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FLORIDA'S SUNSHINE LAW: THE UNDECIDED LEGAL ISSUE

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Convention dictates that the author of a law review article have no personal stake in the article lest he be too emotionally involved and lose his objectivity. His exposure to the human toll that a senseless legal proposition may have imposed is deemed irrelevant. What counts is whether the proposition is, in the dry vernacular of Socratic logic, invalid or at least unsound. This Article departs from that convention by placing a very personal face on the wrenching consequences and absurdities that flowed from a legal proposition (herein called the "per se board meeting rule") that, I submit, is both invalid and unsound. This Article's purpose, however, is not to vindicate the victims. Rather, its purpose is to set the rule in a real life situation to dramatize the need to correct a misconception of the law that makes a mockery of Florida's judicial processes and undermines effective representative government in the State.

I. BACKGROUND

On March 9, 2000, a grand jury indicted Richard Aldrich (Aldrich) and Allen Seed (Seed), two elected trustees of the Indian River County Hospital District (District), for knowingly violating title 19, Section 286.011 of the Florida Statutes (Sunshine Law). The grand jury charged that Aldrich and Seed violated the Sunshine Law by meeting in private with Rock Tonkel (Tonkel), the District's executive director, and Donna Skinner (Skinner),

another District trustee, and discussing matters pending before the District's governing body (District Board).[1] The charges could have resulted in imprisonment.[2]

The Sunshine Law, enacted in 1967, provides in relevant part as follows:

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, . . . at which official acts are to be taken are declared to be public meetings open to the public at all

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1. Florida v. Seed, No. New 00-369 (19th Fla. Cir. Ct. 2000) (indicting Seed for violation of the Sunshine Law). The count against Seed read in relevant part that on or about August 19, 1999, Seed did

> knowingly violate the provisions of Florida Statute Section 286.011(3)(b) by attending a meeting not held in accordance with the provisions of Florida Statute 286.011(1) & (2), and discussing subject matter that could foreseeably come before the Indian River County Hospital District Board of Trustees; in violation of Florida Statute 286.011(3)(b).

An identical count was brought against Aldrich. Florida v. Aldrich, No. New 00-370 (19th Fla. Cir. Ct. 2000) (indicting Aldrich for violation of the Sunshine Law). Aldrich was also charged with a second Sunshine Law violation in connection with a meeting that occurred on or between the dates of July 1, 1999 and August 31, 1999. *Id.* The charges were dropped before Aldrich found out when this alleged meeting occurred or what it was about.

2. FLA. STAT. § 286.011 (2000). Subsections (2) and (3) of the Sunshine Law read as follows:

> (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.
>
> (3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500.
>
> (b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision and who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.
>
> (c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

> times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.[3]

Beyond the bare language cited above, there is no provision in the Sunshine Law that states its purpose, and no documented legislative history that elucidates such purpose, other than a prior open meeting law that applied only to cities and towns and a Florida Supreme Court case interpreting that law.[4] Laying aside for the moment the prior law and court case, the only purpose one can safely infer from the Sunshine Law is that the Legislature intended to prohibit secret meetings of public boards.

The meeting giving rise to the indictments of Aldrich and Seed occurred over dinner, following a regular meeting of the District Board. Although there is a dispute as to whether they ever discussed any pending District business at the dinner, the facts are clear that:

i. The dinner meeting was a spontaneous get together the primary, if not sole, purpose of which was social in nature;
ii. Aldrich, Seed and Skinner did not constitute a quorum of the District Board;
iii. Neither the District Board, nor any quorum of the District Board, ever established a committee composed of, or authorized the meeting of, or otherwise delegated authority to, Aldrich and Seed, or Aldrich, Seed, and Skinner, to discuss the matters allegedly discussed at the dinner meeting;
iv. The dinner meeting was not part of a collaborative undertaking of the District Board (or any quorum thereof) to circumvent the open meeting requirement of the Sunshine Law by, for example,

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3. FLA. STAT. § 286.011 (2000).

4. FLA. STAT. § 165.22 (1969); Turk v. Richard, 47 So. 2d 543 (Fla. 1950). For a detailed discussion see Ruth M. Barnes, *Government in the Sunshine: Promise or Placebo?*, 23 FLA. L. REV. 361-62 (1971). The only legislative history adduced by the author was a series of amendments that were considered but had no bearing on the overall intent of the Sunshine Law, nor on what the Legislature meant by the term "meetings of any board or commission." The author did, however, state, based on interviews with two state legislators who supported the bill creating the Sunshine Law, that the bill's supporters "felt that certain state and local practices, manifested in closed meetings and behind-the-scenes manipulation, indicated an urgent need for abolition of secretive government practices," and that "without media influence and pressure [the bill] might never have survived committee action." *Id.* No examples were given of such "secretive government practices." *Id.* Though inconclusive, this kind of anecdotal evidence is hardly legislative history upon which a court could rely. This point is tellingly underscored in subsequent interviews of one of the two legislators, Senator J. Emory Cross, who denounced the per se board meeting rule criticized in this Article. *See infra* text accompanying notes 84 & 85.

> subdividing into smaller groups in order to secretly forge a majority position on the District business allegedly discussed at the dinner.

In the Grand Jury's Interim Report, dated March 9, 2000, the grand jury made clear that for purposes of the indictments it treated, "any gathering of two or more members of the same board, outside of a properly noticed public meeting, to discuss some matter which will foreseeably come before that board for . . . action" as a violation of the Sunshine Law.[5] This characterization of a Sunshine Law violation assumes that such a gathering, whether or not sanctioned by the board is, ipso facto, a meeting of that board within the meaning of the Sunshine Law (the per se board meeting rule). Under such a rule, the above stated facts are no defense for an alleged infraction of the Sunshine Law, other than perhaps the more punitive infraction of knowingly violating that law under Section 286.011(3)(b).

Driven by the logic of the per se board meeting rule, the Grand Jury Report also took Skinner and Tonkel to task for not stopping the discussion or reporting the matter to law enforcement agents. The Grand Jury Report even castigated Dr. Broadus Sowell, chair of the District Board, for not taking similar action or at least hanging up when another trustee phoned him concerning some Hospital District business. The grand jury found, however, there to be no evidence that Dr. Sowell participated in "telephone calls . . . to the extent that he was in violation of the Sunshine Laws."[6]

Eventually, the prosecutor dropped all criminal charges, including related felony perjury charges.[7] In exchange Aldrich and Seed pled nolo contendere to a noncriminal infraction of the Sunshine Law. This resolution occurred only after Aldrich and Seed had been arrested, had their mug shots taken, were finger printed, jailed, pilloried in the press, and subjected to considerable emotional turmoil and huge defense costs. Neither defendant was prepared to endure the uncertainty and additional expense of a jury trial and possible appeal. The threat of a criminal conviction, however remote, was simply too much to bear.[8]

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5. Grand Jury Interim, 1 Report (Fla. Cir. Ct. 2000).

6. *Id.* at 2-3. It is clear that, under the per se board meeting rule, Skinner and Sowell would have also been indicted for Sunshine Law violations but for the lack of sufficient evidence that they participated in discussions about District Board business. Tonkel escaped indictment because he was a District employee and not a District Board trustee. *Id.*

7. Assistant State Attorney Chris Taylor was quoted in the local newspaper as stating that "the evidence doesn't support (an) intentional act." Adam Chrzan, *Two Take Pleas*, VERO BEACH PRESS J., June 24, 2000, at A1.

8. After the criminal charges were dropped, Aldrich and Seed asked the District to reimburse them for the legal expenses they incurred in defending themselves. The District Board,

If the prosecutor had not dismissed the criminal charges, Seed would have brought a motion to dismiss the Sunshine Law violation charge on the grounds, inter alia, that even assuming he and Aldrich discussed pending District business at the dinner, the gathering was not a meeting within the purview of the Sunshine Law.[9] This Article sets forth the reasons for such a motion.

At this point the reader may be tempted to stop, and without reading on, dismiss this Article as the slanted rantings of an outraged brother unfamiliar with Florida law and hostile to the Sunshine Law. The author pleads guilty to outrage. Hopefully this Article will show that he is only too familiar with Florida law. As for the Sunshine Law, the author unreservedly supports it. The public, and yes, the media are entitled to be made privy to the collective deliberations of public board members whenever they act on behalf of that governing body, whether they conduct themselves as a quorum of that body or of any committee, subcommittee, or other gathering authorized by the governing body to act on its behalf.[10] It should make no difference whether such action is formal or informal, preliminary in nature or binding upon the board as a whole.

However, an open meeting requirement should not suppress private one-on-one consultations between and among board members when they have no authority, either individually or collectively, to act on the board's behalf concerning the matters discussed. The per se board meeting rule has such an effect, and, as more fully discussed in this Article, this rule neither serves the public benefit, nor comports with any common sense understanding of what is meant by a board meeting under the Sunshine Law.

What is most astounding about the per se board meeting rule is its genesis. Contrary to conventional wisdom, the Florida Supreme Court has never approved the rule in any definitive holding. The rule was instead born of unsupported dicta of an activist Florida Supreme Court Justice that was disowned by a majority of the Court but embraced by the media and the State Attorney General. It was nurtured by tortured reasoning and case law denial. It eventually gained a life of its own once a District Court of Appeal, in a bizarre opinion, implicitly adopted the rule as the law of the land,

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by a 4-3 vote, refused the request on the grounds that the District Board had not authorized the meeting in question. Henry A. Stephens, *Trustees Deny Seed's Legal Fees*, VERO BEACH PRESS J., Sept. 23, 2000, at A3. The Board later reversed itself by a 6-1 vote when Aldrich sued the District and agreed with Seed to settle any reimbursement claim for 50 cents on the dollar. Henry A. Stephens, *Hospital District Agrees to Pay Part of Fees*, VERO BEACH PRESS J., Apr. 22, 2001, at A3.

9. FLA. STAT. § 286.011(2)(b).

10. This Article does not discuss what kind of formal board discussions should be exempted from the Sunshine Law. That is a matter properly left for the Legislature to decide.

notwithstanding that two other District Courts of Appeal had held to the contrary.

Although all fifty states have enacted open meeting laws, only one other state appears to have adopted the per se board meeting rule.[11] That state, Colorado, did so in express statutory terms,[12] but only as applied to state boards and commissions. A careful review, in chronological order, of the applicable legislative history and case law surrounding the Sunshine Law reveals that Florida also is not, and should not be, bound by a per se board meeting rule.

II. CASE LAW UNDER PRIOR LAW

A. *1905*

Florida Statutes, 1967, Chapter 165.22 (the Prior Law), enacted in 1905, was the law in effect when the Sunshine Law was adopted in 1967.[13] The Prior Law provided in relevant part, "All meetings of any city or town council or any board of alderman of any city or town in the state, shall be held open to the public of any such city or town . . . ."[14] This law contained a fine or imprisonment enforcement provision.[15] Not until 1950 was there any published court case interpreting the Prior Law.[16]

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11. Reporters Committee for Freedom of the Press, *Tapping Official's Secrets* (4th ed. 2001), *available at* http://www.rcfp.org./tapping (last visited Feb. 7, 2002).

According to *Tapping*, 33 of the remaining 49 states require, mostly by statute and some by judicial interpretation, that a quorum of the board members meet before there can be a meeting of the board under the respective open meeting laws. The only case cited in *Tapping* from another state that interprets board meetings in a manner remotely close to the per se board meeting rule is *Mayor of El Dorado v. El Dorado Broadcasting Co.*, which held, over a vigorous dissent, that "meetings formal or informal . . . of the governing bodies" include any meeting of more than two members of the governing body "called by the mayor or any member of the city council at which members of the city council, less in number than a quorum meet for the purpose of discussing or taking any action on any matter on which foreseeable action will be taken by the city council." Mayor of El Dorado v. El Dorado Broad. Co., 544 S.W.2d 206, 207-08 (Ark. 1976) (quoting ARK. CODE ANN. § 12-2805 (Michie 1968)).

12. COLO. REV. STAT. § 24-6-402(2)(a) (2001). For local governments in Colorado, the open meeting requirement applies to meetings of either a quorum or three or more members of the local governing body gathered together, whichever is less. *Id.* Only Alaska and Virginia has a statute embracing this "lesser of quorum or three or more members" test. ALASKA STAT. § 44.62.310(h)(20)(A) (Michie 2001); VA. CODE. ANN. § 2.1-341.

13. FLA. STAT. § 165.22.

14. *Id.*

15. *Id.*

16. Turk v. Richard, 47 So. 2d 543 (Fla. 1950).

B. *1950*

In *Turk v. Richard*,[17] the Florida Supreme Court, in a declaratory judgment action seeking interpretation of the Prior Law, held that the Prior Law only applied to "formal assemblages of the council sitting as a joint deliberative body as were required or authorized by law to be held for the transaction of official municipal business . . . ."[18] The Florida Supreme Court reasoned that a gathering of some or all of the members of a city council only constitutes a meeting of that council under the Prior Law if action taken at such a gathering could bind the individual members.[19] Accordingly, the Florida Supreme Court found that without a formal meeting held in the manner prescribed by law, there was no "meeting" under Chapter 165.22.[20]

Admittedly, this holding seems unnecessarily restrictive to the extent it implies that only formal assemblages held for the transaction of official business, as distinguished from non-binding discussions, can constitute meetings of the governing body.[21] A lone concurring opinion even went so far as to say that the holding in *Turk* permitted establishment of a special committee of the governing body which could meet in private to discuss matters that would have to be discussed in public at a meeting of the governing body as a whole.[22] Implicit in the concurring opinion was that the special committee would not have the power to decide any issue on behalf of the governing body and that the committee meeting would not, therefore, be a meeting of the governing body.

Regardless of where the remaining Justices stood on that position, the Florida Supreme Court, as a whole, clearly felt compelled to interpret the Prior Law in a manner that would only subject to the open meeting law gatherings for which the board as a governing body could reasonably be held responsible.

There is nothing in the Sunshine Law, as it reads, that could possibly lead one to conclude that the Legislature intended to overrule *Turk*. On the contrary, looking solely at the language of the Sunshine Law, an opposite conclusion seems compelled by the fact that under section 286.011(1) of the Sunshine Law the applicable language refers only to "meetings of any board or commission of any state agency or authority or of any agency or

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17. *Id.*
18. *Id.* at 544.
19. *Id.*
20. *Id.*
21. *Turk*, 47 So. 2d at 544.
22. *Id.* (Chapman, J., concurring).

authority of any county, municipal corporation or political subdivision . . . *at which official acts are to be taken* . . . ."[23] It is hard not to conclude that the italicized words ratify, rather than reject, the holding in *Turk*.[24] Without clear and substantial evidence of legislative intent to the contrary, under accepted canons of statutory construction, the plain meaning of the Sunshine Law requires the conclusion that at the very least, the prohibited meeting satisfy the statutory requirement that it be a meeting of the governing body (in our case, the District Board) as distinguished from an informal gathering of individual officials (in our case District trustees) that is neither sanctioned by the governing body nor capable of taking any action on behalf of the governing body.

