reduce participants’ creativity by increasing the reticence of participants to present new ideas and openly engage in discussion and comments that the laws tend to promote positional bargaining at the expense of joint problem solving.<sup>102</sup> While this scholar notes that occasionally these tensions can be managed developing a hybrid process with public forums and private meetings, his discussion ends there.<sup>103</sup>

Other authors in the *Handbook* recommend that mediators and facilitators be mindful of legal considerations when designing processes and refer to state and federal open meeting laws to make this point.<sup>104</sup> In addition, the *Handbook* offers some discussion on the FACA, how it may be triggered and lists some of the procedural steps mandated by the law.<sup>105</sup> Finally, there is mention of the FACA (without much further discussion) in a case study examining negotiated rulemaking.<sup>106</sup> However, at no point in the *Handbook* is the topic of open meeting laws and their impact on consensus building processes explored in great depth.

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<sup>100</sup> Susskind, *supra* note 17 at 56.

<sup>101</sup> Michael Poirier Elliot, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners* in THE CONSENSUS BUILDING HANDBOOK 61, 88-89 (Lawrence Susskind, et al. eds., 1999).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Carpenter, *supra* note 31 at 72; Golann and Van Loon, *supra* note 3 at 503-04.

<sup>105</sup> Golann and Van Loon, *supra* note 3 at 503-04 and 511-12.

<sup>106</sup> Jan Jung-Min Sunoo and Juliette Falkner, *Regulatory Negotiations: The Native American Experience* in THE CONSENSUS BUILDING HANDBOOK 901, 903-04 (Lawrence Susskind, et al. eds., 1999).

Carpenter and Kennedy also address potential challenges that open meeting laws present to consensus building processes through a discussion of open and closed meetings in their book, *Managing Public Disputes*.<sup>107</sup> In their chapter entitled “Guidelines for Making the Program Work,” they run through the following list of why participants in a consensus building process might want to close a meeting:

- The parties will be reluctant to adjust their stated positions to accommodate new information if each step is criticized as it is made.
- The delicate business of testing for consensus is hard to do in the public view.
- Building personal rapport with representatives of opposing views is important in negotiation yet difficult to do if constituents see overtures of courtesy or partial agreement as selling out to the enemy.
- Discussions become less candid when the press is present. Hard negotiating shifts from the formal sessions to informal meetings among participants between scheduled sessions.<sup>108</sup>

In addition, Carpenter and Kennedy identify the following considerations that may require excluding the public and the press:

- Proprietary information will be exchanged.
- One or more of the parties has been injured by unfair or inaccurate reporting and will not negotiate with the press in attendance.
- Relationships between parties are so bad that conciliation will be difficult in any case and impossible with the news media looking on.<sup>109</sup>

The lists that Carpenter and Kennedy provide, coupled with earlier discussion on public involvement in public participation in public policy consensus building processes, offer

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<sup>107</sup> SUSAN CARPENTER AND W.J.D. KENNEDY. *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE TO HANDLING CONFLICT AND REACHING AGREEMENTS*, 182-184 (1988).

<sup>108</sup> *Id.* at 183.

<sup>109</sup> *Id.* at 184.

valuable insight for those trying to determine whether a particular consensus building process should be open to the public and press, as well as a foundation on how to proceed in the event that a consensus building body elects to close a meeting. However, in general, their writing seems to suggest that those managing and participating in consensus building processes have the autonomy to decide whether a process is open to the public.<sup>110</sup> As a result, these writers offer little guidance for those who have no choice but to adhere to open meeting laws.

Similarly, deliberative democracy theorist James Bohman and conflict analyst Thomas Schelling discuss how laws requiring that meetings be made open to the public may have the unintended effects of increasing strategic posturing to the gallery and decreasing the quality of dialogue and debate.<sup>111</sup> However, the authors give little attention to how to deal with these quandaries.

In their report *Public Participation in Planning: New Strategies for the 21<sup>st</sup> Century*, Innes and Booher comment that open meeting laws drive some decision making further behind the scenes. They also note that the laws fail to afford elected officials the time and opportunity to become informed about complex issues that cannot be addressed in public meetings, and discourage the type of speculative discussion and deliberations that lead to innovative approaches to public policy development.<sup>112</sup> However, the strategies that they suggest may still trigger the open meeting laws they criticize, and they offer no discussion on how this should be handled.

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<sup>110</sup> See for e.g. *Id.* at 184, “When, in the judgment of the sponsors, a meeting must be closed, steps should be taken to reduce, as much as possible, the indignation of the news media and to prevent a party from the act of closure for its own purposes.”

<sup>111</sup> Bohman, *supra* note 69 at 242-243; THOMAS SCHELLING, STRATEGY OF CONFLICT. 30 (1980).

<sup>112</sup> Innes and Booher, *supra* note 25 at .3.



Finally, Cestero and Reike discuss the FACA in their independent works and note that there is a widespread concern in their field that the law hampers innovative processes. They state that this is especially true with respect to the time-consuming and bureaucratic process of getting chartered.<sup>113</sup> In response to this concern, Cesteros suggests ways in which consensus building bodies can maintain their independence, ensure an open and participatory process, continue to engage agency representatives and evade the FACA through making careful decisions about formation, membership, function and control.<sup>114</sup> Yet, her discussion on how to do so is limited and does not include specific examples.

### **Contextualizing The Relationship Between Open Meeting Laws and Consensus Building Processes**

The literature on point offers a solid introduction to some of the major arguments for and against applying open meeting laws to consensus building processes. In addition, it illustrates that people are beginning to discuss and grapple with the challenges related to the application of open meeting laws to consensus building processes. Absent in the literature, however, are concrete examples illustrating the interplay of open meeting laws and consensus building processes. There are no examples in the literature of how the actual challenges posed by open meeting laws present themselves, how mediators and facilitators wrestle with these challenges in real time, and how the decisions that those working with and participating in consensus building processes make in response to these laws impact the development of good public policy.

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<sup>113</sup> BARB CESTERO, BEYOND THE HUNDREDTH MEETING: A FIELD GUIDE TO COLLABORATIVE CONSERVATION ON THE WEST'S PUBLIC LANDS (1999); Elizabeth Reike, *The Federal Advisory Committee Act, Rules And Executive Orders: Judicial Interpretations And Suggested Revisions* Natural Resources Law Center, University of Colorado School of Law, Boulder, CO. (1997).

<sup>114</sup> CESTERO, *supra* note 113 at 79-80.

Not only does the literature lack specific examples from practitioners, but outside of discussion on the FACA, it does not identify the specific provisions in the open meeting laws that practitioners find problematic. While recognizing the rationale behind the open meeting laws is useful and while outlining the challenges open meeting laws may present to consensus building processes alerts consensus building practitioners and participants to potential difficulties, it does not prepare them for what to expect when their consensus building processes are subject to open meeting legislation.

In the following case study, I explore the relationship between open meeting laws and consensus building processes in greater depth by identifying the key provisions in the FACA, the Brown Act and the Bagley-Keene Act that impact consensus building processes and through contextualizing the challenges presented by open meeting laws in a wide array of consensus building environments. I contribute to the discussion on open meeting laws and consensus building processes by categorizing the challenges that I observe and tracing their respective origins back to three geneses. I offer immediate opportunities and long term recommendations for addressing these challenges.

## Chapter 3

# METHODOLOGY

### Introduction

In order to further explore the challenges open meeting legislation presents to consensus building processes, I conducted a case study on how open meeting laws impact the consensus building processes facilitated by one of the nation's leading alternative dispute resolution institutes, the Center for Collaborative Policy (the CCP). The CCP is a joint program of California State University, Sacramento and the McGeorge School of Law, University of the Pacific, in Sacramento California. The CCP is one of several entities in the state of California specializing in the mediation and facilitation of complex public policy issues.

The CCP was an ideal location to study the relationship between the public policy consensus building processes and open meeting laws not only because it specializes in mediating and facilitating these types of processes, but because of the organization's purpose. The stated mission of the CCP is "to build the capacity of public agencies, stakeholder groups and the public to use collaborative strategies to improve policy outcomes."<sup>115</sup> Examples of the types of consensus building processes the Center works with include processes that address governance and fiscal reform, natural resource and environmental policy, water policy, land use, growth management, and regional transportation.<sup>116</sup>

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<sup>115</sup> Center for Collaborative Policy, *About the Center* at <http://www.csus.edu/ccp/about/index.htm> (visited April 28, 2003).

<sup>116</sup> Center for Collaborative Policy, *Recent Projects* at <http://www.csus.edu/ccp/projects/recent.htm> (visited April 28, 2003).

In conducting this case study, I sought to accomplish three tasks. First, I wanted to document the actual experiences of mediators, facilitators and consensus building bodies working with open meeting laws and understand the challenges presented by the laws. Second, I wanted to identify the specific provisions in California and federal open meeting laws that impact consensus building processes. And third, I wanted to explore the possible geneses of the challenges.

### **The Research**

In order to accomplish the aforementioned tasks I conducted ethnographic and legal research. My findings include excerpts from both ethnographic and legal data and quite often marble the two together.

#### ***Ethnographic Research***

Ethnographic data was collected over a nine-month period using four methods: (1) interviewing, (2) observation, (3) participant observation, and (4) document review. While the CCP is an actual institution whose identity has not been masked, the names of the individuals that I interviewed and observed have all been given pseudonyms. In addition, while I make gender specific references to some individuals in the study, in order to protect my informants, the gender of these individuals may have been changed as well. Similarly, all of the consensus building processes named and described in this study have been renamed and their subject matter has been altered so as to protect the privacy of the individuals and agencies involved.

- **Interviews**

I conducted interviews with fourteen mediators and facilitators at the CCP. These interviews lasted in duration from a half hour to two hours. On several occasions, interviewees participated in more than one interview. During the interviews, the mediators and facilitators interviewed were asked about their experiences designing and working both with consensus building processes where open meeting legislation was an issue, as well as with consensus building processes where open meeting legislation was not an issue. In some interviews, mediators and facilitators took the time to debrief with me on processes that I had observed.

- **Observations**

In addition to collecting data through interviews, I also observed various stages of seven consensus building and collaborative processes: three of which were subject to open meeting laws and four of which were not. I observed processes that were and were not subject to open meeting laws, in order to develop a more robust understanding of consensus building processes and the interplay between consensus building processes and open meeting laws.

- **Participant Observation**

My short-term observations were coupled with long-term participant observation. Through a six-month internship at the CCP, I worked as an assistant facilitator on two consensus building processes- one of which was subject to open meeting legislation and

the other which was not. In the former of these two processes, I worked ten hours a week for two months. In the latter, I worked 10-20 hours a week for six months.

Interning at the CCP also allowed me to participate in four of the CCP's formal professional development workshops, where I had the chance to observe mediators and facilitators discuss amongst themselves areas relevant to my thesis research. In addition, it offered the opportunity to participate in conversations and debriefings about a wide range of consensus building processes being facilitated by CCP mediators, not all of which I had the opportunity to directly observe.

- **Document Review**

In addition to interviews, observations, and participant observation, I spent many hours pouring over hundreds of documents from the Center's different consensus building processes. In addition, I visited the websites of a number of processes in order to better understand the processes and their accomplishments, as well as to follow up on things that were discussed in interviews and questions prompted during observations. Similarly, some mediators forwarded me emails and other correspondence related to my research, which I reviewed and incorporated into this thesis.

### ***Legal Research***

The ethnographic research for this study was coupled with extensive legal research. This legal research involved conducting a document review of the relevant laws and case law on point. In addition, it included conducting informational interviews and involved participation in an educational seminar.

- **Document Review**

The actual texts of the FACA, the Brown Act and the Bagley-Keene Act, as well as relevant case law and law review articles, are used in the case study to ground the reader with relevant law. In some sections of the study, I use the laws to highlight the reasons why mediators and facilitators are facing a particular challenge. In other sections, I use the laws to propose the possible existence of a challenge not identified by any of my interviewees. In addition, I incorporate the laws in order to introduce the possibility that perhaps it is not the legislation itself that is presenting a challenge, but rather the challenge is a product of how the law is being read by a particular individual.

- **Informational Interviews & Educational Seminar**

In addition to the two attorney mediators I interviewed at the CCP, I discussed my research with three attorneys and one judge at various stages of my research. One of the three attorneys interviewed is a national expert on open meeting legislation and has written the most widely used treatise on the subject. The other two attorneys I spoke with were attorney mediators who ran another public policy consensus building institute in California. The judge I interviewed wrote one of the first opinions on the Brown Act. I also interviewed William Bagley, the former legislator who carried the Bagley-Keene Act to its enactment. Finally, in conducting this research, I attended a one day seminar on the Brown Act, led by legal counsel from the First Amendment Coalition, where I obtained general information on California open meeting laws and relevant case law.

## Chapter 4

# FINDINGS & ANALYSIS

### Introduction

The findings of the CCP case study reflect that open meeting laws do indeed significantly impact consensus building processes by presenting a number of ongoing challenges. These challenges fall into three general categories. First, there are the procedural challenges, which impact the progress of consensus building processes. Second, there are deliberative challenges, which threaten the high quality of deliberations characteristic of consensus building processes. Third, there are the fiscal challenges, which result in increased costs for consensus building processes.

In my analysis of these findings, I also posit that challenges faced by consensus building processes have three geneses, each of which is not necessarily independent of the others. Some challenges originate from how open meeting legislation is understood by those managing and participating in consensus building processes. In addition, some challenges stem from the ways convening agencies' legal counsel interprets and chooses to apply open meeting legislation to consensus building processes. And finally, some challenges are the result of the actual open meeting legislation. Throughout this section, I allude to these geneses and hint at ways of addressing certain challenges through their respective geneses. However, I reserve my specific recommendations on how this should be done for the final portion of this thesis.



## **Procedural Challenges**

### ***Overview***

Although at first blush the procedural requirements of open meeting laws do not appear onerous, the findings of the CCP case study indicate that open meeting laws significantly impact the speed and manner at which consensus building processes unfold. In the section below, I highlight the procedural challenges posed by open meeting laws in the order that they might present themselves in the course of a general consensus building process, rather than in the order in which I see them presenting the greatest challenges to consensus building processes. I begin my discussion of the procedural challenges by making general observations about the initial confusion that many mediators and facilitators have about whether open meeting laws apply to their consensus building processes. I then review and address the difficulties associated with convening a consensus building body under the open meeting laws. Next, I look at the impacts the laws have on regularly scheduled meetings and subgroup/subcommittee meetings. Finally, I turn to the implications that the procedural requirements have for ad hoc meetings.

### ***Determining Whether Open Meeting Laws Apply to a Consensus Building Process***

Upon agreeing to mediate or facilitate a consensus building body, one of the first questions that a mediator or facilitator must ask is: Is this body subject to any open meeting laws? One facilitator commented,<sup>117</sup> and my fieldwork confirmed, that most of the CCP mediators and facilitators know to ask this question, but do not have the personal

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<sup>117</sup> Rain Interview.

expertise to answer it. Conversations with mediators and facilitators both inside and outside of the CCP confirm that the laws can be quite mystifying even for the most experienced of practitioners. They also indicate that determining whether a process is subject to open meeting laws may take a substantial amount of time.

