

# **SCHOOLS LEGAL SERVICE**

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## **THE BROWN ACT**



## **VOTING AT COMMUNITY COLLEGE BOARD MEETINGS**

### **AN ESSENTIAL DESKTOP REFERENCE FOR BOARD MEMBERS & SUPERINTENDENTS / CHANCELLORS**

**We gratefully acknowledge the contributions to this publication of  
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# THE BROWN ACT AND OTHER MATTERS PERTAINING TO COMMUNITY COLLEGE BOARD MEETINGS

The Brown Act requires “legislative bodies” of all California local agencies (governing boards and certain committees and commissions created by them) to hold their meetings in public, except under specified, limited circumstances where closed sessions are authorized. The Act is found in the Government Code, starting at section 54950. There are also special provisions for governing board meetings found in the Education Code. **ALL SECTION NUMBERS BELOW REFER TO THE GOVERNMENT CODE UNLESS THE TEXT INDICATES OTHERWISE.**

The Brown Act, like all other statutes, is subject to interpretation. Board members and administrators are encouraged to refer questions to their legal counsel, who can apply the text of the law, court decisions and opinions of the Attorney General to the facts of individual cases. In addition to this summary by Schools Legal Service, we recommend that you consult the California Attorney General's web page reprint of the text of the law. This is included in the Attorney General's summary of the Act at:

[http://ag.ca.gov/open\\_meetings/](http://ag.ca.gov/open_meetings/)

## LOCAL AGENCIES

The Brown Act covers legislative bodies of all local agencies. School districts, community college districts, regional occupational programs (ROPs), and joint powers agencies (JPAs) (created as separate legal entities) are all local agencies. **Section 54951**

## LEGISLATIVE BODIES

Governing boards of school and community college districts, ROPs and JPAs, and county boards of education are legislative bodies subject to Brown Act requirements. The following are also considered legislative bodies:

1. Any commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory that are created by resolution or any other formal action of a legislative body (“created by official action”).
2. Any standing committees of a legislative body, **irrespective of their composition**, that have a continuing subject matter jurisdiction or a meeting schedule fixed by resolution or any other formal action of a legislative body. (Note: Except for standing committees, an advisory committee composed solely of members of a legislative body who constitute less than a majority of the legislative body is **not** a legislative body.) A majority of the members of a legislative body may attend an open and noticed meeting of a standing committee, provided they are present only as observers.

3. Any board, commission, committee or other multi-member body that governs a private corporation, limited liability company or other entity that either:

A. Is created by the elected legislative body in order to exercise authority that may be delegated by the elected body to a private corporation, limited liability company or other entity, or

B. Receives funds from a local agency and the membership of whose governing body includes a member of the local agency's legislative body appointed by the legislative body of the local agency. **Section 54952**

Throughout this summary, references to “board meetings” are intended to apply to the meetings of all legislative bodies unless otherwise indicated. The term “member of a legislative body” also includes any person elected to serve as a member but who has not yet assumed the duties of the position. Such a person is required to comply with the Brown Act as though already sworn into office. **Section 54952.1**

As mentioned above, the Act does not apply to an advisory body that is an *ad hoc* committee of limited duration, composed solely of members of less than a quorum of the governing body. If an *ad hoc* committee is created by the board and includes nonmembers of the board, the Act applies. Committees appointed by the superintendent or chancellor without board direction (either directly or through board policy) are not covered by the Act. Permanent standing committees of the board that hold regularly scheduled meetings are subject to the Brown Act.

### **“ACTION TAKEN” DEFINED**

The Brown Act refers in various places to “action taken” by a legislative body. “Action taken” means a collective decision by a majority of members, a collective commitment or promise by a majority to make a positive or negative decision, or an actual vote by a majority. **Section 54952.6**

### **“MEETING” DEFINED**

The Brown Act regulates when, how, where, and why meetings can be held. The following are considered meetings:

1. Any congregation of a majority of members of the legislative body at the same time and place to hear, discuss, or deliberate on any matter within the board's or agency's jurisdiction. **Section 54952.2(a)**

2. Use by a majority of a series of communications to deliberate, discuss, or take action on district business (this could include direct communication, telephone, e-mail, fax, or use of intermediaries). **Section 54942.2(b)** See discussion of “serial meetings,” below.

The following are **not** meetings (**Section 54952.2(a)(2)**):

A. Individual contacts or conversations of a board member with any other person, including another board member (provided the conversation is not used as a means to facilitate communication among a board majority outside a noticed meeting).

