



Brown Act

*Event Verndor -
Schools Legal Service - Jan 14, 2020*


Kern Community College District
Bakersfield College

January 14, 2020


Today's Topics

1	2
3	4
5	6



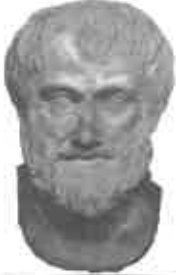
Today's Topics

1- Philosophy	2- Agenda Nuts and Bolts
3- Running the Meeting	4- Closed Sessions
5- What About the Minutes?	6- What Can Go Wrong?




THE BROWN ACT

1-
Philosophy



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**Transparency Laws:
The Brown Act**




“... the Legislature finds and declares that the public... agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”
Gov't Code section 54950

Ralph M. Brown
(Photo Source: Modesto Bee)

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The Brown Act and Transparency



Sharpen Your Instincts:

- Has the public received timely and adequate public notice of the business at hand?
- If not, is there a permissible reason for withholding public notice?

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Brown Act Features to Promote Public Access

- Public notice of matters to be discussed must be posted
- Public is entitled to be **present**, to **comment** on the district's business, and to **record** proceedings
- Closed session allowed only under **limited** circumstances with disclosure as appropriate
- **Documents** available to the public
- Public **report of vote** of each trustee

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If it Looks Like a Meeting and Walks Like a Meeting



As used in this chapter, "meeting" includes any congregation of a majority of the members of a legislative body at the same time and place to *hear, discuss, or deliberate* upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.

Government Code section 54952.2 (a)

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The Brown Act: Serial Meetings

The Brown Act now prohibits the use of a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of board business




DANGER: In a conversation between 2 members of a 5-member board/committee, neither member can be certain the other will not speak with a third member, thus involving a majority

THE PRESS ENTERPRISE
September 14, 2012


- Two months of emails exchanged between Val Verde Unified School District's five board members indicates that almost all might have violated the state open-meeting law by discussing, deliberating, and soliciting support on district matters
- In July and August emails, trustees wrote to all their colleagues and the district's then-interim superintendent Michelle Richardson to discuss business, including committee appointment processes, hiring employees, a Brown Act workshop, a presentation regarding trustee area versus at-large school board elections, and hiring a substitute security officer for a high school
- The Val Verde Unified School District provided emails exchanged among trustees and Richardson between July 1 and August 31 in response to a public records request by *The Press-Enterprise*.

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**Even if it Doesn't Look Like a Meeting,
Does it Involve a Majority?**



Monday 7:45 p.m.



Thursday 8:22 a.m.

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The Brown Act: Serial Meetings









How to Communicate Between Meetings

- Chancellor can meet one-on-one with board members to **provide information** or **answer questions BUT**
 - Chancellor must not convey the comments or position of one board member to others or "poll the Board" on its position
- Updates by mail or email, voicemail, text message
- Call a special meeting

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What is NOT a Meeting?

Examples of Permitted Gatherings Outside a Meeting*

- **Conference open to the public** involving discussion of issues of general interest
- Open and publicized **meeting organized to address a topic of local concern** by other than your district
- Open and noticed **meeting of another local agency**
- Open and public meeting of a **standing committee** of the Board, provided the members who are not members of the committee attend only as observers
- Purely **social or ceremonial gatherings**

* Provided board business is not discussed except as part of the agenda

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Let's Practice

- The Legislature passes a new law regarding degree requirements which is concerning to several Academic Senate members.
- Committee members exchange emails about the new law and request an agenda item at the next meeting, to be held in two weeks.
- The emails generate discussion in the faculty lounge over the next few days.
- Are there any concerns with these communications? What could be done differently?

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Let's Practice

- A luncheon is scheduled in the Renegade Room for faculty, and several members of the Academic Senate end up sitting together.
- Inevitably, they get to talking about items on the upcoming meeting agenda.
- On the morning of the meeting, some of those same members see one another at a conference on campus and discuss the same issues with other A.S. members at the conference.
- Are there any concerns with these communications? What could be done differently?

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2-
Agenda Nuts & Bolts



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Agenda Development



- Roadmap for the meeting
- Agenda descriptions
 - Will public understand what's going on?
 - 20 words or less normally fine
 - "Canned" closed session safe harbor descriptions

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Requests for Agenda Items

- Education Code section 72121.5
 - Must relate to agency business
- Timeframe
- Closed or open session?
- Can requestor require action?

