The Brown Act

What You Don't Know CAN Hurt You!

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Tonight's Agenda

Agenda

- Board Meetings – The Brown Act
  - What is a Meeting?
  - Serial Meeting Exercise
  - Meeting Conduct
  - Agendas
  - Closed Sessions
  - Specific Rules
  - Violations and Confidentiality
- Bonus! 8 Hot Topics
- Questions and Discussion

Board Meetings – The Brown Act

What is a Meeting?

- Brown Act
  - Any gathering of a quorum (majority) of a legislative body to discuss or transact district business
  - Must avoid serial meetings
  - Includes standing subcommittees but not ad-hoc
- Exceptions:
  - Conferences/meetings open to the public
  - Purely social or ceremonial events
  - No discussion of district business
- Location
  - Open to the public, ADA accessible
  - Within the boundaries of the district (exceptions)

Board Meetings – The Brown Act

What is a Meeting?

- Teleconferencing / Video Conferencing
  - One or two members may participate remotely
  - Must notice location, post agenda and hold remote location open and accessible to the public
- Pandemic (Exec Order, AB 361)
  - All members may participate remotely during state of emergency if resolution declaring public safety need
  - Public must be allowed to observe and participate "telephonically or otherwise electronically"
- January 1, 2023 (AB 2449)
  - Less than majority may participate remotely for "just cause" or "emergency"
- The key is accessibility

Board Meetings

Serial Meeting Exercise

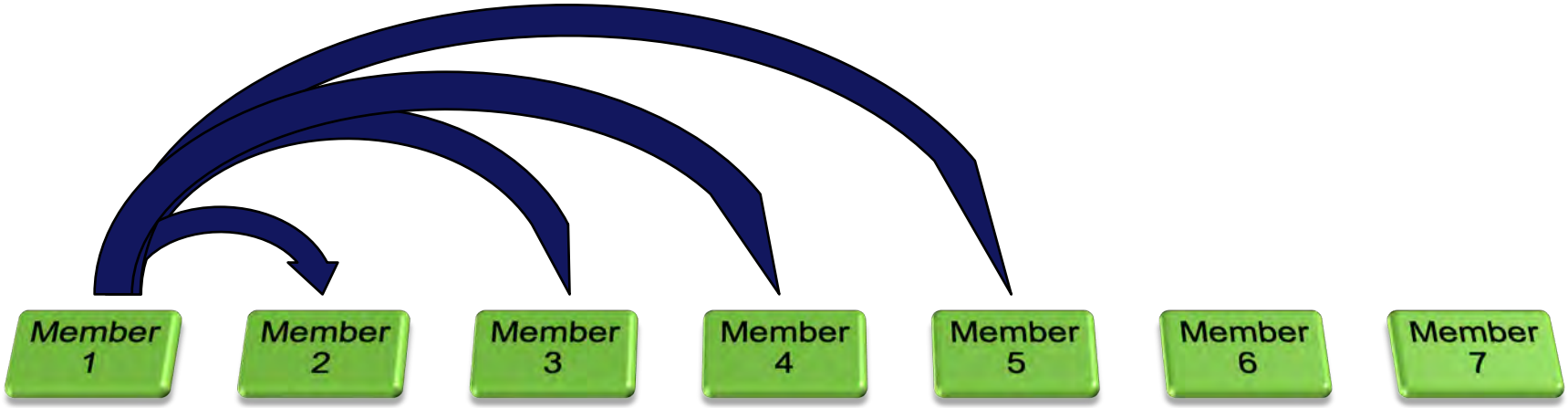
A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body. - Gov. Code § 54952.2(b)(1)

Seven Member Board

Classic serial discussion: the telephone game – when are 4 Board member minds connected?