The simple fact is that without a quorum or some form of delegated authority, the governing body should not be held liable for informal gatherings of one or more of its members. Nor can it be logically expected to give notice of such an unauthorized gathering that is unknown to the board.[25] Without such a nexus to the governing body, there is no meeting which could reasonably be characterized as a board meeting. If the Legislature had intended to broaden the coverage of the Sunshine Law to include one-on-one consultations and other nonquorum gatherings, the Legislature could easily have said so, expressly stating that "meeting" means the gathering of two or more members. In short, the Legislature could have adopted the per se board meeting rule forbidding the private congregation of two or more board members whenever board matters are discussed, if that was its intent.

In the absence of legislative history in support of the per se board meeting rule, *Turk* and restraining words of the statute seem to foreclose such a rule. How then did it arise? As one of the author's law professors was so fond of saying, "Read on."

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23. FLA. STAT. § 286.011 (2000) (emphasis added).

24. This conclusion is reinforced by the fact that the official acts language was added in the 1967 bill after an identical bill without that language had died in committee for six successive years. Robert E. Greenberg, *An Annotated History of Florida's "Sunshine Law,"* 118 CONG. REC., 26908, 26912 n.7 (1972).

25. The notice requirement in the statute was added in 1995. FLA. STAT. § 286.011(1) (1995). The courts had already held that the statute necessarily required notice. TSI S.E., Inc. v. Royals, 588 So. 2d 309, 310 (Fla. 1st DCA 1991); Rhea v. City of Gainesville, 574 So. 2d 221, 222 (Fla. 1st DCA 1985); *see also* Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973).

III. CASE LAW UNDER SUNSHINE LAW

A. *The Insinuation of the Per Se Board Meeting Rule*

1. 1969

The Florida Supreme Court first addressed the Sunshine Law in *Board of Public Instruction of Broward County v. Doran*.[26] In that case the Court upheld the constitutionality of the Sunshine Law and the final judgment of the trial court enjoining the governing body of a political subdivision from violating the Sunshine Law,

> including, without limitation, the holdings of meetings or conference sessions *at which a quorum is present*, wherein all or part of the public is excluded, . . . or at which are held any discussions on current, or forseeably so, matters, not privileged, pertaining to the duties and responsibilities of the BOARD OF PUBLIC INSTRUCTION OF BROWARD COUNTY.[27]

The facts giving rise to *Doran* involved two meetings convened by the governing body at which no formal action was taken.[28] Four members of the school board, constituting a quorum, were present at the first meeting.[29] As stated by Justice Adkins, it was a "routine meeting held every Wednesday before the formal action."[30] Justice Adkins further recited that during the meeting "the *board* discussed a proposed salary schedule. . . ."[31] He later added, "[t]he *board* then passed a motion to exclude all people except the press from the conference meeting."[32] The second meeting discussed in *Doran* involved the entire school board. All the members met to discuss business of the board.[33] This was a meeting where "the *board* met in closed session for a period of two and one-half hours."[34] In short, both meetings

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26. 224 So. 2d 693 (Fla. 1969).
27. *Id.* at 697 (emphasis added).
28. *Id.* at 695-97.
29. *Id.* at 695.
30. *Id.* at 696.
31. *Doran*, 224 So. 2d at 696 (emphasis added).
32. *Id.* (emphasis added).
33. *Id.*
34. *Id.* (emphasis added).

were properly cast as meetings *of the board*, and not an informal gathering of less than a quorum.[35]

The fact of the matter is *Doran* focused on meetings which could only be characterized as "meetings" of the board. As previously stated, the crux of the judgment was an injunction that forbade "meetings or conference sessions *at which a quorum is present*."[36]

In *Doran*, Justice Adkins construed the Court's opinion in *Turk* as limiting the open meeting requirement to "formal assemblages for the transaction of official business."[37] The issue was, therefore, whether the Court was bound by this formulation of the *Turk* decision. Justice Adkins attempted to glean from the Sunshine Law a legislative override of this interpretation. He stated:

> Under the decision in *Turk v. Richard, supra*, it would have been unnecessary to include a provision declaring certain meetings as "public meetings" if the intent of the Legislature had been to include only formal assemblages for the transaction of official business. The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board.[38]

The first sentence makes little sense. The statement in the Sunshine Law that all meetings of the governing body are declared to be public meetings merely provides the reason for requiring that they be open to the public.[39] As for the second sentence, without more it is simply an unsubstantiated categorical assertion. Of course, Justice Adkins could offer no evidence in the nature of legislative staff reports, committee hearings, debates before the Legislature or otherwise that supported what he concluded was the "obvious intent" of the Legislature when it adopted the Sunshine Law.[40]

In light of the existence of the Prior Law and *Turk*, the only logical explanation for the Sunshine Law, given the Legislature's failure to indicate a contrary intent, is that the Legislature did not intend to override *Turk*, but rather intended to (1) expand the reach of the prior law to cover all state agencies and local governmental units instead of just cities and towns, and (2) put more teeth in the law by invalidating actions taken at such private

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35. *Id.*
36. *Doran*, 224 So. 2d at 697 (emphasis added).
37. *Id.* at 698.
38. *Id.*
39. FLA. STAT. § 286.011(1).
40. *Id.*

meetings and allowing for injunctive relief to carry out the purposes of the Sunshine Law. This is exactly the position the Second District Court of Appeal took in *Times Publishing Co. v. Williams*[41] six weeks before the Florida Supreme Court handed down its decision in the *Doran* case.

In *Times Publishing Co.*, the District Court reversed the trial court's dismissal of a complaint that sought to enjoin secret meetings of a school board.[42] The District Court stated:

> The legislature is presumed to have been aware of the ruling case law as it relates to the subject matter of [the Sunshine Law], and to have drawn it with those cases in mind. It is obvious that the legislature intended to extend application of the "open meeting" concept so as to bind every "board or commission" of the state, or of any county or political subdivision over which it has dominion and control. In so doing, it expressly provided that the act related to "All meetings [of the governing bodies involved] * * * at which *official acts* are to be taken * * *," and as *one of the remedies* for a violation thereof it effectively voided any "formal action" taken by such bodies at closed meetings. *There is nothing in the language of the act from which it can be said that the legislature intended to avoid or limit the holding in Turk.* As far as it goes, the *Turk* case is helpful as it relates to the nature of the meetings covered by such an act, and insofar as it defines "meetings."[43]

The District Court did not, however, interpret *Turk* as requiring that the "meeting" be a formal assemblage held to take formal action, as asserted in *Doran*. The District Court took a different track, stating:

> [The *Turk*] case really only stands for the proposition therefore, *that a "meeting," within the purview of the act, is a joint assemblage at which "formal action" could be taken, though not necessarily certain to be taken.*[44]

In short, the District Court read *Turk* (correctly, it is submitted) as requiring that the assemblage be a gathering of members who at least have the authority to take formal action on behalf of the governing body.[45] The

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41. 222 So. 2d 470 (Fla. 2d DCA 1969).
42. *Id.* at 477.
43. *Id.* at 473 (emphasis added).
44. *Id.* (emphasis added).
45. *Id.* at 472-73.

District Court then held that the Sunshine Law requirement, that the meeting be one at which official acts are to be taken, is satisfied so long as the meeting includes "any discussion, deliberation, decision, or formal action . . . relating to, or within the scope of, the official duties or affairs of such body."[46]

In reaching its decision, the District Court reasoned that "formal action" was merely a subset, or the last step, of the official acts that could be taken at a board meeting, and that it would make no sense to limit official acts to formal action which the public can in any event easily ascertain.[47] Hence, any board meeting discussions that may lead to formal action constitute "official acts" under the Sunshine Law as interpreted by the District Court.[48]

Over the next thirty years, the State Attorney General, in a string of advisory opinions, miscited the District Court's discussion of official acts as authority for the per se board meeting rule.[49] In every instance, the opinions conveniently ignored the holding of the Second District Court of Appeal that the *Turk* court's definition of "meeting" applied and that, to

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46. *Times Publ'g Co.*, 222 So. 2d. at 474.

47. *Id.* at 473-74.

48. The relevant language from the District Court opinion reads as follows: "[T]he question still remains as to just what is meant by the terms 'official acts' and 'formal action' which were added [to the Sunshine Law]; and the *Turk* case cannot help us there because these phrases were not in the act before that court." *Id.* at 473.

The District Court further reasoned that

> [e]very thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us.

Id.

In conclusion, the District Court stated,

> [w]e think then that the legislature was obviously talking about two different things by the use of these phrases, and we can't agree with appellee that "official acts" are limited to "formal action," or that they are synonymous. Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the formal execution of an official document. . . . Thus, in the light of the language in *Turk*, *supra*, and of the obvious purpose of the statute, the legislature could only have meant to include therein the acts of deliberation, discussion and deciding occurring prior and leading up to the affirmative "formal action" which renders official the final decisions of the governing bodies.

Id. at 473-74.

49. *See infra* text accompanying notes 82, 150, and 202.

come under the Sunshine Law, the meetings therefore had to occur at a joint assemblage at which formal action could be taken on behalf of the governing body.

In *Doran*, the majority of the Florida Supreme Court concluded that *Turk* permitted informal secret meetings so long as no formal action was taken on behalf of the governing body.[50] Justice Adkins, writing for the Florida Supreme Court, had to either ignore the well established rule of construction that the Legislature drafted the Sunshine Law with *Turk* in mind, or concoct a legislative override. He would have been better off if he had adopted the reasoning of the Second District Court of Appeal in *Times Publishing Co.*

In *Doran*, the Florida Supreme Court left the question of whether the Sunshine Law applied to meetings of less than a quorum to another day. However, some may argue that Justice Adkins set the stage for the per se board meeting rule in his rebuttal of the contention that the Sunshine Law applied only to meetings at which an official act occurred. Justice Adkins wrote, "defendant contends that factually no 'official act' occurred within the meaning of the law and injunctive relief was improperly granted plaintiff."[51]

Adkins then launched a broadside attack on secret meetings in general. His opinion stated:

> The right of the public to be present and to be heard during all phases of enactments *by boards and commissions* is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, *these specified boards and commissions, through devious ways,* should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

50. Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 698 (Fla. 1969).
51. *Id.* at 699.

> Statutes enacted for the public benefit should be interpreted most favorably to the public.[52]

The Adkins rhetoric about inalienable rights to be present was classic emotive reasoning with no foundation in fact.[53] It is universally accepted that under the common law no such right existed.[54] Yet, even taking Justice Adkins' comments at face value, when all the dust settled, it was actions "of the board and commission" against which he railed, leaving one to reasonably conclude that gatherings of less than a quorum of the board members unsanctioned by the board were not within the ambit of his scorn.[55]

2. 1970

In *Jones v. Tanzler*,[56] the First District Court of Appeal did not overreact to the Adkins rhetoric.[57] In this case the trial court ordered dismissal of an amended complaint that a Sunshine Law violation had occurred when council business was discussed at an informal private meeting of less than a quorum of the members of the City Council.[58] The trial court found that such a meeting was not contrary to the Sunshine Law.[59] On appeal, the District Court affirmed the trial court's order in a per curiam opinion.[60] The District Court stated that:

> [w]e have compared the alleged facts in this case with the alleged facts contained in [*Doran*] . . . and we do not find that the order of the trial court dismissing the last amended complaint without leave to further amend is in conflict with said *Doran*.[61]

This statement was a clear cut holding that a meeting under the Sunshine Law requires a quorum of the members of the board or commission. Justice

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52. *Id.* (emphasis added).

53. *Id.*

54. Justice Adkins in a later case acknowledged that there was no common law right to public meetings. *See* City of Miami Beach v. Berns, 245 So. 2d 38, 40 (Fla. 1971).

55. *Doran*, 224 So. 2d at 699.

56. 234 So. 2d 372 (Fla. 1st DCA 1970).

57. *Id.*

58. *Id.*

59. Justice Adkins brought out those facts in his concurring opinion. Jones v. Tanzler, 238 So. 2d 91, 92 (Fla. 1970) (Adkins, J., concurring).

60. *Tanzler*, 234 So. 2d at 372.

61. *Id.*

Adkins' vigorous concurrence when the case came before the Florida Supreme Court underscored this point.[62]

In *Jones v. Tanzler*, the Florida Supreme Court, by petition for certiorari, was asked to review the decision of the District Court on the grounds that it was in direct conflict on the same point of law with the decision in *Doran*.[63] Such a conflict was needed in order for the Florida Supreme Court to take jurisdiction of the case.[64] In a per curiam opinion, the Florida Supreme Court discharged the appeal.[65] At this point it would appear that the Florida Supreme Court had concluded that the holding of the Appeals court was not in conflict with the Florida Supreme Court's decision in *Doran*. Two concurring opinions, however, show a lack of unanimity on the issue.

Justice Adkins concurred specially in the opinion in which the Chief Justice also concurred.[66] In his special concurring opinion, Justice Adkins stated that, but for the bond validation proceedings, he would have quashed the opinion of the First District Court of Appeal on the grounds that the complaint showed a violation of the Sunshine Law.[67] He stated that he concurred in the discharge of the writ of certiorari for the sole reason that the questions raised in the alleged Sunshine Law violation "are properly presented in the pending validation proceedings. . . ."[68]

All in all, four justices in effect concluded that the District Court's opinion did not conflict with *Doran*, Justice Adkins and the Chief Justice concluded there was a conflict, and Justice Roberts finessed the issue without joining either side of the issue.[69]

Justice Adkins spelled out his concerns as follows:

> Defendants contend that no official action as contemplated by the law could be taken until a quorum of the Council acted and an informal gathering of a small group of the Council wherein no official action could be taken does not come within the meaning of a gathering of members of a board or commission. The statute does not make reference to the existence of a quorum. All meetings of any agency or authority of a municipal corporation are declared to be public meetings open to the public at all times. The important

62. *Tanzler*, 238 So. 2d at 92 (Adkins, J., concurring).
63. *Id.*
64. FLA. CONST. art. V, § 3(b)(3).
65. *Tanzler*, 238 So. 2d at 91.
66. *Id.* at 94 (Adkins, J., concurring).
67. *Id.*
68. *Id.* (Adkins, J., concurring).
69. *Id.* at 92.

question is not whether a quorum was present, but whether the members deal with any matter on which foreseeable action may be taken.