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Required Agenda Elements

- Date, time, and location of meeting
- Opportunity for public comment
- Special teleconference requirements
- Cite specific Brown Act provision for litigation
- Disability access
- Location for "72-hour rule" documents

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Required Agenda Elements

- Include these elements in all agendas:
 - "Any materials required by law to be made available to the public prior to a meeting of the Board of Trustees of the district can be inspected at the following address during normal business hours: [list address]."
 - "For information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation to participate in the public meeting, please contact _____"

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Consent Agenda

- What is its purpose?

- What if board members want to take individual action on a consent item?

- Some issues cannot be the subject of a consent agenda

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Agenda Packets

- Can be loaded electronically with agenda software, but not required by law
- Typical to provide to board members when agenda posted, but not required by law
- Closed session documents should be labeled appropriately and segregated from open session documents

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Let's Practice

REGULAR MEETING AGENDA
 Paradise Valley Community College District
 6:00 p.m., April 23, 2020
 123 Caliente Boulevard
 Buttonhollow, California

I. Call to Order and Pledge of Allegiance

Let's Practice

REGULAR MEETING AGENDA
 Paradise Valley Community College District
 6:00 p.m., April 23, 2020
 123 Caliente Boulevard
 Buttonhollow, California

I. Call to Order and Pledge of Allegiance
 II. Facilities Contract

Agenda posted per Brown Act 48 hours in advance on office door and in Renegade Rip.

Let's Practice

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 II. Facilities Contract: Reroof classroom building at Bakersfield College, Acme Construction, \$125,000

Let's Practice

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 III. Personnel - evaluations

Let's Practice

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- ~~III. Personnel evaluations~~
- III. PUBLIC EMPLOYEE PERFORMANCE EVALUATION. Job Title: Director of MOT

Agenda Posting – Regular Meetings

- Agendas for regular meetings must be posted at least 72 hours in advance
- Weekends and holidays count!
- Post in a conspicuous place available to the public 24/7
- Posting requirement is continuous
- Electronic posting required if the agency has a website – what if the website goes down?

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Website Posting Requirements
January 1, 2019

- Agenda must be posted on agency website through prominent, direct link from home page
- Agenda must be downloadable, indexable, and electronically searchable by commonly used Internet search applications

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Agenda Posting – Special Meetings

- Agendas for special meetings must be posted and delivered to members and requesting media at least 24 hours in advance
- Agendas must be posted on the agency's website if it maintains one
- Calling a special meeting on the same day as the regular meeting
- Board President or board majority can call the special meeting

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**The Brown Act:
Public Notice Requirements**

Wasco City Council calls last-minute meeting

[The following text is a blurred newspaper clipping snippet.]

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Teleconference Requirements

- Quorum present within agency boundaries
- Accessible to the public (including those with disabilities)
- Post at remote location
- Post teleconference location on agenda
- Roll call vote

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Teleconference Language

Notice of Teleconferencing:
 Government Code section 54953 permits the Board of Trustees to conduct its meeting from different locations via teleconference provided that at least a quorum of the Trustees participate from locations within district boundaries. This meeting shall be conducted using teleconferencing at the following locations, which shall be accessible to the public: [specify locations].
 Members of the public shall be afforded the opportunity to address the Board as permitted under Government Code section 54954.3 at each teleconference location.
 Voting at this meeting shall be by roll call.


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Emergency Meetings

- Emergency meetings may be called on one hour's notice to requesting media (unless waived by 2/3 vote) – Very Rare!
- Sample emergency meeting agenda – tuck it in a drawer for when the day comes
- An emergency situation means:
 - A work stoppage, crippling or other activity that severely impairs public health, safety, or both, as determined by a majority of the Board
 - A crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring the Board to provide more than one-hour notice to the media before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the Board

Items Not Properly Posted

- Items not posted on the agenda, including matters raised in public comments, should not be acted on or discussed.
- Exceptions:
 - Brief response to public comment
 - Questions for clarification
 - Brief report of activities
 - Direct staff to report back
 - Take action to direct staff to place item on agenda





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So What's the Big Deal?

Two-word error may cost Santa Clara, Calif. water district \$346 million

By Tom Ichniowski, The Mercury News


Ballot wording in Santa Clara ...