Board Meetings

Serial Meeting Exercise

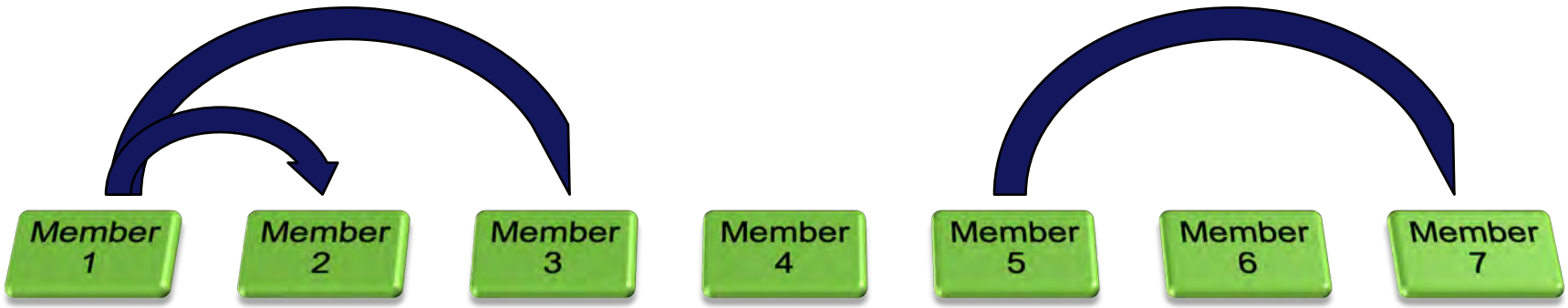


Seven Member Board

A variation on the serial meeting – when are 4 Board member minds connected?

Board Meetings

Serial Meeting Exercise

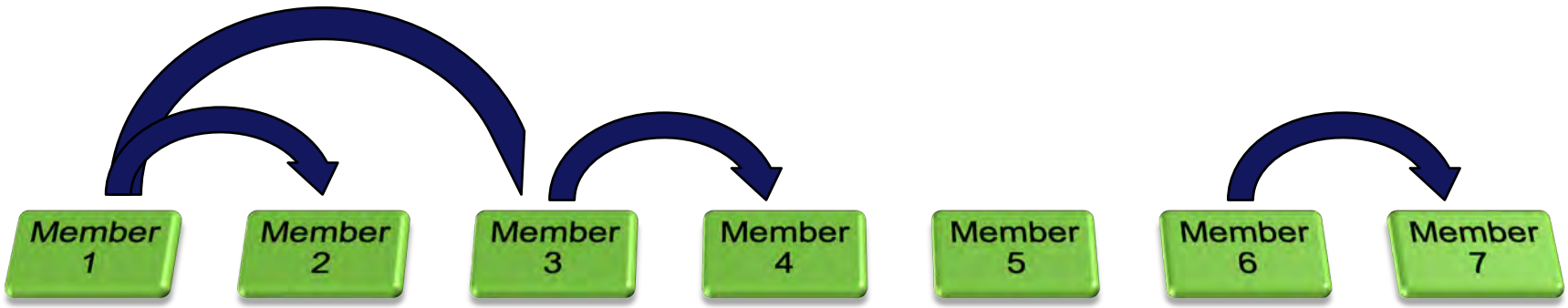


Seven Member Board

Are 4 Board member minds connected?

