SUMMARY OF CAUTION

[*Jeannie Nix notes regarding consultation with an attorney*]

The attorney expressed concern that the "working group" comprised of two county supervisors, three county executives, and two civil service commissioners is a separate legislative body subject to the Brown Act.

Under Government Code 54952(b) "legislative body" includes a "commission, committee, board, or other body of a local agency … created by … formal action of a legislative body." Both the board of supervisors and the civil service commission are legislative bodies. Code 54952(b) has a "Less Than A Quorum" exception for ad hoc advisory committees, composed solely of the members of the legislative body that are less than a quorum.

The SLO board of supervisors met in closed session under code 54956.9(b) to receive advice from its legal counsel regarding pending litigation. The subject of the closed session was not identified. After this, meetings occurred between four individual supervisors and their respective appointed commissioners. Each supervisor told their individual commissioner that according to the HR Director the commission was out of control and that there had been a complaint about commissioners' conduct in an appeal hearing. The specifics of the complaint were not identified.

Concern was expressed over the commission's legal expenses for disciplinary hearings. Neither the quality of the work, nor the need or the time required for any particular item was questioned. The HR Director sent a memo (not attorney-client privileged) to the commission questioning its calling of a witness. This prompted the commission to ask for advice on its authority to consider whether or not this was correct.

The commission discussed these meetings with their respective supervisors at its 8/3/11 regular meeting. As commission president, I read into the record my notes on the meeting I had with the board chair and distributed a discussion outline of concerns and issues. The matter was placed as an item for discussion on the agenda for the commission's next regular meeting. At the 8/24/11 meeting, the HR Director, at the direction of the board, of supervisors, informed the commission that the board had created a sub-committee composed of two supervisors to meet with representatives of the commission to discuss complaints and develop a positive working relationship.

The commission approved a committee in public session and appointed two commissioners to meet with two supervisors. It is unclear whether the Board members approved a committee in public session and appointed its two members who are now serving. Whether representatives of county administrator, county counsel, and HR are acting in an advisory capacity to supervisors and commissioners or as members of the body is unknown. The critical factor is participation in decisions, e.g. voting.

To preserve the "Less Than A Quorum" exception, it is important that a committee of the commission be composed solely of commissioners less than a quorum to meet with a similarly composed less than a quorum committee of board members. An entity composed of commissioners and supervisors (or other county officials as voting members) does not qualify for the LTAQ exception and is subject to the Brown Act.

Two committee meetings have occurred. At the September 28, 2011, commission meeting, it was reported that there was nothing to report regarding the "working group" because the group had been instructed not to report to the commission (apparently until decisions have been made). Presumably, this instruction was to preserve the confidentiality of privileged information related to litigation and to protect personnel privacy. This raises the question whether the "working group" is a separate county advisory body created by the board of supervisors and not a meeting of two separate "Less Than A Quorum" committees.

If the working group is a separate county advisory body, it must comply with the Brown Act including agenda preparation, public discussion of general items of business (for example, ordinance amendments) and noticed closed meetings to preserve confidentiality of litigation and personnel matters.

It is prudent for the commissioners who are part of this "working group" to get a written legal opinion on the following questions:

1. Is the "working group" a body subject to the Brown Act?
2. Was the working group lawfully created? If so, was the Board required at a regular board meeting to disclose the action creating the group and establishing its function?
3. Was there a complaint against an "employee" as defined by the Brown Act? If so, was notice required under code 54957(b)(2)? Members of legislative bodies, for example, commissioners, are not considered "employees" for purposes of 54957. However, under (b)(4), "employee" includes "an officer or an independent contractor who functions as an officer … but not other independent contractors."
4. If the working group is a body subject to the Brown Act:
    a. Did the members of the group discuss matters that should have been discussed at a noticed public meeting?
    b. If so, do any of the members face criminal liability under code 54959 for depriving the public of information to which it is entitled?