In California, in order to determine whether a consensus building body is subject to open meeting laws one must turn to the pertinent sections of the Brown Act, Bagley-Keene Act and the FACA to see whether the consensus building body falls within the parameters of bodies governed by the statutes. The Brown Act applies to all legislative bodies, which include in pertinent part:

(a) the governing body of a local agency or any other local body created by state or federal statute; and

(b) a commission, committee, board or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance or resolution, or formal action of a legislative body are legislative bodies for the purposes of this chapter.<sup>118</sup>

Similarly, the Bagley Keene Act applies to all state bodies, which include:

(a) every state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings and every commission created by executive order;

(b) any board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body;

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<sup>118</sup> Cal Gov Code §54952(a-b)(2003).

(c) any advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons; and

(d) any board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and which is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.”<sup>119</sup>

Finally, the FACA applies to federal advisory committees, which include in pertinent part:

“any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof , which is-- (A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government...”<sup>120</sup>

As is obvious from the statutes quoted above, determining whether open meeting laws apply to consensus building processes is not as simple as one might think. In general, the mediators and facilitators I interviewed commented on the trifling amount of material available to help them navigate California and federal open meeting legislation. They also emphasized that in order to determine whether a particular process needed to comply with open meeting legislation, they always resorted to consulting with the legal

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<sup>119</sup> Cal Gov Code §11121(a-d)(2003).

<sup>120</sup> 5 USCS Appx §3 (2003).

counsel of convening agencies.<sup>121</sup> Their statements were confirmed by my field observations. In addition, I saw that in processes where there is uncertainty about whether the laws apply, certain stages of the process were delayed and mediators and their groups were prevented from moving forward as they would in a consensus building processes not subject to the laws.

My findings indicate that it is generally the attorneys employed by one or more of the convening agencies of a consensus building process who makes the final call on whether and how a process should comply with the open meeting laws. However, my findings also indicate that where mediators and facilitators are well-versed in the law, the procedural hurdle of determining whether open meeting laws apply to consensus building processes can be more readily overcome.

In one process I observed, a mediator took the initiative to attend a seminar on the Brown Act and research whether a particular consensus building body needed to comply with the Act. While in the example I am referring to the mediator ultimately left the final decisions regarding compliance with the laws to the legal counsel of the convening agencies,<sup>122</sup> it is likely that her knowledge of the law allowed her to move forward with her consensus building process more quickly and facilely than a mediator who was not well versed in the law would have been able to. However, it is important to note that while mediator knowledge of the laws may decrease the size of the procedural hurdle

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<sup>121</sup> Eaton Interview; Lith Interview; Barntop Interview; Darrow Interview; Unger Interview; and Samson Interview.

<sup>122</sup> This mediator commented that although the CCP has access to its own legal counsel through the California State University at Sacramento (CSUS), it should not rely on CSUS attorneys for advice on open meeting legislation. She felt that because the CCP wasn't the organization that would ultimately be on the hook should a consensus building process be found to be in violation of open meeting legislation, it wouldn't be prudent for CCP mediators to get or give advice. Moreover, she noted that the counsel at CSUS was probably not as well versed in open meeting legislation as the counsel for the local and state agencies that advises on open meeting legislation on a regular basis. (Unger Interview).

associated with determining whether open meeting laws apply to consensus building processes (by allowing a mediator to engage in informed dialogue with convening counsel on the matter), given that mediators and facilitators still ultimately rely on convening agency counsel to interpret the laws, the hurdle remains.

### ***Convening a Consensus Building Process***

Once it has been determined that open meeting laws apply, mediators and facilitators then must satisfy the procedural requirements associated with convening a consensus building process. The procedural requirements for convening a FACA body are exceedingly more complex than the procedural requirements for convening a body under the Brown or the Bagley-Keene Acts.

- **Convening a Consensus Building Body Under the FACA**

In general, in order to comply with the FACA, a consensus building group must have balanced membership and must adhere to the steps required for the formal establishment of an advisory body. These include creating a charter, a consultation letter, a transmittal memorandum and notifying the public in the *Federal Registrar*.<sup>123</sup> Although many of the individuals I interviewed did not have experience working with the FACA, several of the CCP mediators and facilitators that had either worked with federal advisory committees in the past, or who were presently working with federal advisory committees, stressed the difficulties involved with establishing a consensus building body under the FACA.

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<sup>123</sup> 5 USCS Appx § 9 (2003); Golann and Van Loon, *supra* note 3 at 503-504.

Mediators commented that some of the FACA requirements, which appear straightforward, may prove onerous and have the potential to really slow consensus building processes down.<sup>124</sup> One noted that he and others often pejoratively refer to having to comply with the FACA as “being FACAed.”<sup>125</sup> Another mediator stated that chartering a FACA group is perhaps one of the hardest parts about complying with a FACA body, noting that chartering a group may take over six months.<sup>126</sup> In addition, the comment was made that the FACA procedures have the potential to essentially “stop democracy,” and one individual noted the irony in how these requirements, which were enacted to encourage diverse public participation and bring people into the process in a fair way, actually can end up scaring people away from collaborating.<sup>127</sup>

Because forming a FACA advisory body has the potential to be burdensome, one mediator told me that people often find ways to design consensus building processes that need not comply with the FACA. For example, some agencies that either seek, or are required to seek, public input will use a committee that has already been chartered to get public input. However, in such cases, the people doing the advising are not the actual stakeholders. In other cases, agencies that want public input will simply hold public meetings and collect informal recommendations. In still other cases, entities that knew they would be subject to FACA if they convened an official group would get other entities, which would not be subject to FACA if they convened the group, to convene the groups for them.<sup>128</sup>

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<sup>124</sup> Snow Interview; Frost Interview; and Crow Interview.

<sup>125</sup> Frost Interview.

<sup>126</sup> Snow Interview.

<sup>127</sup> Frost Interview.

<sup>128</sup> Frost Interview.

Interviews with individuals who had worked with the FACA and observations in the field indicated that at least some of the mediators and facilitators at the CCP are aware of the ways to form a consensus building body without triggering the FACA. One of the people I interviewed even referred me to Cestero's work, which suggests ways for consensus building bodies to evade open meeting laws.<sup>129</sup> These interviewees and observations also confirmed that the same frustration that mediators and facilitators may face with the FACA procedural requirements for setting up an advisory committee may be felt by a number of federal agencies. The interview responses and field observations also suggested it may be professionally and socially acceptable, both inside and outside of the field of consensus building, for advisory bodies to look for ways to avoid triggering the FACA, so long as they are as they follow the spirit of open government.

Given that the literature on point, written by people who promote public participation in decision making and the concepts of deliberative democracy, is advising people on how to avoid triggering the FACA<sup>130</sup> and that my findings indicate it is common for mediators and facilitators who are advocates of authentic participation in government decision making to seek ways of avoiding the FACA, one must query whether the process of chartering groups under the FACA needs to be amended. However, it is important not to ignore the possibility that some of the problems people have when commencing a FACA process may be attributable to the particular facilitator leading the consensus building process<sup>131</sup> and/or the agency or counsel interpreting the law.<sup>132</sup>

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<sup>129</sup> See CESTERO *supra* note 113.

<sup>130</sup> *Id.*

<sup>131</sup> Snow Interview.

<sup>132</sup> Participant comments, CCP Professional Development Seminar on Open Meeting Laws (May 30, 2003).

While more comprehensive research is needed before making such a recommendation, it appears as if the procedural requirements of complying with the chartering process of the FACA make convening a diverse consensus building body so difficult that they may discourage conveners and participants from engaging in formal deliberative dialogue. When this happens, none of the positive aspects of the FACA are allowed to influence public policy development. Instead, people are left with the traditional means of public policy development, which, as discussed earlier, often result in deadlock and unsolved problems.<sup>133</sup>

- **Convening a Consensus Building Body Under the Brown and Bagley-Keene Acts**

The procedures for convening a body under the Brown and Bagley-Keene Acts are far less tedious but still may slow consensus building processes down. The formal requirements for convening a consensus building body subject to California open meeting laws simply involve distribution of copies of the applicable law to members of the consensus building body. Whereas the Bagley Keene Act requires all members of the state body to receive a copy of the Act,<sup>134</sup> the Brown Act states that a legislative body of a local agency may require that a copy of the Act be given to each member.<sup>135</sup>

In one process I observed, the actual distribution of the law did not significantly slow the consensus building process down (although it did involve a lot of photocopying), however, the process was impacted by participants' response to being told they would be held accountable for complying with the law. In that case, during the first meeting of the consensus building body, a copy of the law was handed out and the

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<sup>133</sup> SUSSKIND & CRUIKSHANK *supra* note 2 at 19.

<sup>134</sup> Cal Gov Code §11121.9(2003).

<sup>135</sup> Cal Gov Code §54952.7 (2003).



convening agency's counsel made a presentation on the law. One of the mediators commented that following that first meeting discussion between the participants was chilled. She explained that because the text was confusing for some of the participants, they weren't sure whom they could or couldn't talk to. As a result, it took longer for people to feel comfortable engaging in dialogue with one another outside the consensus building process.<sup>136</sup>

The minor procedural delay is one that could possibly be addressed by educating mediators and facilitators on how to answer basic questions about the laws and translate legalese into the language those participating in a consensus building process can understand. However, given that mediators and facilitators who are not authorized to practice law cannot give legal advice, perhaps the attorneys working with convening agencies need to become more adept at explaining the laws to a wide range of people.

### ***Regularly Scheduled Plenary Meetings***

With respect to the regularly scheduled plenary meetings of consensus building processes, my findings indicate that there are three primary ways that the procedural requirements of open meeting laws impact consensus building processes. First, all three laws require that, except in some limited circumstances, all meetings be noticed in advance and that an agenda be posted with the notice.<sup>137</sup> Second, open meeting laws place limitations on what can be discussed in meetings.<sup>138</sup> And finally, open meeting

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<sup>136</sup> Lith Interview.

<sup>137</sup> See generally 5 USCS Appx §10 (2003), Cal Gov Code §54954.2 (2003), and Cal Gov Code §11125 (2003).

<sup>138</sup> *Id.*

legislation prescribes that adequate time be set aside for public comment.<sup>139</sup> Each of these requirements is discussed in greater depth below.

- **Advance Posting of Notice and Agenda**

Under open meeting laws, mediators and facilitators of consensus building processes are required to post meeting notice and agendas within a designated time period before the consensus building body convenes. The FACA requires that notice be given and an agenda be posted in a “timely” manner.<sup>140</sup> The Brown Act requires that these requirements be met 72 hours before meetings.<sup>141</sup> And finally, the Bagley-Keene Act requires that they be met ten days before meetings.<sup>142</sup>

- **Advance Noticing**

In general, the CCP mediators and facilitators were amenable to complying with the notice requirement for regularly scheduled plenary meetings. Both my fieldwork and interviews confirmed that mediators and facilitators welcome the public at plenary meetings and were even noticing the public with the plenary meetings when notice requirements were not legally mandated.

While one would think that mandating that the meetings of consensus building bodies be noticed would increase public participation and, in turn, enhance the quality of deliberations of the consensus building body, my finding showed otherwise. In general, most mediators and facilitators felt that adhering to the notice requirements of open

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<sup>139</sup> See generally 5 USCS Appx §10(a)(3) (2003), Cal Gov Code §54954.3 (2003), Cal Gov Code §11125.7 (2003).

<sup>140</sup> 5 USCS Appx §10 (2003).

<sup>141</sup> Cal Gov Code §54954.2 (2003); See also *International Longshoreman’s & Warehouseman’s Union v. Los Angeles Export Terminal, Inc.* (1999, 2<sup>nd</sup> Dist) 69 Cal App 4<sup>th</sup> 287, 293, 81 Cal Rptr 2d 456.

<sup>142</sup> Cal Gov Code §11125 (2003).

meeting laws did nothing to increase the number of voices and public participation in consensus building processes. Similarly, in many of the processes I observed, the notice requirement served merely to notice those who were already involved with the process. Perhaps this is because most CCP mediators and facilitators do a considerable amount of public outreach at the initial stages of their consensus building processes and are quite conscientious about including all possible interested stakeholders in their work.

In addition to getting people to participate in the actual consensus building process, it is also routine practice for CCP mediators and facilitators to develop email listserves and mailing lists of people who are interested and want to keep abreast of CCP consensus building processes. These listserves and mailing lists include individuals participating in the process, individuals who want to track the process, individuals and entities that might be interested in what is taking place in the process and, in some cases, members of the press. It was my observation that where such lists were in place, the statutorily prescribed notice requirements did nothing to enhance public participation in the consensus building processes.

Surprisingly, some mediators and facilitators commented that if they were to rely solely on the notice requirement to inform the public about their meetings, the process might actually be slowed down or halted for failure to inform all interested stakeholders of the process. One mediator noted California's diversity and asked: If those who enacted the open meeting legislation really want to make sure they were involving the public, why don't they require that meeting notices, agendas and minutes be published in multiple languages?<sup>143</sup> Similarly, in discussing the FACA requirement that notice be

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<sup>143</sup> Frost Interview.

posted in the *Federal Register*. Another mediator asked how many people even know what the *Federal Register* is?<sup>144</sup>

In contrast, the notice requirement used by most CCP mediators and facilitators is far more inclusive. As one mediator put it:

“It is the very nature of our work that you are constantly wondering, “Did we leave somebody out? Is there somebody who is going to find out about this later on and raise up a storm because they weren’t involved or they didn’t know about it. So you are constantly thinking we have got to structure an agreement which everybody knows about and everyone who wants to get their two cents in has a chance to do it. Otherwise we are not going to have an agreement of the level of support that it needs to really implement it.”<sup>145</sup>

Although the notice requirements are hardly an issue for consensus building processes, the above discussion is included to illustrate a reoccurring theme throughout this thesis. Consensus building processes and open meeting laws both embrace the idea of people getting involved in government decision making. Ironically, however, there are times when strictly adhering to the statutory provisions of the open meeting laws may threaten the ultimate outcomes of consensus building processes. Whereas in the case of noticing, mediators and facilitators generally have the ability to compliment the statutorily prescribed noticing requirements of the open meeting laws with their own noticing procedures, this is not always the case. There are times when the negative impact of the open meeting laws on consensus building processes cannot be ameliorated and where legislative reform may be required.

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<sup>144</sup> Crow Interview.

<sup>145</sup> Rain Interview.

- **Advance Agenda Posting**

Unlike the notice requirement, which on the whole is not problematic, the requirement that agendas be posted days, and sometimes weeks, in advance proved problematic for some, particularly in consensus building processes governed by the Bagley-Keene Act. One mediator currently working with a process subject to the Bagley-Keene Act commented:

“You tend to churn out agendas to meet the ten day notice requirement and you either have to develop a skill or you just by default end up writing agendas that don’t say much- because you are constantly worried about [getting them done]. And in [the organization I facilitate for], a ten-day notice really means that it must leave my hands fifteen or sixteen days before the meeting. And for meetings every thirty days it really cuts down the time to really plan a really rich agenda. You are constantly thinking about getting the agenda done.”<sup>146</sup>

This mediator further commented on the irony of the fact that the agenda posting requirement is in place to give people an idea of what is going to be discussed, yet because agendas must be created before plans for meetings have been refined they end up being so vague that fail to be informative.<sup>147</sup>

Given that my findings show that the agenda posting requirement is problematic for state consensus building processes, and not for local or national processes, one must question whether this procedural requirement may need to be amended. While ten days gives people enough time to see what will be discussed at a meeting and, if necessary, rearrange their calendars to fit the meeting in, one must query why the requirement is different for state meetings when people are likely to have the same scheduling issues as

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<sup>146</sup> Marblen Interview.