Talk about going over your character limit.

City officials in Santa Clara, California are scrambling to fix a two-word mistake in the upcoming November ballot that could cost a Silicon Valley water district more than half a billion dollars.

Turns out the hastily called meeting to fix the problem was not publicized 24 hours before the Board convened. California's open meetings law requires the notice. The board missed the deadline by less than an hour, the Mercury News reports.

Now the Silicon Valley Taxpayers' Association has sent a letter to the district threatening a lawsuit unless the measure is pulled off the ballot.



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Access to Documents

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Access to Documents

Request for Agenda Packet

- Members of the public can request copies of agenda or agenda packet, to be mailed at earlier of posting or distribution to a board majority (open session portion only)
 - Can charge a fee not to exceed cost
- A standing request is valid for up to a calendar year
- Failure to receive the materials is not grounds for invalidation of action

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Access to Documents

Agenda Materials as Public Records

- Agendas and any other writings distributed to a board majority in connection with a matter subject to discussion in open session are disclosable public records.
- They must be made available "upon request without delay." A standing request is valid for up to a calendar year.
 - Does this mean available for inspection or copying?

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Access to Documents

Agenda Materials as Public Records

- There is a **special rule** for public records distributed to a board **majority within 72 hours prior** to a meeting.
 - The records must be made available for inspection at a public location.
- The location (address) where the documents can be inspected must be **posted on all agendas**. A district may post them on the Internet in a way that makes clear they relate to the upcoming meeting.

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Access to Documents
Public Records Distributed at Meeting

- Open session documents must be made available for inspection at the meeting if prepared by the district.
- Must be made available for inspection after the meeting if prepared by some other person.
- Must be available in **alternative formats** upon request for people with disabilities.

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Access to Documents
What about closed session documents?

- Closed session documents should be labeled as such: "CONFIDENTIAL CLOSED SESSION MATERIAL"
- The public is not entitled to closed session documents, at least initially

CLASSIFIED

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Access to Documents
Weird Closed Session Rules

- Provide copies of documents approved in closed session
 - A person who makes a **written request** within 24 hours of agenda posting or who has a **standing request** is entitled to copies, if **present** when the closed session ends
 - Unless the action results in amendments, in which case, provide them when **retyping** is completed during business hours (in this case, Board President should summarize amendments)
 - Other people on the next business day or when retyping is complete

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Access to Documents
Closed Session Documents

Other closed session documents would normally not be accessible to the public without a fight!

- Employee evaluations
- Chancellor/College President goals and objectives
- Documents reflecting prior employment investigations – consult counsel

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**The Brown Act:
Location of Meetings**

- Meetings must normally be held within agency boundaries
- Exceptions

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3-
Running the Meeting



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Robert's Rules of Order

- Not legally required
- Some districts adopt
- Can be helpful for prioritizing business, but rules are fairly complex and may be difficult for presiding officer to administer

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Voting

- Affirmative vote of majority of all members, not just those present
- No secret ballots
- Vacancies
- Supermajority requirements
- Abstentions
- Duty to vote absent conflict of interest

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Taking Action on Items Not on the Agenda

- Regular meeting only
- 2/3 initial vote to consider the item
- Board determines by 2/3 vote of those present (or if less than 2/3 are present, by unanimous vote) that:
 - Board is faced with a need to take immediate action on an item not on the agenda of a regular meeting **AND**
 - The need for action did not come to the attention of the Board OR staff until after the agenda was posted

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Rights of the Public – Public Comment

- Time, Place, Manner → Special Meetings
- Content → First Amendment



Let's Practice

The District posted notice of a board meeting 48 hours in advance, with an urgent agenda item to discipline a new faculty member.

The agenda was also posted online the day before the meeting. One board member decided to participate by teleconference.

The agenda item stated, "Personnel Matters."
What would be important to know?

need more specific info about this matter

Let's Practice

A member of the public fills out a speaker card stating that he wishes to address the Board regarding information concerning a college administrator posted on Facebook.

- A. The citizen probably has the right to express his views regarding the administrator; encourage him to channel any complaints through the district's complaint process.
- B. Members of the public cannot discuss district employees in an open session.
- C. Board members and administrators cannot be publicly criticized.