Board Meetings

Serial Meeting Exercise



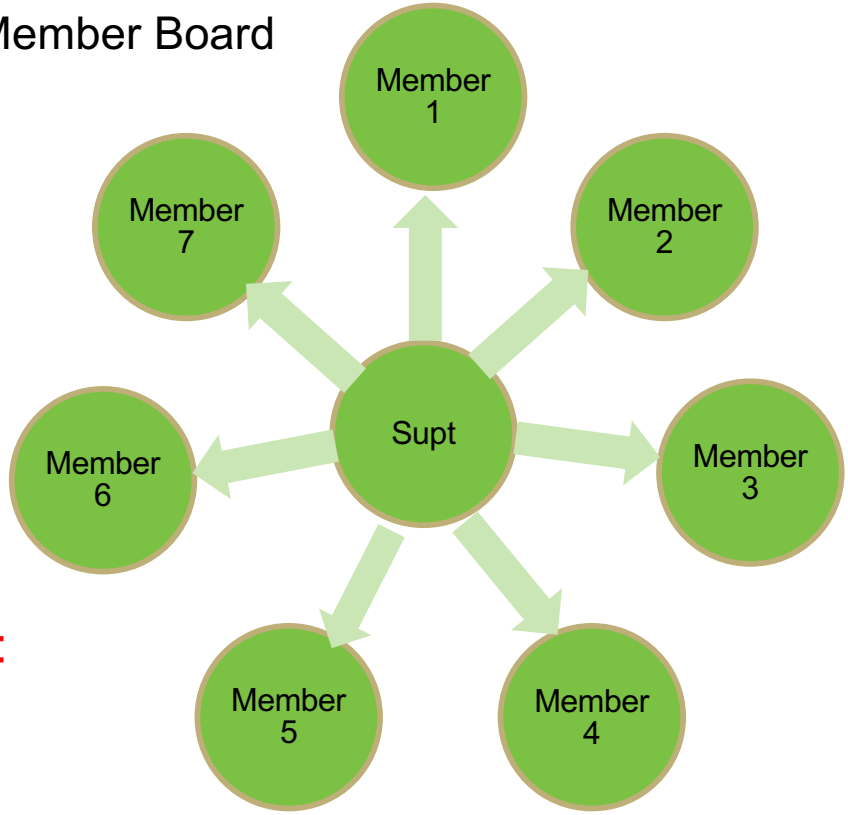
Seven Member Board

Are 4 Board member minds connected?