<sup>147</sup> Marblen Interview.

they have when planning for local and federal meetings. Likewise, as the mediator above pointed out, if the idea is to give people an idea of what is going to be discussed at a meeting and the agenda can't do that, then one must question whether the procedural requirement of posting an agenda so far in advance is serving its purpose. Perhaps this is a case where ambiguity in the law is preferable and it would be more appropriate for California laws to model the FACA and require "timely" postings of agendas, leaving it to the discretion of the mediators and facilitators of consensus building processes to determine what that is.

- **Meeting Discussion Limited**

A second way that open meeting legislation hampers the plenary meetings of consensus building processes is by limiting the subject matter discussed during meetings. The limitations on what can be discussed in meetings vary depending on whether consensus building processes are subject to federal or California open meeting laws. The FACA limits discussion to agenda items approved by the designated officer or employee of the Federal Government responsible for managing the advisory committee,<sup>148</sup> whereas California laws limit discussion, in most meetings, to issues that are listed on the pre-posted agenda.<sup>149</sup>

The California laws offer some noteworthy flexibility and allow for some exceptions to this rule. Under the Brown Act, a legislative body may cover items not on the posted agenda when members of a legislative body or its staff briefly respond to statements made by individuals in the public comment period.<sup>150</sup> Similarly, "on their

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<sup>148</sup> 5 USCS §10(f) (2003).

<sup>149</sup> Cal Gov Code §54954.2 (2003) and Cal Gov Code §11125 (2003).

<sup>150</sup> Cal Gov Code §54954.2(a)(2003).

own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities.”<sup>151</sup> Moreover, members of legislative bodies and legislative bodies themselves may “provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.”<sup>152</sup>

In addition, the Brown Act allows for an exception to the law in any one of the following situations:

- (1) when the majority of the members of a legislative body vote that an emergency situation exists;
- (2) when two-thirds of the members of a legislative body are present and vote that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted;
- (3) when two-thirds of the members are not present, but there is a unanimous vote of the members present that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted; and
- (4) when the item was properly posted on an agenda for a prior meeting of the legislative body occurring not more than five calendar days prior to the date the action is taken on the item, and at the prior meeting the item was continued to the meeting at which the action is being taken.<sup>153</sup>

Like the Brown Act, under the Bagley-Keene Act, members of a consensus building body may take action on a non-agenda item in the first three of the four

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

situations listed above.<sup>154</sup> However, the Bagley-Keene Act states (in addition to other requirements) that notice for the additional item “shall be delivered in a manner that allows it to be received by the members and by the newspapers of general circulation and radio or television stations at least 48 hours before the time of the meeting specified in the notice.”<sup>155</sup>

Despite these opportunities for flexibility and these exceptions, I found that none of the mediators and facilitators I observed and interviewed elected to employ them. Instead, these individuals were particularly mindful of this portion of the law, even when it meant that processes were slowed by observance of the law. One mediator gave an example of how the Bagley-Keene Act limited her in her work:

“Say I have a meeting and what I maybe need [is to be able to say] to a group, ‘Okay. Sounds like we need to take that off-line. Why don’t we- five of you will go off in a corner we’ll try to sort something out and then we’ll bring it back to the full group to take a look at it.’ Well, if I were doing that, I would have to do the ten day public notice on that group, they would have to meet, then we’d be coming back and I would have to have the ten day notice after that for the group about what was going to be looked at.”<sup>156</sup>

This mediator further commented that her inability to deviate from the agenda was a reoccurring problem that compounded over time. It is not uncommon, she noted, for issues that need to be addressed right away to come up in meetings of large groups of people.<sup>157</sup>

In contrast, in my observations of consensus building processes that were not subject to the open meeting laws, I noted that while the bodies generally adhered to their

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<sup>154</sup> Cal Gov Code §11125.3(a)(1-2)(2003).

<sup>155</sup> *Id.* at (b).

<sup>156</sup> Eaton Interview.

<sup>157</sup> Eaton Interview.



agendas, there were several situations where participants and/or the mediators wanted to, and were permitted to, deviate from the pre-posted agenda. Interestingly enough, these deviations generally did not result in final decision making to which those absent from the meeting were not privy.

While the limitations posed by these provisions of the state laws came up several times in interviews, the FACA provisions were not raised as an issue in any of my interviews or field observations. While further research is needed, it is my hunch that in this particular area, the FACA is not as problematic for mediators and facilitators as the state laws. Perhaps this is because the designated officer is only one person and has the discretion to make on the spot changes to the agenda.

My findings related to the difficulties associated with the state laws can be interpreted in several ways. First, there is a possibility that the CCP mediators and facilitators are not familiar with the exceptions discussed above. If this is the case, perhaps the challenges related to these provisions of the open meeting laws might be mitigated or eliminated by educating those managing and participating in consensus building processes about ways to discuss items not on meeting agendas without violating the laws.

There is also the possibility that the mediators and facilitators know about the exceptions to the laws but the attorneys for the convening agencies don't know about the exceptions. Because the laws are both complex and voluminous, it is possible that even highly competent attorneys might overlook the opportunities for flexibility that the legislature has left in the statutes. In addition, there is a possibility that the attorneys know about the exceptions, but don't believe the issues that come up after an agenda is

posted ever fall into the categories cited above. Given that the case law on point has strictly construed at least one of the exceptions,<sup>158</sup> perhaps the attorneys who are advising consensus building bodies are keeping this case law in mind when they make the decision not to invoke the exceptions.

Finally, there is the possibility that those participating in and managing consensus building processes are aware of the exceptions but that one of the entities is uncomfortable with invoking them for fear of being accused of violating the open meeting laws. One of the overriding themes that came out in this research was that many of the convening agencies were super concerned with public image and did not want to risk being accused of acting behind closed doors, even if what they were doing was perfectly legal and perfectly acceptable. If this is the case, then the implications of this behavior have greater significance in the quest to reconcile open meeting laws with consensus building processes.

The behavior would suggest that if minor amendments were made to the law to mitigate or eliminate other challenges presented by open meeting laws to consensus building processes, the challenges might still remain. If this is true, perhaps one of the only ways to avoid this challenge is to explicitly exempt consensus building processes from open meeting laws. All three laws do have provisions in them with laundry lists of the bodies exempt from the legislation. Perhaps consensus building bodies should be included on this list as well. The question remains, however, whether it would be appropriate to include consensus building processes on the list. When discussing the Bagley-Keene Act with its original sponsor, William Bagley, he noted that there are now so many bodies exempted from the legislation that the legislation is often prevented from

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<sup>158</sup> Cohan v. City of Thousand Oaks (1994, 2<sup>nd</sup> Dist) 30 Cal App 4<sup>th</sup> 547, 35 Cal Rptr 2d 782.

serving its purpose.<sup>159</sup> Yet, perhaps consensus building bodies are so distinct from the bodies the legislation was designed to embody that they should not fall under the laws.

- **Prescribed Period for Public Comment**

Yet another procedural requirement that impacts consensus building bodies subject to open meeting laws is the public comment requirement. California's Brown and Bagley-Keene Acts require that consensus building bodies subject to open meeting laws provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item.<sup>160</sup> Similarly, the FACA states that interested persons must be allowed to appear before or file statements with any advisory committee.<sup>161</sup>

In general, adhering to the public comment procedural requirements did not appear to raise any problems for mediators and facilitators. During my fieldwork, I noted that including a public comment period in all of the scheduled meetings was a common practice for CCP mediators and facilitators managing consensus building processes. Some mediators and facilitators even provide public comment cards for people who would prefer to share written comments or who prefer to remain anonymous. Therefore, on the whole, this procedural requirement did not seem to unduly burden or delay consensus building processes.

Two mediators did, however, note that when members of a special interest group show up in numbers to comment during a meeting, it becomes difficult to give them all

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<sup>159</sup> Telephone Interview with William Bagley *supra* note 6.

<sup>160</sup> Cal Gov Code 54954.3 (2003); Cal Gov Code 11125.7 (2003).

<sup>161</sup> 5 USCS Appx § 10(a)(3) (2003).

airspace and can slow down the consensus building process.<sup>162</sup> Such challenges can be overcome by employing the provisions in all three laws that allow the individual facilitating consensus building processes to place reasonable limitations on the public comment period.<sup>163</sup> The mediators I interviewed seemed to be aware of the ability to exercise their right to limit the public comment period. However, this is another area of the law that could be pointed out to mediators in advance of entering into a consensus building process, to help avoid potential challenges posed by the public comment period that might unduly hamper consensus building processes.

### ***Subgroup and Subcommittee Meetings***

The requirements for regularly scheduled plenary meetings also apply to all subcommittee and subgroup meetings, unless law exempts the subgroups. The FACA explicitly states that it applies to subcommittees, but yet it exempts subcommittees that are “established or utilized by one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government...”<sup>164</sup> The Bagley-Keene Act applies to subcommittees where they are created by formal action<sup>165</sup> of the state body or any member of the state body and consists of three or more persons.<sup>166</sup> Finally, the Brown Act applies to (1) subcommittees that are composed solely of members of the general legislative body with membership that

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<sup>162</sup> Eaton Interview; Lith Interview.

<sup>163</sup> See generally Cal Gov Code 54954.3 (2003), Cal Gov Code 11125.7 (2003), and 5 USCS Appx §10(a)(3) (2003).

<sup>164</sup> 5 USCS Appx § 3(2)(c) (2003).

<sup>165</sup> Cal Gov Code § 11122 (2003).

<sup>166</sup> Cal Gov Code § 11121 (2003).

constitutes a quorum or (2) subcommittees that are “standing” committees of a legislative body.<sup>167</sup>

For most mediators and facilitators, having to abide by California open meeting laws in subgroup and subcommittee contexts makes moving forward with consensus building efforts particularly difficult and is a great source of concern. One mediator I spoke with commented on how hard it was to notice and post agendas for several working group meetings while at the same time adhering to the notice and agenda posting requirements of the general meeting.<sup>168</sup> In contrast, in a process I observed that was not subject to the open meeting laws, this was not the case. In the latter process, I witnessed a situation where a subgroup of a consensus building body met on a Tuesday and was able to ask another subgroup of the larger body, which happened to be meeting the next day, to alter the agenda for their meeting to reflect items that they wanted the second subgroup to consider.

Because complying with the law is often quite prohibitive, some people find creative ways to avoid triggering the open meeting laws. In one process I learned of, which was subject to the Bagley-Keene Act, the consensus building body worked around the open meeting requirements by having the work groups report to the convening agency (which was not subject to the laws) rather than to the official advisory group.<sup>169</sup> In that case, the consensus building process was focused on developing plans for the future, rather than on a specific issue or dispute. The mediator stated that while she was comfortable reading the open meeting laws to afford her flexibility in that process, she was not willing to do it in another process where the consensus building process was

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<sup>167</sup> Cal Gov Code § 54952 (b) (2003).

<sup>168</sup> Marblen Interview.

<sup>169</sup> Eaton Interview.

highly visible and the parties involved in the consensus building process were likely to litigate.<sup>170</sup>

Another mediator commented that in a five-year consensus building process he had worked on in the past, which although in another state apparently had similar open meeting laws in place, the open meeting laws were circumvented by creating subgroups that were not standing subgroups and therefore were not subject to the law. These groups would look at issues, organize them, and maybe make some recommendations to the larger group. In all cases, however, the formal decisions were made at the meetings of the larger group, which were noticed.<sup>171</sup>

Although my fieldwork evidences that several mediators and facilitators knew how to creatively design subgroups and subcommittees that were exempt from open meeting legislation, my interviews and observations also led me to believe that not all mediators and facilitators understand the intricacies of the laws as they applied to subgroups and subcommittees. Nor were many of them aware of the ways that they can avoid triggering the laws in such settings.

My findings also indicate that counsel for convening agencies have different approaches to interpreting the laws as they applied to subgroups. Some attorneys are extremely conservative and advise consensus building bodies to adhere to the laws in all meetings of the body, be they plenary meetings or subgroup meetings. In contrast, other agencies read the law so as to exempt certain subgroups from the open meeting procedural requirements. As a result, the speed at which the different consensus building

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<sup>170</sup> Eaton Interview.

<sup>171</sup> Rain Interview.

processes moved was impacted by the legal interpretations and applications of the law to the processes by their respective counsels.

The findings on how California open meeting laws impact subgroups and subcommittees are telling. First, they indicate that in some cases, although not all, there may be opportunities to further educate mediators and facilitators about when open meeting laws apply to subgroups, as well as on how to design subgroups that do not trigger open meeting laws. Second, given the range of ways that advising attorneys for convening agencies are interpreting the laws in this particular area, the findings may indicate that some of these attorneys may not be spending the time scrutinizing the law to look for exceptions that might apply to consensus building processes. Or, in the alternative, the findings may reflect the fact that even where it is legally acceptable not to comply with the open meeting laws, the convening agencies or other entities involved with a consensus building process still adhere to the laws, no matter how onerous, in order to avoid any appearance of impropriety.

Interestingly enough, mediators and facilitators did not comment on the FACA provisions related to subgroups and subcommittees. Individuals well versed in the FACA understand that that while the legislative history of the FACA does not suggest that subgroups and subcommittees are excused from the legislation,<sup>172</sup> the General Services Administration (GSA), has exempted, “meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for the chartered advisory committee, to analyze relevant issues and facts, or to draft position papers for deliberation by the advisory committee or a subcommittee of the advisory

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<sup>172</sup> Croly and Funk, *supra* note 11 at 490.

committee.”<sup>173</sup> Under these exemptions, the meetings of consensus building subgroups are not subject to open meeting laws and perhaps this is why the issue was not raised.

Perhaps some of the procedural hurdles faced by subgroups and subcommittees subject to the California open meeting legislation could be overcome if the language of the sections of the California laws applicable to subgroups and subcommittees were amended to read more like those in the FACA and an entity in California, tantamount to the GSA, made an official statement on when the laws were triggered for subgroups and subcommittees. This could be done through legislative reform and through the issuance of an advisory opinion or statement by the California Attorney General’s Office.

### ***Ad Hoc Meetings***

While adhering to the procedural requirements discussed above proves challenging in cases of regularly scheduled plenary and working group meetings, open meeting laws have an even more dramatic effect in situations where managers and/or participants of consensus building processes want to engage in ad hoc meetings. Last minute meetings get called for a number of reasons. For example, during my observations, I saw that some mediators call last minute meetings to prepare information for upcoming plenary meetings. In addition, I observed that last minute meetings are used to discuss how developments on matters related to the focus of the consensus building process impact the subject matter being addressed by the consensus building body.

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<sup>173</sup> *Id.* at 489 citing 41 C.F. R. § 101-6.1004(k).



Last minute meetings are also used to have a team of people with a particular expertise draft a recommendation about a particular issue for the larger group, and to identify and address the concerns of constituencies within the plenary group. When processes are not subject to open meeting laws, the only difficulty in setting up these meetings is coordinating the calendars of the invitees. In contrast, in cases where the open meeting laws apply, mediators and participants need to be mindful of all of the procedural requirements discussed above.