There is no law which prevents members of a board [or] commission from attending a social gathering at the same time, but the statute should not be circumvented by this Court in placing the stamp of approval on small individual gatherings wherein public officials, regardless of good intentions, may reach decisions in private on matters which may foreseeably affect the public. It is elementary that the officials cannot do indirectly what they are prevented from doing directly.

* * *

The right of the public to be present and to be heard should not be circumvented by having secret meetings of various *committees* composed of members of the Council and vested with [the] authority to make recommendations to the Council.

* * *

[A]ny Council could divide itself into groups of small *committees* and each councilman would have the opportunity to commit himself on some matter on which foreseeable action will be taken by expressing himself at a secret *committee* meeting . . . The ultimate action of the entire Council in a public meeting would merely be an affirmation of various secret *committee* meetings. . . .[70]

Justice Adkins was in effect saying that the risk of secret meetings can only be thwarted by making the Sunshine Law apply to any group of board members acting as a committee of the board, regardless of the language of the statute.[71]

The fact remained that a majority of the Florida Supreme Court, by discharging the writ of certiorari in *Jones*, concluded that the holding in *Tanzler* was not in conflict with *Doran*. Hence, the Florida Supreme Court did not have jurisdiction to take the appeal. As previously noted, *Tanzler* required a quorum for application of the Sunshine Law.

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70. *Tanzler*, 238 So. 2d at 92-93 (Adkins, J., concurring) (emphasis added).

71. *Id.* at 91.

In *City of Miami Beach v. Berns*,[72] the Third District Court of Appeal interpreted *Doran* to mean that the Sunshine Law "[applies] not only to formal *quorum* meetings thereof but also to informal preliminary meetings of *all or part of* the members of such boards dealing with matters as to which it was foreseeable that action would be taken by the board."[73] A first year law student would fail a test if the student said that *Doran* contained such a holding.[74] It clearly did not.

3. 1971

The Florida Supreme Court, in an opinion written by Justice Adkins, affirmed the Third District Court of Appeal's holding in *City of Miami Beach v. Berns*[75] that the Sunshine Law superseded and repealed the Prior Law and applied to all meetings of the city council, including informal executive sessions of the council "at which the public is excluded for the discussion of condemnation matters, personnel matters, pending litigation or any other matter relating to city government."[76] These sessions were clearly meetings of the governing body as a whole. In his opinion, however, Justice Adkins could not resist launching into a discussion of the Sunshine Law that far exceeded the scope of the question presented by writ of certiorari to the Court. He wrote:

> A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials mentioned in Fla. Stat. § 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the government in the sunshine law, regardless of whether the meeting is formal or informal.
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> * * *
>
> It is the law's intent that any meeting, relating to any matter on which foreseeable action will be taken occur openly and publicly. In this area of regulating, *the statute may push beyond debatable limits* in order to block evasive techniques. An informal conference or

72. 231 So. 2d 847 (Fla. 3d DCA 1970).
73. *Id.* at 849 (emphasis added).
74. *See supra* text accompanying note 38 and subsequent discussion herein of *Doran*.
75. 245 So. 2d 38 (Fla. 1971).
76. *Id.* at 39.

caucus of any two or more members permits crystallization of secret decisions to a point just short of ceremonial acceptance.[77]

It is not the statute, but Justice Adkins in the above quoted dicta pushed the Sunshine Law beyond debatable limits. A superficial reading of *Berns* would seem to suggest that the Court (albeit in dicta) embraced a per se board meeting rule.[78] However, a more careful reading of the case leads to a contrary conclusion. In the penultimate paragraph of the opinion, Justice Adkins made an extraordinary admission that reflected a significant division in the Florida Supreme Court by stating that the *majority* of the Court is of the opinion that this case should be decided *solely upon the question presented by the petitioner* and that future problems will have to be met as they arise.[79]

That question, certified to the Florida Supreme Court, simply posed whether the Sunshine Law repealed the prior law and whether meetings under the Sunshine Law included informal executive sessions of the city council.

Notwithstanding that (1) the Second District Court of Appeal held in *Times Publishing Co.*, that it was bound by the *Turk* definition of "meetings," (2) the First District Court of Appeal in *Tanzler* held that a quorum was required for application of the Sunshine Law, (3) the majority of the Florida Supreme Court necessarily concluded that *Tanzler* was not in conflict with *Doran*, which focused on "meetings or conference sessions at which a quorum is present,"[80] and (4) the majority of the Florida Supreme Court in *Berns* took the extraordinary action of requiring that Justice Adkins expressly limit his opinion to the question certified to the Court, namely, in relevant part, whether the Sunshine Law applied to "informal executive sessions of the city council," in *Attorney General Opinion* 071-32, March 3, 1971, the State Attorney General chartered a different course. The Attorney General instead opined that the Sunshine Law applied to a telephone conversation between two members of a board or commission relating to or bearing upon the public's business and then cited as the sole authority for his opinion the *Doran* and *Times Publishing Co.* cases.[81] Language taken from these two cases elucidated what constituted "official acts" under the Sunshine Law and was mistakenly quoted as authority for what amounted to a board "meeting" under that

77. *Id.* at 41 (emphasis added).
78. *Id.*
79. *Id.* (emphasis added).
80. *See supra* text accompanying note 36.
81. *See id.*

law.[82] Thus, the State Attorney General, for the first time, applied but did not fully articulate, the per se board meeting rule.

Although the Attorney General opinion was only advisory, and not binding on the courts,[83] it helped lay the foundation for the myth that the courts had adopted the per se board meeting rule, when in fact the only court which clearly addressed the issue in a non quorum context was the First District Court of Appeal in *Tanzler*, which clearly held to the contrary. As for the *Doran* and *Times Publishing Co.*, for the reasons herein stated, reliance on those cases was at best misplaced.

In a newspaper interview, the Sunshine Law's Senate author, J. Emory Cross, considered to be the father of the Law, characterized the Attorney General's telephone opinion as "way out" absurd.[84] The newspaper article further reported that Cross thought the requirement of a quorum "was clearly put, indicating he did not intend to prevent a couple of public officials meeting for dinner or talking on the phone for fear of violating the law."[85] Even thoughtful members of the press questioned the reach of the telephone opinion. Pulitzer Prize winning journalist H.G. "Buddy" Davis, who wrote articles exposing the evils of closed door meetings, was quoted as saying, "When a responsible guy goes around and says two officials have to invite reporters to listen to a phone conversation — that's ridiculous."[86]

Later in the year, members of the Florida Society of Newspapers were more explicit and on the mark, stating "[o]ur concern is with closed

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82. 32 Fla. Op. Att'y Gen. 51-52 (1971). The Attorney General's non sequitur followed: "Thus, telephone conversations between public officials on aspects of the public's business are part of the process which ultimately leads up to final recorded action in a formal public meeting, and they may not be held covertly." *Id.* at 52.

The Attorney General failed to either appreciate or acknowledge that the language upon which he relied addressed what constituted official acts, rather than what amounted to a board meeting, under the Sunshine Law and that the two cases from which the language was taken can only be read as holding that such a meeting must be "a joint assemblage at which 'formal action' could be taken" (Times Publ'g Co. v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969); *see supra* text accompanying note 44) or "any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board" (*Doran*, *see supra* text accompanying note 38). A per se board meeting rule simply cannot be inferred.

83. Leadership Hous., Inc. v. Dep't of Revenue, 336 So. 2d 1239, 1241 (Fla. 4th DCA 1976) (overruling an attorney general opinion). As stated in the web site for State Attorney General Opinions under the caption *General Nature and Purpose of Opinions*, "[the attorney general opinions] are advisory only and not binding in a court of law," *available at* http://legal.fsu.edu/opinions/faq.html (last visited Feb. 10, 2002).

84. Greenberg, *supra* note 24.

85. When research assistant, Robert E. Greenberg, later interviewed Cross on July 7, 1972, the senator repeated his characterization of the State Attorney General's "absurd ruling that the law applied when two or more public officials congregate." *Id.* at 26912.

86. *Id.* at 26913 (citing in note 111 MELBOURNE TIMES, Mar. 19, 1971, at 3).

meetings or hideaway meetings by a quorum or committee with authority to act."[87]

In *Attorney General Opinion* 071-295, September 24, 1971, the Attorney General resumed his misplaced reliance on case law. This time he seized upon the disavowed Justice Adkins dicta in *Berns* and twisted that language into a Court holding. In response to the question as to whether members of the governing body could go on a boat trip or have lunch together prior to a formal meeting on the same day without opening the event to the public, the Attorney General said:

> [A] purely social meeting at which no official business is to be discussed or transacted might not violate the letter of the Sunshine Law. However, when such a meeting is held in a place where the public and the press are effectively excluded from participation, it is a "secret meeting" as defined by the court in the *Berns* case, *supra*; and the court might very well conclude that such a meeting is an "evasive technique" to avoid the statute, *just as it held that a discussion of official business by less than a quorum "permits crystallization of secret discussions to a point just short of ceremonial acceptance" and should be avoided.*[88]

The Attorney General's statement of the holding in *Berns* addressing situations when less than a quorum is involved, is simply untrue. As previously stated, the question certified to the Court involved a quorum, and the majority of the Court clearly disowned the Adkins dicta that underpinned the Attorney General's opinion. The Court deferred deciding whether even a committee of less than a quorum of the board, much less an unsanctioned meeting of less than a quorum of the board, was subject to the Sunshine Law. That judicial restraint did not deter the Attorney General in AGO 071-346, October 21, 1971, from opining, without citation of authority, that committees of less of a quorum of the board were required under the Sunshine Law to give reasonable notice of their meetings.[89]

4. 1972

In 1972, the State Attorney General embraced the per se board meeting rule with a vengeance. Without citation of any case law authority, he opined in AGO 072-16, January 12, 1972, that two or more legislators, regardless

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87. *Id.* at 26911 (citing in note 121 GAINESVILLE SUN, May 7, 1971, at 7).
88. 295 Fla. Op. Att'y Gen. 409 (1971) (emphasis added).
89. 346 Fla. Op. Att'y Gen. (1971).

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89. 346 Fla. Op. Att'y Gen. (1971).

of whether they constituted a numerical minority of a committee, were subject to the Sunshine Law. Later that year, in AGO 072-158, May 11, 1972, he cited as his sole authority, *Berns*, for the blatantly false assertion that "by judicial interpretation the law includes all meetings of two or more members of the public board of Commissioners at which official acts are to be discussed and deliberated."[90] The per se board meeting rule finally found its voice in an Attorney General opinion which stated that county commissioners at a private booster club luncheon could listen about a matter that would come before the board, without regard to the Sunshine Law, so long as they did not discuss the matter until the board met. As far as the State Attorney General was concerned, out of context dicta, taken from Justice Adkins' opinion in *Berns* and disowned by a majority of the Florida Supreme Court, was the law of the land.

In *Bassett v. Braddock*,[91] the Florida Supreme Court restrained the reach of the Sunshine Law.[92] The Florida Supreme Court held that labor negotiators, employed by a school board in a preliminary or tentative teacher contract negotiation with teachers' representatives, could negotiate outside of public meetings without violating the Sunshine Law. In addition, the board could instruct and consult with its labor negotiators in private without violating the law.[93] The Florida Supreme Court relied in part on a constitutional provision which guaranteed collective bargaining for employees. However, in apparent recognition that this provision dealt with employee rights, rather than employer rights, the Florida Supreme Court rejected the contention that its prior decisions compelled public meetings for not only formal acts, but also acts of deliberation, discussion, and deciding, occurring prior to, and leading up to, affirmative formal action. As stated by the Florida Supreme Court:

> While conceding that our opinions have been as broad as possible to let in the sunshine under the Legislature's enactment, nevertheless a careful rereading of our opinions and the Act fail to support the foregoing contention. It was not specifically involved in our prior decisions which have dealt principally with "meetings" (some informal) *of a board*. We have in earlier opinions referred to "matters on which foreseeable action will be taken by the Board" and "any discussions on matters pertaining to the duties and responsibilities of the Board of Public Instruction of Broward

90. 158 Fla. Op. Att'y Gen. 262 (1972).
91. 262 So. 2d 425 (Fla. 1972).
92. *Id.* at 427.
93. *Id.* at 427-28.

> County." *These are broad considerations but they still do not invade the areas of deliberation here involved, for it will be noted that in all of these observations by the Court, they are predicated upon a "meeting."* Here the required action under the statutes was taken in a public meeting; changes were made and voting had, all in public. The discussions and deliberations, however, in an executive process often take place beyond the veil of actual "meetings" *of the body involved.* It is only in those "meetings" that official action is taken. Preliminary "discussions" may never result in any action taken. There may be numerous informal exchanges of ideas and possibilities, either among members or with others (at the coke machine, in a foyer, etc.) when there is no relationship at all to any meeting at which any foreseeable action is contemplated. Such things germinate gradually and often without really knowing whether any action or meeting will grow out of the exchanges or thinking.[94]

The Florida Supreme Court continued:

> Every action emanates from thoughts and creations of the mind and exchanges with others. These are perhaps "deliberations" in a sense but hardly demanded to be brought forward in the spoken word at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government. One must maintain perspective on a broad provision such as this legislative enactment, in its application to the actual workings of an active Board fraught with many and varied problems and demands.[95]

Notably, Justice Adkins joined by Justice Boyd, strongly dissented.[96] The fact that Adkins and Boyd dissented simply underscored that they could not muster a majority of the court to push the Sunshine Law "beyond debatable limits." In this dissent, Justice Adkins made it seem like the Court had already crossed that threshold. He recast the holding in *Doran* as applying to "any gathering dealing with some matter on which foreseeable action would be taken by the Board."[97] Similarly, he quoted the disowned dicta in *Berns* as if the words had been embraced by the entire court, beginning the quotation by saying: "We have previously defined a secret

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94. *Id.* (emphasis added).
95. *Id.* at 428 (emphasis added).
96. *Bassett*, 262 So. 2d at 429-31 (Adkins, J., dissenting).
97. *Id.* at 429 (Adkins, J., dissenting).

meeting in the following language. . . ."[98] Absent a careful reading of *Berns*, few would know what "We" meant.