Board Meetings

Serial Meeting Exercise

Seven Member Board

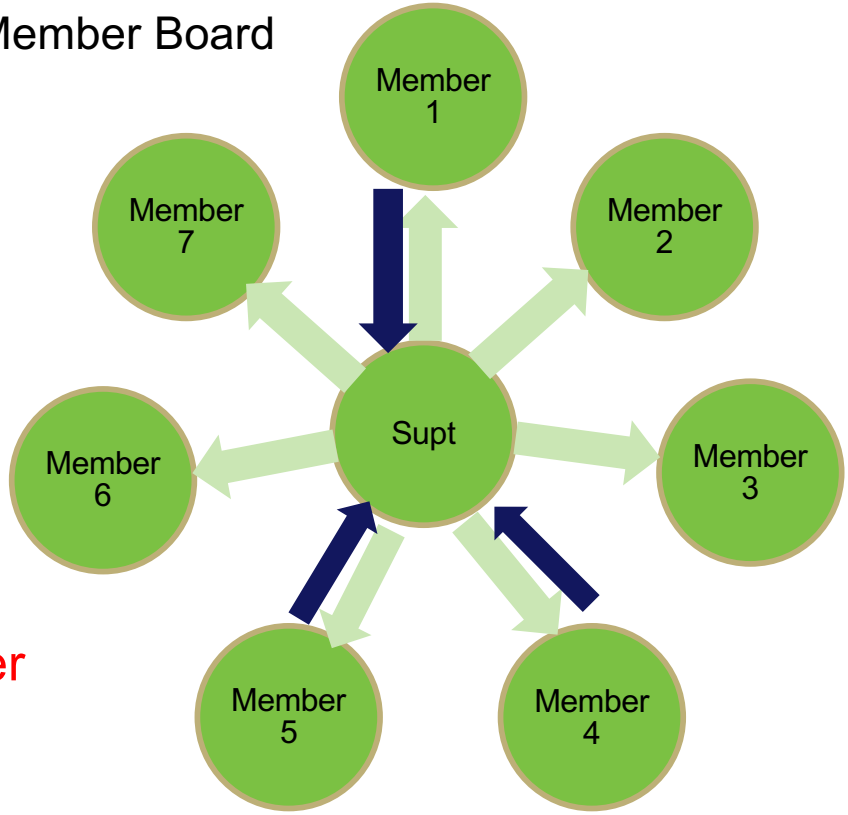


The Hub and Spoke:
A one-way "Friday memo" is OK

Board Meetings

Serial Meeting Exercise

Seven Member Board

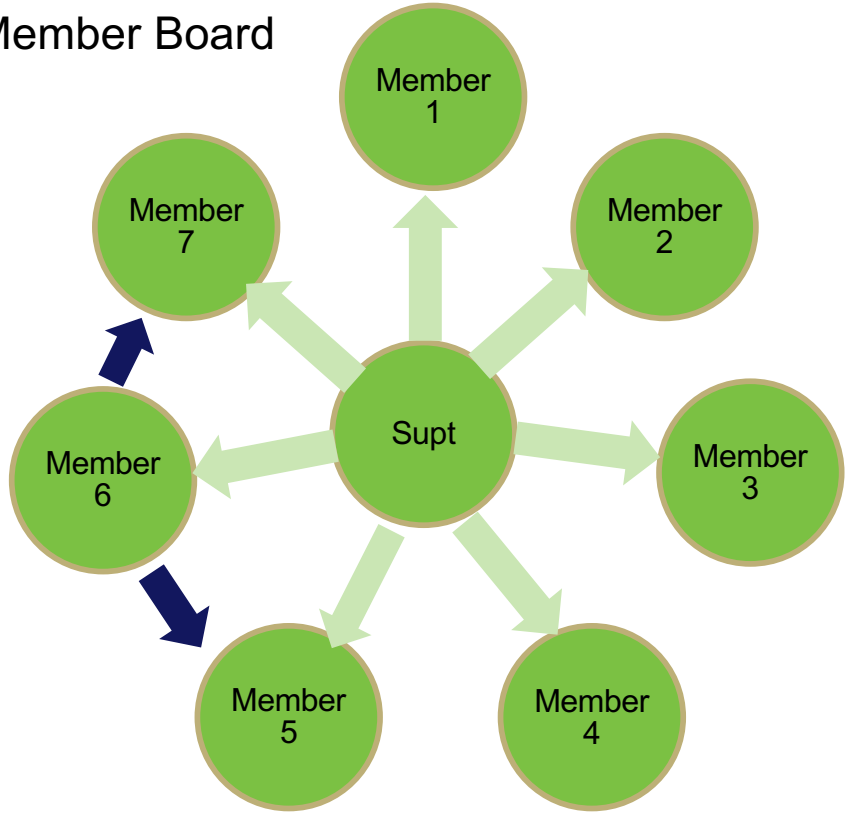


Response from fewer than 4 is OK – but how do you know?

