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February 15, 2007

VIA FACSIMILE AND U.S. MAIL

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Dr. Ben Lastimado
Vice Chancellor Human Resources and Labor Relations
Grossmont-Cuyamaca Community College District
8800 Grossmont College Drive
El Cajon, CA 92020

Re: **Litigation Counsel Response to Weiler Report**

Dear Dr. Lastimado:

1. Introduction

I have read the Weiler Report. I believe that Tim Garfield, as the College's Brown Act counsel, should have an opportunity to give his recommendations on this report. I think that he will concur with my general assessment that it is easy for an experienced lawyer to make a Brown Act mistake and almost impossible for anyone to do it correctly all the time, but it is also easy to correct and cure Brown Act mistakes.

A significant part of the Brown Act addresses the methods of correcting errors. The Legislature recognized that there will be errors, and made provision for correcting errors at different places in the Act. One particular section of the Brown Act is devoted to curing or correcting general errors, and it contains a "substantial compliance" defense, (54960.1, (d)(1)) which will apply to most of the errors identified in the Weiler Report. But these errors should be corrected and careful steps taken to ensure that they are not repeated.

Please understand that the report indicates a very common set of errors that we see in many institutions. There is no error identified in the Weiler Report that cannot be cured easily, without

any requirement for litigation. As litigation counsel, I can make some recommendations with a view to avoiding litigation that might result from the kinds of mistakes identified in this report. I do not see *anything* in the Weiler Report that indicated illegal conduct. These were procedural errors that can all be corrected.

2. Employment Law Issues

Because you have responsibility for Human Resources, your responsibility for avoiding litigation may be critical in this case. The most likely source of dangerous litigation will be *employment* law. The Brown Act issues can be relatively easily cured, but I think that a natural response to this Report would be to blame somebody for the errors. The public may ask the Board to punish somebody. But all employees have a right to privacy, which the public often forgets, so the public does not get a report on who was punished. You will need to ensure that employees are not publicly punished, to avoid privacy rights violations.

To briefly recap the issues, all public employees have Constitutional rights, both under the U. S. Constitution and the California Constitution. Those right include the right to privacy in discipline, so that the public should never know if you have punished an employee for misconduct. In addition, public employees have due process rights under the Fourteenth Amendment of the U. S. Constitution. The Due Process clause forbids a State from depriving "life, liberty or property." The "liberty interest" prohibits an employer from making public statements about a public employee that tend to limit the "liberty" of an employee to look for another job, so that even a true statement that "stigmatizes" the employee's reputation can be a violation of the Due Process Clause. (*Board of Regents v. Roth* (1972) 408 U.S. 564.) Public statements about punishment of an employee could result in litigation in the federal court. We must avoid that.

Moreover, as I will try to make clear, below, the Brown Act is complicated, and nobody gets it right all the time. It is really difficult to prove that a person knowingly made a Brown Act error. Perhaps more important, in this case, I think that there is enough fault to go around, so that everybody, starting with legal counsel and including the Board, will have some fault for the errors that are identified.

If blame is to be assigned, defenses will be raised, and can be raised at a public session. (Gov. Code § 54957.) If an employee is blamed, that employee will have a right to a hearing and an opportunity to defend his or her actions, which would tend to shift the blame to some other employee. That will tend to lead to a series of hearings, with attorney fees, and substantial distraction from the mission of the institution. Instead, the errors should be corrected, the public should be informed of those facts identified as improperly handled in the report, and the focus placed

upon preventing the same errors in the future. That course will keep the institution on task, and save attorney fees.

3. Brown Act Fault Is Difficult to Prove

In my experience, no school or college is always in compliance with the Brown Act, because it is too complicated to understand without a huge expenditure of time, and most lawyers do not understand it. And it is very easy for a non-lawyer with a good understanding of the Brown Act to think the institution is in compliance because they are doing things the same way they did it the last time. But the "last time" is not always the same as "this time." Similar actions are treated differently under the Brown Act. Some closed session items MAY NOT be voted on in public, some closed session items MUST be voted on in public, and most, BUT NOT ALL, actions taken in closed session must be reported out to the public at that same meeting. Some actions taken in closed session MUST NOT be reported out after the closed session. So the only solution is to become as familiar as possible with the Brown Act — and its associated provision in the Education Code and other parts of the Government Code— and then to be open and friendly to the possibility that the Act was violated. In almost all cases, a violation can be cured or corrected, and there is a provision in the Brown Act for curing or correcting almost every error that might be identified. The usual cure for an error is to do it again correctly.