B. Attendance of a majority of members of the board at a conference or similar gathering open to the public involving a discussion of public issues, or issues of interest to public education agencies, provided a majority of the board does not discuss among themselves specific business within the board's jurisdiction, unless the discussion is part of the scheduled program. A meeting is "open to the public" even if the conference organizers charge a fee for attendance.

C. Attendance of a majority of the board at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided a majority of the board does not discuss among themselves specific business within the board's jurisdiction, unless the discussion is part of the scheduled program.

D. Attendance of a majority of the board at an open and noticed meeting of a standing committee of the board (as observers only), of another body of the school district, or of another local agency. A majority of the board cannot discuss among themselves specific business within the board's jurisdiction, unless the discussion is agendized as part of the scheduled program.

E. Attendance of a majority of the board at a purely social or ceremonial event, provided a majority of the board does not discuss among themselves specific business within the board's jurisdiction.

### **UNLAWFUL "SERIAL MEETINGS"**

The term "serial meeting" refers to a series of communications outside a formal meeting, each of which involves less than a quorum of the board, but when viewed collectively, encompasses a board majority. Such communications may be made directly, by telephone, e-mail or otherwise. They can occur through a chain of individual communications (Board Member 1 talks to 2 who talks to 3), or when a single person acts as the hub of a wheel (1 talks to 2 and 1 talks to 3), or through intermediaries such as staff.

While not every communication outside a meeting is problematic, in many instances these chain communications can have the effect of advancing the board's knowledge on an upcoming agenda item, helping the board to effectively reach consensus outside the presence of the public. The Brown Act favors public access to board deliberation and

action, so that the board does not simply show up and vote as a formality, having already determined its position on a matter.

**New Restrictions on Board Member Communications.** In statutory amendments effective January 1, 2009, the Legislature makes clear that an unlawful serial meeting encompasses (1) communications outside a noticed meeting among individual board members or groups of board members less than a quorum which come to involve a majority, whether directly or through intermediaries which (2) are used to discuss, deliberate, or take action on any item of business. **Section 54952.2.** There is no longer any requirement that a serial communication be used to develop a “collective concurrence” in order to violate the Brown Act. The mere discussion of an agenda item or a likely agenda item by a majority of board members will now clearly be a violation.

*In light of the potential consequences, board members who desire further information on an agenda item between meetings are urged to consult with their superintendent or chancellor rather than discuss it with other board members.*

**The Role of Staff.** The 2009 amendments also make clear that staff can continue to meet with individual board members to “answer questions or provide information” relating to district business. This confirms that a superintendent or chancellor can meet one-on-one with every single board member to brief them on upcoming agenda items without triggering a Brown Act violation. Similarly, a superintendent or chancellor could meet with groups of board members less than a quorum for the same purpose.

However, for any staff/board communications, the following caveats apply:

- ▶ Staff may not divulge a board member’s comments or position to other board members.
- ▶ In meeting with board members, an administrator cannot act as an intermediary for one or more board members.
- ▶ If staff meets with more than one, but less than a quorum of board members, the rules concerning board member communications discussed above must be observed.

Accordingly, board members must take great care in their discussions with fellow board members outside a meeting. On a five-member board, a single board member may speak with another member regarding district business, assuming the intent is not to communicate among a majority. However, if either of those members speaks with just one other board member, an unlawful serial meeting has occurred. Similarly, with seven-member boards, a board member is permitted to speak with two other board members outside a meeting on an agenda item, but if just one additional board member is brought into the loop, the Brown Act has been violated. **Remember — intentional violations of the Brown Act by elected board members are punishable as criminal misdemeanors!**

NOTE: The prohibition against serial meetings is not applicable to collective bargaining consultations with the board's labor negotiator. The Rodda Act at Government Code sections 3540, et seq., completely exempts these consultations from Brown Act notice and agenda requirements.

### **COPIES OF THE BROWN ACT**

A legislative body may require that a copy of the Brown Act be given to each member of the legislative body and to each person elected to the board before he or she takes office. An elected legislative body may also require that a copy of the Brown Act be given to appointed committee members. **Section 54952.7**

### **OPEN MEETINGS ARE REQUIRED**

Board meetings must be open and public (except where closed meetings are authorized; see discussion below) and all persons — not just local residents — must be permitted to attend.