Board Meetings

Serial Meeting Exercise

Seven Member Board

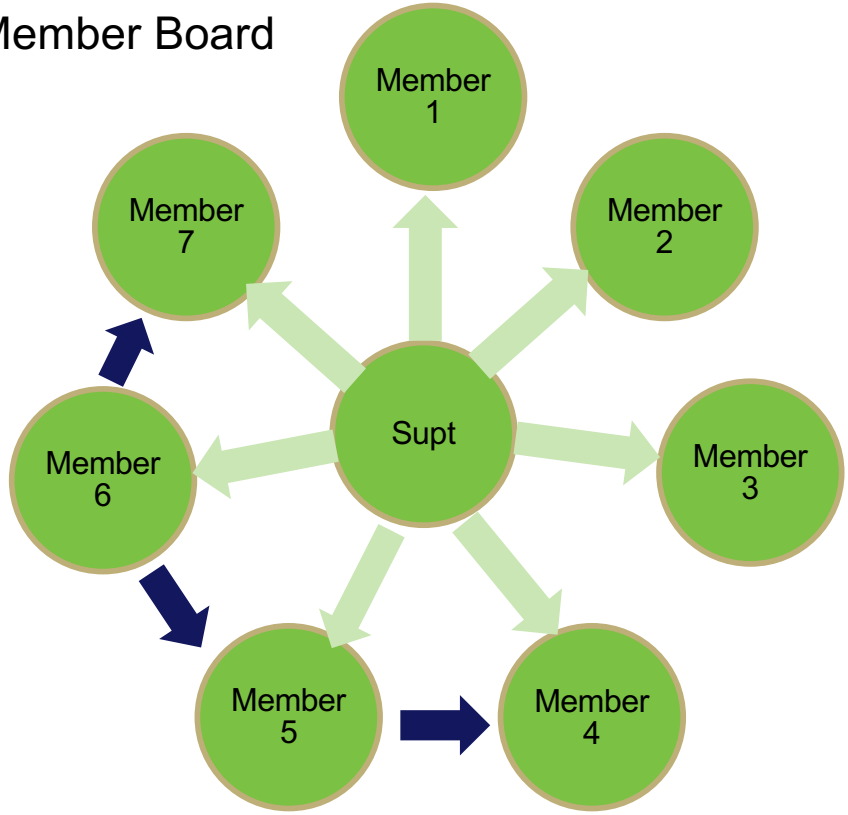


3 Board member minds connected

Board Meetings

Serial Meeting Exercise

Seven Member Board

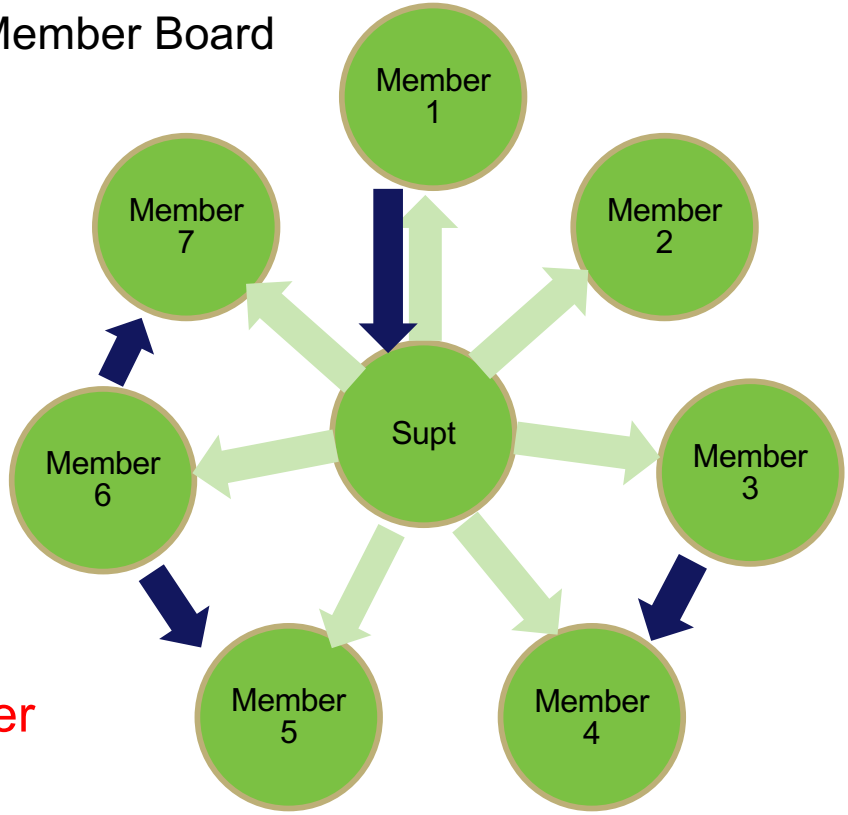


4 Board member minds connected

Board Meetings

Serial Meeting Exercise

Seven Member Board



Are 4 Board member minds connected?