Under California open meeting legislation, the term “meeting” is defined broadly. The Brown Act defines a meeting as “any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”<sup>174</sup> The definition of meeting under the Bagley-Keene Act is essentially the same, except that it applies to state bodies, rather than local bodies.<sup>175</sup> Both laws prohibit any use of direct communication, personal intermediaries, or technological devices by a majority of the members to develop a collective concurrence as to action to be taken on an item by the members of the body.<sup>176</sup> The FACA does not define meeting, but states that meetings of the advisory may not be held unless called or approved by a designated officer or employee of the Federal Government.<sup>177</sup>

While the California open meeting laws allow for some ad hoc meetings, the exceptions are limited. For example, the Brown Act allows a special meeting to be called at any time by the presiding officer of the legislative body of a local agency or by a

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<sup>174</sup> Cal Gov Code §54952.2(a) (2003).

<sup>175</sup> Cal Gov Code §11122.5 (2003).

<sup>176</sup> *See generally Id.* and Cal Gov Code §54952.2(b) (2003).

<sup>177</sup> 5 USCS Appx § 10(f) (2003).

majority of members of the legislative body. However, in such cases the Act still requires that 24 hours notice be given to the general public.<sup>178</sup> In addition, there is an exception in the Brown Act for emergency situations. However, the types of situations discussed in this are limited to emergency situations that generally do not arise in the types of dialogue generally covered by consensus building bodies.<sup>179</sup>

For some, the inability to call last minute meetings makes the idea of working within the perimeters of open meeting laws simply unpalatable. One mediator, who is quite accustomed to calling last minute meetings with smaller groups within the larger consensus building body, made a conscious decision to have members of a consensus building body selected by public figures who were appointed executives, rather than elected officials, so as to not invoke the Brown Act and preserve the ability to call last minute meetings.<sup>180</sup> This mediator explained that in consensus building processes there are occasions where there is a need to have a meeting within 24 hours and that the notice requirement would get in the way of doing this.<sup>181</sup>

This mediator agreed with the principles of open government and noted that if members of the public wanted to attend last minute meetings, the presence of outsiders would not pose any problems. Rather, the issue for this mediator was time. The mediator felt as if the Brown Act slowed the pace of the process.<sup>182</sup> Interestingly, other mediators at the CCP commented on this mediator's style and noted that although the mediator's processes were not subject to the open meeting laws, the mediator retained a high level of transparency. They also noted that all of the dialogue in this mediator's last minute

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<sup>178</sup> Cal Gov Code §54956 (2003).

<sup>179</sup> Cal Gov Code §54956.5 (2003).

<sup>180</sup> Unger Interview; Darrow Interview.

<sup>181</sup> Darrow Interview.

<sup>182</sup> Darrow Interview.

meetings and other types of caucuses always got reported to the larger consensus building body and that final decisions were always reserved for the larger group.<sup>183</sup>

Given that the inability to hold ad hoc meetings only applies to meetings that involve the majority of the members of a particular body (rather than all meetings), perhaps mediators that feel constrained by the open meeting laws do not understand the intricacies of law and are not as limited by the laws as they imagine. This is particularly true with respect to the Brown Act, where the notice and agenda posting requirements for general meetings can be satisfied 72 hours before a meeting.<sup>184</sup> Therefore, perhaps the best way to address this particular challenge is through education.

## **Deliberative Challenges**

### ***Overview***

The CCP case study confirmed that in addition to procedural challenges, open meeting legislation might also pose deliberative challenges to consensus building processes. Whereas procedural challenges threaten to dismantle consensus building processes by bogging them down with administrative burdens, deliberative challenges threaten the high quality of deliberation generally characteristic of consensus building processes by making it difficult for participants to engage in authentic dialogue. As discussed earlier, authentic dialogue is dialogue that allows all participants in a consensus building process to speak openly and in an informed way about their interests and understandings, as well as ensures that they are equally heard and respected.<sup>185</sup> As consensus building scholars have noted, “Without this kind of dialogue, meanings will

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<sup>183</sup> Unger Interview; Frost Interview; and Rain Interview.

<sup>184</sup> Cal Gov Code §54954.2 (2003).

<sup>185</sup> *See generally*, Booher and Innes, *supra* note 20; J. HABERMAS, *supra* note 23; SUSSKIND, MCKEARNAN & THOMAS-LAMAR *supra* note 25; FOX & MILLER *supra* note 25.

not become truly shared, not will group members identify with a common system or community. Without such dialogue, opportunities for reciprocity will be missed, important information about the problem will not surface, and creative solutions are far less likely to emerge.”<sup>186</sup>

The deliberative challenges threatening authentic dialogue observed in the CCP case study can be broken down into three categories of challenges: (1) those that arise because meetings are open to the public, (2) those that result from the statutory prescriptions and limitations on meeting dialogue, (3) and finally, those that are the product of obstructed channels of communication. Each of these will be discussed below.

### ***Opening Consensus Building Processes to the Public***

The Brown Act, the Bagley-Keene Act and the FACA may require essentially all meetings of consensus building bodies subject to open meeting laws to be open to the public.<sup>187</sup> Given that plenary meetings of consensus building bodies are generally held open to the public, a legislative mandate requiring that such meetings be held open to the public really has little to no effect on the quality of deliberations. However, requiring that the subcommittee and subgroup meetings of consensus building bodies be open to the public may pose some serious threats to the quality of deliberations taking place within these groups. Recall that whether open meeting laws apply to subcommittees and subgroups is different under each piece of legislation.<sup>188</sup> In processes where

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<sup>186</sup> Booher and Innes, *supra* note 20.

<sup>187</sup> See generally Cal Gov Code §54952.2(b) (2003), Cal Gov Code §11122.5 (2003) and 5 USCS Appx § 10(f) (2003).

<sup>188</sup> See discussion on subgroups and subcommittees in the Procedural Challenges section above.

subcommittees and subgroups are not afforded the opportunity to meet in private, several of the essential elements necessary for high quality deliberations may be at risk.

My fieldwork and interviews indicate that it may be hard for the participants of consensus building bodies to build relationships with one another in cases where all their meetings are open to the public. My findings also show that opening consensus building meetings to the public may drive some participants towards increased secrecy in decision making. In addition, the results of the CCP case study indicate that where consensus building processes are open to the public, mediators and facilitators may have to address the possibilities that the processes may be hijacked either by special interest groups or by individuals who are uninformed and/or misinformed.

- **Threats to Relationship Building**

Opening consensus building processes to the public may prevent members of consensus building bodies from forming solid relationships with one another, which may ultimately impact the quality of their present and future public policy deliberations with one another. As Carpenter and Kennedy have pointed out, “Building personal rapport with representatives of opposing views is important in negotiation yet difficult to do if constituents see overtures of courtesy or partial agreement as selling out to the enemy.”<sup>189</sup> While the inability to build relationships may not be an issue in the plenary meetings of consensus building bodies (which are usually not forums for intimate discussions), it may be an issue in subcommittee and subgroup meetings. One experienced CCP mediator

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<sup>189</sup> CARPENTER & KENNEDY, *supra* note 107 at 183.

commented on why it may be important to hold closed subcommittee and subgroup meetings. She explained:

“If you are working on a collaborative process and you’ve got a group that has been working together, they gel. They’ve developed group norms. It’s extremely disruptive to have outsiders be in your process- because they’re not part of your group.”<sup>190</sup>

This mediator further commented that the advantage to working with consensus building processes that are not subject to open meeting laws is that people can make agreements not to sue one another, not to quote each other out of context, not to attribute things to one another, and can feel assured that the agreements will be upheld.

This sentiment was backed by my observations of the working group meetings of a consensus building process I studied over a six-month period that was not subject to open meeting legislation. In that process, the working group meetings were noticed and open to the public but, in general, the public did not attend. As a result, as time went by, I noted that participants in the working groups felt more comfortable with one another and seemed to be more at ease with brainstorming out loud and freely responding to one another’s ideas.

Six months into that process, I observed an engineer, a city planner, and an attorney take the comments of a woman who decided to share her personal thoughts and experiences about the issue being debated very seriously. Whereas some members of the group earlier in the process had dismissed this woman, six months into the process, participants had developed a group norm where everyone’s comments were heard and respected. Similarly, I noted that the group had become comfortable enough with one another that they felt comfortable responding to this woman’s ideas with additional ideas,

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<sup>190</sup> Eaton Interview.

rather than censoring themselves and worrying about how their comments would come across. Had this work group meeting been attended by members of the public, it is debatable whether the woman would have felt comfortable making her comments at all and whether the individuals that responded to her would have felt comfortable engaging in the type of discussion that they engaged in.

When it comes to relationship building, open meeting laws come across as being more concerned with giving everyone a voice, then with the quality of dialogue taking place. As discussed earlier, consensus building processes only work when people are equally heard and listened to.<sup>191</sup> If getting more people to participate in a public policy dialogue does nothing to increase the interests represented and instead has the unintended impact of making it more difficult for people to truly hear one another, one must question benefit to the public in their application.

In deciding whether to apply open meeting laws to consensus building processes, the long-term impacts on relationship building must also be considered. As consensus building scholars have pointed out, the relationships built and the trust established in one consensus building process often leads to people working together and dialoguing with one another on other projects.<sup>192</sup> If, as a result of holding consensus building meetings open to the public, stakeholders are prevented from building social capital and developing shared understandings, and it becomes less likely that they will be able to work together on future public policy decisions, perhaps there is a need to evaluate

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<sup>191</sup> See generally, Booher and Innes, *supra* note 20; J. HABERMAS, *supra* note 23; SUSSKIND, MCKEARNAN & THOMAS-LAMAR *supra* note 25; FOX & MILLER *supra* note 25.

<sup>192</sup> Judith Innes, *Evaluating Consensus Building* in THE CONSENSUS BUILDING HANDBOOK, 631, 635 (Lawrence Susskind, et al. eds., 1999); Innes and Booher, *supra* note 1; Connick and Innes, *supra* note 75.

whether the laws are truly promoting citizen involvement in good public policy development.

Given that most relationship building generally takes place in the subcommittee and subgroup sessions, these challenges arise most often when subgroup and subcommittee meetings are required to adhere to open meeting laws. As discussed earlier, mediators and participants who have a working knowledge of the laws may find ways of legally complying with the laws while still allowing for intimate discussions. While this is relatively easy to do under the FACA and the Brown Act, it is harder to do under the Bagley-Keene Act. Therefore, this may be an area where the possibility of legislative reform should be examined in greater depth.

- **Threats to Confidentiality**

When meetings are open to the public, participants of consensus building processes may also be less likely to make concessions or to share information with one another, for fear that what they say in a meeting will not be kept confidential. In addition, when meetings are open to the public, participants may also be concerned that there will be inaccurate reporting by the media or other entities.<sup>193</sup> When people feel as if what they are saying will be made public, or fear that they will be quoted out of context, the full disclosure necessary for authentic dialogue may be stymied, making it much harder to develop good and sustainable public policy. Again, this is particularly true in the smaller subcommittee and subgroup meetings where confidential information is often exchanged.

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<sup>193</sup> CARPENTER AND KENNEDY, *supra* note 107 at 184.



There are two primary ways in which this challenge to consensus building processes plays out. First, it surfaces where subgroups and subcommittees are unable to caucus. Second, it comes up where there is a possibility that what was said in a meeting will later be available to the public in the form of a public record.

- **Inability to Caucus**

In the CCP study, situations often arose where groups of individuals felt that they needed to caucus with one another outside of the public eye. My observations and interviews revealed that mediators generally relied on caucuses to both prevent and solve problems. I noticed that private caucusing tends to foster innovation and productive brainstorming. One mediator explained that this occurs because people feel more free to think creatively when they don't have to worry that everything they say is going to be taken as representative of a position of their agencies when in fact it is nothing of the sort.<sup>194</sup> This mediator's comments and my own observations reinforced what has been said in consensus building literature about trust arising from the creation of environments where people feel safe to test out ideas and have opportunities to develop confidence in one another.<sup>195</sup>

Open meeting laws do not mandate any sort of blanket prohibitions on private caucusing. However, the ways in which the laws define the term "meeting" impact the ability of members of a consensus building body to meet in private with one another. For example, private caucusing may trigger California open meeting laws depending on the

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<sup>194</sup> Rain Interview.

<sup>195</sup> See generally Susskind *supra* note 17; Ehrmann and Stinson, *supra* note 291; and Gray, *supra* note 2.

number of people who meet,<sup>196</sup> how the group of people meeting was formed,<sup>197</sup> and/or whether it involves meetings of a standing committee.<sup>198</sup>

Where open meeting laws apply to consensus building processes, some mediators have found ways of satisfying the mandates of the legislation and the need for private deliberation. For example, in one FACA consensus building process I learned of, rather than trying to hold intimate discussions in plenary sessions, individuals used the subcommittee meetings, which were exempt from the FACA to have their private discussions.<sup>199</sup> Similarly, as discussed in an earlier section of this thesis, mediators sometimes ensure the privacy of their subgroup and subcommittee deliberations under the Brown Act by making a conscious decision to form a subgroup that does not trigger the laws.<sup>200</sup>

As was the case with challenges to relationship building discussed in the previous section, my findings show that it is particularly difficult for subgroups and subcommittees of consensus building processes subject to the Bagley-Keene Act to caucus in private. Under the Bagley-Keene Act, once a subcommittee of three or more people is created by formal action of the consensus building body or a member of that body, the subcommittee becomes subject to the Act and cannot caucus in private.<sup>201</sup> As a result, when caucusing is needed, the consensus building process ultimately suffers.

One mediator illustrated this point by comparing her experiences mediating a consensus building process that was subject to the Bagley-Keene Act with one that was

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<sup>196</sup> See generally Cal Gov Code §11121(c)(2003), §11122.5(a), Cal Gov Code §54952 (2003), and Cal Gov Code §54952.2 (2003).

<sup>197</sup> See Cal Gov Code §11121(c) (2003).

<sup>198</sup> Cal Gov Code §54952(b) (2003).

<sup>199</sup> Snow Interview.

<sup>200</sup> Rain Interview.

<sup>201</sup> Cal Gov Code §11121(c) (2003).

not. The consensus building process that was not subject to open meeting laws was called the Lake Movenin Project (LMP) and the process that was not subject to the laws was called the State Monument Collaboration (SMC).

In the LMP the consensus building process involved a management plan for motorboats in a body of lake that was part of a state park. There was a point in the consensus building process where the group was trying to reach consensus on the appropriate level of sound for the motorboats and there was a disagreement between members of the environmental constituency as to how much sound should the motorboats should be allowed to make. Some environmentalists felt that the motorboats should be allowed to be as loud as they can possibly be, contending that if the motorboats are louder it will be easier to justify confining them to a smaller area of the lake and more of the lake would be put into protected status. Also, these environmentalists felt that when the motorboats are loud and noxious, it increases public disdain for motorboats and the more dislike for motorboats the better. In contrast, some environmentalists thought that sound was a problem and negatively impacted people and aquatic habitat. They, on the other hand, believed that the motorboats should be quieter.

Rather than working these disagreements out in front of the entire group, where the environmentalists' positions may be negatively impacted as a whole, the mediator felt it was important to caucus with the environmental groups. She also noted that it wasn't as if the group would be making a final decision, it was just that they were working out one detail and then bringing back a shared perspective to the larger group. This is helpful not only for people in the caucus group, but for the other participants that needed to be

assured that the agreement that was being reached was an agreement the entire constituency could live with, rather than an agreement with a particular individual.