5. 1973

In *Canney v. Board of Private Education*,[99] a divided Florida Supreme Court held four to three that a school board acting in a quasi-judicial capacity was part of the legislative branch of government and was thus subject to the Sunshine Law when the board deliberated as to whether a student's suspension should be continued.[100] The case focused solely on whether the Florida Constitution and separation of powers doctrine prohibited the Legislature from making the Sunshine Law applicable to quasi-judicial functions delegated to a local governing body.[101]

Justice Adkins wrote the opinion, and in support of the foundational statement that the Legislature intended the Sunshine Law to apply to quasi-judicial deliberations, he said: "The obvious intent of the Government in the Sunshine Law . . . was to cover any gathering of *some of* the members of a public board where *those* members discuss some matters on which foreseeable official action will be taken by the board."[102] In *Doran*, Justice Adkins had stated the same proposition but referred only to "any gathering of *the* members where *the* members deal with some matters on which foreseeable action will be taken by the board."[103] As in the earlier cases, Adkins' rewrite of the holding in *Doran* had nothing to do with the case at bar, which involved a meeting of the board as a whole. Indeed, the rewording was not even germane to the point he was making, namely the Legislature intended that the Sunshine Law cover all meetings of the board, whether or not they involved quasi-judicial deliberations. And, of course, there was no discussion as to what "some" meant. Yet, as will be shown, this superfluous dicta became, in the eyes of the Third District Court of Appeal and the State Attorney General, additional authority for the per se board meeting rule.

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98. *Id.* (Adkins, J., dissenting).

99. 278 So. 2d 260 (Fla. 1973).

100. *Id.* at 263-64.

101. *Id* at 262.

102. *Id.* at 263 (emphasis added).

103. *See supra* text accompanying note 38 (emphasis added). Significantly, when the Florida Supreme Court had occasion recently to restate this seminal proposition, it reverted to the language originally taken from *Doran*. Frankenmuth Mut. Ins. v. Magaha, 769 So. 2d 1012, 1021 (Fla. 2000).

A month after *Canney* was decided, the Third District Court of Appeal in *Hough v. Stembridge*,[104] held that Florida's Sunshine Law not only applied to a gathering of less than a quorum of a governing body, but also to members elect who constituted two of the three officials who met.[105] The court stated:

> In order for there to be a violation of F.S. § 286.011, F.S.A., a meeting between two or more public officials must take place which is violative of the statute's spirit, intent, and purpose. The obvious intent of the Government in the Sunshine Law, *supra*, was to cover any gathering of *some of* the members of a public board where *those* members discuss some matters on which foreseeable action may be taken by the board.[106]

As for the argument that there could not be any assemblage of a board since there was, in law, only one board member at the meeting, the District Court responded:

> We simply cannot accept this line of reasoning. To adopt this viewpoint would in effect permit as in the case sub judice members-elect of a public board or commission to gather with impunity behind closed doors and discuss matters on which foreseeable action may be taken by that board or commission in clear violation of the purpose, intent, and spirit of the Government in the Sunshine Law.
> . . . An individual upon immediate election to public office loses his status as a private individual and acquires the position more akin to that of a public trustee.[107]

As a result, Justice Adkins' rewrite of the *Doran* holding, taken verbatim from the throw away dicta in *Canney*, came home to roost. That dicta, together with an invocation of the unsubstantiated "purpose, intent and spirit" of the Sunshine Law, became the sole authority for the first and only judicial holding for the per se board meeting rule. The District Court did not even try to explain how the gathering in question could possibly be a board meeting. Not surprisingly, the District Court did not certify to the Florida Supreme Court that this landmark holding was a question of great

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104. 278 So. 2d 288 (Fla. 2d DCA 1973).

105. *Id.* at 289.

106. *Id.* (emphasis added) (citing Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 698 (Fla. 1969) and Canney v. Bd. of Private Educ., 278 So. 2d 260, 263 (Fla. 1973)).

107. *Id.*

public interest. Given the predilections of the majority of the Court, one can only surmise that the District Court feared its holding would be summarily reversed.

B. *Tangents that Make a Point*

In a few subsequent court opinions, some loose dicta gives surface credence to the per se board meeting rule. However, a more careful reading of the cases reveals an embrace not of the per se board meeting rule, but of either (1) a delegation of authority rationale in which a smaller or different group of board members or delegees designated by the board are deemed to be acting on behalf of the board, or (2) a *negative* per se board meeting rule, which makes the obvious point that one cannot even get to the question of whether there has been a board meeting unless at least two board members meet. The author has no quarrel with either proposition. In subsequent State Attorney General opinions, however, we find the per se board meeting rule as a starting point for further amplification of tortured distinctions.

In *IDS Properties, Inc. v. Town of Palm Beach*,[108] the Fourth District Court of Appeal held that an ad hoc planning committee appointed by the Town Board to provide advice to a consultant on preparing a comprehensive zoning plan was subject to the Sunshine Law.[109] Although the District Court quoted with approval some of Justice Adkins' dicta in *Berns* that the State Attorney General cites in support of the per se board meeting rule, the Court's holding rested exclusively on the conclusion that the planning committee acted as an alter ego of the town board.[110] As stated by the District Court, "The Sunshine Law does not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego."[111]

1. 1974

In *Attorney General Opinion* 074-47, February 10, 1974, the State Attorney General concluded that individual city council members could consult in private with the city manager on city business as long as no effort was made to "intentionally avoid the requirements of an open meeting by having an individual who is not a board member act as a liaison for board

108. 279 So. 2d 353 (Fla. 4th DCA 1973).
109. *Id.* at 359.
110. *Id.*
111. *Id.*

members by circulating information and thoughts of individual councilmen to the rest of the board."[112] The opinion, however, points to a tensioned dichotomy that permitted private one-on-one consultation between the city manager and a board member but prohibited, under the per se board meeting rule, such consultation between board members, thus giving to non-elected "professionals" a whip hand over elected board members that even Justice Adkins would begin to rue in a later opinion.[113]

For the Attorney General, the delegation of authority rationale provided grounds for expanding the reach of the Sunshine Law that were separate from the per se board meeting rule. In *Attorney General Opinion* 074-84, March 25, 1974, he asserted the per se board meeting rule as a given, without regard to whether the two or more members had authority to act on behalf of the board (the Florida Board of Dentistry), citing both *Doran* and *Berns* as authority for the rule.[114] Then, under the delegation of authority rationale set forth in *IDS Properties, Inc.*, he opined that the Sunshine Law applied to a hearing conducted by a single board member, delegated the authority to do so, on the grounds that the board member is necessarily acting on behalf of the board.[115] No attempt was made to explain why a similar delegation of authority linkage to the board would not also be required when two or more, but less than a quorum, of the board members meet.

In *Bigelow v. Howze*,[116] the Second District Court of Appeal saw the need for such linkage. At first blush, the District Court seemed to embrace the reasoning of Justice Adkins and the *Hough* holding when it held that any meeting of a fact-finding committee composed of two out of five county commissioners is subject to the Sunshine Law.[117] The District Court first quoted liberally from Justice Adkins' dissent in *Jones* relating to a council dividing itself into small committees to circumvent the Sunshine Law, and then stated:

> *While there has not been a specific holding on this point*, the philosophy of the cases which have construed the Sunshine Law clearly indicates that the decision making process *of a duly appointed committee of a public body* composed of more than one

112. 47 Fla. Op. Att'y Gen. 81 (1974).

113. Occidental Chem. Co. v. Mayo, 351 So. 2d 336, 343-44 (Fla. 1977) (Adkins, J., dissenting).

114. *Id.*

115. *IDS Props., Inc.*, 279 So. 2d at 359.

116. 291 So. 2d 645 (Fla. 2d DCA 1974).

117. *Id.* at 647.

> member of that body must be held in public, even though such members constitute less than a quorum of the public body.
>
> We do not suggest that the committee cannot interview others privately concerning the subject matter of the committee's business or discuss among itself in private those matters necessary to carry out the investigative [aspects] of the committee's responsibility.... However, at the point where the members of the committee who are also members of the public body make decisions with respect to the committee's recommendation, this discussion must be conducted at a meeting at which the public has been given notice and a reasonable opportunity to attend.
>
> This court may take judicial notice of the fact that committee recommendations are often accepted by public bodies at face value and with little discussion. Therefore, unless the decision making process of a committee composed of two or more members of the public body *appointing the committee* is made in public, the salutory objectives of the Sunshine Law will have indeed become clouded.[118]

In *Bigelow*, as in *IDS Properties, Inc.*, the County Board as a whole authorized the meetings. The two elected officials were a duly appointed committee, acting on behalf of the governing body, so as to make these gatherings meetings of the governing body. Clearly, the Second District Court of Appeal was not prepared to hold, as the State Attorney General erroneously claimed had been held by the Florida Supreme Court, that consultation about pending board business between two or more but less than a quorum of the members of a board, was ipso facto subject to the Sunshine Law.[119] Absent board authorization, such consultation lacked the board's approval which is so obviously critical in the District Court's reasoning.

In *Town of Palm Beach v. Gradison*,[120] Justice Adkins was able to command a majority in affirming the Fourth District Court of Appeal's holding in *IDS Properties, Inc.* that a citizens' planning committee was subject to the Sunshine Law.[121] Following the Fourth District Court of Appeal's reasoning, the Florida Supreme Court's holding was predicated on the proposition that the meeting of the citizens' committee was sanctioned by the town board and thus took place on behalf of the board. Justice Adkins reasoned:

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118. *Id.* (emphasis added); *see* City of Miami Beach v. Berns, 245 So. 2d 38, 41 (Fla. 1971).
119. *Bigelow*, 291 So. 2d at 647-48.
120. 296 So. 2d 471 (Fla. 1974).
121. *Id.* at 478.

> One purpose of the government in the [S]unshine [L]aw was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, *as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency*, and relates to any matter on which foreseeable action will be taken.[122]

Again Justice Adkins hedges the logic of his rhetoric about discussions at secret meetings by requiring that under the delegation of authority rationale, the committee or authority conducting such discussions be sanctioned by the governmental agency.[123]

One is left to wonder if, notwithstanding his disowned dicta in *Berns*, even Justice Adkins would have conceded that a quorum *is* required under the statute unless the meeting is of a committee or other gathering authorized by the governing body as a whole to act on its behalf.

2. 1975

In *Attorney General Opinion* 075-59, March 6, 1975, the State Attorney General for the first time cited both *Canney* and *Hough* as authority for the per se board meeting rule.[124] In the opinion, he struggled with the dilemma of empowering the director of a utilities authority and the city manager to consult in private with individual members of their respective governing bodies, while denying such right to any governing body member to consult with another member.[125] The Attorney General was asked whether the director and city manager could each inquire in private with each of their respective board members as to his or her position on a pending board matter. While acknowledging that such a practice was not per se a violation of the Sunshine Law, as long as the director or manager did not act as "liaison," all the Attorney General could do was advise against such conduct.[126]

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122. *Id.* at 477 (emphasis added).
123. *Id.* at 478.
124. 59 Fla. Op. Att'y Gen. (1975).
125. *Id.*
126. *Id.*

3. 1976

In *Bennett v. Warden,*[127] the Second District Court of Appeal held that the president of a junior college was neither a board nor a commission within the meaning of the Sunshine Law, and therefore, meetings between the president and a group of junior college employees appointed by the president to discuss working conditions were not subject to the Sunshine Law.[128] In this case, the District Court distinguished *Gradison* on the grounds that the group of junior college employees were, unlike the planning committee in *Gradison*, performing only a fact-finding function, and hence were not delegated any decision making authority by the president. The District Court said:

> . . .[F]requent and unpublicized meetings between an executive officer and advisors, consultants, staff or personnel under his direction, for the purpose of "fact-finding" to assist him in the execution of those duties, are not meetings within the contemplation of the Sunshine Law. Any other conclusion, carried to its logical extension, would in our view unduly hamper the efficient operation of modern government the administration of which is more and more being placed in the hands of professional administrators. It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data or intelligence needed to advise or guide the authority by whom they are employed, be a public meeting within the disciplines of the Sunshine Law. Neither the letter nor the spirit of the law require it.[129]

Inadvertently, perhaps, the Second District Court of Appeal had begun to articulate one of the reasons why the per se board meeting rule, advanced in *Hough* and by the State Attorney General, undercuts effective board oversight of governmental operations. Just as the professionals need to be given a free rein to conduct in private a fact-finding expedition in the performance of their duties, similarly do the members of a governing board need to be able to consult in private among themselves whenever they think the information they are being fed in connection with their duties is incomplete or otherwise suspect. To require that the members compare

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127. 333 So. 2d 97 (Fla. 2d DCA 1976).
128. *Id.* at 100.
129. *Id.* at 99-100.

notes in such a situation only in public, even when done on a one-on-one basis, is to place the members at the mercy of such professionals as they advise each member in confidence. Yet this is the kind of absurd result the per se board meeting rule compels.

In *Mitchell v. School Board of Leon County*,[130] the First District Court of Appeal held that the Sunshine Law did not apply to separate conversations between the school board attorney and the school board superintendent and the director of pupil personnel services.[131] The District Court cited *Hough* for the proposition that, "Requisite to application to the Sunshine Law is a meeting between two or more public officials."[132] This was the first of a series of cases (hereinafter discussed) that articulated what this Article previously described as the negative per se board meeting rule, namely that, absent any board delegation of decision making authority, one cannot even get to the issue of whether a board meeting has taken place unless at least two board members meet. However, the First District Court neither decided nor addressed, under what circumstances a board meeting in fact takes place where two members meet to discuss board business. The District Court's holding nevertheless underscored the anomaly of allowing a single board member to discuss in private a pending business matter with anyone other than a fellow board member.

4. 1977

In *Wolfson v. State*,[133] the Second District Court of Appeal held that in a criminal proceeding, an indictment adequately alleged a violation of the Sunshine Law.[134] The District Court cited *Times Publishing Co.* in holding that the "official acts" component of a Sunshine Law violation was covered by an allegation that at the meeting "matters pertaining to City Commission business, to-wit: Employment of the City Attorney, was [sic] discussed in willful and knowing violation of Section 286.011, Florida Statutes."[135] Although the District Court also erroneously cited *Times Publishing Co.* for the proposition that the Sunshine Law covers "any gathering of some or all of the members of a public board,"[136] the defendants never challenged the

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130. 335 So. 2d 354 (Fla. 1st DCA 1976).
131. *Id.* at 356.
132. *Id.* at 355.
133. 344 So. 2d 611 (Fla. 2d DCA 1977).
134. *Id.* at 614.
135. *Id.* at 613.
136. *Id.* at 613-14. The District Court also quoted from Adkins' dicta in *Gradison* that the Sunshine Law embraced "the collective inquiry and discussion stages within the terms of the statute, *as long as such inquiry and discussion is conducted by any committee or other authority*

indictment on the grounds that no quorum or committee of city commission members was alleged to have been present at the meeting. In short, the validity of the per se board meeting rule was not an issue in the case.