Board Meetings

Serial Meeting Exercise

- Keys to safety:
  - One-way communications from non-board members to the board are always safe
    - Examples: Superintendent, Legal Counsel, Unions or Community
    - However, it is never 100% safe to respond, as any response can accidentally cause a violation
  - Up to three members may communicate (on 7 member Board), but it is essential that each one knows and agrees not to talk to any others
    - If another member attempt to communicate, the member should politely inform them they cannot discuss due to the Brown Act.
  - Unintentional violations may result from responding to any outside communication, because you don't know who else responded
    - One-on-one union or citizen discussions

Board Meetings

Meeting Conduct

- Requirements
  - Call to order, approve agenda
  - May add to agenda in certain cases (Emergency: majority; Immediate Need: 2/3)
  - Report after closed session any action taken and vote of each member
- Public Comment Requirements
  - Must allow comment on closed session items before closed session
  - Must allow comment on open session items at or before the time the item is considered (options)
  - Regular meeting: any matter within jurisdiction (broad)
  - Special meeting: only agenda items

Board Meetings

Meeting Conduct

- More on Public Comment:
  - Subject to reasonable regulation
  - If translator required, must double speaking time (GC 54954.3)
  - Don't forget *Baca v. Moreno Valley.* You cannot prohibit criticism of employees, District, or Board Members
  - However you can direct a person to complaint procedures (and consequences for avoiding), remind them of privacy/ defamation laws, and direct them to staff for assistance
  - Individual Board members should not respond if the matter is not on the agenda, other than to direct to staff or request a future agenda item (GC 54954.2(a))
  - Even during Board member comments, specific matters of business should not be discussed if not on agenda

Board Meetings

Agendas

- Must be posted in advance of meetings
  - 72 hours for regular meetings, 24 hours for special
  - 1 hour for emergency – work stoppage/crippling disaster
- Agenda Items
  - Must reasonably apprise the public of the business to be transacted so they can determine whether to participate
  - Brief general description, usually no more than 20 words
  - Agenda materials provided to Board become public records unless otherwise protected
  - Agenda materials provided to Board members within 72 hours of meeting must be made available to the public without delay

Board Meetings

Closed Session

- Default Rule:
  - All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided… Gov. Code § 54953(a)
- General Exception:
  - **Public purpose for confidentiality**
- Special Exception:
  - EERA Negotiations Provision: Gov. Code § 3549.1(d)

Board Meetings

Closed Session – Public Purpose

- Safe Harbor agenda language: GC § 54954.5
  - Conference with Real Property Negotiators
  - Conference with Legal Counsel – Existing Litigation
  - Conference with Legal Counsel – Anticipated Litigation
  - Liability Claims
  - Threat to Public Services or Facilities
  - Public Employee Appointment / Public Employment
  - Public Employee Performance Evaluation
  - Public Employee Discipline/Dismissal/Release (24 hour notice requirement)
  - Conference with Labor Negotiators

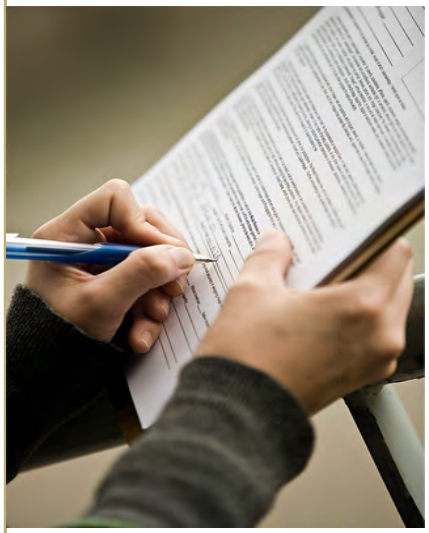
Board Meetings

Closed Session – Agenda Requirements

- **Conference with Real Property Negotiators**
  - Must identify property, agency negotiator, parties and subject
- **Conference with Legal Counsel – Existing Litigation**
  - Must identify case number or party name
- **Conference with Legal Counsel – Anticipated Litigation**
  - Must state number of potential cases
- **Liability Claims** – must identify claimant and agency
- **Threat to Public Services or Facilities** – identify consultant
- **Public Employee Appointment / Public Employment**
  - Must identify position title
- **Public Employee Performance Evaluation** - same
- **Public Employee Discipline/Dismissal/Release**
  - No other info required, but possible 24 hour notice requirement
- **Conference with Labor Negotiators**
  - Must identify agency negotiator and organization