### **REMOTE LOCATION PARTICIPATION**

Meetings by audio or video teleconferencing are permitted for any purpose for which a meeting may be held. Agendas must be posted at each teleconferencing site and each site must be accessible to the public. At least a quorum of the board must participate from locations within the district. All teleconference votes must be taken by roll call. **Section 54953**

### **SECRET BALLOTS**

Secret ballots may not be used for preliminary or final action. **Section 54953(c)**

### **CONDITIONS TO ATTENDANCE**

No person may be required to give his or her name or provide other information as a condition of attendance. Any attendance list or similar document must state that signing is voluntary and not a condition of attendance or addressing the board. **Section 54953.3**



## VIDEOTAPING AND AUDIOTAPING OF MEETINGS

Anyone in attendance may record an open meeting of a legislative body with an audio or videotape recorder or still or motion picture camera, unless the body makes a reasonable finding that the noise, illumination, or obstruction of view will persistently disrupt the meeting. If the agency makes a tape recording or film record of an open session for any purpose, the tape or film becomes a public record that may not be destroyed for 30 days and must be available to the public for viewing, or auditing on an agency recorder without charge. **Section 54953.5**

## BROADCASTING MEETINGS

A board cannot prohibit or restrict broadcasting of public meetings unless the board makes a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the meeting. **Section 54953.6**

## TIME AND PLACE OF REGULAR MEETINGS

Every board must adopt a time and place for holding regular meetings. (This rule is not applicable to standing committees or advisory bodies that do not elect to meet on a regular basis.) If a regular meeting date falls on a holiday, the meeting shall be held on the next business day. If a fire, flood, earthquake, or other emergency renders the regular meeting place unsafe, the meetings may be held elsewhere on proper notice to all news media who have requested notice of special meetings.

***Meetings Outside District Territory:*** Regular and special board meetings must be held within the agency's territory, except:

1. When necessary to comply with state or federal law or court order, or to attend a judicial or administrative proceeding to which the local agency is a party.
2. To inspect real or personal property that cannot conveniently be brought into the agency's territory, provided the topic of the meeting is limited to items directly related to that property.
3. To participate in meetings or discussions of multi-agency significance within the territory of one of the agencies, with all agencies giving notice of the meeting as required by the Brown Act.
4. To meet in the closest meeting facility if the agency has no meeting facility in its boundaries, or at its principal office if it is located outside its territory.

5. To meet with state or federal officials, where a local meeting would be impractical, solely to discuss legislative or regulatory matters affecting the local agency over which the state or federal officials have jurisdiction.

6. To meet at a facility owned by the agency located outside its territory if the meeting is limited to items directly related to that facility.

7. To meet at the office of the agency's attorney for a closed session discussion of pending litigation in order to reduce legal fees or costs.

8. Other examples: Governing boards may also:

A. Attend conferences on nonadversarial bargaining techniques outside the district boundaries.

B. Meet outside the boundaries of the district to interview members of the public residing in another district regarding the potential employment of the superintendent or chancellor of that district.

C. Meet outside the boundaries of the district to interview a potential employee from another district.

A joint powers authority must meet in the territory of one of its members or as authorized under paragraphs 1 through 7, above. **Section 54954**

### **MAILED NOTICE OF MEETINGS**

A copy of the agenda or a copy of the documents comprising the agenda packet must be mailed to any person who has made a standing written request. Written requests remain good for one year, and are annually renewable if the request is filed within 90 days after January 1. Upon receipt of the written request, the board or its designee shall cause the requested materials to be mailed at the time the agenda is posted or upon distribution to all or a majority of the board, whichever occurs first. Failure of any person to receive the notice given by the agency does not invalidate the actions taken at the meeting. Reasonable fees may be charged for these notices. **Section 54954.1**

### **AGENDAS OF REGULAR MEETINGS**

Agendas of regular meetings must be posted at least 72 hours in advance, in a place freely accessible to the public. The agenda must state the time and location of the meeting.

The agenda must contain a brief general description of each item of business to be transacted or discussed in open and closed sessions sufficient to inform an interested

member of the public about the subject matter under consideration so that he or she can determine whether to monitor or participate in the meeting. A "brief general description" of a matter generally need not exceed 20 words.