In contrast, in the SMC, when there were similar disagreements within subgroups, the mediator was prevented from holding private caucuses to work them out. Because of the Bagley-Keene Act, she had to work these issues out real time in front of the entire plenary group, which not only took time, but also impacted the quality of the deliberations of the group.<sup>202</sup> Although the SMC ultimately had some positive outcomes, several of the conditions necessary for authentic dialogue discussed by Booher and Innes<sup>203</sup> were compromised along the way. For example, the consensus building process was not afforded the ability to employ strategies suggested by Gray<sup>204</sup> and Susskind<sup>205</sup> and use subcommittee and subgroup meetings to build the trust necessary for sincere dialogue. Nor was there full disclosure by all parties throughout the SMC consensus building process,<sup>206</sup> indicating that statements made in the dialogue may not have been accurate.

Given that the Brown Act and the FACA leave room for such conversations to take place in subcommittee and subgroup settings, one must query once again why the provisions of the Bagley-Keene Act are so easily triggered. In an interview with William Bagley, he pointed out that the original Act did not apply to subcommittees and that he was disappointed in the 1981 amendment that resulted in the application of the law to additional groups within state bodies.<sup>207</sup> Perhaps the 1981 amendment was for the worse

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<sup>202</sup> Eaton Interview.

<sup>203</sup> See Booher and Innes, *supra* note 20 at 229-231.

<sup>204</sup> Gray, *supra* note 2 at 128.

<sup>205</sup> Susskind *supra* note 17 at 27.

<sup>206</sup> Eaton Interview.

<sup>207</sup> Telephone Interview with William Bagley, *supra* note 6.

and the legislature should consider adopting a provision more like the provision on subcommittees in the Brown Act.

However, making an amendment to the Bagley-Keene Act which would allow consensus building bodies to create subcommittees that are not subject to open meeting laws might not eliminate this challenge. As discussed earlier, even when the law provides opportunities for opting out of compliance with open meeting laws, convening agencies still might require adherence with the laws. For example, one mediator I interviewed told me about a process he facilitated where the convening agency's counsel required him to comply with the Brown Act in the subcommittee meetings, even though the subcommittees did not fall under the law and where there was a threat to participants by having private deliberations be made public.<sup>208</sup>

Such findings illustrate that the challenges that open meeting laws pose to the ability to caucus with subgroups and subcommittees are multifaceted and may need to be addressed not only through legislation, but through working more closely with the legal counsels of convening agencies to help them understand consensus building processes and their outcomes. Perhaps if the legal counsels of convening agencies had a better understanding of consensus building processes, they might be less hesitant to read the laws to better accommodate the needs of consensus building processes.

- **Availability of Documents**

The possibility that what is said in a consensus building meeting may be made available to the public in the form of public records also threatens confidentiality and encumbers the participants' ability to have authentic dialogue. As discussed earlier,

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<sup>208</sup> Samson Interview.

people need environments where they can privately test tentative agreements, look for consensus and draw support for proposals.<sup>209</sup> If the open meeting laws require that all of participants' statements and conversations be made available to the public, people may be more hesitant to brainstorm out loud and may be less likely to come up with creative solutions to difficult public policy issues.

The California and Federal open meeting law provisions addressing this matter are distinct. The FACA requires that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection."<sup>210</sup> The California requirements are less comprehensive and only require that agendas and other writings distributed to all or a majority of the members of the convening body, and pertinent to the body's mission, be made available under the California Public Records Act.<sup>211</sup>

As with complying with the public comment period, CCP mediators and facilitators did not seem burdened by the procedural requirement of making records available to the general public upon request. It is common practice for all of the CCP facilitators and mediators to save meeting packets, make detailed meeting notes and/or minutes, and keep electronic and hard copies of all documents available for the public, irregardless of whether a process is subject to open meeting laws. One mediator did, however, express a concern with the ways in which these and other laws might impact the CCP's ability to keep private information confidential.<sup>212</sup> Depending on how open

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<sup>209</sup> Gray, *supra* note 2 at 80.

<sup>210</sup> 5 USCS Appx § 10(b) (2003).

<sup>211</sup> See Cal Gov Code §11125.1 (2003) and Cal Gov Code §54957.5 (2003).

<sup>212</sup> Rain Interview

meeting laws are read by the courts and others, and depending on how the process is classified, there remains a possibility that the CCP might have to make available records from meetings that were previously thought to be confidential. While this has yet to be an issue at the CCP, this is definitely an area where providing education to mediators and facilitators can help avoid a potential problem.

- **Increased Secrecy**

Requiring that the meetings of consensus building processes be open to the public may also have the unintended effect of encouraging secret dialogues between members of consensus building bodies, which directly impacts the quality of deliberations in consensus building meetings by detracting from their authenticity. Although open meeting laws are designed to promote open discussion and dialogue, my findings back what has been asserted by Innes and Booher<sup>213</sup> and Carpenter and Kennedy<sup>214</sup> and show that open meeting laws sometimes push public policy dialogue further behind closed doors. This distracts from the conditions necessary for authentic dialogue because it may limit the opportunity for participants to challenge and explore assumptions.

One mediator compared her experiences working with two bodies that were both subject to open meeting laws. She noted that whereas in one of the processes, the participants took advantage of open meetings to harvest different points of view and engage in true open and public deliberations, in the other process, the participants were uncomfortable with frank public interchange and had carefully worked out how they were

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<sup>213</sup> Innes and Booher, *supra* note 25 at 3.

<sup>214</sup> CARPENTER & KENNEDY, *supra* note 107 at 183.

going to orchestrate their disagreements ahead of time.<sup>215</sup> She explained that in the latter case, the body included major state and federal political leaders and commented that it was her experience that such individuals are not likely to publicly disagree on big policy matters, either within their own agencies, or between state and federal agencies, without a lot of discussion among themselves behind closed doors.<sup>216</sup> My field observations and interviews with other mediators also confirmed this to be a representative occurrence.

It is critical to distinguish the types of private conversations that I am referring to here from the ones I am referring to when I talk about caucusing within subgroup and subcommittee settings. The types of private conversations I am referring to here are held without the knowledge and consent of the larger consensus building body. In contrast, the private conversations in subgroup and subcommittee meetings are authorized by the larger consensus building body and are reported on to the larger body and the public in later plenary meetings.

This type of finding indicates that where the law does not afford for private conversations, people are going to have them anyway. Once again, it appears as if there may be a need to legally allow for such conversations in the legislation and that the most obvious way to do so may be through allowing for them to take place in subcommittee and subgroup settings.

- **Deliberations Hijacked By Special Interest Groups**

Mediators and facilitators also suggested that complying with open meeting laws may result in the meetings of consensus building processes being hijacked by special

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<sup>215</sup> Snow Interview.

<sup>216</sup> Snow Interview.



interest groups. In an article on consensus building in the form of negotiated rulemaking, Perritt comments that consensus building processes will only work “if no one party has power sufficient to overwhelm the others.”<sup>217</sup> Where the meetings of consensus building processes are open to the public, special interest groups are permitted to show up in droves and may use the public comment period, or their mere presence, to influence the direction and tone of discussions. In addition, when special interest groups dominate meetings, it may become more challenging to employ strategies such as role-playing and active listening, discussed by Innes and Booher<sup>218</sup> and Fisher and Ury<sup>219</sup> respectively, to make sure that all interests in the room are equally heard.

The presence of a large number of individuals from one particular special interest group may also detract from the intentional balance present in a legitimate consensus building body.<sup>220</sup> In other words, if participants in a consensus building body accurately represent all the interests at stake and stand for the interests of their communities, it may hurt, rather than help, the development of good public policy to have additional people involved in the process. Also, as discussed earlier, part of the legislative intent in enacting the FACA was to prevent special interest groups from dominating advisory bodies.<sup>221</sup> Therefore, if after a FACA consensus building body is formed, its meetings are still dominated by special interest groups, the legislation fails to serve its original purpose.

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<sup>217</sup> Perritt, *supra* note 80 at 1644-1645.

<sup>218</sup> Innes and Booher, *Consensus Building as Role Playing and Bricolage*, APA J. Winter 1999 at 9-25.

<sup>219</sup> Fisher and Ury, *supra* note 2.

<sup>220</sup> Here, legitimate consensus building body is defined as one that was formed, and is being carried out, in a manner similar to that suggested by the authors of and contributors to *The Consensus Building Handbook*. See generally SUSSKIND, MCKEARNAN & THOMAS-LARMER *supra* note 25.

<sup>221</sup> Croly and Funk, *supra* note 11 at 464.

One mediator shared an example from a process she facilitated to illustrate this point. In that process, because of the open meeting laws, members of a particular special interest group were allowed to show up to meetings of the consensus building body in droves. The mediator explained that because the group had such a large physical presence the room, someone was always attempting to bring the dialogue in the room back to the group's particular interest, whether it was on or off topic:

“It took a lot of air space in the meeting- particularly in the beginning..... They were talking about history- but it still came out. [The subject] did come up throughout the process- whether we were talking about the present, the past the future.”<sup>222</sup>

Although this mediator commented that these particular members of the public felt listened to and involved in the consensus building process, she conceded that their behavior did impact the process.<sup>223</sup> The lead mediator of this process echoed this other mediator's observations and stated that she had to step in to prevent this group from dominating the meetings.<sup>224</sup> She explained:

“This is not a numbers game...It is not an issue of the numbers, it is an issue of the interests and [in consensus building processes], we try to create as much equality at the table as we can. In public processes, it's always about the numbers and that's one of the problems. So, you know, you could pack a room, you know, you get special interests and they pack a room. And that's not really in the public's interest.”<sup>225</sup>

The challenge of preserving consensus building processes from being hijacked by special interest groups may sometimes be overcome by using the provisions in the open meeting laws that allow limitations to be placed on the amount of public comment. For example, in the consensus building process referred to above, the mediators and

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<sup>222</sup> Lith Interview.

<sup>223</sup> Lith Interview.

<sup>224</sup> Eaton Interview.

<sup>225</sup> Eaton Interview.

facilitators were able to prevent coercion by the special interest groups by relying on these provisions and their facilitation skills. Given that there are ways to address this challenge, perhaps this is an area within open meeting legislation that can be adequately addressed through education.

- **Deliberations Hijacked by the Uninformed and Misinformed**

Where consensus building processes are open to the public, there is also the possibility that they will be hijacked by people who are either uninformed or misinformed. One mediator conveyed a story about a consensus building process aimed at developing a new county ordinance that was disrupted by a group of citizens that did not understand the subject matter that they were protesting against. In that case, a special interest group sent out a mailing with inaccurate statements about the proposed ordinance to the general public. This happened after the consensus building process was already underway. As a result, people showed up at a meeting in numbers to protest the ordinance and people that didn't even understand what they were protesting ultimately derailed the process.<sup>226</sup>

While consensus building processes designed in the manner embodied in Susskind, McKearnan and Thomas-Larmer's seminal handbook<sup>227</sup> are less likely to encounter such problems than those that designed and carried out simply according to the requirements for public participation prescribed by open meeting laws, the threat that uninformed or misinformed members of the public will hijack a process remains. As discussed above, open meeting laws offer consensus building bodies opportunities to set

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<sup>226</sup> Crow Interview

<sup>227</sup> SUSSKIND, MCKEARNAN & THOMAS-LARMER *supra* note 25.

reasonable limits on public comment periods. Similarly, consensus building processes afford consensus building bodies time to process and reflect on such comments. However, preventing those managing a consensus building body from using their discretion to determine who gets to participate in a consensus building process creates the risk of having the consensus building process derailed by a contingent of misinformed or uninformed people.

***Prescriptive Requirements and Statutory Restrictions on Who Speaks, When People Speak and What May Be Discussed in Meetings***

Open meeting legislation also threatens the high quality of deliberation inherent in consensus building processes with its prescriptive requirements and statutory restrictions on who speaks, when people speak and what may be discussed in meetings. This section begins by looking at the public comment period and discussing how requiring a public comment period may do more harm than good for some consensus building processes. It then looks at the cumulative impact of requiring that so many discussions take place in formal meetings. Finally, it looks at how restricting the items discussed in the meetings of consensus building processes to items on the pre-posted agenda may spoil dialogue by crowding meetings agendas and stifling the voices of participants of consensus building processes.

- **Public Comment Period May Harm Process**

Deliberations of a consensus building body may be damaged by the procedural requirement (discussed several times in earlier sections of this thesis) that all meetings of

consensus building processes allow adequate time for public comment.<sup>228</sup> This can be particularly problematic where the public comment period is mismanaged and/or taken advantage of by those making public comments to obstruct the dialogue or limit it to their own concerns.

One mediator who has spent a considerable amount of time observing consensus building processes subject to open meeting laws noted that in some of the meetings that she had observed, there was very little room built in for public comment. She explained that in these cases, “[u]sually the public comment period is held after all of the business has been transacted- sort of like the chair will call for public comment and then adjourn after a split second.”<sup>229</sup> In such cases, while the short public comment period may not be intentionally designed to exclude the public, and may be limited because of time constraints or other factors, there is the possibility that the open meeting laws will actually result in the public feeling more excluded from the process than if they hadn’t been invited to participate.

Another mediator also noted that where the public comment period is limited to a few minutes at the end or beginning of a meeting, it has the potential to turn a proactive consensus building process into an adversarial process.<sup>230</sup> In such situations, rather than encouraging dialogue between diverse interest groups, the public comment period ends up turning the consensus building process into the traditional decision making process described by Innes and Booher where people are generally pitted against one another and important problems remain unsolved.<sup>231</sup>

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<sup>228</sup> Snow Interview

<sup>229</sup> Selva Interview.

<sup>230</sup> Amos Interview.

<sup>231</sup> Innes and Booher, *supra* note 25 at 3.

Some mediators facilitating open consensus building processes, however, are able to use the public comment period to incorporate the public in dialogue throughout the entire meeting. Below, one mediator summarizes her observations of a process where this worked well:

“And the person chairing that directed the whole meeting towards the public. He made sure that the seating of the consensus building body was changed so as to avoid having peoples’ backs face the audience. He made sure to stop people and explain things when he thought that they were talking about things that members of the public wouldn’t understand. He would make spaces for the public to provide feedback. There were no crisp distinctions between who was allowed to talk and who wasn’t. People from the audience would actually contribute and stand up and make points and that kind of thing.”<sup>232</sup>

In the above example, the mediator’s election to take the time to include the public in the discussion, through both physical and verbal cues, preserved authentic dialogue. As a result, the mediator was able to involve the public in the meeting of the consensus building body without allowing them to hijack the process. Similarly, in most of the processes I observed, where the public comment period was woven into the dialogue as discussed in the example above, the ability of the consensus building body to engage in authentic dialogue was also preserved.

However, this approach to the public comment period does produce a different strand of challenges to high quality deliberations. In some of the processes I observed where the public was allowed to inject their comments into the meeting dialogue, members of the public made comments that were off topic and took up a considerable amount of time. In one process I observed, the result was that the body did not make it through most of their agenda. In addition, where public comment is woven into regular

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<sup>232</sup> Selva Interview.

dialogue, the possibilities for hijackings by special interest groups and the misinformed and uniformed arise. In such situations, it becomes harder to place the same types of limitations that are placed on comments when the public comment period is confined to a certain time period on the agenda.