A significant fact about the Weiler Report — a fact that will be missed by the general public— is that the most significant error identified in the Report is not found in the Brown Act. The requirement to vote publically on administrators' contracts is contained in section 53262 of the Government Code. That is in a different part of the Government Code from the Brown Act, but it modifies a rule in the Brown Act. That statute is not even mentioned in the Attorney General's book on the Brown Act. (The Brown Act, Cal. Att. Gen (2003 ed.) Index, p. 89.) Moreover, training on the general rules for handling senior officers' contracts would not be complete for a Community College, because there are additional significant rules on employment contracts in the Education Code which are different for Community Colleges than the rules for other entities. So I will recommend training focused the particular issues specific to community colleges.

Finally, when it comes to responsibility for a Brown Act error, I recommend caution in assigning blame. In the eyes of the law, any criminal errors are not the responsibility of the staff. The Brown Act puts the responsibility for a Brown Act violation upon the Board Members, and I quote:

> Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows <u>or</u>

> has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.

(Gov. Code § 54959.) (Emphasis added.)

Most errors occur with no intention to deprive the public of information, but instead occur because of confusion or misunderstanding of the rules. And, because the statutes are so complicated, it is very difficult to prove that any individual intended to deprive the public of information. So fault is difficult to prove.

From everything that I have seen here, and the material in the Weiler Report, I do not believe that anybody intentionally violated the Brown Act, or any other provision of the various codes. None of the Board Members acted illegally. None of the Administrators identified in the Report acted illegally. None of the actions identified in the Weiler Report would have been done differently if they had been done correctly, in the full light of day. There was nothing here that merited keeping secret. So I recommend that the response to this Report should avoid assigning fault or laying blame, because that could devolve into an embarrassing situation for many people, would tend to generate unnecessary litigation, and would not advance the institution. I recommend, instead, that the focus be directed toward correcting deficiencies found in the Weiler Report and ensuring that these errors do not happen in the future.

4. Specific Issues from the Weiler Report

First, I do not see any criminal conduct identified in the Weiler Report. Criminal misconduct requires evidence of an intentional act in violation of the law. The only statutes that we can think of that might even remotely apply are the Brown Act criminal statute cited above, and section 6200 of the Government Code.

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:
> (a) Steal, remove, or secrete.
> (b) Destroy, mutilate, or deface.
> (c) Alter or falsify.

(Gov. Code § 6200.)

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A critical part of any analysis of criminal misconduct is "intention." That statute requires the intention to be "willful." To act willfully means different things in different statutes, and is the subject of many different cases, but generally it means to deliberately, intentionally, or wantonly perform an act with actual or constructive knowledge that injury is a likely result, or the conscious failure to act to avoid the act.

Under the statute identified above, a prosecutor would need to prove that the person "intended" to alter or falsify a document. "If a record is changed in good faith to make an erroneous statement of facts speak the truth, such an alteration would lack the criminal intent to violate the provisions of the statute." (*People v. McAtee* (1939) 35 Cal. App.2d 329.) So under this statute, the issues are (1) whether there was an alteration and (2) whether it was in good *faith*. Since the alterations were corrected, or can easily be corrected, and were made in good faith, there is no criminal action.

Under the Brown Act criminal provision, quoted *supra*, which only applies to elected members, the prosecutor would need to prove that an elected member intended to deprive the public of information to which the member had reason to know the public had a right. It would be easy to prove the Brown Act is complicated, and no one knew that they were violating the public's right to know. So is it unlikely that any board member could be shown to have intended to deprive the public of information. Therefore there is no criminal misconduct by any board member.

The Weiler Report specifically stated that it did not address issues of intention. (Report at p. i.) The errors could have been accidental or they could have been intentional, but the Report did not analyze that issue. Obviously, we could not analyze most of the intent issues, but we can look for motive. Logically, if there is no motive to deprive the public of information, then there was no reason for any intention to do so.

A review of the errors identified in the Weiler Report does not disclose errors that might provide any benefit to anyone, or the benefit was very small, so there was no motive to avoid public scrutiny. In each of those cases, the contract would probably have been approved if it had been publicly reviewed and properly documented. There are no errors where there was substantial benefit from the error. So there does not appear to be a motive for secrecy. I will provide more detail below to show my analysis.

Next, we do not see any significant potential for civil litigation out of the Weiler Report. There was not an actual harm to anyone. The errors are easily corrected. The public can be retroactively informed of the actions that were taken. Therefore there is no harm to be corrected in a civil suit.