In *Occidental Chemical Co. v. Mayo*,[137] the Florida Supreme Court held that an increase in rates set forth in a twenty-two and one half page staff proposal and approved by the Public Service Commission at a ninety minute agenda conference was not a violation of the Sunshine Law.[138] In that case the Florida Supreme Court noted that, "There is, of course, no evidence in this record that the commissioners met in secret or used staff members as intermediaries in order to circumvent public meeting requirements."[139] The Florida Supreme Court further stated that "the commissioners did not discuss various points among themselves before making a final decision."[140] But then the Florida Supreme Court added, "The law is satisfied if the commissioners reached a mutual decision on rate matters when they met together in public for their 'formal action.'"[141] After stating that "[n]othing in the Sunshine Law requires each commissioner to do his or her thinking and studying in public,"[142] the Florida Supreme Court observed in a footnote:

> The members of a collegial administrative body are not obliged to avoid their staff during evaluation and consideration stages of their deliberations. Were this so, the value of staff expertise would be lost and the intelligent use of employees would be crippled. *This case does not present a proper occasion, however, for us to determine whether all private collegial discussions among commissioners become decision-making acts which must occur in public.* See [*Williams*], suggesting that all deliberative discussions among commissioners are within the act, and contrast [*Gradison*], condemning pre-meeting agreements which have the effect of rendering later meetings a "ceremonial sham."[143]

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appointed and established by a governmental agency, . . ." *Id.* at 614 (emphasis added). By "some . . . of the board," the District Court presumably had in mind the italicized limit Adkins placed on discussions covered by the Sunshine Law. *Id.*

137. 351 So. 2d 336 (Fla. 1977).
138. *Id.* at 342.
139. *Id.* at 341.
140. *Id.* at 342.
141. *Id.*
142. *Mayo*, 351 So. 2d at 342.
143. *Id.* at 342 n.10 (emphasis added).

Again, the Florida Supreme Court in effect put everyone on notice that it had not yet decided whether the per se board meeting rule advanced by the State Attorney General and *Hough* was in fact the law. Predictably, Justice Adkins, together with Justice Boyd, dissented.

In his dissent, Justice Adkins argued that the evidence compelled the inference that the staff was delegated decision making authority, and thus, commissioner discussions with staff were subject to the Sunshine Law.[144] Rather than acknowledge that an overly broad application of the Sunshine Law would simply foster staff domination, Adkins sought to correct the imbalance by probing even deeper into the recesses of the decision making process under the delegation of authority rationale. In short, if it looks like the board is accepting staff recommendations with little debate, put all board members' discussions with staff under the Sunshine Law.

5. 1978

In *Florida Parole & Probation Commission v. Thomas*,[145] the First District Court of Appeal held that a decision of the Commissioner's attorney to appeal an administrative ruling after discussing the matter in private with the individual Commission members did not violate the Sunshine Law.[146] The District Court said:

> We find nothing improper in the individual discussions had between members of the Commission and the Commission's legal staff. It is well settled that frequent, unpublicized meetings between an agency member and advisors, consultants or staff who assist him in the discharge of his duties are not meetings within the contemplation of the Sunshine Law. See [*Bennett* and *Mayo*].[147]

Adkins' dissent in *Occidental Chemical Co.* fell on deaf ears. The Court relied instead on the negative per se board meeting rule articulated in *Mitchell*.[148] And so the unfettered right of staff to give in confidence advice to individual board members, without, under the per se board meeting rule, an off-setting right of board members to question in private among themselves the consistency and wisdom of such advice, remained unchallenged.

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144. *Id.* at 344 (Adkins, J., dissenting).
145. 364 So. 2d 480 (Fla. 1st DCA 1978) (per curiam).
146. *Id.* at 482.
147. *Id.*
148. *Id.* at 481.

In 1978, the *New York Times* Affiliated Newspaper Group of Florida, not exactly a disinterested party, financed the first *Florida Open Governmental Laws Manual* that was, ostensibly, a compilation of legal precedent and Attorney General Opinions.[149] Not surprisingly, the manual did not mention any of the following: that *Times Publishing Co.* held, that a meeting under the Sunshine Law is a joint assemblage at which formal action could be taken; that the injunction challenged in *Doran* focused on meetings at which there was a quorum; that the majority of the Florida Supreme Court disowned the Adkins' dicta in *Berns*; that the First District Court in *Tanzler* sustained a trial judge's requirement of a quorum and construed the holding in *Doran* as consistent with such a ruling; that a majority of the Florida Supreme Court in *Jones* in effect concurred in the First District Court's construction of *Doran*; that the dicta about meetings of "some members" in *Canney* was not even remotely related to the case at bar; that the sole authority cited for the per se board meeting rule in *Hough* were the non-germane *Doran* and *Canney* cases; and that even Justice Adkins at least intimated in a number of cases that the line drawn for meetings of less than a quorum should cover only meetings that are somehow authorized by the board. Instead, the manual, as well as subsequent editions thereof (collectively, the Sunshine Manual), embraced the per se board meeting rule as if it was the law and cited *Doran*, *Times Publishing Co.*, *Berns*, *Canney*, and *Hough*, or some combination thereof, as the sole authority for such a position.[150] The press (which has also funded

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149. 2000 GOVERNMENT IN THE SUNSHINE MANUAL 22.

150. In the 2000 Edition of the Government-in-the-Sunshine Manual, the per se board meeting rule was stated as follows: "The Sunshine Law applies to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board or commission." *See* Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693, 698 (Fla. 1969).

* * *

It is the how and the why officials decided to so act which interests the public, not merely the final decision. Thus, the court recognized in *Williams*:

> Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire [*d*]*ecision-making process* that the legislature intended to affect by the enactment of the statute before us.

Times Publ'g Co. v. Williams, 222 So. 2d 470, 473 (Fla. 2d DCA 1969) and *supra* note 48. This quotation from *Williams* was the reasoning used by the Second District Court in interpreting "official acts" not what constituted a board meeting. *Id.*

all later editions of the Sunshine Manual) had found a willing ally in the State Attorney General, and in their zeal, they overreached.[151]

6. 1979

In *Blackford v. School Board of Orange County*,[152] the Fifth District Court of Appeal held that orchestrated private individual meetings, carried out in rapid succession over two day periods on five different occasions between the School Superintendent and each of the School Board members to discuss a proposed school closure, constituted de facto meetings of the board, in violation of the Sunshine Law.[153] The tacit agreement of the board as a whole to this consensus-making arrangement was obvious.

In *Krause v. Reno*,[154] the Third District Court of Appeal (the progenitor of *Hough*) held that the city manager, as an "agency" of the city, created a "board" when he established an advisory group to screen applicants for the position of policy chief and that the meetings of such "board" were subject to the Sunshine Law.[155] The District Court reasoned that the advisory group was made an integral part of the City Manager's decision making process. In reaching its decision, the District Court quoted liberally from the Adkins dicta in *Doran* and *Gradison*.[156] The District Court summarized, "[i]t is beyond doubt that the Statute is to be construed liberally in favor of open government."[157] The District Court then listed all the benefits of open government without any countervailing considerations that the Legislature may have taken into account in failing to repudiate *Turk*, or in requiring that the gatherings covered by the statute be "meetings of the board or commission" of the governmental unit.[158]

Be that as it may, this case, as well as many others cited erroneously for the per se board meeting rule, ultimately relies on the delegation of

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151. *See also* Askew v. Green, 348 So. 2d 1245, 1246-48 (Fla. 1st DCA 1977) (denying the State Attorney General's challenge to the validity of a county ordinance requiring reimbursement of attorney fees incurred by county officials acquitted of Sunshine Law violations).

152. 375 So. 2d 578 (Fla. 5th DCA 1979).

153. *Id.* at 580-81.

154. 366 So. 2d 1244 (Fla. 3d DCA 1979).

155. *Id.* at 1252.

156. *Id.* at 1248, 1250.

157. *Id.* at 1250. Note the shift in the presumption from a liberal construction in favor of the public as in *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 697 (Fla. 1969), to a presumption in favor of open government. Such a shift helps undermine any thoughtful consideration of any countervailing benefits the public derived from the balance struck by the Legislature that allowed for private consultation between board members outside of board meetings, a sort of "don't confuse me with the facts" approach to the Sunshine Law.

158. *Krause*, 366 So. 2d at 1250-51.

authority rationale for concluding that the group in question was, in fact, acting as a duly authorized public collegial body of the governmental unit. However intrusive and beyond the pale the opinion may seem to carry the Sunshine Law under the banner of the delegation of authority rationale, and into the collective decision making processes of the executive and administrative side of government, there is at least some basis for concluding that the group subjected to the Sunshine Law is acting either as, or on behalf of, a collegial public body.

7. 1980

In 1980, an updated version of the Sunshine Manual (renamed *Government-In-The-Sunshine Manual*) was published and included in the State Attorney General's Annual Report.[159] The Attorney General proclaimed in a cover letter that, "[N]owhere is 'Government in the Sunshine' brighter than in Florida... where courts have avoided restrictive interpretations that would have weakened them."[160] He then touted the "champions of open government," court decisions that have "beamed sunshine to the farthest recesses of government and steadfastly nullified efforts to get around them by delegation of authority and other devices" and "a working environment that fosters a vigorous free press."[161]

Given this clarion call, any attempt to question the wisdom, much less validity, of the per se board meeting rule was bound to encounter the concerted opposition of both the State Attorney General and the press. The issue thus laid dormant, while the courts and State Attorney General pushed the Sunshine Law in new directions, based on the more defensible line of reasoning embedded in the delegation of authority rationale. At the same time, the courts continued to perpetuate the anomaly of confidential staff advice (given also by the executive branch) permitted under the negative per se board meeting rule. But deep divisions still smouldered in the Florida Supreme Court over the reach of the Sunshine Law.

8. 1981

In *Tolar v. School Board of Liberty County*,[162] the First District Court of Appeal held that a decision to abolish the position of "director of administration," though made in violation of the Sunshine Law at the home of the School Superintendent-elect at a non-public gathering attended by a

159. 1980 FLA. ATT'Y GEN. ANN. REP. 5.
160. *Id.* cover letter from Att'y Gen.
161. *Id.* at 5-6.
162. 363 So. 2d 144 (Fla. 1st DCA 1978).

majority of the School Board members, was validated at a subsequent school board meeting held in compliance with the Sunshine Law, where the affected employee was present and given an opportunity to be heard.[163] Subsequently, the Florida Supreme Court affirmed that holding in a 5-2 opinion, with Justice Adkins dissenting.[164]

Since a quorum of the board members necessarily attended the questioned meeting in *Tolar*, the Florida Supreme Court again left to another day the decision of whether an unauthorized meeting of less than a quorum of the members of the governing body came within the purview of the Sunshine Law. However, a concurring opinion in *Tolar*, approved by three justices, suggests that these justices were not even sure that the meeting with the Superintendent-elect was violative of the Sunshine Law. The concurring opinion stated:

> Justice Adkins remains the strong judicial voice in Florida in support of an unadulterated Sunshine Law, and it is difficult indeed to disagree with the principles he so articulately advances. I do so here, however, cautiously, out of a belief that he has overcharacterized the private meetings involved in this case by calling them "secret sessions" of the board, *and that the ostensible reach of his characterization would bar all private communications with and among public officials on a collegial body.*[165]
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> * * *
>
> The record before us does not indicate that the superintendent-elect of Liberty County convened the school board expressly to discuss abolition of the position Tolar held as director of administration or to transfer Tolar to Bristoll Elementary School . . . To the extent that Justice Adkins implies that a public official cannot communicate ideas to her supervisory board except by convening or attending a public meeting, I must respectfully disagree and suggest that there is no legislative history to indicate that the public meeting law was designed to so restrict public officials in the performance of their duties.[166]

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163. *Id.*
164. Tolar v. Sch. Bd. of Liberty County, 398 So. 2d 427, 429 (Fla. 1981).
165. *Id.* at 429.
166. *Id.*

In his dissent, Justice Adkins quoted liberally from his past dicta in *Doran* and *Berns,* and cited *Wolfson* for its holding that upheld a criminal indictment[167] and *Krause* for all the public good that is served by the Sunshine Law.[168] In his peroration, Justice Adkins conjured up machinations which hinged on a collaborative undertaking of at least a quorum of the board:

> The important question is not whether a formal meeting was held, but whether the members of the Board had a nonpublic meeting dealing with any matters on which foreseeable actions might be taken. This Court should never place the stamp of approval on individual gatherings wherein public officials, regardless of good intentions, reach decisions in private on matters which may foreseeably effect the public. It is elementary that the officials can not do indirectly what they are prevented from doing directly.
>
> Under the reasoning of the majority, *any board or commission could have informal meetings* in which each member could commit himself to some matter on which foreseeable action will be taken. This could be done in the absence of the public and without giving the public an opportunity to be heard. The ultimate action of the entire board in public meeting would merely be an affirmation of the various *secret board meetings*, so this would not be in violation of the Government in the Sunshine Law.
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> The bright rays of the sunshine law have not been dimmed, they have been obliterated. We now have to rely upon the good faith of public officials to continue public meetings and avoid the presumption of "hanky-panky" which flows from "*secret sessions.*"[169]

Notwithstanding the State Attorney General's categorical assertion of the per se board meeting rule, the concurring and dissenting opinions continued to reveal considerable uncertainty as to the reach of the Sunshine Law. Yet, even here, it is by no means clear that Justice Adkins would apply the Sunshine Law to one-on-one consultations which are not orchestrated by at least a quorum of the board.

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167. *Id.* at 431 (Adkins, J., dissenting).
168. *Id.* at 431-32 (Adkins, J., dissenting).
169. *Tolar*, 398 So. 2d at 432 (Adkins, J., dissenting) (emphasis added).