No action may be taken and no discussion may take place on an item not on the posted agenda, except:

1. Board members or staff may briefly respond to statements or questions from the public;
2. Board members or staff may, on their own initiative or in response to public questions, ask questions for clarification, make brief announcements and make brief reports on their own activities. Subject to any rules or procedures of the board, the board or any member may provide references to staff or other resources for factual information, or request staff to report back at a subsequent meeting; and,
3. A board member or the board itself may take action to direct staff to place a matter on a future agenda. **Section 54954.2**

NOTE: The Education Code permits members of the public to place matters directly related to district business on the agenda (Education Code section 72121.5). The District can adopt reasonable procedures for processing such requests. The placing of a matter on the agenda at public request does not compel the board to **take action** on the item.

### **TAKING ACTION ON ITEMS NOT ON A REGULAR MEETING AGENDA**

In exceptional cases, action may be taken on items not on a posted regular meeting agenda if, prior to any discussion of the item, the board publicly identifies the item **and**

1. A majority of the board (not just of the quorum) determines an emergency exists (work stoppage or other activity, or crippling disaster, severely impairing public health and/or safety); **or**
2. Two-third's of the board members present (not just of the quorum) or, if less than two-thirds are present, all of those present, determine (a) there is a need to act immediately and (b) the need for the action came to the agency's (not just the board's) attention after the agenda was posted; **or**
3. An item was on a posted agenda for a prior meeting held not more than five calendar days earlier and at the prior meeting the item was continued to the present one. **Section 54954.2**

NOTE: This authority to act on matters not on the agenda is found in the section of the Act dealing with regular meetings. *The requirements for notices of special meetings do not include this authority.* Since special meetings only require a 24-hour posting, it is a relatively easy matter to call a special meeting to occur 24 hours after an emergency has arisen, and include the subject for action on the agenda of that special meeting (see "Notices of Special Meetings," below).

If a matter arises that needs the board's attention, but is too late to be placed on the regular meeting agenda, a special meeting may be held at the same time as the regular meeting, provided the special meeting agenda is posted at least 24 hours before the regular meeting. After the regular meeting has commenced, the board can adjourn and conduct the special meeting, then reconvene and complete the regular meeting.

### NOTICES OF SPECIAL MEETINGS

A special meeting may be called at any time by the board president or board majority, by delivering notice personally or by mail to each member and to any local media that have made written request for notice. This "call and notice" is essentially the same as an agenda (and Education Code section 72129 requires an agenda for all governing board meetings must conform to the Brown Act requirements for agendas of regular meetings; see discussion, above). The notice/agenda must be delivered personally or by any other means (such as the telephone or fax), and posted in a place freely accessible to the public and employees, at least 24 hours in advance of the meeting. No matter may be considered at a special meeting unless specified in the notice. Written notice may be dispensed with as to any member who actually attends and any member who files a written waiver of notice (which may be filed by telegram or fax).

### EMERGENCY MEETINGS

A board may meet under emergency circumstances without complying with the 24-hour posting and notice for special meetings. A one-hour notice to local news media that have requested notice of special meetings is required except in the case of dire emergencies (see below).

An emergency (as determined by a majority of the board) is a work stoppage, crippling activity or other activity that the majority determines severely impairs public health and/or safety, or a dire emergency such as a terrorist act or threat. In cases of dire emergency, the one-hour notice to the media can be disregarded. During an emergency meeting, the board by two-thirds vote of the members present (or unanimous vote if less than two-thirds of members are present) may meet in closed session for any legitimate closed session purpose. **Section 54956.5**

## **ADJOURNMENTS AND CONTINUANCES**

Regular and special meetings may be adjourned to a future date. **Section 54955.** If the subsequent meeting is conducted within five days of the original meeting, matters properly placed on the agenda for the original meeting may be considered at the subsequent meeting. **Section 54954.2(b)(3).** If the subsequent meeting is more than five days from the original meeting, a new agenda must be prepared and posted pursuant to section 54954.2. Hearings continued pursuant to section 54955.1 are subject to the same procedures.

When a meeting is adjourned to a subsequent date, notice of the adjournment must be conspicuously posted on or near the door of the place where the meeting was held within 24 hours after the time of the adjournment. When less than a quorum of a body appears at a noticed meeting, the body may either meet as a committee of the parent body or adjourn to a future date pursuant to the provisions of section 54955 or 54954.2(b)(3). If no members of the legislative body appear at a noticed meeting, the clerk may adjourn the meeting to a future date and provide notice to members of the legislative body and to the media in accordance with the special meeting notice provisions set forth in section 54956.

