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OPINION	:	No. 83-1107
of	:	MARCH 20, 1984
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THE HONORABLE ADRIAN KUYPER, COUNTY COUNSEL, ORANGE COUNTY, has requested an opinion on the following question:

Is an advisory committee which has been created by the Board of Supervisors to advise it on airport matters entitled to meet in closed session with counsel with respect to litigation to which the board is the sole party representing the interests of the county?

CONCLUSION

Assuming that such a meeting with counsel which is held by the advisory committee properly relates to its powers and duties to advise the Board of Supervisors on airport matters, such committee may meet with counsel in closed session to discuss litigation to which the board is the sole party representing the interests of the county.

ANALYSIS

Orange County has by ordinance established an Airport Commission ("Commission") to advise it on airport matters.[1] Apparently the Board of Supervisors ("Board") is involved in litigation involving airport matters where it is the sole party representing county interests. The question presented for resolution herein is whether the Commission is entitled to meet in closed session with counsel with respect to this litigation.

We conclude that assuming such a meeting properly relates to its powers and duties to advise the Board on airport matters, the Commission may meet with counsel to discuss such litigation.

Advisory commissions such as the Commission are "legislative bodies" within the meaning of the Ralph M. Brown Act, Government Code section 54950 et seq. (Gov. Code, § 54952.3.) Accordingly, their meetings are required to be open and public unless otherwise specifically provided in the act or as may be implied from some other provision of law such as the attorney-client privilege. (Gov. Code, § 54953; 65 Ops.Cal.Atty.Gen. 412, 413 (1982).)

The suggestion has been made that since the litigation names only the Board, and since the Board has the duty to "direct and control the conduct of litigation in which the County . . . is a party" (Gov. Code, § 25203), only the Board may properly meet with counsel in an attorney-client relationship. We, however, do not believe that the attorney-client relationship at the county level need be so narrowly applied. In reaching our conclusion we will first analyze the attorney-client privilege in the county context and then analyze the implied exception carved out by case law for such privilege in relation to the Ralph M. Brown Act.

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[1] The Commission's powers are set forth in section 2-1-6 of the Codified Ordinances of the County which reads as follows:

> "The Airport Commission shall be advisory to the Board of Supervisors, and shall have power:
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> "(a) To recommend to the Board of Supervisors plans for the development, maintenance and operation of Orange County Airport and other airports which may be acquired or operated by the County of Orange.
>
> "(b) On request of the Board of Supervisors, to advise the Board and make recommendations on any matter pertaining to airports or air transportation.
>
> "(c) To make such investigations as it may deem necessary in the exercise of the powers in this section enumerated. The Manager, County Airports Division, shall give full cooperation in any such investigations. (Code 1961, § 21.016; Ord. No. 2873, § 3, 11-4-75)."

An examination of both the statutory law and the case law leads us to conclude that when an action is brought against only the Board as a board, and not in their individual capacity, the "client" for purposes of the attorney-client privilege is in reality the county as an entity, and not merely the Board. From this conclusion, it follows that *any* county board, commission, committee or officer having a legitimate official interest in a particular lawsuit may confer with counsel in an attorney-client relationship.[2] To illustrate, a committee such as the Commission involved herein could be replete with expertise which could be of invaluable aid to the Board in advising it with respect to the possible conduct of litigation or the settlement of such litigation.

As to the statutory law, the attorney-client (or "lawyer-client") privilege is codified in section 950 et seq. of the Evidence Code. "Client" is defined in section 951 as follows:

> "As used in this article, '*client*' *means a person who*, directly or through an authorized representative, *consults a lawyer for the purpose of* retaining the lawyer or *securing legal service or advice from him in his professional capacity*, and includes an incompetent (a) who himself so consults the lawyer or (b) whose guardian or conservator so consults the lawyer in behalf of the incompetent." (Emphases added.)

"Person," for purposes of the Evidence Code, "includes a . . . public entity." (Evid. Code, § 175.) "Public entity" is defined in section 200 of the Evidence Code as follows:

> "'*Public entity*' *includes a* nation, state, *county*, city and county, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic." (Emphasis added.)