Given that most consensus building bodies are interested in what the public has to say, and that the open meeting laws are not mandating that the public comment period take on a certain form, it appears as if the presenting challenge here stems not from the open meeting laws, but rather from how to manage the public comment period. Examining the ways that the public comment may be used to engender authentic dialogue is an area ripe for further research.<sup>233</sup>

- **Deliberations Strained By the Number of Items on the Agenda**

The deliberations of consensus building bodies subject to open meeting laws are also challenged by full agendas, which are the natural result of legislation requiring that most of the deliberations of the body take place in public. Full agendas may mean superficial discussion on a number of items. Whereas consensus building bodies that are not subject to open meeting laws have the flexibility to call a number of shorter meetings or to deliberate certain matters before a larger meeting, consensus building bodies subject to the laws have to do everything real time.

Meetings with full agendas have several consequences. Because there are so many items on the meeting agendas of these bodies, there are occasions where the topics on the agenda are not given the requisite attention they deserve. As a result, full agendas

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<sup>233</sup> Participant Comments, CCP Professional Development Seminar on Open Meeting Laws (May 30, 2003).

may indirectly promote violations of the law by encouraging people to reach agreements about items on the agenda ahead of time in secret.

Full agendas also impact the quality of public participation. As one mediator commented, “It almost seems as if the amount of business that an elected body has to address is so ominous that it is hard for people to really engage.”<sup>234</sup> This mediator’s comments fall into synch with the recommendation of Daniel Yankelovich, who comments that people are already experiencing information overload and explains that in order to come to quality public judgment on a public policy issue, the number of issues to which people must attend to should be limited to two or three.<sup>235</sup>

- **Deliberations Strained By Restricting Discussion to the Pre-Posted Agenda Items**

The California open meeting laws requiring that, in most cases, discussion during the meetings of consensus building processes be restricted to items on the pre-posted agenda<sup>236</sup> not only place procedural burdens on mediators and groups, as discussed earlier, but also negatively impact the quality of deliberations of consensus building processes.<sup>237</sup> Not only do these laws take away the ability of a consensus building body to manage their own meetings, but also the laws may delay discussion on matters of concern,<sup>238</sup> break the flow of natural dialogue and prevent people from engaging in spontaneous and creative brainstorming.

One mediator explained how this portion of the open meeting legislation impacts her work. She commented that in consensus building processes that are subject to open

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<sup>234</sup> Crow Interview.

<sup>235</sup> Yankelovich, *supra* note 71 at 165-166.

<sup>236</sup> Cal Gov Code §54945.2 (2003); Cal Gov Code §11125 (2003).

<sup>237</sup> Eaton Interview; Crow Interview; Marblen Interview.

<sup>238</sup> SUSSKIND & CRUIKSHANK *supra* note 2.



meeting laws, she lacks the flexibility to immediately address the problems, concerns and interests of members of her consensus building bodies. She stated that if an issue comes up right before or during a meeting that would be best addressed at the meeting, she is unable to organize a small caucus of people to talk about the issue and report back to the larger group.<sup>239</sup> In contrast, in two processes I observed which were not subject to the open meeting laws, authentic and productive dialogue was had on items not originally on the agenda.

As discussed earlier, there are exceptions to these laws that allow consensus building bodies to discuss items that were not on their pre-posted agendas.<sup>240</sup> However, during the course of my study, I never saw them being invoked. Given that invoking the exceptions may afford consensus building bodies opportunities to engage in deliberations in ways that they might if their process were not subject to open meeting laws, it is advisable that mediators be made aware of these exceptions as well as advisable that the other reasons why these exceptions aren't be invoked (which are discussed above in the procedural challenges section) be explored.

### ***Channels of Communication Blocked***

Not only does open meeting legislation block communication between members of consensus building bodies during meetings, as discussed above, but open meeting legislation also prevents people from deliberating outside of meetings. The legislation is prohibitive in a number of different ways. First, it inhibits dialogue between members of a consensus building process as well as the dialogue between mediators and members of

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<sup>239</sup> Eaton Interview.

<sup>240</sup> See generally Cal Gov §54954.2(a-b) (2003) and Cal Gov Code §11125.3(a)(1-2) (2003).

a consensus building process. Second, it restricts the way that members of a consensus building process can use the phone. And finally, it places significant barriers on member use of electronic communications.

- **Dialogue**

Open meeting laws may impact the quality of deliberations taking place in a consensus building process by having a prohibitive effect on dialogue among members of consensus building processes, dialogue between members of consensus building bodies and formal decision makers, as well as dialogue between members of a consensus building process and facilitators of the processes. Members of consensus building processes need to be particularly mindful to not engage in serial meetings, which are prohibited by open meeting laws. Serial meetings are meetings that at any one time might involve only a portion of the consensus building body, but eventually involve a majority.<sup>241</sup>

California case law offers helpful guidance in understanding serial meetings. In *Roberts v. City of Palmdale*, the court held that where there was a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member to the next, members of a legislative body were in violation of the Brown Act.<sup>242</sup> In another case, *Sutter Bay Associates v. County of Sutter*, the court construed deliberation even more narrowly and held:

“The requirement of the Ralph M. Brown Act (Gov. Code §54950 et seq.), that meetings of governmental bodies be open to the public, is not limited to gatherings at which action is taken by the

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<sup>241</sup> League of California Cities, *Open and Public III* p.4

<sup>242</sup> *Roberts v. City of Palmdale* (1993) 5 Cal.4<sup>th</sup> 363, 20 Cal. Rptr.2d 330, 853 P.2d 496.

relevant legislative body; deliberative gatherings are included as well. Deliberation in this context connotes not only collective decisionmaking, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. To prevent evasion of the act, a series of private meetings (known as serial meetings) by which a majority of the members of a legislative body commit themselves to a formal decision concerning public business or engage in collective deliberation on public business would violate the open meeting requirement.”<sup>243</sup>

My interviews and observations revealed that several mediators were not familiar with the concept of serial meetings or the case law interpreting what is meant by serial meetings. In some cases, making sure that members of a consensus building body did not engage in serial meetings was not a challenge because people were never aware that it was an issue. In other cases, people were aware of the concept of serial meetings, but had (or advising counsel had) various ways of interpreting the case law on point.

In one case I learned of, where members of a collaborative process subject to open meeting laws wanted to engage in dialogue with one another and where dialogue between certain members was prohibited by the open meeting laws, the mediator for the process commented on the irony in the fact that the open meeting laws were promoting uninformed decision making and didn't offer members of a consensus building body time to consider valuable information that other members of that body might have.<sup>244</sup> This mediator noted that in general, public meetings did not provide the time or environment for such deliberations to occur. His latter reflections were consistent with others who

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<sup>243</sup> *Sutter Bay Associates v. County of Sutter* (1997, 3d Dist) 58 Cal App 4<sup>th</sup> 860, 68 Cal Rptr 2d 492. See also *Frazer v. Dixon Unified School Dist.* (1993) 18Cal.App.4<sup>th</sup> 781, 22, Cal. Rptr.2d 641.

<sup>244</sup> Crow Interview.

have noted that public meetings often involve strategic posturing to the gallery and decrease the quality of reasoned argument and informed debate in legislative bodies.<sup>245</sup>

In some of the processes I observed and learned about in my interviews, I noticed that the mediators (or the counsel advising them) were interpreting the rules on serial meetings liberally. As a result, they engaged in deliberations freely. For example, during my fieldwork, I observed a process where the mediator was facilitating a committee that was not subject to open meeting laws, but was working on developing an agreement to be adopted by a board that was subject to the laws. In that process, the mediator felt that if it would be okay for the committee to write up their staff preferred recommendations for the agreement, have members of the committee bring it back to their respective board members, reconvene as a committee to discuss feedback from the board members, return to the individual board members once again to share the collective findings of the committee meeting and continue with the iterations until they ultimately led to an agreement all the Board members could live with (even if they had not yet voted on it).

In an interview with her where I discussed this observation, she told me that she felt that so long as there were no formal decisions made about something that was not on the agenda at the formal board meeting the committee was not in violation of the Act.<sup>246</sup>

She further stated,

“I think that there has got to be in the Brown Act a level of discretion around which you get input from board members and have some iteration. Otherwise, you couldn’t make public policy. All you could do is have staff come up with ideas and never vet them except for in a public meeting and so you would only be able to work on something one month at a time.”<sup>247</sup>

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<sup>245</sup> Bohman, *supra* note 69 at 242-43; Faure, *supra* note 79 at 507; Harter, *supra* note 91 at 19-20; Schelling, *supra* note 111.

<sup>246</sup> Unger Interview.

<sup>247</sup> Unger Interview.

In an interview with another mediator, I learned of a situation where a consensus building process, which was not subject to open meeting laws, made a number of informal agreements which were later officially agreed on in the different formal meetings of the agency and entity participants. When I asked how the members of a consensus building process could informally agree to something when it was uncertain whether the official decision makers would agree to it, I was told that no agreements were made in the consensus building processes until buy in from those sitting on the formal decision making bodies was confirmed.<sup>248</sup>

In these cases, while the formal decision makers were not deliberating with each other about agreements ahead of time, it is possible that what they were doing could be viewed as engaging in serial meetings. In the first case, it could be argued that there was a collective acquisition and exchange of facts by all of the decision makers ahead of time. And in the second case, it could be alleged that the majority of the members of a decision making body committed themselves to a decision about public business before a meeting. These examples are offered not to debate whether the mediators were or weren't adhering to the law, but to illustrate that there are gray areas in the area of serial meetings. Although the way the law was read in these two examples does not slow the consensus building process down, in other cases, it may be read more conservatively and prevent the type of dialogue that is critical to consensus building processes.

Open meeting laws may also stifle the types of conversations that mediators can have with members of a consensus building process. Just as participants of consensus building bodies and formal decision makers may not engage in serial meetings, nor may

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<sup>248</sup> Darrow Interview.

mediators and facilitators. In the early stages of one consensus building process, where a mediator was meeting with a number of elected officials in order to write a stakeholder assessment report, she was advised by one of the convening agencies that she could not convey any information from one elected official to another “in a manner such that they effectively held a meeting or made a public decision in private.”<sup>249</sup>

Although avoiding serial meetings may pose some deliberative challenges to consensus building bodies, given that there are other ways for information to be conveyed and for people to engage in dialogue with one another, perhaps this is an area where it may be wise for those engaged in consensus building processes to educate themselves on how to have dialogue without engaging in serial meetings. At the same time, this is an area that requires further research on how attorneys are making decisions on what constitutes a serial meeting. Given that the law in this area appears to be developing through case law, it will be important to check in periodically with advising legal counsel to learn about the latest developments on what types of dialogue are considered serial meetings by the courts.

- **Telephonic Communications**

The deliberations of consensus building bodies are also occasionally compromised by limitations on how telephones may be used by their members. It is often the case that members of a consensus building body will want to meet over the phone to discuss a matter that needs to be addressed immediately. This is particularly true where the members of a consensus building body are spread out across the state or a large geographic region and where meeting in person is costly both in terms of time and

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<sup>249</sup> Email between Helen Unger and Ron Singer November 12, 2002.

money. Despite these desires, Brown Act and the Bagley-Keene Act both have provisions in them that address telephonic conferencing. The provisions are almost identical and are triggered where participants in the legislative body use the telephone to conduct meetings (be they ad hoc or regularly scheduled meetings) as defined above.<sup>250</sup>

Both pieces of legislation require that telephonic conference calls adhere to all of the procedural requirements applicable to meetings,<sup>251</sup> meaning that, among other things, the telephone calls must be properly noticed and agendas must be posted within the prescribed periods. In addition, the laws require that the meetings be audible to the public in the locations in which they are being held, that agendas be posted at all of the teleconference locations, and that the meetings be conducted in a manner that protects the rights of the parties or the public appearing before the body.<sup>252</sup> The laws also require that there be a designated time on the agenda for members of the public to address the body at each teleconference location.<sup>253</sup> Finally, the Brown Act requires that at least a quorum of the members of the legislative body participate from locations within the boundaries of the territory over which the body exercises jurisdiction,<sup>254</sup> and the Bagley-Keene Act requires that “at least one member of the state body be physically present at the location specified in the meeting notice.”<sup>255</sup>

One mediator working with a legislative subcommittee of a consensus building taskforce subject to the Brown Act conveyed her frustration with these requirements. She gave an example of a situation where the subcommittee wanted to meet by phone in order

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<sup>250</sup> Cal Gov Code § 54953 (b)(1) (2003); Cal Gov Code § 11123 (b)(1) (2003).

<sup>251</sup> *Id.*

<sup>252</sup> Cal Gov Code § 54953 (b)(3) (2003); Cal Gov Code § 11123 (b)(3) (2003).

<sup>253</sup> *Id.*

<sup>254</sup> Cal Gov Code § 54953 (b)(3) (2003).

<sup>255</sup> Cal Gov Code § 11123 (b)(3)(F) (2003).

craft a joint letter to a senator on how funds from a specific proposition should be spent. Given that several very busy members of the subcommittee would have had to travel three hours each way to a physical meeting location without pay, the mediator explained that a meeting over the phone made better sense. However, the subcommittee ultimately decided that complying with all of the requirements discussed above was just too onerous and never held the meeting. The dialogue simply didn't happen. Moreover, she added that because of the open meeting laws, this particular group had decided they would no longer holding any meetings over the phone.<sup>256</sup>

While the intentions behind the laws addressing telephonic conferencing are admirable, once again one must question whether they are fulfilling their purpose. If the idea behind open meeting laws is citizen participation in decision making, then it makes little sense when the laws prevent citizens from engaging in dialogue, especially when that dialogue does not amount to any type of formal decision making. However, it is easy to see where if the laws were not in place, telephonic conferencing could be abused. Perhaps there is some type of middle ground to be found here. One possible approach to this dilemma might be to require that telephone conferences still be noticed and still adhere to the public comment requirements, without being subject to some of the other mandates. For example, the Brown Act's requirement that at least a quorum of the members participate in the telephone conference from locations within the boundaries of the territory over which the body exercises jurisdiction may be too excessive.

In addition to the open meeting laws preventing telephonic conferencing, they also may prevent normal conversations from taking place-- conversations that would normally happen by phone if people were not part of a consensus building body subject

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<sup>256</sup> Snow Interview.



to open meeting laws. One mediator gave an example from a consensus building process subject to the Bagley-Keene Act where she wanted to get a handful of people to talk out an issue of common concern over the phone. However, because the applicable open meeting law prevents three or more members of a consensus building body to meet in private when their group is formed pursuant to a formal action by a member of the committee,<sup>257</sup> she was prohibited from doing so.<sup>258</sup>

Another mediator expressed similar sentiments about the limitations open meeting laws place on her work as a mediator. This second mediator is accustomed to working over the phone with the participants in her consensus building processes in an iterative way. This mediator said that is very common for her to draft documents for upcoming meetings by calling the different members of the consensus building body, getting their feedback and acting as a go-between. She said this is especially true where the people she works with are spread out across a large geographic area. She noted that under the open meeting laws, she would likely be prohibited from operating this way, as these types of iterations might possibly constitute a serial meeting.<sup>259</sup>

While both of the last two examples are examples of people being blocked from deliberating with one another over the phone, they can be distinguished from one another. Whereas the first example is an example of a subcommittee being subjected to open meeting laws, the second example is an example of a serial meeting. While earlier sections of this thesis discuss the origins of and different ways to handle these challenges, they are noted here for the purpose of illustrating how open meeting laws often stymie telephonic communications.