## **PUBLIC ACCESS TO MEETINGS**

Public meetings cannot be held in a location inaccessible to people with disabilities or where access requires making a purchase or payment, or where admission is prohibited based on protected characteristics listed in Government Code section 11135, such as race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, disability and others. **Section 59961**

## **PUBLIC OPPORTUNITY TO ADDRESS THE BOARD**

Every regular meeting agenda must provide an opportunity for the public to address the board on items of public interest within the board's jurisdiction prior to or during board consideration of the item. A similar opportunity must be provided at special meetings, with respect to any item described in the notice of the meeting (i.e., the agenda). No action may be taken on an item presented by a member of the public unless the item is on the agenda or an emergency exception exists (see discussion, above).

The agenda may, but need not, provide an opportunity for public comment on any item that has already been considered in either of two situations:

A. By a committee composed exclusively of board members at a public meeting where all interested members of the public were given an opportunity to address the committee before or during the committee's consideration, unless the

item has been substantially changed (as determined by the board) since the committee heard it. **Section 54954.3**

B. [By analogy to section 54954.3] by the board itself, after an earlier public meeting where members of the public were given an opportunity to address the board before or during the board's consideration, unless the item has been substantially changed.

NOTE: Education Code section 72121.5 also permits the public to place matters on board agendas and to address the board regarding all items on the agenda "as such items are taken up." The section also permits **but does not require** the taking of testimony on items the public wishes to bring up at a meeting which are not on the agenda, provided no action is taken at that meeting (unless authorized by section 54954.2 of the Government Code).

Public Criticism: The board may not prohibit public criticism of policies, procedures, programs, or services of the agency, or the acts or omissions of the board. The Legislature has provided that this protected right to criticize individuals does not grant any privilege or protection for such speech beyond what is already provided in the law, most notably the "qualified immunity" provisions of Civil Code section 47. **Section 54954.3**

### **PUBLIC ACCESS TO MATERIALS TO BE DISCUSSED AT BOARD MEETINGS**

The Act requires that agendas of public meetings and other writings, when distributed to all or a majority of the members of the board for discussion or consideration at a public meeting, and not otherwise exempt from disclosure under the California Public Records Act, be made available to the public at the time they are distributed. Writings that are distributed prior to a public meeting must be made available for public inspection upon request when they are given to at least a majority of the board members. Writings distributed to the board during a public meeting must be made available for public inspection at that time, if prepared by the agency or a board member, or after the meeting, if prepared by some other person.

**NEW REQUIREMENT: 72 Hour Rule for Regular Meetings.** Any nonexempt materials relating to an open session agenda item for a regular meeting distributed less than 72 hours prior to the meeting must be made available for public inspection at a public office or location at the time they are made available to a majority of board members. This rule applies whether or not someone requests the materials. A district may also post a document on its Internet website in such a way as to indicate that the document relates to an agenda item for an upcoming meeting. In addition, agendas for **all board meetings** must list the address of the office or location where such documents are made available for public inspection.

If requested, the agenda and agenda packet must be available in appropriate, alternative format (e.g., Braille, tape recording) to persons with disabilities in compliance with the Americans With Disabilities Act.

These requirements do not affect matters to be discussed in closed session. It is our opinion that written memoranda or legal opinions from attorneys and negotiators retained by the district need not be disclosed even if the subject matter is to be discussed at a public session. Memoranda prepared by counsel in connection with pending litigation are exempt from disclosure at least until the litigation has finally been adjudicated or otherwise settled.

A district may adopt a policy that copies will be made upon the request of a member of the public. The district may require payment of the copying fee (not to exceed the cost of reproduction) in advance. **Section 54957.5**

2008 legislation also adds a provision in the California Public Records Act which provides that when board members are given access to district documents, the district cannot discriminate between or among them as to which documents or portions of them are available, or as to when they are made available.

## **CLOSED SESSIONS**

The Brown Act is most commonly thought of as the authority for governing boards to hold closed sessions. However, section 54953 states the general requirement that meetings must be open and public. There must be specific statutory authority to meet behind closed doors. (See also the discussion below concerning the detailed agenda description required for closed sessions.)

The Brown Act authorizes closed sessions for these limited purposes:

1. **License/Permit Determination [not applicable to community college districts].**
2. **Conference With Real Property Negotiator.**

A governing board may meet in closed session with its real estate negotiator prior to the purchase, sale, exchange, or lease of property solely to give instructions about price and terms of payment. Prior to the closed session, the board must publicly identify the property in question, the name of the negotiator who will be attending the closed session, and the persons with whom the negotiator may deal. The negotiator may be a board member or members. **Section 54956.8**

### 3. Conference with Legal Counsel on Pending Litigation.

The Brown Act authorizes a board to meet, on advice of legal counsel, to confer with or receive advice from counsel regarding pending litigation when public discussion would prejudice the agency's legal position. This is the exclusive authorized use of closed session under the attorney-client privilege. However, the Brown Act does not affect privileged communications outside meetings between counsel and the board or its members. The Act does not require disclosure of privileged written communications.