Board Meetings

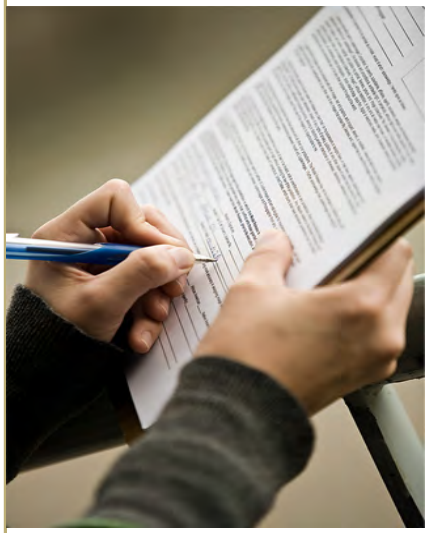
Specific Rules



- Must report out all closed session actions/votes
  - Some exceptions
- Must report/record individual vote of each member
- Must vote on employment contracts in open session in a regular meeting
- Must orally report a summary of a recommendation for comp/benefits in an executive contract in open session prior to the vote (GC 54953)
- No discussion of salaries/benefits in closed session (except conference with labor negotiator)
- No discussion of compensation in a special meeting
- Agenda must be posted on website (single click)

Board Meetings

Violations and Confidentiality



- Challenging Board action (GC § 54960):
  - District attorney or any interested person
  - Preventing future (GC § 54960) or remedying past violations (GC § 54960.1 – 54960.2)
  - Mandamus, injunction or declaratory relief
  - Requires a cure and correct opportunity
- Confidentiality:
  - No person may disclose confidential information that has been acquired by being present in a closed session to a person not entitled to receive it, unless the legislative body authorizes disclosure. (GC § 54963)
  - Communication that is the basis for closed session
  - **Penalties:** Injunction or referral to Grand Jury

Brown Act Hot Topics

1. Disruptions – SB 1100
2. Remote Meetings – AB 2449
3. Social Media – AB 992 and *Garnier*
4. Public Agenda Item Requests
5. Anticipated Litigation in Closed Session – *Fowler*
6. Conferences – A “Meeting” Exception
7. The EERA Meeting Exception
8. Discussion and Action on Executive Comp

1. Disruptions - SB 1100

- SB 1100 adds Gov. Code 54957.95 effective January 1, 2023.
  - Existing law and typical board policies prohibited disruptions and allowed for the removal of disruptive individuals, with limitations. *See* Gov. Code § 54957.9.
  - SB 1100 provides additional statutory authority (and guidance) for presiding officer of legislative body to remove disruptive attendees.
  - Prior to removal, disruptive individual must be warned that if they don't cease disruptive acts, they will be removed. If they continue they can be removed.
- "Disrupting:" behavior that disrupts, disturbs, impedes, or renders infeasible the orderly conduct of the meeting. Includes:
  - Failure to comply with reasonable/lawful regulations of the body or other law.
  - Engaging in behavior that constitutes use of force or a true threat of force.

2. Remote Meetings and AB 2449

- Brown Act contains "traditional" teleconferencing rules:
  - Must identify remote location and post agenda there, hold open to public
- Executive Order N-25-20 added option during pandemic.
  - Meetings can be fully remote during state of emergency, provided the public is given electronic means to observe and participate. *Also see* AB 361.
- AB 2449 amended Brown Act to allow less than a majority to participate remotely without complying with the traditional rules in two circumstances:
  - Just cause: caregiving, contagious illness, disability, travel on school business
  - Emergency: personal or family medical emergency (must briefly describe)
  - Majority must participate from a single physical location open to the public.
  - Must provide two-way audio-visual access to the public in real time.

