

THE RALPH M. BROWN ACT
TRAINING FOR CLERK OF THE
BOARD
APRIL 16, 2010

Presented By
Deputy County Counsel Lizanne Reynolds



Public Policy Considerations

2

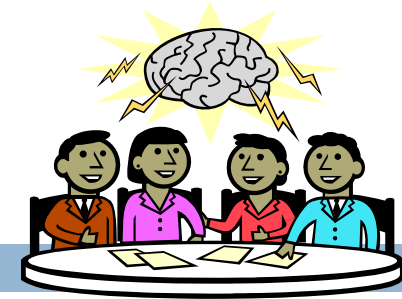
- ❑ Right to Access – the people have a right to be informed about the conduct of their business, and for deliberations to be conducted and actions to be taken openly.
- ❑ Brown Act (Gov. Code § 54950 et seq.) has broad applicability. It covers all local agencies and broadly defines “public meetings” and “legislative bodies.”
- ❑ Broad public notice/participation requirements.

Legislative Bodies

3

- What is a “legislative body”? (§ 54952)
 - ▣ governing body
 - ▣ appointed body
 - ▣ standing committee [def’n: has continuing jurisdiction over particular subject matter or mtg schedule is fixed by law or other formal action of legislative body]
- What is not a “legislative body”?
 - ▣ temporary (ad hoc) committee if comprised solely of less than a quorum of the body
- “Local agencies” include JPAs and nonprofit corporations if created by a gov’t entity to support the efforts of the gov’t entity.

“Meetings”



4

- “Meetings” include both face-to-face gatherings, telephone calls, e-mails, etc. involving the majority of the legislative body in which issues under its subject matter jurisdiction are discussed, decided or voted on. (54952.2)
- Meetings in Disguise
 - ▣ collective briefings
 - ▣ Retreats/workshops of legislative bodies
 - ▣ serial meetings
 - ▣ informal gatherings
 - ▣ Collective e-mails and other communications

Meeting Exceptions

5

- Six Exceptions to the Meeting Definition
 - (1) individual contacts (n/a to agency employees)
 - (2) conferences
 - (3) community meetings
 - (4) other legislative bodies
 - (5) social or ceremonial events

Communications Through Others May Constitute “Meetings”

6

- Communications through intermediaries (e.g., staff, members of public) can be “meetings” if there is discussion, deliberation, or action taken on matters within the body’s jurisdiction.
(54952.2(a))

- *Note:* This does not prevent an employee from having separate communications with members of a legislative body to answer questions or provide info to members so long as that person does not communicate the comments of the members to other members of the legislative body.

- **CAUTION:** Board aide briefings.



“Serial Meetings” are prohibited

7

- A “serial meeting” is a series of communications each of which involves less than a quorum of the legislative body, but which taken as a whole involve a majority of the members for the purpose of developing concurrence re an action to be taken. GC 54952.2(b). Communications can be in any form (e.g., face-to-face, e-mail, telephone).
- “Serial meetings” are prohibited because they circumvent the Act’s requirement for open and public deliberation of issues.
- Test is whether the purpose or effect is to develop collective concurrence regarding an action to be taken.
- Members may unknowingly become involved in serial meetings. Intent to violate Act is not required.

Practice Tips:

8

- Avoid substantive communications (directly or through others) with other members regarding items that are on an agenda or likely to be placed on a future agenda and that are within the legislative body's jurisdiction.
- Discussing procedural issues (e.g., time, date and order of matters on an agenda) is NOT prohibited. But be careful that these discussions do not veer into substantive communications.

Access to Written Materials



9

- Agenda and any written materials related to items on agenda that are distributed to a majority of the members are public records and must be made available to public without delay. (§ 54957.5(a).)
 - Exception: Attorney-client privileged communications and other protected communications.
- Documents provided < 72 hrs before meeting must be made available to public at same time they are provided to a majority of members.
- Documents provided by others (public) must be made available promptly after the meeting.