9. 1983

In *Wood v. Marston*,[170] the Florida Supreme Court held that a university search-and-screen committee of faculty, charged to assist in the selection of a college dean and appointed by the university President as required by the university's constitution, was a board or commission under the Sunshine Law and that meetings of such a committee were therefore subject to the Sunshine Law.[171] In reaching its decision the Florida Supreme Court enunciated board principles underlying the Sunshine Law:

> We note that the Sunshine Law was enacted in the public interest to protect the public from "closed door" politics and, as such, the law must be broadly construed to effect its remedial and protective purpose. This Court has consistently refused to permit *governmental entities* to carry out decision-making functions outside the law.[172]

Again, *Wood* is not on point because it rests on the proposition that the decision making authority of the President of the university (the power to reject applicants) was delegated to the committee.[173] A broad attack against "closed door politics" does not overcome the statutory mandate that the meeting be a meeting of the governing body.[174] As noted in the italicized language quoted above, the focus is on actions taken by the "governmental entities." This necessarily excludes actions taken by government officials who cannot rationally be deemed acting on behalf of the entity that is the source of their authority.[175]

In *Marston v. Wood*,[176] the First District Court of Appeal held that the search and screening committee was not subject to the Sunshine Law because it functioned like staff, which the Florida Supreme Court held in *Occidental Chemical Co.*[177] were not subject to the Sunshine Law.[178] In reversing the District Court of Appeal, the Florida Supreme Court

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170. 442 So. 2d 934 (Fla. 1983).
171. *Id.* at 939.
172. *Id.* at 938 (emphasis added).
173. *See id.*
174. FLA. STAT. § 286.011 (2001).
175. *Wood*, 442 So. 2d at 939.
176. 425 So. 2d 582 (Fla. 1st DCA 1982).
177. Occidental Chem. Co. v. Mayo, 351 So. 2d 336, 341 (Fla. 1977).
178. *Marston*, 425 So. 2d at 585.

distinguished that case by stating that the "privileged function of staff is to inform and advise the decision-maker" and that "the delegation issue was not properly before the Court."[179]

In *Wood*, the Florida Supreme Court also dispelled, once and for all, the notion that remoteness in the decision making process may relieve a group from the requirements of the Sunshine Law.[180] The Florida Supreme Court held that such a consideration (possibly due to some Adkins dicta in earlier cases about "deliberations just short of ceremonial acceptance")[181] is not relevant if the group has been delegated any decision making authority, no matter how many steps have to be taken before the matter discussed by the group comes up for formal action.[182]

The author agrees that the nature of the deliberations between board members (beyond whether they relate to a matter likely to come before the board) should be irrelevant.[183] In other words, whether the discussion be remote or just short of ceremonial acceptance, preliminary or climatic, binding or nonbinding on the parties involved, should have no bearing on the question of whether they give rise to a board meeting.[184] That is an impossible line to draw, as the Florida Supreme Court rightly concluded.[185]

But just because, practically speaking, the continuum of board deliberations (from inception to a point just short of formal action) cannot be subdivided with any reasonable certainty, it does not follow that workable boundaries cannot be set through a definition of "meeting" that respects the distinction the Sunshine Law necessarily draws between board member discussions which occur at a board meeting, and those which occur outside of board meetings. Three versions of such a definition are proposed at the conclusion of this Article.

10. 1984

In *Rowe v. Pinellas Sports Authority*,[186] the Florida Supreme Court held in a bond validation proceeding that the Sunshine Law did not apply to joint bond financing discussions between a governing body member of one

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179. *Wood*, 442 So. 2d at 940.

180. *Id.* at 941.

181. *See supra* text accompanying note 77 (just short of ceremonial acceptance quote).

182. *Wood*, 442 So. 2d at 940-41 (making essentially the same point in deciding when "official acts" take place). *See also* Times Publ'g Co. v. Williams, 222 So. 2d 470, 474 (Fla. 2d DCA 1969).

183. *Wood*, 442 So. 2d at 940-41.

184. *Id.*

185. *Id.*

186. 461 So. 2d 72 (Fla. 1984).

governmental unit and the governing body member of a different governmental unit.[187] Justice Adkins, who wrote the opinion, said:

> [The] gatherings do not rise to the level of decision-making which is required to violate the act. The record does show that some private discussions occurred where the stadium financing was mentioned. However, since no two individuals who were members of the same governing body were present at any one of these discussions, no decision-making official acts could occur that would violate the act.[188]

This, of course, is not a holding that the Sunshine Law, per se, applies to discussions between two or more board or commission members of a single governmental unit — only that, absent such discussions (or the delegation of board decision making authority to a single member), one cannot even get to the issue of whether the Sunshine Law applies.[189] The logic of such a negative per se board meeting rule cannot be challenged.

11. 1985

In *Neu v. Miami Herald Publishing Co.*,[190] the Florida Supreme Court held in a 5-2 decision that, notwithstanding the holding in *Bassett v. Braddock*,[191] meetings between the city council and its attorney over pending litigation were subject to the Sunshine Law.[192] The Florida Supreme Court relied heavily on intervening legislation which spelled out the conditions under which such meetings were exempt from the Sunshine Law.[193] The Florida Supreme Court held that those conditions were not satisfied. As for *Bassett*, the Florida Supreme Court said:

> We agree that much of our rationale in *Bassett* would appear to support the proposition that private consultations are permitted with attorneys representing governmental bodies in pending litigation. Indeed, we went so far as to comment that "where the negotiator is an attorney that certainly he is entitled to consult with the Board on matters regarding preliminary advices." Despite the broadness of

187. *Id.* at 75.
188. *Id.*
189. *Id.*
190. 462 So. 2d 821 (Fla. 1985).
191. 262 So. 2d 425 (Fla. 1972).
192. *Neu*, 462 So. 2d at 823.
193. *Id.* at 824-25.

> such language, our decision was restricted to and rested on what we saw to be a constitutional exception to the Sunshine Law, to wit: the article I, section 6 right of public employees to bargain collectively.[194]

In response to the argument that the Florida Supreme Court's interpretation of the Sunshine Law is an overly broad construction of the statute, the Court said:

> Petitioners' broadest argument, and the one most fervently pressed, is that this Court's decisions in *Doran* and *Berns* have effectively strangled the political process in Florida and forced political bodies and officials to evade the Sunshine Law, as interpreted, in order to make the political process function. On this point, petitioners' arguments go beyond the issue here of consultations with attorneys on pending litigation to ask that we recede completely from *Doran* and *Berns*. Essentially, petitioners would have us read section 286.011 narrowly and hold that it applies only to climatic meetings where official actions and acts are approved by the governing body. We have recently articulated why we will not adopt such a reading in *Wood*, and will not repeat the reasons here.[195]

As previously stated, criticism herein of the per se board meeting rule does not turn on its application to nonclimatic meetings of the board, but rather on the fact that the rule embraces one-on-one consultations and other nonquorum gatherings that cannot reasonably be construed as board meetings. The Florida Supreme Court need not retreat at all from its prior holdings to correct this misconception of the law.

In *Deerfield Beach Publishing, Inc. v. Robb*,[196] the Fourth District Court of Appeal affirmed a trial court's dismissal of a complaint seeking injunctive relief arising from alleged discussions between the mayor and other commissioners.[197] The grounds for dismissal were that the plaintiff refused to identify the other commissioners and the dates on which the discussions occurred.[198] The District Court held that such identification is critical to a claim for injunctive relief, noting that the Sunshine Law was "never intended to become a millstone around the neck of the public's

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194. *Id.* (alteration in original) (citation omitted).
195. *Id.* at 825 (citation omitted).
196. 530 So. 2d 510 (Fla. 4th DCA 1988).
197. *Id.* at 511.
198. *Id.*

representatives,"[199] and cited *Mitchell* for the negative per se board meeting rule.[200]

As far as the author is concerned, the negative per se board meeting rule is unassailable but vastly different from a rule that ipso facto treats as a board meeting any gathering of two or more board members, whether or not they have any authority to act on behalf of the board. It is not enough that board business is discussed at such a gathering. That merely qualifies the kind of board meeting which, absent an exemption, is subject to the open government requirements. However, one does not get to that issue unless the threshold requirement is first met that the gathering in fact constitutes a board meeting.

12. Attorney General Opinions: 1985-1990

During the same period of time the courts were side stepping the per se board meeting rule, the State Attorney General was issuing a flurry of opinions that continued to accept the rule as a given and then addressed how it applied at the edges. In every case, the State Attorney General cited as authority for the rule the *Hough* case or one or more of the litany of Florida Supreme Court cases that contained (1) at best dicta of Justice Adkins arguably in support of such a rule, but of problematic value, and (2) in the *Berns* holding, dicta disowned by a majority of the Court.[201] In most

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199. *Id.*

200. *Id. See also* City of Sunrise v. News & Sun-Sentinel Co., 542 So. 2d 1354 (Fla. 4th DCA 1989), where the Fourth District Court of Appeal held that a meeting between the mayor and a city employee was not a meeting under the Sunshine Law. *Id.* The District Court reasoned that the mayor had not delegated any of his decision making authority to the employee. *Id.* at 1356. The District Court added that, absent such delegation of authority and as the District Court had stated in *Deerfield Beach Publishing, Inc.*, one cannot even get to the question of whether there was a meeting under the Sunshine Law unless at least two public officials had met. *Id.* at 1354-56. Again, the point must be stressed that just because there cannot be a board meeting unless at least two board members meet (absent delegation of decision making authority), it does not follow that there is a board meeting whenever two or more board members meet.

201. *See, e.g.*, 36 Fla. Op. Att'y Gen. (1985); 26 Fla. Op. Att'y Gen. (1990) (Council member may discuss in private council business with mayor, so long as mayor is not acting as intermediary nor authorized to break a tie, nor delegated any council decision making authority over the subject matter); 23 Fla. Op. Att'y Gen. (1986) (Incumbent is subject to Sunshine Law if he presents, at an election campaign function, his ideas about pending council matters in the presence of other council members even though the members do not discuss the ideas); 34 Fla. Op. Att'y Gen. (1987) (Council member may talk in private to a planning commission member so long as decision making authority was not delegated to council member and council member was not acting as a liaison for council or any smaller group thereof); 23 Fla. Op. Att'y Gen. (1989) (Commissioner may send memo to other commissioners about pending matters so long as recipient does not respond until public meeting); and 17 Fla. Op. Att'y Gen. (1990) (Single member may

opinions, the State Attorney General also continued to cite *Times Publishing Co.* as additional authority, in apparent ignorance that the Second District Court of Appeal, in fashioning its own definition of a meeting, held exactly to the contrary.[202] Of course, *Tanzler* and *Jones* were ignored.

C. *Constitutional Amendments*

While the courts and the State Attorney General were interpreting the Sunshine Law during the twenty years following its adoption, bills from time to time were being introduced in the Legislature that either expressly included the Legislature and its committees (and in some instance, individual members thereof) within the ambit of the Sunshine Law (or a rewrite thereof) or (as an amendment to the State Constitution) embraced all state and local public bodies.[203] With one exception only, none of the bills made it to the floor of either chamber for a vote.[204] In addition, in 1978, Florida's Constitution Revision Committee proposed to the voters an amendment that read as follows:

> SECTION 25. Open meetings. — No person shall be denied access to any meeting at which official acts are to be taken by any nonjudicial collegial public body in the state *or by persons acting together on behalf of such a public body.* The legislature may exempt meetings by general law when it is essential to accomplish overriding governmental purposes or to protect privacy interests.[205]

This amendment was proposed in order to elevate the Sunshine Law to constitutional status and to include the Legislature within its ambit.[206] The italicized portion of the proposed amendment supports the contention in

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be authorized to discuss garbage contract with vendor in private so long as member serves as fact-finder with no delegated authority to accept or reject contract provisions).

202. *See supra* text accompanying notes 43-45 (*Times Publ'g Co.* holding about what is a meeting).

203. Thomas R. McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U. L. REV. 307 (1991).

204. *Id.* at 329. That bill was passed in the House in 1975. It originally subjected "meetings of, between, or among the government, the lieutenant governor, members of the cabinet, and/or members of the legislature" to open meeting requirements, but was amended in committee to exclude meetings among individual legislators and meetings among individual legislators and officials in the executive branch. *Id.*

205. *Id.* at 322 (quoting Fla. HB 186, § 1 (1975) (proposed amendment to FLA. STAT. § 286.011(1)) (emphasis added).

206. *Id.*

this Article that the Sunshine Law can apply to a meeting among members of the same public body only if they have authority at such meeting to act on behalf of that body.[207] The proposed amendment was rejected by the voters on November 6, 1978, by a vote of 1,512,106 to 623,703.[208]

Following the 1988 legislative session, Common Cause of Florida and the Florida Legislative Committee began a petition drive for a constitutional open government amendment that applied to the Legislature only and that defined a meeting as "a prearranged gathering of two or more members, either to take formal action or to agree to take formal action later,"[209] a more circumscribed version of the per se board meeting rule. Although the petition drive failed, it provided impetus for both chambers of the Legislature to strengthen their open meeting rules to apply to not only their legislative sessions and meetings of its committees but also to meetings among its legislators. Again it is significant that both chambers, from the outset, distinguished between meetings of its committees and meetings among the legislators, a distinction which, of course, the per se board meeting rule disregards.

The above distinction was ultimately embedded in an amendment to the State Constitution (the "1990 Constitutional Amendment") that was approved by the Legislature during the 1990 legislative session and by the voters at the November 3, 1990 general election.[210] Section 4(e) of the 1990 Constitutional Amendment provided in relevant part:

> The rules of procedure of each house shall provide that all legislative committee and subcommittee meetings of each house, and joint conference committee meetings, shall be open and noticed to the public. The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a

207. *Id.*

208. *Id.* at 323 (citing Div. of Elections, Dep't of State, Tabulation of Official Votes, Fla. Gen. Elections 25 (1978)).

209. *Id.* at 337.

210. The amendment was approved 2,795,784 to 392,323. Div. Of Elections, Dep't of State, State of Florida General Election Returns, Nov. 6, 1990 at 5 (1990). McSwain attributes the 1990 Amendment to an uproar caused by key legislators allegedly agreeing in secret with lobbyists to support a special interest tax proposal. McSwain, *supra* note 203, at 307.

> subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.[211]

Under the logic of the per se board meeting rule, the distinction drawn by the Legislature between committee meetings and meetings between legislators would be obliterated. For, if only two committee members (not constituting a quorum of the committee) met by chance and discussed a bill pending before the committee, then ipso facto, under the rule, that discussion would be a meeting of the committee regardless of whether the meeting of the two legislators was sanctioned by the committee. In short, the rule would trump the two or more/prearranged meeting test so carefully crafted by the Legislators.[212] Needless to say, no one has ever suggested that such a one-on-one consultation would be treated as a meeting of the committee.

Within a year after adoption of the 1990 Constitutional Amendment, the Florida Supreme Court held in *Locke v. Hawkes*[213] that the Legislature was not subject to the Public Records Act.[214] This opinion triggered a movement to elevate to constitutional status not only the Public Records Act (making it also applicable to the Legislature), but also the Sunshine Law.[215] The State Attorney General Bob Butterworth, led the charge, and proposed the following open meeting amendment:

> Notwithstanding any other provision of this Constitution, no person shall be denied access to any meeting at which official acts are to be taken by any collegial public body in the state *or by persons acting together on behalf of such a public body*, with the exception of jury and grand jury deliberations. The legislature may exempt meetings by general law when the exemption serves an identifiable public purpose that is sufficiently compelling to override the public policy of open government.[216]

This provision was almost identical to the language proposed in 1977 by the Constitutional Revision Commission and retained the distinction in the 1977

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211. FLA. CONST. art. III, § 4(e) (2001).