3. Social Media – AB 992 and *Garnier*

- AB 992 was effective Jan 1, 2021, sunsets Jan 1, 2026.
  - Authorizes individual board members to engage in conversations with the public via social media answer questions, provide information, or to solicit feedback from the public.
  - Board members may not use social media to discuss among themselves business within the subject matter jurisdiction of the legislative body.
  - Includes comments and also "use of digital icons that express reactions to communications made by other members of the legislative body" (emojis, "like" buttons, reactions).
- *Garnier v. O'Connor-Ratcliff* 41F.4th 148 (9th Cir. July 27, 2022)
  - Board members may not block or restrict the public from social media (FB/Twitter) on a viewpoint basis. First Amendment analysis, also qualified immunity issue. Reasonable content restrictions are permissible in a limited public forum, but not a blanket ban.

4. Public Agenda Item Requests

- Ed. Code 35145.5 allows the public to place matters on the agenda of school district board meetings.
- This is a recent development, where the public is demanding discussions, action or consideration of proposed resolutions or board policies.
- Several strategies:
  - Where possible, direct to public comment.
  - If necessary, use a discussion item entitled "Public request for agenda item." Make it a discussion item only.
  - The public cannot compel the board to consider an action or a resolution – this is equivalent to a motion, and only board members may make a motion.
  - Proposed polices /resolutions should be vetted by staff and/or legal counsel.

5. Anticipated Litigation in Closed Session

- CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION
  - This item is intended to allow the board to discuss potential litigation where doing so in public may create liability or trigger action from potential litigants (or alert potential defendants concerning service).
  - Must specify number of potential cases. Need not identify litigants. <u>However</u>:
- *Fowler v. City of Lafayette* (2020) 46 Cal. App. 5th 360
  - Failure to identify the case or any facts or circumstances related to the threatened litigation – and provide support in agenda packet – was a Brown Act violation where City Council discussed litigation threat in closed session.
  - Facts are narrow, and it only applies where the notice of the potential litigation was provided to the agency in writing outside of a board meeting. Gov. Code

6. Conferences – A "Meeting" Exception

- The Brown Act provides several examples of events that are not a "meeting" requiring notice and an agenda. Gov. Code 54952.2
  - Conference or similar gathering open to the public.
  - Open and publicized meeting organized by another organization or agency
  - Purely social or ceremonial occasion
  - Less-than-quorum social media interactions (take care) – **this provision sunsets on January 1, 2026.**
- In each case, a majority/quorum of members may not discuss agency business.

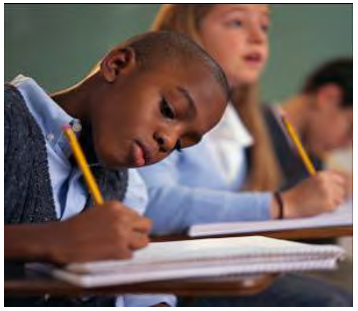
7. The EERA Meeting Exception

- There is a limited exception that allows a closed session meeting without complying with the Brown Act for purposes of allowing the local agency to discuss its position regarding any matter within the scope of representation and instructing its representatives.
  - K-12 Schools: Government Code section 3549.1(d)
- Formerly referred to as the “Super Secret EERA Exception,” but it really isn’t a secret.

8. Discussion and Action on Executive Comp

- The Brown Act restricts discussion and action on Local Agency Executive compensation including fringe benefits.
  - LEA comp may only be addressed in a regular meeting. Gov. Code 54956(b)
  - Closed session discussion may only occur under "Conference with Labor Negotiator – Unrepresented Employee [Title]." Gov. Code 54956.9
- Action on a contract must be a regular meeting open session action item
  - Includes any changes to salary or benefits, and any renewals or term extensions
  - Board vote must be preceded by an "oral report" describing the financial terms. Gov. Code 54953(c)(3)

Questions, Answers, & Discussion



Thank You

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