Thus, the statutory law as set forth in the Evidence Code contemplates that a "*county*" as well as any other public entity may be the client for purposes of the attorney-client privilege. (See also Gov. Code, § 26520: "The district attorney shall render legal services *to the county* . . ." which duty devolves upon the county counsel in counties which have established that office. (See Gov. Code, §§ 26529, 27642; *Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 53.)

With respect to case law, *Ward* v. *Superior Court* (1977) 70 Cal.App.3d 23 is instructive. Watson, the county assessor, had brought an action against Ward, the chairman of the Board of Supervisors, and other county employees alleging defamation

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[2] We note that the request for our opinion points out that the Board controls county litigation, and then concludes that since the Committee does not control litigation, "it has no need for direct consultation with counsel." We do not think the latter conclusion necessarily follows.

and violation of civil rights. The Court of Appeal determined that the trial court erred in granting Watson's motion to disqualify the county counsel who was representing the defendants. Watson's theory was that since the county counsel had advised him in his official capacity, then to represent Ward and the other defendants was in violation of the Rules of Professional Conduct as being employment adverse to a former client. The Court of Appeal held, based upon the duties of the county counsel set forth in the County Charter, which are analogous to those set forth in the Government Code with respect to general law counties, that vis-a-vis the county, *the county*, and not Watson had been the client. Accordingly, the county counsel should not have been disqualified. Thus, at page 32, the court stated:

> "The Los Angeles County Counsel has only one client, namely, the County of Los Angeles. [2] (See *Woolwine* v. *Superior Court*, 182 Cal. 388, 391 [188 P. 569].) Of course, the county acts through its board of supervisors, its officers and its employees, much as does a private corporation. Under the mandate of Los Angeles County Charter article VI, section 21, the county counsel must represent county officers in civil actions, but only as to matters wherein such officers acted in their representative capacity and within the scope of their official duties. Thus the county counsel's representation of county officers is analogous to the representation afforded officers of a corporation by corporate counsel." (Fn. omitted.)

And at page 35, the court further stated:

> "The tax assessor's office is merely an arm of county government over which the board of supervisors has direct supervision. Thus Government Code section 25303 provides as follows: 'The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly those charged with the assessing, collecting, safekeeping, management, or disbursement of the public revenues. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.'[4]
>
> "Any communication between Watson and the county counsel, pursuant to the discharge of their respective duties, concerning the operation of the assessor's office could not be considered a secret confidential communication so as to bar the county, acting through the board of supervisors, from obtaining that information. The assessor is an agent of the county. (*People* v. *Vallerga*, 67 Cal.App.3d 847, 876 [136 Cal.Rptr. 429].)

> As such, the assessor has a duty of full disclosure to his principal, the county. Communications by the assessor with respect to the operations of his office made to the county counsel are not subject to a claim of privilege as between the assessor and members of the board of supervisors, who are charged by law with the duty of supervising the conduct of the assessor's office. [5]" (Fns. omitted.)

By the same reasoning, when the Board controls county litigation which names it as the sole defendant, it does so *on behalf of the county*. The county is in reality the client. Accordingly, the fact that the board acts representatively does not necessarily exclude other county officers, employees or boards from also having an interest in the matter in *their* official capacity so as to seek advice from counsel. As noted, "the county counsel's representation is analagous to that afforded officers of a corporation by corporate counsel." It is axiomatic that corporations can only act through their officers and employees. Likewise, a county can only act through its officers and employees. (See also, generally, *Orinda-County Fire Protection Dist.* v. *Frederickson and Watson Co.* (1959) 174 Cal.App.2d 589, 592-593; *People* ex rel. *Dept. of Public Works* v. *Glen Arms Estates, Inc.* (1964) 230 Cal.App.2d 841, 854 et seq.: ". . . our task being to determine the extent of the privilege where the client is the state. In reality the problem is the same where the client is a body politic as when the client is a corporation. . . .")