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First amendment right


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4-
Closed Sessions



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Closed Sessions


Boards must make extra efforts to keep the public informed concerning closed session items:

- Agenda description
- Announcement – special rule for litigation
- Reporting out
- Making documents available

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**The Brown Act:
Closed Sessions**

- Special rule for pending litigation: The specific Brown Act provision authorizing the closed session must be stated on the agenda item or announced
- Example:
CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION. Significant exposure to litigation pursuant to subdivision (b) of Government Code section 54956.9:
1 potential case



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Permissible Closed Sessions

- To meet with agency counsel regarding anticipated or pending litigation
- To consider the appointment, employment, evaluation of performance or dismissal of a public employee
- To instruct its representatives concerning negotiations with represented and unrepresented employees
- To meet with its negotiator prior to the purchase, sale, exchange, or lease of real property related to the price and terms of payment

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Closed Sessions – Litigation

PURPOSE: To confer with or receive advice from counsel regarding pending litigation when discussion in open session could prejudice the district's position in litigation

SPECIAL CONCERNS: Attorney should opine that closed session is proper and should be present in person or by telephone for the entire discussion

CAUTION: A closed session litigation agenda item is not an open forum for discussion of all possible litigation or controversial issues

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Closed Sessions – Personnel

PURPOSE: Avoid embarrassment for the employee and permit candid discussion by the Board; discussion should center on individual employees, not policy decisions concerning positions.

SCOPE: Appointment, evaluation, leaves, discipline, dismissal, release, complaints against employees

SPECIAL CONCERNS: Hearing complaints or charges; boards cannot discuss or act on employee compensation under this authority.

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Closed Sessions – Labor Negotiations

PURPOSE: To review the Board's position and instruct negotiators regarding salaries, salary schedules, and fringe benefits for represented and unrepresented employees.

Cannot take final action on compensation of unrepresented employees.

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Closed Sessions – Student Matters

PURPOSE: Protect confidentiality of actions involving the disclosure of protected student information (authority comes from Education Code, not Brown Act)

SPECIAL CONCERNS: Parents may request open session discussion, although board deliberation can still occur in private.

CAUTION: FINAL ACTION MUST NORMALLY TAKE PLACE IN OPEN SESSION

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Closed Sessions – Reporting Out

- In some circumstances, boards must publicly report action taken in closed session
- The report can be oral or written
- Not every action taken in closed session should be reported out
- If in doubt, consult legal counsel



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Closed Sessions – Who Can Be Present?

- Board members
- Necessary staff or others with essential knowledge or official role
- Don't permit some members of the public to attend and exclude others

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Closed Session Confidentiality

- Disclosure prohibited
- Employee disclosures
- Consequences
- Exceptions
- Personal liability
- Removal from office



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5-
What About the
Minutes?



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Minutes

- Record of board actions
- Important tool for communicating with community, staff, and stakeholders
- Record vote or abstention of each board member present
- What about closed session?

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6-

What Can Go Wrong?



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CONSEQUENCES OF BROWN ACT VIOLATIONS



Consequences of Brown Act Violations

- Declaring actions void
- Ongoing/future violations
- Past violations
- Financial consequences
- Criminal penalties

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Let's Practice

- A community college trustee overhears a student threaten to sue the district over a disability access issue; he suggests to the Board President that the matter be agendaized for discussion.
- The Board President announces, "We will now adjourn to closed session to consider Agenda Item 5."
- The Board meets in closed session to discuss the potential lawsuit and decides to refer the matter to counsel.

Let's Practice

- A. The matter is properly considered in closed session because it involves possible litigation.
- B. A proper basis for closed session is lacking since there was no opinion of legal counsel regarding the basis for the closed session and no involvement of counsel in the discussion.
- C. The Board President should announce the precise Brown Act provision authorizing the closed session.
- D. Both B and C are correct.
- E. Both A and C are correct.

have to announce specific requirement in Brown Act for the litigation

Let's Practice

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- B. A proper basis for closed session is lacking since there was no opinion of legal counsel regarding the basis for the closed session and no involvement of counsel in the discussion.
- C. The Board President should announce the precise Brown Act provision authorizing the closed session.
- D. **Both B and C are correct.**
- E. Both A and C are correct.

*Thank you
for your attention*



Schools Legal Service is a joint powers entity providing legal and collective bargaining services to public education agencies since 1976.