#### **Section 54956.9**

NOTE: The statute authorizes closed sessions for pending litigation. This "pending litigation" exception does not extend to situations where a board merely wishes to discuss a controversial topic behind closed doors or because the board fears it or the district might be sued. The mere presence of an attorney at a closed session does not make the closed session lawful. This includes cases where an attorney is present during negotiations between a board and non-board members (e.g., another agency's board). Since the non-board members are present to hear the remarks of the board's attorney, the privileged nature of the communications is lost and the rationale for a closed session is eliminated. (62 Ops.Cal.Atty.Gen. 150) There must be an underlying statutory basis for the closed session, since the Legislature has expressly eliminated all attorney-client privilege claims as a basis for closed sessions, other than the pending litigation exception.

The Attorney General has opined that the statute requires the physical presence of an attorney in a pending litigation situation (71 Ops.Cal.Atty.Gen. 96). This is not necessarily consistent with the language of the statute, which permits a board to "receive advice" on pending litigation from counsel. It is certainly possible to receive advice from counsel through a conference call, a confidential written communication, or even a report from the superintendent or chancellor concerning a conversation with counsel. While this interpretation may result in abuse, the alternative of requiring the presence of an attorney rather than a report may be needlessly expensive. Boards need to consult their own counsel on the proper application of the statute in these cases.

Litigation is "pending" if:

A. A proceeding has already been initiated in a court, administrative action, or arbitration, if the agency is a party.

B. On counsel's advice, the agency decides that a point has been reached where there is "significant exposure" to litigation, or the board is meeting solely to determine whether a closed session is authorized under the significant exposure provision. The "significant exposure" determination must be based on "existing facts and circumstances" that may need to be disclosed either on the agenda or in an oral statement prior to entering into closed session. These "facts and circumstances" are limited to:



- ▶ Those that might result in litigation against the agency but which the agency believes are not yet known to potential plaintiffs. These facts and circumstances need not be publicly specified.
- ▶ Those (such as accidents, disasters, incidents, or “transactional occurrences”) that might result in litigation and are already known to potential plaintiffs. These facts and circumstances must be publicly disclosed before the closed session or specified on the agenda.
- ▶ Receipt of a tort claim or written threat of litigation. The claim or written communication must be available for public inspection in the same manner as other public agenda material.
- ▶ A threat of litigation regarding a matter in the agency's jurisdiction made by a person in an open and public board meeting.
- ▶ A threat of litigation regarding a matter in the agency's jurisdiction, made by a person outside an open and public board meeting. The threat could be made directly to an agency official or employee or could be communicated to the official or employee by someone else. In either event, the agency official or employee receiving knowledge of the threat must have made a contemporaneous or other record of the threat prior to the board meeting. That record must be available for public inspection in the same manner as other public agenda material. The record need not identify the person making the threat or identify the employee who is the alleged perpetrator **unless** the identity of the person has already been publicly disclosed.

C. The agency has decided, or is deciding, to initiate litigation.

#### 4. **Insurance Claims.**

The board of a self-insurance joint powers agency (JPA), or of an agency that is a member of the JPA, may meet in closed session to discuss a claim for tort, public liability, or workers' compensation. **Section 54956.95**

#### 5. **Threat to Public Facilities.**

A board may meet with the Attorney General, district attorney, sheriff, police chief, or their deputies, agency counsel, security consultant or security operations manager on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or facilities. However, the board is prohibited from discussing the agency's funds, funding priorities, or budget during this type of closed session. **Section 54957**

## 6. Certain Personnel Matters.

A board may meet in closed session to consider (including taking action on) the appointment, employment, evaluation of performance, or dismissal of a public employee. Dismissal includes lesser forms of discipline, including demotion or potential reduction of compensation.

Closed sessions are also authorized to hear complaints or charges against a public employee by any person including another employee. However, if the employee requests a public hearing, the session must be held in public. Before the board may hear specific complaints or charges in closed session, it must give the employee at least 24 hours' written notice. Failure to give notice invalidates any disciplinary or other action taken against the employee. This remedy is so severe that caution should be taken to give the notice before entering into any closed session that may result in some adverse action against an employee based on specific complaints or charges. Consult legal counsel if in doubt as to the proper course of action.