Thus, the statutory law and the case law support the conclusion that the Commission discussed herein may, in the proper course of its duties, confer with the county counsel in an attorney-client relationship with respect to litigation controlled by the Board, since the county counsel has essentially only one client, the county, with respect to county functions. Thus, we reach the ultimate question, may the Commission confer with counsel in closed session?

That question gives rise to an examination of *Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs.*, *supra*, 263 Cal.App.2d 41. That case held that the Ralph M. Brown Act, which requires "legislative bodies" of "local agencies" as defined therein to generally hold their meetings in public did not override the attorney-client privilege. Thus, the court noted that the attorney-client privilege may be invoked at *public meetings*, as follows:

> "Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. *They view it as a barrier to testimonial compulsion*, *not a procedural rule for the conduct of public affairs*. *The view is too narrow*. [8] The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full

> disclosure to the attorney unfettered by fear that others will be informed. (*Greyhound Corp.* v. *Superior Court* (1961) 56 Cal.2d 355, 396, [15 Cal.Rptr. 90, 364 P.2d 266]; *Holm* v. *Superior Court*, supra, 42 Cal.2d at pp. 506-507; 8 Wigmore on Evidence (McNaughton rev. 1961) § 2291; Comment, *Attorney-Client Privilege in California*, 10 Stan. L.Rev. 297-300 (1958); Louisell, *Confidentiality, Conformity and Confusion*: *Privileges in Federal Court Today*, 31 Tulane L.Rev. 101 (1956).) The privilege serves a policy assuring private consultation. If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value. *Considered in isolation from the Brown Act*, *this assurance is available to governmental as well as private clients and their attorneys*. (*Id.*, at pp. 53-54; emphases added.)

The court then went on to conclude that the Ralph M. Brown Act did not impliedly repeal the attorney-client privilege with respect to governmental agencies, and that the two could coexist. Thus the court stated:

> "*The two enactments are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions*. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (*Greyhound Corp.* v. *Superior Court*, *supra*, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. *The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act*, *neither superseding the other by implication*." (*Id.*, at p. 58; emphases added.)

And finally, in the context of the particular case which gave rise to the question of the interrelationship of the Ralph M. Brown Act and the attorney-client privilege, the court stated:

"Because the Brown Act did not abolish the statutory opportunity of boards of supervisors to confer privately with their attorney on occasions properly requiring confidentiality, the preliminary injunction is too broad. The preliminary injunction is modified by adding at its end a new paragraph 6, to read as follows:

"'6. This preliminary injunction shall not prevent the Sacramento County Board of Supervisors from consulting privately with the county counsel or other attorney representing the board *under circumstances in which the lawyer-client privilege conferred by sections 950 through 962 of the California Evidence Code may lawfully be claimed*.'" (*Id.*, at pp. 58-59; emphasis added.)

It is thus seen that the *Sacramento Newspaper Guild* case held that the attorney-client privilege was in no manner overridden or modified by the Ralph M. Brown Act.[3] Accordingly, the Commission as well as the Board may confer in private with counsel insofar as necessary or desirable to perform *its* duties *if properly within the area of privilege*. Apropos is the observation of the court in the *Sacramento Newspaper Guild* case that attorney-client conferences are important to public agencies as to both the "settlement and avoidance of litigation." We believe that advisory boards such as the Commission involved herein could play a legitimate role in such functions in advising the Board and accordingly could legitimately confer with counsel in the context of the attorney-client privilege, if "not overblown."

Thus, we conclude that assuming a meeting with counsel which is held by the Commission relates to its powers and duties to advise the Board on airport matters, the Commission may meet with counsel in closed session to discuss litigation to which the Board is the sole party representing the interests of the county.

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[3] See also *Sutter Sensible Planning, Inc*. v. *Board of Supervisors* (198l) 122 Cal.App.3d 813, 823-825; 62 Ops.Cal. Atty.Gen. 150, 152-153 (1979).