212. *Id.*

213. 595 So. 2d 32 (Fla. 1992).

214. *Id.* at 34, 37.

215. Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments; Article I, Section 24 and Article III, Section 4(e) — Let the Sunshine In!*, 18 NOVA L. REV. 973, at 977-78 (1994).

216. McSwain, *supra* note 203, at 368 (emphasis added).

proposal between meetings at which official acts are to be taken by the collegial public body and meetings at which persons are acting together on behalf of such a body.[217] It is hard to believe that any court would infer from such language that consultation between two or more board members who have no authority to act on behalf of the board is nevertheless deemed to be acting together either as, or on behalf of, the board. This proposed amendment offered no solace to any proponents of the per se board meeting rule.

Ultimately the constitutional open meeting amendment, submitted to and approved by the voters in the November 3, 1992 general election (the "1992 Constitutional Amendment"), substantially tracked the operative provisions of the Sunshine Law. It read in relevant part:

> Section 24. Access to public records and meetings.
>
> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken *or at which public business of such body is to be transacted or discussed*, shall be open and noticed to the public. . .[218]

The italicized language embraced the interpretation of "official acts" in the Sunshine Law adopted by the courts but left an intriguing negative inference that the "official acts" language found in the Sunshine Law, and retained as a separate test in the 1992 Constitutional Amendment, had a different and presumably more narrow meaning. Although the courts in subsequent cases have never addressed this issue, they have in two cases stated that the amendment is substantially identical to the Sunshine Law.[219]

Presumably, any advocate of the per se board meeting rule will argue that since the rule was assumed by the State Attorney General to be the law under the Sunshine Law at the time the 1992 Constitutional Amendment was adopted, the rule was somehow subsumed in the amendment. This Article has hopefully dispelled the illusion that the rule was then in fact the law. On one side of the ledger we have (1) the quixotic *Hough* case that invokes an ethereal "spirit, intent and purpose" (a favorite rationale of

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217. *See supra* text accompanying note 205.

218. FLA. CONST. art. I, § 24(b-c) (2001) (emphasis added).

219. *See* Zorc v. City of Vero Beach, 722 So. 2d 891, 896 (Fla. 4th DCA 1999); Monroe County v. Pigeon Key Historical Park, Inc., 647 So. 2d 857, 868 (Fla. 3d DCA 1994) (holding that the 1992 Constitutional Amendment "does not create a new legal standard by which to judge Sunshine Law cases").

activist judges intent on overcoming statutory constraints), and (2) the stretched dicta of Justice Adkins in *Berns* miscited as a Florida Supreme Court holding by the State Attorney General.[220] On the other side of the ledger we have (1) the statutory mandate that the Sunshine Law only apply to "meetings of the board or commission" (now a constitutional mandate), (2) the holding in *Times Publishing Co.* that a meeting under the Sunshine Law is a joint assemblage at which formal action could be taken, and (3) the holding in *Tanzler* that the Sunshine Law does not apply to an informal meeting of less than a quorum of city members with no authority to take action on behalf of the council.[221]

At worst, the law was unsettled as to whether the Sunshine Law countenanced a per se board meeting rule. At best, not even Justice Adkins intended such a rule to become the law, as evidenced by the fact that even his most extreme statements about the meeting of two or more public officials were invariably tied to the actions of a committee that may not have the power to bind the board as a whole, but was clearly authorized by the board to receive testimony and make recommendations or otherwise act on behalf of the board in the preliminary stages of the decision making process.[222]

After taking into account the thrust of the 1990 Constitutional Amendment that clearly set forth a narrowed version of the per se board meeting rule separate and apart from meetings of legislative committees and subcommittees, one can only infer from the failure to draw a similar distinction in the 1992 Constitutional Amendment that the Legislature never intended to deviate from a common sense meaning of the term "meetings of any collegial public body," as distinguished from non-board sanctioned meetings among less than a quorum of its members. A per se board meeting rule makes no more sense than would a comparable per se committee meeting rule under the 1990 Constitutional Amendment.[223]

In short, when the Legislature intended under the 1990 Constitutional Amendment the equivalent of a per se board meeting rule, it said so in separate, clear and unmistakable language that recognized that meetings between individual legislators are necessarily a universe broader than, and different from any committee meetings. At the same time, the Legislature

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220. *See supra* note 88 (Att'y Gen. miscite of *Berns*).

221. Jones v. Tanzler, 234 So. 2d 372 (Fla. 1st DCA 1970); Times Publ'g Co. v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969).

222. *See supra* text accompanying notes 70 & 122, and *supra* note 136 (examples of Adkins' focus on committees).

223. McSwain, *supra* note 203. Nowhere in the rather detailed account of the legislative history surrounding the 1990 Constitutional Amendment is there any indication that the Legislature was concerned about a per se committee meeting rule. *Id.*

rationalized the rule so as to permit (1) confidential one-on-one consultations about legislative matters, (2) unlimited private discussions between more than two legislators about legislative matters that did not constitute formal legislative action, nor an agreement to take such action, and (3) unfettered private discussions at chance meetings of legislators.[224]

Surely if the Florida Supreme Court is not willing to acknowledge that a non-board sanctioned meeting among less than a quorum of the board members cannot logically be treated as a meeting of that board, the Legislature has the power to say so without being in conflict with the 1992 Constitutional Amendment.[225]

D. *Post-Amendment Developments*

In the cases that followed the 1990 and 1992 Constitutional Amendment, the courts further extend the reach of the Sunshine Law under the delegation of authority rationale.[226] As previously noted, such reasoning is at least consistent with the notion advanced in this Article that a similar linkage to the governing body must be established before any meeting among less than a quorum of its members can be treated as a board meeting under the Sunshine Law and the 1992 Constitutional Amendment. No court, however, addressed the validity of the per se board meeting rule, though the State Attorney General continued to embrace the rule as if it were the law as he spun fine distinctions that in most instances tried to mitigate some of the rule's more onerous effects.

One line from the State Attorney General's Opinion attempted to distinguish between two or more board members expressing their opinions about board matters at a larger gathering (e.g., candidate's forum, community development board, and other city board meetings) and discussing or debating those matters among themselves at the gathering. According to the Attorney General, the Sunshine Law only applied if the

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224. Once the State Attorney General and the District Court in the *Hough* case crossed the statutory boundary of a board meeting, they necessarily assumed the role of the Legislature in drawing new lines comparable in specificity to the parameters the Legislature drew for itself in the 1990 Constitutional Amendment.

225. At the very least, the Legislature can clarify the Sunshine Law so that its remedial provisions (particularly the criminal sanctions) are tied to a reasonable interpretation of a board meeting.

226. Mem'l Hosp.-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 373-74 (Fla. 1999) (holding that a private nonprofit organization that leases and operates a hospital from the hospital taxing authority is subject to Sunshine Law and Public Records Act); Silver Express Co. v. Miami-Dade Coll., 691 So. 2d 1099, 1101 (Fla. 3d DCA 1997) (holding that a committee established by college's purchasing agentto screen contract proposals is subject to Sunshine Law).

board members went beyond merely expressing their opinions and engaged in such "interaction."[227] The Attorney General applied his "no interaction" rationale to memoranda on board matters circulated by and among board members. The Sunshine Law only applied if memoranda either solicited a response or, worse yet, was in response to another board member memorandum.[228]

In other opinions, the State Attorney General applied the negative per se board meeting rule to allow the board to authorize a single board member to speak in private about board matters to one or more than one non-board member as long as the board did not delegate to the board member or the non-board members any decision making authority of the board.[229] But sometimes the absurd logic of the per se board meeting rule

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227. 5 Fla. Op. Att'y Gen. (1992). Discussions between an incumbent candidate and a non-incumbent candidate are not subject to the Sunshine Law so long as no "interaction" takes place between the two. This opinion departed from an earlier opinion that treated such presentations as tantamount "to discussions." 23 Fla. Op. Att'y Gen. (1986). The Attorney General later expanded the "no interaction" exception by concluding that two or more members of a commission could serve as panelists at a private forum and express their opinions on commission matters so long as they deferred until the board meeting discussions among themselves of these issues. 62 Fla. Op. Att'y Gen. (1994). The Attorney General again extended the "no interaction" exception by opining that a meeting of the city commission subject to the Sunshine Law does not occur if the commissioners attend a meeting of the city's community development board established by the commission to review proposed ordinances and express their support or opposition to an ordinance so long as the commissioners do not engage in debate or discussions with each other at the meeting. 68 Fla. Op. Att'y Gen. (2000).

228. 21 Fla. Op. Att'y Gen. (2001); 35 Fla. Op. Att'y Gen. (1996). In the 2001 opinion, the Attorney General, perhaps sensing the unworkability of the "no interaction" exception, suggested that the better practice would be for the commissioners to refrain from submitting position papers and simply discuss their positions at an open meeting. Position papers should be used to clarify each commissioner's preliminary thinking on a board matter so that the discussion on the matter at a subsequent open meeting can be more to the point and productive. 20 Fla. Op. Att'y Gen. (2001) (Communicating factual background information from one board member to another via e-mail is not subject to the Sunshine Law, so long as it does not result in the exchange of member's comments or other responses that would require council action.).

229. 78 Fla. Op. Att'y Gen. (1993) (Chairman of a community development agency could not discuss in private with any other commission member the terms of employment of applicants for executive director, whether or not such discussions were authorized by the commission. The commission could, however, authorize the chairman to discuss in private such terms with the applicants but only if the chairman was not also authorized to accept or reject on behalf of the commission any contract options, whether or not the commission had final authority to accept or reject the contract.); 52 Fla. Op. Att'y Gen. (1997) (School board member and a college board member may discuss the purchase of property for joint use by the school district and college when the decision to acquire the property is not a joint decision but rests solely with the school board and when neither party has any decision making authority).

cannot be mitigated, as was the case in *Attorney General Opinion* 2000-08, February 9, 2000, in which the Attorney General opined that the Sunshine Law applied each time two or more fire commissioners from one fire and rescue district attended a county-wide association of seventeen such districts if the commissioners should discuss common concerns that may come before their district board.

The per se board meeting rule underpinned each of the Attorney General Opinions discussed above, and in each opinion the authority for the rule remained the suspect mantra of *Doran, Times Publishing Co., Berns, Canney,* and *Hough*, or some combination thereof.[230]

IV. CONCLUSION

A. *Teaching Points*

The foregoing review of Florida Supreme Court and District Courts of Appeal decisions, and State Attorney General Opinions, can best be summarized as establishing the following points:

1. The language of the Sunshine Law clearly requires a meeting of the governmental unit's governing body, and no Florida Supreme Court case has held that that requirement can be met if the meeting takes place among less than a quorum of the members of the governing body and is not sanctioned by the governing body as a whole. Only the Third District Court of Appeal, in *Hough*, held differently by in effect adopting the per se board meeting rule as the law.[231] The Second District Court of Appeal, in *Times Publishing Co.*, and the First District Court of Appeal, in *Tanzler*, held to the contrary.[232]

2. *Jones, Berns*, and *Occidental Chemical Co.* indicate that the Florida Supreme Court consciously deferred until another day whether, and under what circumstances, a meeting of less than a quorum of the board is

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230. 52 Fla. Op. Att'y Gen. (1997); 8 Fla. Op. Att'y Gen. (2000). The Attorney General cited *Krause* as authority for the per se board meeting rule, and in 1998, *Gradison* was cited as additional authority for the rule. 60 Fla. Op. Att'y Gen. (1998); *see supra* text accompanying notes 122 & 154 (discussion of *Gradison* and *Krause* cases).

231. Hough v. Stembridge, 278 So. 2d 288 (Fla. 3d DCA 1973).

232. Times Publ'g Co. v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969); Jones v. Tanzler, 234 So. 2d 372 (Fla. 1st DCA 1970).

nevertheless a meeting of the board under the Sunshine Law.[233] The delegation of authority logic of *Gradison, Wood*, and *Memorial Hospital*,[234] however, is that a board meeting will include any meeting conducted by a committee appointed by the board, as properly held by the Fourth District Court of Appeal in the *Bigelow* case.[235]

3. *Bassett, Tolar,* and *Occidental Chemical Co.* show that the Florida Supreme Court was rightly troubled by the near impossible line drawing problems and real world absurdities that arise once the Sunshine Law is expanded beyond the borders of the statute to include non-board sanctioned gatherings among less than a quorum of the members of a governing body.

4. Neither the holding in *Doran*,[236] nor the superfluous dicta in *Canney*,[237] nor the negative per se board meeting rule affirmed in *Rowe*,[238] provides any precedent for upholding the per se board meeting rule. Yet *Hough* relies upon *Doran* and the dicta in *Canney*, together with the unsubstantiated "purpose, intent and spirit" of the Sunshine Law, as its sole authority for adopting this rule as the law in Florida.[239]

5. The real winners under the per se board meeting rule are non-elected staff and lobbyists who can privately pursue their agendas with each board member and thereby influence board decisions as long as each board member is left in the dark as to the thinking of the other board members on the subject until the board meeting.

6. The per se board meeting rule has spawned some tortured distinctions (e.g., the speak, listen but don't discuss "no interaction" out) in a futile attempt to loosen the straight jacket that binds all public officials subjected to the rule.

7. The State Attorney General, under cover of the Sunshine Manual, has disregarded the foregoing and continues to perpetuate the myth that the per se board meeting rule is the law in Florida.

B. *The Need For A Rational Bright Line*

Powerful arguments can be made, starting with the language of the statute and the State Constitution, that the Sunshine Law should not be

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233. Jones v. Tanzler, 238 So. 2d 91 (Fla. 1970); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Occidental Chem. Co. v. Mayo, 351 So. 2d 336 (Fla. 1977).

234. *See supra* text accompanying notes 122 (*Gradison*), 173 (*Wood*) and 226 (*Memorial Hospital*).