With that caveat, it should be noted that a 24-hour written notice to the employee is **NOT** required before a closed session unless specific complaints or charges are involved. Written notice is likewise not required before a closed session to consider the nonreelection of a probationary certificated employee.

The Brown Act specifically prohibits closed session consideration of any aspect of the filling of vacant public offices, including community college trustee positions. Trustees are officers, not employees. The board may discuss and evaluate the performance of the superintendent or chancellor in closed session because that individual is an employee rather than a public officer. Employees also include independent contractors who function as employees. In contrast, independent contractors and consultants (including attorneys and architects not on district staff) are **NOT** employees. Their hiring and performance are to be discussed in public. Of course, if counsel determines the district is on the brink of litigation, the matter may be suitable for consideration in closed session (see discussion, above). **Section 54957**

The right to enter into closed session in the personnel area is limited. Closed sessions are authorized to encourage full and candid discussion of individuals whose employment status is being considered. The Attorney General has determined that the option to hold closed sessions to discuss the "employment" of personnel covers all personnel matters and not simply matters relating to initial employment or discharge (59 Ops.Cal.Atty.Gen. at 535). However, closed sessions should not be used for general discussion concerning all employees.

In closed session, the board is prohibited from discussing or acting on the proposed compensation of individual employees, including superintendents or chancellors, except for reductions of compensation that result from the imposition of discipline. **Section 54957, last sentence.** Additionally, other Government Code provisions control the

manner in which contracts and amendments for superintendents, chancellors, and assistant superintendents are to be amended and made available to the public prior to board ratification. **Sections 53260-53262**

## **7. Salaries, Salary Schedules and Fringe Benefits.**

A board may meet with its designated representatives regarding salaries, salary schedules, or fringe benefits for represented and **unrepresented employees**. The board must first publicly name the designated representatives. When the negotiations are with represented employees, all matters within the statutory scope of negotiations may be considered. However, the law prohibits discussion of the local agency's available funds, and funding priorities, unless the discussion relates to providing instructions to the board's representatives. The term "employee" includes any officer or an independent contractor who functions as an officer or employee, but not an elected official, member of a legislative body, or other independent contractors. The purpose of these closed sessions must be for the board to review its position and instruct its representatives. **The sessions may occur prior to and during consultations, discussions or negotiations with represented employee groups and unrepresented employees.** Closed sessions are also permitted with state conciliators. **Section 54957.6**

NOTE: The Rodda Act (the collective bargaining law for school and community college districts) exempts the following proceedings entirely from the Brown Act: negotiations, meetings with mediators, factfindings and arbitrations, and closed sessions with bargaining representatives to discuss the board's position regarding any matter within the scope of representation. **Section 3549.1**

## **8. Deferred Compensation Plan Withdrawal.**

The board may meet in closed session to discuss an employee's application for early withdrawal of funds from a deferred compensation plan based on financial hardship arising from unforeseeable emergencies as specified in the plan. **Section 54957.10**

## **9. Discussion of Student Matters.**

In addition to the Brown Act, the Education Code provides authority for closed sessions to consider the discipline of any student or to consider any action involving a student where disclosure of information would violate the privacy of student records protected from disclosure by state and federal law. Before calling a closed session for this purpose, the board must notify the student (and the student's parent or guardian if a minor) in writing by registered or certified mail or personal service. If no written request for an open session is received within 48 hours of receiving the notice, the matter may proceed

in closed session.<sup>1</sup> **Education Code section 72122.** An appeal to the governing board of a decision concerning a challenge to the content of student records is also to be held in closed session. **Education Code section 76234**

Unlike employee disciplinary matters, closed sessions for such student matters are mandatory unless the parents or student (after proper notice) request otherwise. Even in those cases, matters conflicting with the privacy rights of students who are not the subject of the discipline must still be discussed privately. Also, unlike personnel matters, the final board action in a student discipline case must be **taken** in a public session. Following deliberations in closed session, the board should reconvene the public meeting and cast its votes publicly, so that the action may be effective immediately. The board's action is a public record. **Education Code section 72122**

#### 10. **Honorary Degrees and Anonymous Donations.**

A community college district governing board may hold a closed session to consider the conferring of honorary degrees or to consider gifts from donors who may wish to remain anonymous. **Education Code section 72122**