Agendas for Regular Meetings

10

- Agendas for Regular Meetings
 - Must be publicly posted at least 72 hours in advance.
 - Must contain general description of all matters to be discussed. (§§ 54954, 54954.2)
- Items not on agenda may not be discussed except:
 - Emergency situations that may impair public health, safety or welfare. Legislative body must determine (by 2/3 vote or unanimously if < 2/3 present) that immediate action is needed and issue came to agency's attention after agenda was posted.
 - Discussion during a subsequent meeting held w/in 5 days if continued during a properly-agendized prior mtg.

Meeting Locations

11

- Regular and special meetings must be held within body's jurisdictional boundaries, but several exemptions exist. (§ 54954.)

Public Participation

12

- Members of the public have the right to participate in public meetings.
 - ▣ Must be allowed to speak on agenda items before or during deliberations on the item.
 - ▣ Also have the right to speak regarding any matters within the body's jurisdiction that are not on the agenda (usually agenda items as "Public Comment" or "Public Presentations")
 - Body may briefly discuss these items and refer matters to staff, but cannot take action.
 - ▣ Have right to make audio/video recordings.

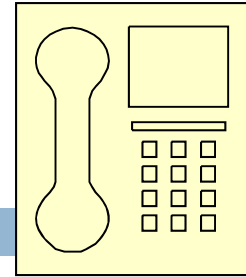
Public Participation

13

- ❑ Can impose reasonable restrictions on participation (e.g., time limits per speaker), as long as they are fairly applied.
- ❑ Can prohibit disruptive behavior and have noncompliant persons removed from meeting.
- ❑ Cannot prohibit criticism.
- ❑ Can ask speakers to provide name/address/tel., but cannot require this.

Teleconferencing Requirements

(§ 54953)



14

- ❑ Key issue is maintaining public access.
- ❑ All teleconferencing locations must be identified on the agenda.
- ❑ The agenda must be posted at all teleconferencing locations.
- ❑ All teleconferencing locations must be accessible to the public.
- ❑ During the teleconference at least a quorum of the members must participate from locations within the County.
- ❑ Each teleconference location must provide an opportunity for members of the public to address the body.
- ❑ All teleconference locations must comply with all requirements of otherwise applicable provisions of law relating to a specific type of meeting or proceeding.
- ❑ All votes taken during a teleconferenced meeting must be by roll call.

Closed Sessions

15

- Consult with County Counsel on all issues related to Closed Sessions.
- Just because an item is controversial or sensitive does not mean it can be discussed in Closed Session.
- Permissible Closed Session Topics:
 - ▣ Pending or threatened litigation
 - ▣ real estate negotiations
 - ▣ public employment
 - ▣ labor negotiations
 - ▣ grand jury testimony
 - ▣ public security
- Closed Session discussions are confidential.



Closed Session Agendas/Notice

16

- Agenda must briefly describe each item to be discussed. (§ 54954.2)
- Before going into closed session, items to be discussed must be orally announced. (§ 54957.7)
- When closed session is finished, agency must reconvene in open session and report on votes and actions taken when required by Act. (§ 54957.7)

Other Types of Meetings

17

- ❑ Special Meetings (§ 54956)
 - ❑ Notice must be posted and delivered to all members and media outlets that have requested notice 24 hrs in advance.
- ❑ Emergency Meetings (§ 54956.5)
 - ❑ “Emergency” defined as a crippling activity, work stoppage or other activity that severely impairs public health or safety.
 - ❑ Must provide telephone notice to all media outlets at least 1 hr prior to meeting. This can be reduced if “dire emergency” (e.g., terrorist attack, mass destruction).

Adjournments/Continuances

18

- Can adjourn regular and special meetings to a future date. If future meeting is within 5 days, don't need to re-agendize matters. If > 5 days or additional matters will be considered, need to prepare/post new agenda. (§§ 54955, 54954.2.)
- Within 24 hrs, must post notice of adjournment conspicuously on or near door of place where meeting was held.