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<sup>257</sup> Cal Gov Code §11121(c) (2003).

<sup>258</sup> Eaton Interview

<sup>259</sup> Amos Interview.

- **Electronic Communications**

Similarly, open meeting laws have stifled the use of electronic communications. Although not explicitly referenced in the text of the law, the provisions in the Brown and Bagley-Keene Acts that prohibit members of consensus building bodies from engaging in meetings through technological devices also prevent them from deliberating together via certain forms electronic communication.<sup>260</sup> The California Attorney General has issued an advisory opinion stating that it is not permissible for a majority of members of a legislative body to use email to develop a concurrence with one another on an action to be taken, even when the emails are also posted on the agency's website and printed versions of all the emails are reported at the next meeting of the body.<sup>261</sup> However, there are no statutory references, case law or advisory opinions addressing email reflectors/listserves, web boards or chat rooms.

During my fieldwork at the CCP, I learned of one consensus building process involving a state advisory body that set up an email reflector system that sent copies of certain emails involving the process to everyone on the advisory committee. Soon after doing this, the facilitation team was advised that if more than two members of the advisory committee hit reply and responded to a given email message, this would constitute a meeting under the Bagley-Keene Act. As a result, the consensus building body was forbidden from deliberating through this type of email listserve.<sup>262</sup>

One of the mediators of this process commented on the impact of this decision on the quantity and quality of information being deliberated by the consensus building body. She explained that members of this particular process are spread out across the state and

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<sup>260</sup> Cal Gov Code §54952.2(b) (2003) and Cal Gov Code §11122.5(b) (2003).

<sup>261</sup> 84 Ops. Cal. Atty. Gen. 30.

<sup>262</sup> Barntop Interview; Amos Interview; Selva Interview

rely heavily on the use of the internet and email communication. She commented that while she understood that Bagley and Keene were likely concerned with people being excluded from conversations, the end result here is that there simply are no conversations to be excluded from. Dialogue that would have taken place over the internet is not being replaced with dialogue at officially noticed meetings. The conversations “simply aren’t happening,” she said.<sup>263</sup>

The attorney advising this particular consensus building body also prohibited the group from using web boards, even though the web boards were to be open to the public. He claimed that engaging in electronic deliberations on web boards, may constitute a serial meeting.<sup>264</sup> As a result, where the mediation team had planned on using web boards to increase, manage and archive deliberative dialogue among its participants and with the public, it was prevented from doing so.<sup>265</sup>

One of the mediators managing this consensus building process noted the irony of having the most open and participatory process imaginable stopped by a sunshine law.<sup>266</sup> He commented that this made little sense given web boards can be set up in a way that is completely open, as well as in a way where members of the public can have unrestricted access to them twenty four hours a day and seven days a week. He further commented that unlike email reflectors, where things get lost and auto archived, web boards keep thoughts public and available. In addition, he noted that whereas the traditional flows of information go in one direction, web boards allow for discussions to become threaded--

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<sup>263</sup> Amos Interview

<sup>264</sup> Barntop email correspondence to Sherman, Linden, Sowinski, Ceres Unger and Malstov May 20, 2002.

<sup>265</sup> Amos Interview, Barntop Interview.

<sup>266</sup> Barntop email correspondence to Sherman, Linden, Sowinski, Ceres Unger and Malstov May 21, 2002.

people are given a sense of order, as well as the opportunity to jump in to discussion when they are comfortable and/or have something to say.<sup>267</sup>

Literature on point provides further support for this mediator's position. It has been suggested that the amount of information that people share with one another quadruples when people involved in the process have the ability to make anonymous comments online.<sup>268</sup> In addition, some believe that allowing consensus building bodies to dialogue online may eliminate gender power imbalances. In negotiation experiments, men were five times more likely to make a proposal than women, whereas online, women make the first proposal as often as men do.<sup>269</sup> Others claim that internet discussion allows people who otherwise might not be able to weigh in on a discussion to participate.<sup>270</sup>

In addition, it has also been pointed out that where as in face-to-face meetings, each side reacts immediately to new developments, participants in online dialogues can engage in asynchronous interaction, where their responses are not expected immediately and participants can connect to the ongoing discussions at different times.<sup>271</sup> If necessary, they can defer their responses until after they have had time to digest what is on the table, consult with others, or do additional research.<sup>272</sup> Some scholars have commented that online dialogue also allows people to be at their best when engaging in dialogue with others. For example, instead of reacting emotionally to comments, parties

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<sup>267</sup> Barntop Interview.

<sup>268</sup> John Ford, *Integrating the Internet into Conflict Management Systems* (May 2003) at <<http://www.mediate.com/articles/ford10.cfm>>.

<sup>269</sup> *Id.*; L. THOMPSON, *THE HEART AND MIND OF THE NEGOTIATOR* (1997).

<sup>270</sup> Michael Froomkin, *Conference Draft: Democracy in the Digital Age*, Information and Society Project, Yale Law School. April 3-5, 2003.

<sup>271</sup> *Id.*; Colin Rule, *New Mediator Capabilities in Online Dispute Resolution* (December 2000) at <http://www.mediate.com/articles/rule.cfm>.

<sup>272</sup> Rule, *supra* note 270; Fishkin *supra* note 78 at 19.

can communicate in a considered way. They can still react emotionally if they so choose, but they do have the option of stepping back. Similarly, mediators and facilitators have time to deliberate and become more reflective practitioners.<sup>273</sup>

It also should be noted that electronic communications are being used in other rulemaking processes. The Department of Agriculture, for example, encouraged the public to submit email comments on a proposed regulation for organic foods.<sup>274</sup> Similarly, other agencies have opened up chat rooms and other online venues.<sup>275</sup> In addition, the Bush administration and Congress are actively supporting e-government venues as means to encourage citizen participation in government.<sup>276</sup>

Despite the case that can be made for exempting certain categories of electronic communications from open meeting laws, there are some legitimate arguments to be made against allowing such exemptions. First, there is the digital divide argument. Some allege that allowing people to dialogue online is inappropriate because not everyone knows how to use internet resources and not everyone has access to internet resources. However, this statement could be countered with the argument that access to computers and computer training is becoming increasingly common.<sup>277</sup>

In addition, one could also point out that it is even easier to participate in such dialogue by making the trip to the public library and getting on line than it would be to go to a consensus building process and wait until your item was called on the agenda. Similarly, proponents of electronic deliberations point out that if the laws were modified to allow such communications, online conversations would not replace other types of

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<sup>273</sup> Rule, *supra* note 270.

<sup>274</sup> Coglianesi, *supra* note 61.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*; see also E-Government Act of 2002, P.L. No. 107-347.

<sup>277</sup> Froomkin, *supra* note 269.

conversations. Instead, online conversations would supplement face-to-face dialogue. As a result, people who prefer not to engage in digital democracy need not acquire the skills or resources to participate in public policy dialogue.<sup>278</sup>

A second argument against allowing electronic deliberations is that a project may get taken over by perpetual and professional meeting goers or project groupies and the conversation would become inaccessible to people who were not willing to monitor the conversations all the time and participate in the wee hours of the night. However, this problem could be ameliorated by a facilitator who is willing to facilitate and monitor the discussions on the boards and send out short synopses of what was taking place to all participants via other forms of communication on a regular basis. In addition, this situation could be addressed by having participants subscribe to a notification service whereby they would be notified on the postings or on a particular category of posting on a regular basis.<sup>279</sup>

Given that participants of consensus building processes are making increasing use of internet technology to disperse information and dialogue with one another,<sup>280</sup> there is a need to carefully consider these arguments and perhaps consider amending the open meeting laws to allow for such discussions. However, as one deliberative democracy scholar who has examined public participation in rulemaking has cautioned, the fact that information technologies can be used in transformative ways does not necessarily suggest that they should be implemented.<sup>281</sup>

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<sup>278</sup> Barntop Interview

<sup>279</sup> Barntop Interview.

<sup>280</sup> Connie Ozawa, *Making the Best Use of Technology* in THE CONSENSUS BUILDING HANDBOOK, 402-434 (Lawrence Susskind, et al. eds., 1999).

<sup>281</sup> Coglianese, *supra* note 61 at 70.

## **Fiscal Challenges**

In addition to the procedural and deliberative challenges posed by open meeting laws, there are the fiscal challenges to adhering to the laws. Less attention was given to this category of challenges in the present study, but these challenges are still worthy of review. Fiscal challenges generally fall into two categories: expenses incurred by complying with the laws, expenses incurred to avoid triggering certain provisions within the laws.

The expenses associated with complying with open meeting laws general involve additional human resource expenditures. One mediator I spoke with commented that thousands of dollars are often spent preparing for open meetings where nobody shows.<sup>282</sup> Another mediator posited that the consensus building process she was currently facilitating, which was subject to the Bagley-Keene Act probably cost the convener twice as much as it would have cost had it not been subject to the laws.<sup>283</sup> While in some cases, the cost of complying with the notice and agenda posting requirements for meetings may be nominal, depending on what is required and how often it is required these costs may add up. In addition, mediator and attorney human capital is always spent grappling with how and when the laws apply to a particular process.

Once one is working with a consensus building process, there are also the expenses associated with avoiding unnecessarily triggering the laws. One interviewee commented on how in order to avoid violating the law in one process, he had to hold five

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<sup>282</sup> English Interview.

<sup>283</sup> Eaton Interview.

independent meetings where he essentially said the same thing in all five of the meetings, as well as had to charge the convening agency for all of his additional time.<sup>284</sup>

Although the cost of adhering to open meeting legislation was not an overriding concern for most mediators, it is worth at least briefly mentioning the topic for several reasons. First, further research is needed to determine if this is actually so. Second, if there are additional costs associated with complying with open meetings and they can be itemized and traced to their sources, there may be ways of avoiding incurring them in the future. Third, being cognizant of these costs allows mediators and facilitators to speak knowledgably about these costs with their clients before beginning a consensus building process. Fourth, if these costs are prohibitive and prevent those who might have convened a consensus building process from otherwise convening one, then there is a need to be aware of this as well.

### **Summary**

To recap, challenges presented by open meeting laws fall into three general categories: *procedural challenges*, which impact the progress of consensus building processes; *deliberative challenges*, which threaten the high quality of deliberations characteristic of consensus building processes; and *fiscal challenges*, which result in increased costs for consensus building processes. Challenges within each of these categories can be traced to three geneses: how open meeting legislation is understood by those managing and participating in consensus building processes, how open meeting

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<sup>284</sup> Crow Interview.



legislation is interpreted by convening agencies' legal counsel, and the open meeting legislation itself.

In addition, findings of the CCP case study indicate that there is a wide range in the levels of understanding that mediators, facilitators, participants and advising legal counsels have of open meeting laws and how open meeting laws can be read in the context of consensus building processes. In addition, the findings show that even when some individuals are aware of ways to read the laws creatively so as to satisfy the laws and the needs of a consensus building body, they are electing to read the laws more conservatively. Finally, the findings show that there are certain areas where the laws and consensus building processes are at loggerheads and indicate that there may be a need for legislative reform. In the following section, I will discuss my recommendations on how to proceed with these findings.

## Chapter 5

### CONCLUSIONS & RECOMMENDATIONS

In examining the challenges presented to consensus building processes by open meeting legislation, it has become apparent that the need for open government, embodied in open meeting laws, and the need for authentic dialogue, embodied in consensus building processes, are not mutually exclusive. The goals of open meeting laws and consensus building processes frequently overlap. Yet, at the same time, there are still a number of steps that can be taken to reconcile the remaining tensions between open meeting laws and consensus building processes.

In this final section, I draw three sets of conclusions and recommendations about what can be done to mitigate and/or eliminate the challenges posed by open meeting legislation. Each of these three sets of conclusions and recommendations is based in the finding discussed in the previous section of this thesis. While future research is needed before proceeding with most of the suggestions below, it is my hope that these suggestions will prompt both dialogue and action from others in the field.

#### **Educate Managers of Consensus Building Processes**

Given that many of the challenges presented by open meeting laws can be attributed to lack of intimate knowledge of California and federal open meeting laws, perhaps the easiest and most immediate way to mitigate or eliminate some of the challenges presented by open meeting laws is to educate people managing consensus building processes on open meeting legislation and how it impacts consensus building processes in the states where they work. My fieldwork and interviews indicate that when

mediators and facilitators have a working knowledge of the laws, some of the challenges presented to consensus building processes by open meeting laws become surmountable. For example, mediators and facilitators who understand the California laws on subgroups and subcommittees are cognizant of ways to create such bodies without triggering the laws. I also observed that mediators and facilitators that have read and understand the provisions of the open meeting laws pertaining to the public comment period appeared comfortable invoking the portion of the laws that allow them to place reasonable limitations on the length of these comments when necessary.<sup>285</sup>

In contrast, where mediators and facilitators do not have an understanding of the laws, and/or are unaware of how the courts have interpreted the laws, there is an increased likelihood that the laws will challenge them. For example, in one consensus building process discussed in the findings, a mediator expressed frustration with a provision in the Bagley-Keene Act that prevented her group from discussing anything in a meeting that was not on the agenda that she had been required to post ten days before the meeting.<sup>286</sup> While there is a provision in the Act that might have allowed her to seek an exception to this rule,<sup>287</sup> her lack of knowledge of the provision amounted to her essentially waiving her right to use the exception. As a result, deliberation on the matter was ultimately delayed.

In addition, the findings of the CCP case study suggest that understanding open meeting laws saves the people who are working with consensus building processes time. Mediators who know the laws are able to intelligently discuss them with convening agencies' legal counsel and quickly address issues surrounding the applicability of the

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<sup>285</sup> Cal Gov Code §11125.7 (2003) and Cal Gov Code §54954.3 (2003).

<sup>286</sup> Cal Gov Code §11125(b) (2003).

<sup>287</sup> Cal Gov Code §11125.3 (2003).

laws to different stages and groups within a consensus building process. As a result, these mediators are less likely to have a process get hung up or derailed by open meeting laws. Finally, knowledge of the law lends mediators and facilitators credibility in the consensus building field. It assists them in making good decisions, it allows them to weigh in on how a process should proceed, and it helps ensure that the processes that they facilitate are legal.

As a result of these findings, I posit that some, although definitely not all, of the challenges presented by open meeting legislation can be attributed to the level of understanding that mediators and facilitators have of open meeting laws. California and federal open meeting laws are complex, voluminous and nebulous. Given that many attorneys have a hard time navigating and interpreting these laws, it was not surprising that even some CCP mediators, who are leaders in their field, had a hard time understanding the laws. Despite the complexity in this area of the law, I believe that mediators and facilitators who take the time to learn about open meeting legislation and investigate the different strategies for handling open meeting laws will find the experience to be worthwhile.