235. Bigelow v. Howze, 291 So. 2d 645 (Fla. App. 1974).

236. Bd. of Pub. Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

237. Canney v. Bd. of Private Educ. of Alachua County, 278 So. 2d 260 (Fla. 1973).

238. Rowe v. Pinellas Sports Auth., 461 So. 2d 72 (Fla. 1984).

239. Hough v. Stembridge, 278 So. 2d 288 (Fla. App. 1973).

construed to apply towards unsanctioned meetings of less than a quorum of the members of the governing body. The key point is that if such meetings are not authorized by at least a quorum of the governing body, they cannot fairly and reasonably be construed as meetings of the governing body as required by the statute. Justice Dekle's quotation from *Fine v. Moran*[240] in his dissent in *Gradison* says it all:

> In construing or interpreting the words of a statute it should be borne in mind that the courts have no function of legislation, and seek only to ascertain the will of the Legislature. The courts may not imagine an intent and bend the letter of the act to that intent, much less, says the Maryland court, "can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not evidence."[241]

Apart from the "plain meaning of the statute" rule of construction, another reason for rejecting the per se board meeting rule is that it creates insurmountable line-drawing problems that unduly inhibit private communications between public body members. For example, under the Sunshine Law's forseeability test, a settled business matter not likely to be reopened may be discussed in private.[242] But how does one know that the matter will not be raised again? Only when the formal action on the matter commanded a unanimous vote?

A more common line-drawing problem arises concerning issues that are not even on the board's radar screen. Take the following hypothetical: A city commissioner may think that a vacant property should be acquired by the city and converted into a playground, but only if the neighborhood would support the playground and if the property is not likely to be developed. Another commissioner lives in the neighborhood and would provide useful insights on the issue. May the two commissioners first discuss the matter in private before deciding whether to even approach the board on the matter?

Questions of this nature would vanish if there were a clear rule that two or more board members may discuss in private any potential board matters, as long as the members involved do not collectively have the power to

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240. 77 So. 533 (Fla. 1917).

241. Town of Palm Beach v. Gradison, 296 So. 2d 473, 480 (Fla. 1974) (Dekle, J., dissenting) (quoting *Fine*, 77 So. at 536).

242. This forseeability test originated in *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 698 (Fla. 1969), and has never been challenged.

engage in such discussions on behalf of the board. If they do have such authority, then they can simply conclude that the Sunshine Law covers all such discussions.

Another example of a line-drawing problem is, of course, the State Attorney General's "no-interaction" out that allows board members at unnoticed gatherings to express their views to others in attendance on matters pending before the board so long as they do not debate or discuss those issues among themselves at the gathering. When does such a prohibited interchange occur? When the board member says he disagrees with the other board member? When the board member criticizes the positions of the other board member? When the board member asks another board member a clarifying question? Again, the niceties of permissible expression with no interaction can be largely eliminated if all discussions about board matters are either allowed or prohibited under the kind of clean rule suggested above.

We are assured that the Sunshine Law does not apply to purely social gatherings of board members,[243] but then the State Attorney General cautions against any such meeting that may raise suspicions, like a regular practice of having dinner together just before each regular meeting. In the case of the dinner involving Aldrich, Seed, Skinner, and Tonkel, when the District Attorney learned that all or some of the same people had dinner together on two other occasions after a regular meeting of the Board (also investigated by the State's Attorney but not found wanting), he fired off a memorandum to all District Board trustees not to attend any more such dinners because of the appearance of impropriety.[244]

Trustee Skinner is quoted in the *Vero Beach Press Journal* as saying that, as a result of the investigation and indictments, she will not get "within a football field's length" of any other trustee.[245] Under the per se board meeting rule, the right to socialize has a hollow ring.

C. *Private One-On-One Consultations Serve the Public Interest*

A common sense interpretation of the Sunshine Law and the 1992 Constitutional Amendment is that they do not peer into any potential board matter discussions that take place between board members when there is no reasonable basis for concluding they are acting either as, or on behalf of, the

243. *See supra* text accompanying note 88.

244. Memorandum from Alan Polackwich on Post Meeting Dinners to Richard R. Aldrich, Allen Seed, and Donna Skinner (Sept. 27, 1999) (on file with author).

245. Adam Chrzan, *Grand Jury: Trustees Deny Seed's Legal Fees*, VERO BEACH PRESS J., Apr. 11, 2000, at A3.

governing body. A rule of reason which fairly implements this simple concept is not only mandated by statute and the 1992 Constitutional Amendment. It is also needed so that board members can effectively function as representatives of the public.

Such a rule of reason should allow for an elected official to informally share in confidence information with another elected official and talk through with that person an issue which might come before the board. This kind of one-on-one, give and take consultation is a crucial component of governmental decision making, as any state legislator or appellate judge (who, of course, is not subject to the Sunshine Law) will readily admit. The art of "reasoning together" cannot be exclusively practiced at a public meeting. Any other interpretation of the law runs the serious risk of making elected officials pawns of lobbyists and non-elected staff who remain free to consult in private with individual board members.

To characterize the process of reasoning together as "back room politics" or "closed door politics" is to ignore human nature. Any elected official who cares about an issue may well want to talk in private to other interested parties about the matter. It is the process by which "dumb questions" are asked without embarrassment, differences are narrowed, and emotionally laden misunderstandings are sorted out.[246] A rule that prohibits such discourse between board members is both childish and demeaning. Political deal-making will not be stifled by artificially limiting private deliberations to discussions with staff, lobbyists and interested citizens who are not members of the governing body. The deals, or understandings, will simply be reached with those non-elected persons who have little accountability to the public at large.

By requiring that the affected assemblages be meetings of the governing body and not just of the members thereof, the Legislature (and the electorate through the 1992 Constitutional Amendment) struck a balance, allowing for private one-on-one and small group consultations among members of the governing body that cannot reasonably be construed as board meetings, and yet, imposing open meeting requirements when those consultations do amount to board meetings. A rule of reason that respects

246. According to the local newspaper, a member of the Indian River Memorial Hospital board of directors resigned "because of frustration with the state's open meeting law." VERO BEACH PRESS J., Jan. 6, 2002, at A7. In a letter to the board, the director said "the Sunshine Law has thwarted the board's ability to dig in and solve problems." *Id.* Two quotes from the letter are telling: "So many times I really wanted to sit down with a fellow director and discuss hospital business,. . .but the possibility that we might vote on something meant we didn't do that. It would, violate the Sunshine Law." *Id.* Little did the director know that he was just another casualty of a misconception of the law that must surely discourage citizen participation in local public boards.

such a balance should eliminate most of the line-drawing problems discussed above. More importantly, the rule facilitates good government.

Much is made in the State Attorney General opinions of the statement in *Doran* that the Sunshine Law should be liberally construed for the benefit of the public.[247] No one can quarrel with that proposition, and indeed it is one that has been rightly embraced by the Florida courts in subsequent opinions. However, what is missing from the equation is the clear benefit that the public gets from the balance struck by the Legislature and the kind of private consultations among board members that must be permitted.[248]

In a separate article in progress the author describes how the per se board meeting rule was used, perhaps by well intentioned persons, to terrorize Aldrich and Seed in a criminal proceeding. It is an ugly story of personal animus, struggling memories (as parties tried vainly to recall events which at the time they occurred seemed so innocuous), paranoiac suspicions, strong arm tactics, media angst, emotional turmoil, costly litigation, and political revenge, all fostered in large part by the misguided notion that the per se board meeting rule was the law.

Perhaps the havoc that the rule wrought in the lives of Aldrich and Seed is the best argument for its rejection. A rule that penetrates so intrusively into the unguarded private moments of board members is bound to create paranoia, particularly if the rule becomes a sword for exacting vengeance, no matter how justified such exaction may seem to be in the eyes of the avengers. By limiting the Sunshine Law to board meetings, the Legislature provided a setting for the law's application that properly puts each board member on notice that the spotlight must be on. So focused, the board member is more likely to choose his or her words carefully and thereafter recall what transpired at such a meeting. A rule of reason that respects the "board meeting" boundaries set by the Legislature and reaffirmed by the electorate in the 1992 Constitutional Amendment greatly reduces the risk of misunderstandings and abuse in the enforcement of the Sunshine Law.

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247. *See supra* text accompanying note 52. One should take to heart the cautionary point made in *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. 4th DCA 2000) ("[this] rule of construction will not support an interpretation where 'there is neither reason nor policy expressed in the language of the statute' to support an expansive reading of it").

248. *See* Moberg v. Indep. Sch. Dist. No. 281, 336 N.W.2d 510 (Minn. 1983) (for an insightful discussion of the balance the court concluded the Minnesota Legislature struck in a comparable open meeting law then in effect).

D. *Proposed Solutions*

It is time to consign the per se board meeting rule to the graveyard of good intentions gone awry. In its place should be a definition of a meeting under the Sunshine Law that (1) respects the statutory (and constitutional) requirement that the meeting be "of any board or commission" ("of any collegial public body"), (2) prohibits the governing body from circumventing the open meeting requirement, and (3) provides a workable bright line that does not stifle one-on-one consultations between board members on potential board matters. Such a definition, preferred by the author, is the following:

> A "meeting" under the Sunshine Law is any gathering of a quorum of the members of the collegial public body, including any committee, or subcommittee thereof, at which public business of such body is to be transacted or discussed, and any other gathering of less than a quorum of the members intended by the public body to circumvent the open meeting requirement by either subdividing into smaller groups that collectively constitute a quorum or delegating to the smaller group the authority to act on behalf of the collegial public body. Any one-on-one consultation or other gathering between two or more members who are not acting on behalf of the public body as provided in the preceding sentence is not a "meeting" under the Sunshine Law.

This definition, like the law that is being interpreted, strikes a balance between the demand for open government and meaningful deliberations in public on the one hand, and the need for effective representation of the people on the other. Board members must be able to reason together both in public and private settings. The proposed definition seeks to achieve that goal while never permitting the governing body to do indirectly what it cannot do directly.

Perhaps the same objectives can be achieved with a definition more general in nature, such as:

> A "meeting" under the Sunshine Law is any meeting of two or more members of a collegial public body at which public business of the public body is discussed, provided that the members involved have authority to engage in such discussions on behalf of the public body. Membership in the public body does not alone constitute such authority.

Such a definition aptly states the principle that there cannot logically be a meeting of the board unless the board has somehow sanctioned the meeting. However, in the author's opinion, the definition leaves too much to interpretation.

A definition that cuts the Gordian Knot and comes closer to both the definition found in the 1990 Constitutional Amendment, and a definition used by a few other states,[249] is as follows:

> A "meeting" under the Sunshine Law is any meeting of the lesser of (i) three or more members or (ii) a quorum of a collegial public body convened for the purpose of discussing public business of the public body. No other meeting involving any members of the public body is a meeting of that body under the Sunshine Law.

This definition provides a brighter line by placing no open meeting requirements on meetings between only two members of the governing body. The definition also exempts discussions at meetings (e.g., social or chance meetings) that are not convened for the purpose of discussing public business. Some may view the definition as an opportunity for abuse. The author sees in the definition the same kind of workable rough justice that was achieved in the 1990 Constitutional Amendment covering the Legislature. If the first more nuanced definition proposed above is unacceptable, perhaps the Florida Supreme Court or Legislature will find this last one more fitting.

Pitted against all three proposed definitions is the illogical per se board meeting rule, a rule born of disavowed dicta, squarely held in only one intermediate appellate court decision that invoked the deities of "spirit, intent and purpose" without a scintilla of supporting legislative history, contradicted in the holdings of two other intermediate appellate courts and perpetuated in a string of State Attorney General opinions that, charitably speaking, misrepresented critical case law and rendered meaningless the constraining words of the statute. That no other state has imposed the per se board meeting rule on local government[250] speaks volumes about whether the rule serves any public benefit. Either the Florida Supreme Court, or the Legislature, should set the record straight and correct a misconception of the law that has gone unchallenged for too long.[251]

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249. *See supra* note 12 (states with three or more members test).

250. *Id.*

251. Probably the best way to question the validity of the per se board meeting rule in the courts (through to the Florida Supreme Court) is a declaratory judgment action brought by a local government unit. Joseph W. Little and Thomas Tompkins in *Open Government Laws: An Insider's*

V. POSTSCRIPT

Some may undoubtedly argue that the per se board meeting rule has, rightly or wrongly, become a part of Florida's culture, that most local public officials have learned to live with the rule, and that no useful purpose would therefore be served in raising the issue now. Why ask the Florida Supreme Court (perhaps by way of a declaratory judgment action) to decide once and for all whether the per se board meeting rule is the law in Florida? Why get the Legislature involved? Why roil the press?

The answer lies in the two concerns set forth at the outset and explicated in this Article. The per se board meeting rule (1) undermines effective representative government and (2) makes a mockery of Florida's judicial processes. Most local government officials undoubtedly support the Sunshine Law. However, the author doubts that there are many local officials who seriously believe that the public interest is served by a rule which prohibits even two board members from discussing in private potential board matters. Certainly the Legislature did not think so, as evidenced by the 1990 Constitutional Amendment.

The per se board rule, however, is not just a bad rule. It is a bogus rule. It is not inferable from the statutory language. It is not supported by any legislative history. It ignores accepted cannons of statutory construction. It thrives on a repeated misstatement of critical case law as seen in *Doran, Times Publishing Co.,* and *Berns.* It finds solace in only one definitive appellate court holding, the bizarre *Hough* case. And, it disregards the two contrary holdings found in *Times Publishing Co.* and *Tanzler.* Whether this aberration is the product of self-righteous dissembling or atrocious legal scholarship is a question for someone else to answer.

What is clear is that the State Attorney General and press funded Sunshine Manual should not be allowed to decide that the per se board

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View, suggest that a right of privacy argument might be an effective grounds for challenging at least some of the more extreme applications of the open meeting laws. Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451 (1974-75). This Article does not attempt to pursue that argument, largely because Article I, Section 23, of the Florida Constitution addresses the privacy issue. It states that the right of privacy "shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23. Another grounds for challenge, however, that should surely prevail when criminal charges are brought under the per se board meeting rule, is that the defendants are denied due process protection under the State and Federal Constitutions because the Sunshine Law does not give adequate notice that conduct of the kind attributed to Aldrich and Seed is a violation of the law. *See* 16A C.J.S. CONSTITUTIONAL LAWS 580; *see also* Brock v. Hardie, 154 So. 690 (Fla. 1934). It is, of course, the statute, not a series of advisory State Attorney General opinions, nor the Sunshine Manual, that must provide such notice.

meeting rule is the law in Florida. That, of course, is exactly what will happen if the Florida Supreme Court and Legislature do not address this issue head on. As this Article shows, the legal reasoning and process by which the per se board meeting rule has been foisted upon the citizens of Florida is ludicrous. Neither the Florida Supreme Court nor the Legislature can allow such a situation to stand. Florida's credibility is at stake.[252]

252. Getting it right takes heavy lifting by both the Legislature and the judiciary. *See* State *ex rel.* Newspapers, Inc. v. Showers, 398 N.W.2d 154, 165-66 (Wis. 1987) (construing legislation that attempted to strike a balance between open government and the need for unfettered one-on-one consultation among board members); *see also* McComas v. Bd. of Educ. of Fayette County, 475 S.E.2d 280, 286-93 (W. Va. 1996).