Common Brown Act Mistakes



19

- ❑ Meeting of an *ad hoc* committee that is no longer temporary.
- ❑ Informal gathering when officials fail to avoid talking about matters within the subject matter jurisdiction of the agency.
- ❑ Failing to post the agenda at least 72 hours before the regular meeting.
- ❑ Adding items to the posted agenda without making sufficient findings.
- ❑ Requiring members of the public to register their names at a meeting.
- ❑ Using the wrong label to describe closed session items.
- ❑ Expressing opinions to a constituent that that constituent conveys to other members, resulting in a collective concurrence by a majority of the legislative body.
- ❑ Failing to reconvene in open session after closed session.

Penalties and Remedies for Violations

20

- ❑ D.A. or interested person may file a lawsuit.
- ❑ Court may issue an injunction against future violations.
- ❑ Court may declare action(s) taken in violation of Act void.
- ❑ Intentional violations are subject to criminal prosecution. Can be convicted of misdemeanor (up to six months in jail and \$1,000 fine).



Hypothetical #1

21

- Q: During public comment for items not listed on the agenda, a speaker requested the legislative body write a letter of support on behalf of his cause. The legislative body proceeded to vote on writing the letter and it passed unanimously. Is this a violation of the Brown Act?

- A: Yes. Items not listed on the agenda but raised during the public comment period can only be briefly discussed by the legislative body. The body can refer the matter to staff, but cannot engage in lengthy discussion or take formal action.

Hypothetical #2

22

- Q: The Chairperson of a legislative body e-mails a newspaper article pertaining to an upcoming item listed on the agenda next week to other members. The Chair indicates she supports the item based on the article and one member e-mails back that he also supports the item and the information was very helpful. Is this a violation of the Brown Act?
- A: Probably, because it could be viewed as facilitating collective concurrence.



Hypothetical #2 (variation)

23

- Q: What if Chair merely e-mailed the article indicating that no member was to reply or discuss it until the meeting, and also provided a copy of the article to include in the Agenda packet?
- A: Probably not a violation, but we discourage this because it can easily trigger further substantive communications. Better practice is forward all materials through Clerk, and let Clerk distribute.

Hypothetical #3

24

Q: The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?

A: She may attend, but only as an observer. She may not participate in discussions.

Hypotheticals 4 & 5

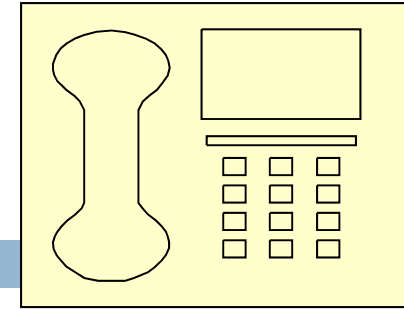
Q: The agency's web-site includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?

A: *Yes, because it is a technological device that may serve to allow for the development of a collective concurrence as to action to be taken.*

Q: A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?

A: *No, the Brown Act expressly allows this kind of communications, though the members should avoid discussing the merits of what is to be taken up at the meeting. We recommend having the Clerk handle these communications.*

Hypothetical #6

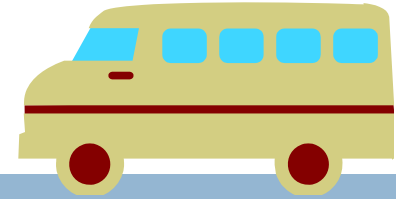


26

Q: A member on vacation desires to participate in a meeting of the legislative body and vote by cellular phone from his car while driving from Washington, D.C. to New York. May he?

A: He may not participate or vote because he is not in a noticed and posted teleconference location. However, if he was participating from a fixed location that was properly noticed and posted, he could participate.

Hypothetical #7



27

Q: Agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

A: Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting (noticed, agendized, public must be able to attend).

Note: If less than a majority of the members visit the site at any one time, then it is not a “meeting.”