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2023 Brown Act Survival Training

The Brown Act in 90 Minutes (or less)

Presented by

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Dannis Woliver Kelley

January 30, 2023

This training is provided for educational, compliance and loss-prevention purposes only, and absent the express prior agreement of DWK, does not create or establish an attorney-client relationship. The training is not itself intended to convey or constitute legal advice for particular issues or circumstances. Contact a DWK attorney for answers to specific questions.

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Intent of the Brown Act

To keep the public informed of the actions, debates and views of locally elected representatives; and

To provide the procedural framework for local legislators to meet, debate, act and listen collectively to their constituents

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What is a Meeting?

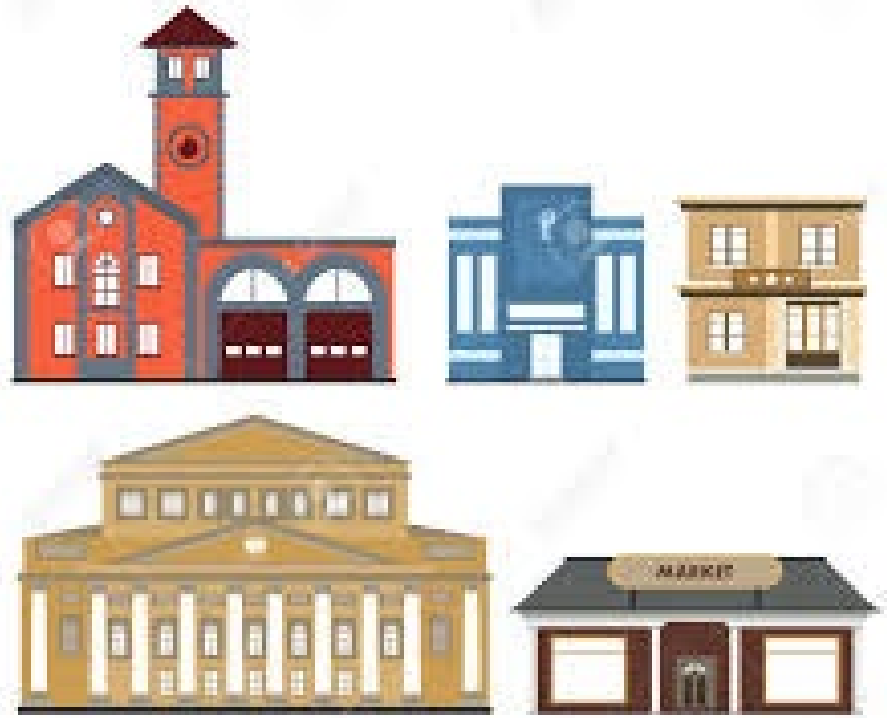
- Any congregation of a majority of members of a legislative body at the same time and location, including teleconference locations, to hear, discuss, or deliberate, or act on any item within the subject matter jurisdiction of the legislative body (See Gov. Code, § 54952.2.)



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Meetings – Location, Logistics



- All meetings must be open and public
  - Teleconference locations must be identified and accessible;
  - At least a quorum of the Board must be within District boundaries
- Meeting place must be accessible to public -nondiscriminatory, accessible to disabled, no payment or purchase required

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AB 361 Electronic Meeting

- Replaced flexibility for remote meetings during the pandemic by Executive Order.
- All board members may meet remotely without complying with the traditional teleconference requirements if there is real-time remote public comment.
- Only available if:
  - There is a proclaimed state of emergency; and, if state or local officials have imposed or recommended social distancing measures; or, if the board has previously determined that it should hold remote meetings for health and safety reasons.
  - Findings renewed every 30 days.
- Option provided by AB 361 will no longer be available after February 28, 2023 absent another declared state of emergency.

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AB 2449 Remote Participation

Board member may participate remotely without "traditional" requirements if:

- Quorum in-person at a location open to the public.
- Public access via a two-way audiovisual platform or audio service and live webcast
- Public comment allowed via the remote platform as well as in person.
- Members participate through both audio and video and identify individuals in the room.

Available in limited circumstances:

- "Just cause:" provide care to a family, illness, disability, or traveling on government business. Notify board at the earliest opportunity possible.
- "Emergency circumstances:" a physical or family medical emergency, with board approval.

Member limited to:

- Two times a year for "just cause."
- No more than three consecutive months or 20% of regular meetings, for either reason, if board meets at least 10 times a year.

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AB 2647 – Disclosure of Agenda items

- Effective January 1, 2023
- Generally, all writings related to agenda items must be made available 72 hours prior to a noticed meeting.
- Now, all writings related to an agenda item must be available for public inspection at the time the writing was distributed.
  - This provision means the public must have access to copies of all of the same documents provided to Board members ("Board packet"), at the time they are provided to the Board.
  - Obligation satisfied by publishing or linking to materials on Board website, provided clearly disclosed to website visitor.
  - Also still must have physical copies available for inspection.

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Questions?