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At this point, I believe that I should address the actual errors that were identified. In the Summary at the beginning of the Weiler Report, it identified a failure to comply with section 53262 of the Government Code on five contracts. That section requires contracts of senior officials of local agencies to be voted upon in open session. It is significant that another part of that particular section of the Government Code also requires all of those contracts and any settlement agreements, to be "available to the public upon request. (Gov. Code § 53262, (b).) It has been the law in California for many years that senior officials' contracts are public documents. So there is not much reason to try to keep them secret, or to violate the Brown Act, or to violate the public-voting provision to keep these public documents secret. Those contracts cannot be kept secret. Everybody in Human Resources at the District that I have spoken with about administrator contracts in the last 10 years has known that administrator contracts are public documents. That is the first item of evidence — and in my mind persuasive evidence if presented to a jury — to indicate that the errors reported were inadvertent, rather than a plot to protect secrecy.

In four of the contracts identified in the Report, the issues handled incorrectly were minor issues that were not of significant economic importance, and were the kind of contract payment that most senior administrators would expect in their contracts. Four of the contracts had an increase in the reimbursement for cell phone usage that was not voted upon in open session.

There is no indication that you acted illegally in any respect with your contract. Your contract extended the relocation payment deadline, and omitted the section on a performance evaluation, which were not voted upon in open session. The extension of time gave you no additional money, but extended the time to submit proof of relocation expenses. The removal of the evaluation provision was no benefit to you because that language also protected your evaluation, objectives, and goals, from public viewing. It did not stop your evaluation — in fact I am aware you were evaluated by the chancellor for the 04-05 and 05-06 year. So, there is no identifiable reason to keep these changes secret, which eliminates any motive to intentionally avoid voting on this provision in open session.

Similarly, the Chancellor did not act illegally with regard to his contract. The Chancellor's contract had the automatic renewal provision reduced, so that it renewed for a shorter period of time, which is actually a *worse* provision for the Chancellor. That would not be a change he would desire.

His contract also had a change to the language for the milage allowance, and the removal and then replacement of a provision addressing "maximum cash settlement." That requires an explanation. The Legislature set the maximum cash settlement for administrators and managers at 18 months. (Gov. Code § 53260.) The only change to the Chancellor's contract — when the provision was removed — is that, at some time in the future, *if* the Governing Board decided to end his employment, he agreed that he would not negotiate for a settlement larger than 18 months, by that

statute. His first contract had a 12-month provision. That provision was removed, without a vote in open session, and when the error discovered, it was then put back into the contract. The change would have only amounted to the option to negotiate for an additional six-months salary, in the event that, at some time in the future, his contract was being bought out. Because that provision would be subject to negotiation between the parties, there was no actual benefit, and only a potential future benefit, subject to negotiations during some possible future settlement talks. There is not any evidence of motive to keep the change secret. So that error appears inadvertent, and it has been corrected.

There was nothing illegal in the remaining contracts mentioned. "Portions of contracts involving benefits or detriments to the cabinet official[s], which portions were not approved in compliance with . . . section 53262, include language relating to cellular phone reimbursement as to multiple officials . . . ." The contract for Interim President Colli had changes made to the effective dates for travel expenses and cellular phone allowance. Those changes were not voted upon in open session. Again there is no evidence of motive, because those are changes that are ordinarily made to administrators' contracts, in the open, so it would appear that the staff and the Board were not aware of the provision outside of the Brown Act requiring senior staff contracts to be voted upon in open session.

There were other issues identified in the Report, including poor documentation of actions taken, and record keeping errors. The video record was incomplete. There is no evidence in any part of the report of any contract that was substantially more lucrative for the administrator, but was not reported to the public. For those additional reasons I would recommend correcting the errors rather than punishing staff who might have been responsible for the errors. Training is called for, rather than recriminations. These kinds of errors can be remedied and the public properly informed of all contract changes with some training.

5. Recommendations

I recommend that the Chancellor ask the Board to authorize actions to address the Weiler Report. My recommendations should be considered in concert with any recommendations that come from General Counsel.

I recommend doing the following actions :

(1) Training on the Brown Act by legal counsel with experience in the Brown Act for selected staff and the board;

(2) Ensure that each Board member has a copy of the Attorney General's book on the Brown Act;

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(3) Training to ensure that senior staff understand how to develop a contract in compliance with the Government Code and the Education Code, as recommended in the Weiler Report;

(4) Prepare and adopt a Procedure for preparing employment contracts, including proofreading, and adopting those contracts;

(5) Prepare and adopt a Procedure for ensuring that the agenda for closed sessions and the report out of closed sessions is performed properly, including proofreading;

(6) Prepare and adopt a Procedure for ensuring that there is a record, and proper minutes, of open sessions; and

(7) Prepare and adopt a Procedure for the public to report a contention of a Brown Act violation and a procedure to cure and correct the error.

Very truly yours,

STUTZ ARTIANO SHINOFF & HOLTZ
A Professional Corporation

Jack M. Sleeth, Jr.

JMS:djh