As I pointed out earlier in this thesis, while there are some instructive materials on how the FACA impacts consensus building processes, there is no such literature on the Brown and Bagley-Keene Acts and their impacts on consensus building processes. Therefore, it is likely that the patterns I observed during my fieldwork at the CCP are illustrative of what is taking place in other California organizations, firms and agencies managing consensus building processes. Indeed, conversations I had with mediators outside of the CCP, confirmed the need for such materials. It is also likely that there is a

need for similar educational guidance on open meeting laws and consensus building processes in other states.

The education of mediators and facilitators could take on any one of a number of forms. For example, information on the laws and how to comply with them could be put into flow charts or checklists. In addition, organizations, firms and other entities working with consensus building processes could either send their mediators and facilitators to seminars on open meeting legislation. Or, in the alternative, outside agencies specializing in open meeting legislation could be brought in to the offices of these entities to do a workshop on the topic.

However, it must be noted that while providing mediators and facilitators with more information on the laws may address some of the challenges presented by open meeting laws, this solution is not all encompassing. Many of the challenges presented by open meeting laws will remain. In the CCP case study, some of the mediators and facilitators who were extremely well versed in the laws faced challenges that were attributable to other factors. As was discussed throughout the previous section of this thesis, many of the challenges presented by the open meeting laws stem from the approaches convening agencies' counsels take to interpreting and applying the laws and/or the open meeting legislation itself. Suggestions on how to grapple with these two challenges are offered below.

### **Examine Counsels' Counseling**

A second way to address the challenges presented by open meeting laws is to examine how the attorneys that advise the convening agencies in consensus building processes read open meeting legislation and apply the laws to consensus building

processes. The CCP case study indicates that legal counsels do not read the law uniformly. While some attorneys are comfortable with looking for creative ways to avoid triggering the laws, other attorneys are more conservative in their approach to advising their respective agencies on complying with the law. Moreover, the case study revealed situations where the open meeting laws did not apply to a particular process or a particular group within a process, yet the advising attorneys recommended compliance with the laws.

Based on these findings, I conclude there is a need for further research on how the attorneys who advise the CCP on consensus building processes read, interpret and apply the laws. Are the attorneys who are making conservative recommendations, making them because they are not reading the laws carefully and are not aware of the exceptions and opportunities to opt of compliance? Or, in the alternative, are they cognizant of these exceptions and opportunities, but uncomfortable with invoking them? Are they concerned with potential litigation?

In addition, it is important to examine whether the attorneys advising convening agencies understand consensus building processes and the ways in which they involve the public in decision making. There is the possibility that if the attorneys advising their agencies had a more comprehensive understanding of consensus building processes, they might be more likely to read the law creatively to help satisfy the interests of open meeting laws and consensus building processes. More research is needed to determine what level of understanding attorneys who are currently advising on consensus building processes have about consensus building processes to see whether there is any correlation with the ways they are reading the law.

One way that the CCP and other entities working with consensus building processes may be able to presently address the challenges that arise from convening agencies' more conservative readings of the law might be to develop an instructive document on consensus building processes and open meeting laws that could be used by mediators and facilitators to talk with convening agencies and their legal counsels about how best to address the challenges presented by open meeting legislation to consensus building processes. For example, the said document, among other things, would give different options for forming working groups and would highlight which types of working groups would be subject to and exempt from the laws. Such a document could be developed together with legal counsel. The document would not govern decision making on how open meeting laws apply to consensus building processes, or be deemed a legally binding interpretation of the law, but it would serve to provide attorneys working with consensus building processes ideas for thinking about the laws in the context of consensus building processes.

### **Applying Evolution to Open Meeting Laws**

A final way to address the challenges presented by open meeting laws is through encouraging the evolution of open meeting laws through legislative reform. As a mediator in the CCP case study put it, the evolution of open meeting laws needs to parallel the evolution in our societal approaches public policy decision making:

“Open meeting laws are a necessary evil. They are, and that isn't even too harsh of a term to use. And in principle, of course I support open meeting laws. I'll just put it this way. The very fact that we have a new direction as practitioners and professionals towards consensus building and consensus building efforts and involving the public and all that kind of stuff, that exists because

we have open meeting laws that were written in the 70s and even before then. If we had never as a society had this kind of seminal shift where we said, ‘no we do not want policy making and decision-making to take place behind closed doors,’ we would never have entered into this new evolution that led us to where we are now. So, in that regard, I think they were absolutely, fundamentally necessary. Now we are at a place where we have to reassess. You know any organism that does not evolve dies. I mean, that is a standard Darwinian Law. I think that our laws and the ways in which we govern ourselves are different. There are some laws- just like some creatures- that have hardly evolved at all because by God, they were perfect the first time and why tinker with it...Conversely, there are laws, like the public meeting laws that need to continue evolving.’<sup>288</sup>

The CCP findings confirm the statement made by this individual and suggest that the FACA, the Brown Act and the Bagley-Keene Act have failed to evolve in ways that allow for the development of good public policy through consensus building. As shown above, in a number of occasions the laws threaten the pillars of consensus building processes discussed earlier in this thesis, thereby preventing good public policy discourse. If what Habermas and other modern democratic theorists suggest is true, and good discourse is at the center of our deliberative democracy,<sup>289</sup> then something needs to be done to address these difficulties.

Below, I will discuss some of the possible approaches to legislative reform as well as highlight the particular areas of the law that need to be addressed. I will also point out where further research is needed before any of these recommendations are pursued.

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<sup>288</sup> English Interview

<sup>289</sup> JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg. Trans. 1995).



### *Evolution of the FACA*

With respect to the FACA, I have two recommendations for potential legislative reform. First, given that it has become commonplace for people to avoid invoking the law, so much so that people are publishing pieces on how to do so,<sup>290</sup> further research is needed to examine the possibility of developing a faster and more efficient chartering process. Second, the legislation could be amended to explicitly reflect the GSA's statement, and the common practice of, exempting certain categories of subcommittees from open meeting laws.

An alternative to amending certain portions of the FACA would be to include consensus building processes on the list of processes exempt from the legislation. The exemption could be a blanket exemption or could apply to consensus building bodies that meet certain requirements or demonstrate a level of commitment to citizen involvement in public policy development. Under such an exemption perhaps consensus building bodies serving an advisory purpose would be exempt from the legislation, while consensus building bodies engaged in final decision making would remain subject to the laws.

This type of amendment would still allow the public to respond to the recommendations of a consensus building body before any formal decisions were made. However, it might not address the concern discussed by Faure that people would have a hard time appealing and responding to recommendations that were developed in

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<sup>290</sup> See generally CESTERO *supra* note 113 at 79-80.

private.<sup>291</sup> Therefore, before making such an amendment, further studies would be needed on whether the public's need for open government could be satisfied.

### ***Evolution of the Brown and Bagley-Keene Acts***

With respect to the Brown and Bagley-Keene Acts, legislative reform could be approached in one of two ways. First, the particularly problematic portions of the laws could be amended to accommodate the needs of consensus building processes. Second, consensus building processes could be added to the long lists of processes exempt from the legislation.

- **Legislative Reform Via Specific Amendments**

One way to address many of the challenges that appear to be arising directly from California open meeting legislation is to propose specific amendments to the legislation. Depending on what is more appropriate, proposals to amend certain portions of the laws might involve asking that consensus building bodies be exempt from certain sections of the law, or, they might involve amending the law as it applies to all state or legislative bodies. Given the findings of the CCP case study, I have identified several areas where amendments to the law might be appropriate: (1) electronic communications under the Brown and Bagley-Keene Acts, (2) subgroups and subcommittees under the Bagley-Keene Act; and (3) the 10 day advance notice and agenda posting requirements under the Bagley-Keene Act.

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<sup>291</sup> Faure, *supra* note 79 at 505.

## 1. Electronic Communications

As discussed in the findings and analysis portion of this thesis, given US citizens' increasing use of electronic technology to deliberate and participate in democratic decision making, open meeting legislation might want to evolve to allow for certain types of electronic communications. Further research is needed on the use of electronic communication in consensus building processes before advising an amendment to California open meeting laws. The research could be done through using e-venues such as webboards, chatrooms, blogs, and email listserves in consensus building processes that are not subject to open meeting laws and examining how these different venues impact the consensus building process.

In a discussion on public participation in agency rulemaking, Coglianese suggests running through the checklist below to analyze whether electronic communications truly improve public participation in rulemaking. I recommend that future research in this area make the same queries included on Coglianese's checklist, modifying the questions to apply to the way electronic communications impact consensus building processes and good public policy outcomes. This well thought out and comprehensive list is quoted in full below:

- Mobilization: Do people get involved more frequently in the decision making process?
- Distribution: Is there any change in the *kinds* of people who participate?
- Frequency: Do specific individuals and organizations participate more frequently? If greater participation occurs, how much of it is due to an increased number of participants versus an increase in participation of the same participants?
- Knowledge: Is learning enhanced or inhibited?
- Tone: Does the tone, style or emphasis of expression change?
- Ideas: Do the ideas generated by the public or the views that get expressed change? Are views arrayed differently along the ideological

spectrum? Do they convey new or better information? Are the ideas more complex or simpler?

- Conflicts: Are conflicts mitigated or exacerbated? What kinds of issues seem to generate reduced or heightened conflict?
- Perceptions: How do people feel about their participation and their engagement with others in the rulemaking process? Do they view the government any differently (such as with different levels of perceived trust, legitimacy or approval)?
- Spillovers: Are there any policy effects that spill over into other policy forums or into other aspects of politics? Does the process tend to polarize the public?
- Organization: How, if at all, do the roles of political organizations like trade associations, unions or public advocacy groups change? Does easier and more direct access to the rulemaking process diminish the value of “gatekeeper” organizations?
- Time: Does the process take more or less time from the beginning to the time when the agency issues its final rule?
- Cost: Does the process demand more staff time and analysis?
- Response: How do government officials respond to public input? Do they view it as constructive or as a burden?
- Role: Do government officials view their roles as decision makers any differently?
- Agency Deliberations: Will changes that make government decisions more transparent make it easier or more difficult for officials or staff to deliberate among themselves? To contact experts for advice?
- Outcomes: Are decisions improved? Are behaviors changed and conditions in the world improved relative to the status quo?<sup>292</sup>

I suppose that further research will likely show that whereas some electronic communications may be inappropriate for consensus building processes, some forms of electronic communications may actually enhance consensus building processes, if properly monitored and complimented with face to face dialogue.

## 2. Subgroups and Subcommittees

Legislators might also want to reconsider amending the Bagley-Keene Act to afford more subgroups and subcommittees of consensus building bodies the opportunity

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<sup>292</sup> Coglianesi, *supra* note 61 at 76.

to meet in private without triggering open meeting laws. As discussed earlier, the Bagley-Keene Act presently applies to subgroups and subcommittees of consensus building bodies that have three or more members and are created by a formal action of the state body or one of its members.<sup>293</sup> This provision is far stricter than that of the Brown Act, which only applies to standing subgroups and subcommittees and/or to subgroups or subcommittees that have membership greater than a quorum<sup>294</sup> and the FACA, which allows subcommittees and subgroups that are formed to offer advice or recommendations to the larger body to be exempt from the law.<sup>295</sup> Given that the literature on point<sup>296</sup> and the findings of this case study indicate that taking away opportunities for private conversations threatens authentic dialogue, perhaps an amendment to the Bagley-Keene Act revising the Act to mirror one of these other acts might be appropriate.

### **3. Ten Day Advance Notice and Agenda Posting Requirement**

Findings of the CCP case study, coupled with the generally rise in internet communications throughout our society, suggest that the Bagley-Keene Act's requirement that notice and agendas for the meetings of state bodies be posted ten days in advance of the meeting<sup>297</sup> might be somewhat excessive. Given that adhering to the requirement poses both procedural and deliberative challenges, and that the requirements for FACA meetings and Brown Act meetings are far more lenient, it may be appropriate to amend the Bagley-Keene Act to read more like one of these other Acts.

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<sup>293</sup> Cal Gov Code §11121-22 (2003).

<sup>294</sup> Cal Gov Code §54952(b) (2003).

<sup>295</sup> 5 USCS Appx §3(2)(c) (2003).

<sup>296</sup> *See generally* Faure, *supra* note 79; Harter *supra* note 91.

<sup>297</sup> Cal Gov Code §11125 (2003).

- **Legislative Reform Via a Blanket Exemption For Consensus Building Processes**

Another type of proposal to amend open meeting laws might involve including consensus building processes on the list of processes exempt from open meeting laws. In considering the option of seeking an amendment to California open meeting laws that exempts consensus building processes from open meeting legislation, one should also consider the history of open meeting laws in our country. Although one might assume that right of the public to know what its representatives are doing is so deep-seated in our system of democracy that it must predate the establishment of the United States and have roots in colonial America and England, in actuality, this is not the case. Most open meeting legislation is relatively new.<sup>298</sup> The viewpoint that the public has a constitutional right to access public meetings has not been adopted by the courts.<sup>299</sup>

There are a number of reasons why the legislature might want to consider applying a blanket exemption for consensus building processes to open meeting laws. First, even if specific amendments were made to California open meeting legislation to accommodate consensus building processes, there is still a possibility that many of the challenges discussed in this case study would remain. As discussed earlier, several of my findings indicate the strong possibility that even in cases where open meeting laws do not apply to consensus building processes counsels for convening agencies are recommending that consensus building bodies comply with open meeting laws “just in case.” In other words, sometimes the laws are read more conservatively in order to avoid any potential litigation. A blanket exemption would eliminate this problem.

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<sup>298</sup> SCHWING, *supra* note 4 at 1.

<sup>299</sup> SCHWING, *supra* note 4 at 6.

Second, a blanket exception would preserve the elements of a consensus building process and encourage authentic dialogue, without negating the importance of conducting the public's business in public. As one experienced mediator stated:

“[T]he legislature should acknowledge that the public's business should be conducted in public, but that the process of collaboration is a precursor to that. And the only exception to that might be where, in fact, the parties really are decision bodies making the public's business, but that is only in the case of the public policy collaboratives. So, in other words, if there was a big vote and then tomorrow was the law, then that would be different. But that is never the case, not ever...The process of collaboration is much more like the process of staff or other people who are simply sorting through or working on ideas in evolving thinking and finding options. It's basically staff work. And it has to be able to be created in a way that is draft, it has to be able to be created in a way that can evolve, it has to be created in a way that people can change their minds without harm, it has to be created in a way that people can learn. All of these things are important and the imposition of an open meeting law or requirement on top of that is inconsistent with what it is that the group is designed to do.”<sup>300</sup>

Despite these convincing arguments, there are good reasons to be skeptical about exempting all consensus building processes from open meeting laws. For example, if all consensus building processes were automatically exempt from the laws, people might intentionally use consensus building processes to avoid compliance with the laws. In addition, requesting exemption from the laws might raise concerns for the public and/or public watchdog organizations.<sup>301</sup> These concerns would need to be addressed before moving forward with any sort of legislative reform.

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<sup>300</sup> Eaton Interview.

<sup>301</sup> Participant comments, CCP Professional Development Seminar on Open Meeting Laws (May 30, 2003).

## **Concluding Reflections**

Although different in form, all of the above recommendations embody the ultimate goal of both open meeting laws and consensus building processes— deliberative democracy. Pursued independently or together, these recommendations not only offer possibilities for reconciling the tensions between open meeting laws and consensus building processes, but they also enhance opportunities for authentic dialogue and public participation. Where citizens genuinely partake in government decision making, good public policy outcomes become all the more common.