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What is/is not a Meeting

- Definition of meeting excludes:
  - Appearance of a Board majority at a general conference open to the public involving a discussion of broad issues and attended by a broad spectrum of officials from a variety of governmental agencies
  - Attendance at open and publicized meetings, organized to address a topic of local concern by a person or organization other than the local agency
  - Social or ceremonial occasions

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What is/is not a Meeting (cont.)

- Definition of meeting excludes:
  - Attendance by a Board majority at open and noticed meetings of another body of the same local agency or any other agency; or
  - Attendance by a Board majority at an open and noticed meeting of a standing committee of the Board, if members of the Board that are not members of the committee attend only as observers. (Gov. Code, § 54952.2.)

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Serial Meetings

- A majority of the members of a Board shall not, outside a noticed meeting, **use a series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the board's jurisdiction
- This includes communications through:
  - Telephone, electronic mail, facsimile, internet;
  - Communications through an intermediary

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Serial Meetings

- A serial meeting can occur even though a majority of members never gather in a room at the same time.
- Section 54952.2(b)(1) prohibits a majority of members of a legislative body outside of a lawful meeting from directly or indirectly using a series of meetings to discuss, deliberate or take action on any item of business within the subject matter jurisdiction of the body.
- Serial meetings commonly occur in one of two ways:
  - A staff member, a member of the body, or some other person individually contacts a majority of members of a body and shares ideas among the majority ("I've talked to Boardmembers A and B and they will vote 'yes.' Will you?") or,
  - Without the involvement of a third person, member A calls member B, who then calls member C, and so on, until a majority of the body has reached a collective concurrence on the matter.

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Permitted Communications

- An employee or official of a district may engage in separate conversations or communications outside of a meeting with other board members in order to answer questions or provide information regarding a matter that is within the district's jurisdiction, if that person does not communicate to board members the comments or position of any other board member



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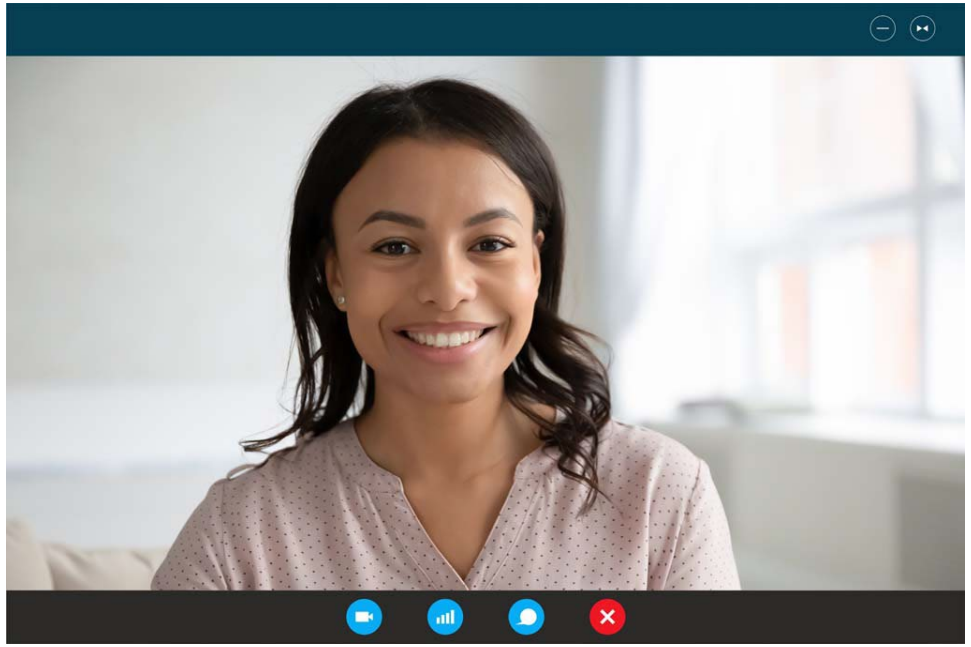
Permitted Communications (cont.)

- Communications limited to providing information (i.e. superintendent's weekly report) or procedural or administrative matters do not constitute meetings.
  - Receipt of written legal advice is not a meeting!
- Private briefings for less than a quorum of board members on background events concerning agenda items do not violate the Act *unless the comments or position of any other board member is disclosed.*

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Receiving & Delivery of Public Comment

- In-person
- Email
- Phone / Call-in
- Zoom / Video comments
- Delivery by:
  - Individuals
  - Board clerk
- All of the above or any combination



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15

Meetings – Public Rights

- Right to comment:
  - Agenda must provide opportunity for public comment
    - Before or during consideration of item
    - Public comment must be allowed on any other matter under the Board's jurisdiction
    - At special meetings, the public only has the right to address agenda items
- Board may place reasonable time limitations on particular topics or speakers

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Meetings – Public Rights (cont.)

- Board meetings are a limited public forum
  - Public has constitutional right to comment on any subject relating to district/board business
  - Any restriction on the content of public comment must effectuate a compelling state interest
  - Prohibiting members of the public from criticizing school district employees is unconstitutional

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Questions?



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Social Media



- New rules (AB 992) allow:
  - Answering questions
  - Providing information
  - Soliciting information from the public
- Limitations:
  - Must be open and accessible to the public
  - No discussion or response between board members

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19

Social Media: What Is Prohibited



- A board member shall not respond directly to any communication regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member.
- Majority may not use social media to discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the board.

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Social Media: What Is Prohibited (cont.)

- "'Discuss among themselves' means communications made, posted, or shared on an internet-based social media platform between members of a legislative body, including comments or use of digital icons that express reactions to communications made by other members of the legislative body."



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Social Media and the First Amendment

- Social media as a public forum in an interactive space
  - Send feedback to government officials
  - Interact with others regarding the subject matter of a comment or post
- The President may not "block" constituents from official social media accounts because doing so violates the first amendment. (*Knight Institute v. Trump)*

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Garnier v. O'Connor-Ratcliff (9th Cir)

Can a member of the school board block members of the public on social media?



Can a member of the school board "hide" or delete repetitive comments on their social media pages?



Can a board member designate "rules of etiquette and decorum" applying to comments on their social media posts and pages?

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What about NextDoor?



- Not open and accessible to the general public, so less of a public forum.
- Still be cautious! Remember the purpose of official social media accounts.

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Personal v. Official

Personal

- Acting as yourself.
- Purpose is to connect with friends, share opinions, and be part of a community.

Official

- Potentially acting under color of state law.
- Purpose is to share information with or solicit information from the public.

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Social Media Takeaways

- Board members:
  - May use social media unrelated to board business.
  - May use social media to provide/solicit information to/from members of the public.
  - May not directly respond to any communication from another members regarding board business.
  - Must avoid otherwise permissible use of social media which results in a discussion between majority of board members regarding business of a specific nature.
    - Even the appearance of a discussion is potentially problematic.

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Closed Session Topics



- Include:
  - Personnel Actions – Appointment, Employment, Evaluation, Discipline/Dismissal/Release
  - Hearing “Complaints or Charges” against employees - requires 24-hour notice of right to open session
  - Conference with Labor Negotiator – for represented and unrepresented employees. Generally regarding ongoing negotiations, can give status to Board of items discussed at the table.
  - Student Matters

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Pending and Anticipated Litigation

- To confer with, or receive advice from legal counsel regarding pending or threatened litigation when discussion in open session would prejudice the position of the district in the litigation. (Gov. Code, § 54956.9.)
  - Includes consideration of tort claims
  - Must counsel be present?



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Confidentiality of Closed Session

- Board member may not disclose confidential information from closed session
- Consequences:
  - Injunctive relief
  - Disciplinary action
  - Referral to grand jury
  - Expose the District to potential liability



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Brown Act Violations

VOICE of OC

NEWS: EDUCATION

Did the Placentia-Yorba Linda School Board Violate Transparency Law?

BY ANGELINA HICKS AND HOSAM ELATTAR
Aug 11, 2022

Mountain Democrat

PLACERVILLE, CALIFORNIA



Camino Union School District Trustees Bob Van Gilder, left, and Pat Kernan returned to the school board meeting after leaving for close to 10 minutes. Mountain Democrat photo by Odin Rasco

News

Tensions flare at Camino school board meeting

By Odin Rasco

DEL MAR TIMES
SOLANA BEACH SUN · CARMEL VALLEY NEWS

NEWS

San Dieguito board to re-do officer election due to alleged Brown Act violation

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Violations

- Consequences for violation of the Brown Act:
  - Criminal liability exists if there is “intent to deprive public”
  - Public can sue to stop violation of Act
  - Declaratory relief regarding past violation of the Act
  - Payment of attorneys’ fees
  - Voiding of action taken in violation of the Act
  - Court may order taping of closed session
  - Grand Jury Investigation/Findings



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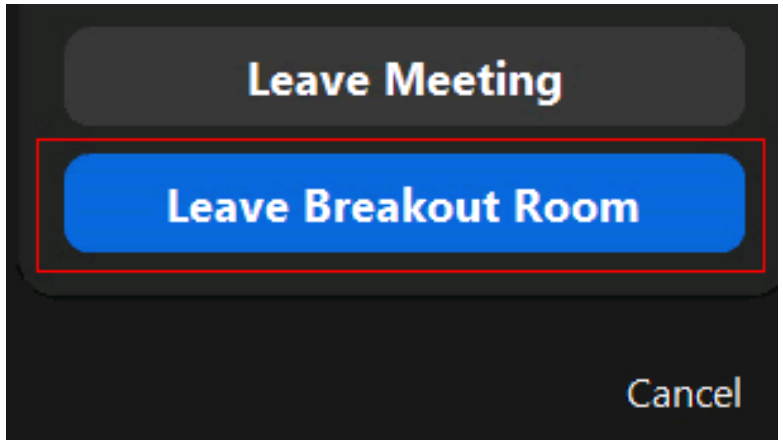
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When you are ready to return to the main session, please click on “Leave Room” and then on “Leave Breakout Room.” If you click on “Leave Meeting,” you will need to rejoin the webinar using the Zoom link.



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