#### 11. **Information From Joint Powers Agency Closed Session.**

If a district is a member of a joint powers agency, on the advice of its legal counsel, the districts governing board may conduct a closed session to receive, discuss and take action concerning information obtained in a closed session of the joint powers agency, provided the joint powers agency has authorized this in a policy or bylaw or the joint powers agreement. **Section 54956.96**

### **CLOSED SESSION AGENDA ITEM DESCRIPTIONS**

Agendas must contain a brief general description of each item to be transacted or discussed, "including items to be discussed in closed session." A conservative reading suggests that closed sessions must be listed on the agenda or they are prohibited. An alternative reading is that a board may go into closed session even if the words "closed session" do not appear on the agenda, provided the items themselves are properly described. **Section 54954.2(a)**

The Brown Act now provides a format for describing closed session items. Boards and elected officials will not be in violation of the requirements for describing closed session items if they substantially comply with the descriptions below, irrespective of the format used. The safest practice is to use the statutory format and indicate "closed session" on the agenda. The board is then free to decide during the meeting whether to

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<sup>1</sup>Even if an open session is requested, any discussion that would be in conflict with the right of privacy of another student must be held in closed session.

go into closed session or remain in open session for any or all of these items. **Section 54954.5**

**Government Code section 54954.5:** For purposes of describing closed session items pursuant to section 54954.2, the agenda may describe closed sessions as provided below. No legislative body or elected official shall be in violation of section 54954.2 or 54956 if the closed session items were described in substantial compliance with this section. Substantial compliance is satisfied by including the information provided below, irrespective of its format.

(a) With respect to a closed session held pursuant to section 54956.7:

**LICENSE/PERMIT DETERMINATION**

Applicant(s): (Specify number of applicants)

(b) With respect to every item of business to be discussed in closed session pursuant to section 54956.8:

**CONFERENCE WITH REAL PROPERTY NEGOTIATORS**

Property: (Specify a street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)

Agency negotiator: (Specify names of negotiators attending the closed session) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Negotiating parties: (Specify name of party [not agent].)

Under negotiation: (Specify whether instruction to negotiator will concern price, terms of payment, or both.)

(c) With respect to every item of business to be discussed in closed session pursuant to section 54956.9:

**CONFERENCE WITH LEGAL COUNSEL—EXISTING LITIGATION**

(Subdivision (a) of section 54956.9)

Name of case: (Specify by reference to claimant's name, names of parties, case or claim numbers.)

**-or-**

Case name unspecified: (Specify whether disclosure would jeopardize service of process or existing settlement negotiations.)

## **CONFERENCE WITH LEGAL COUNSEL—ANTICIPATED LITIGATION**

Significant exposure to litigation pursuant to subdivision (b) of section 54956.9: (Specify number of potential cases.)

(In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of section 54956.9.)

Initiation of litigation pursuant to subdivision (c) of Section 54956.9: (Specify number of potential cases.)

**(d)** With respect to every item of business to be discussed in closed session pursuant to section 54956.95 (applicable solely to insurance pooling JPAs and their local agency members):

### **LIABILITY CLAIMS**

Claimant: (Specify name unless unspecified pursuant to section 54961 [relating to victims of tortious sexual conduct or child abuse].)

Agency claimed against: (Specify name.)

**(e)** With respect to every item of business to be discussed in closed session pursuant to section 54957:

### **THREAT TO PUBLIC SERVICES OR FACILITIES**

Consultation with: (Specify name of law enforcement agency and title of officer, or name of applicable agency representative and title.)

### **PUBLIC EMPLOYEE APPOINTMENT**

Title: (Specify description of position to be filled.)

### **PUBLIC EMPLOYMENT**

Title: (Specify description of position to be filled.)

### **PUBLIC EMPLOYEE PERFORMANCE EVALUATION**

Title: (Specify position title of employee being reviewed.)

### **PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE**

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.)

- (f) With respect to every item of business to be discussed in closed session pursuant to section 54957.6:

**CONFERENCE WITH LABOR NEGOTIATORS**

Agency designated representatives: (Specify names of designated representatives attending the closed session.) (If circumstances necessitate the absence of a specified designated representative, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Employee organization: (Specify name of organization representing employee or employees in question.)

**-or-**

Unrepresented employee: (Specify position title of unrepresented employee who is the subject of the negotiations.)

- (g) With respect to closed sessions called pursuant to section 54957.8:

**CASE REVIEW/PLANNING**

(No additional information is required in connection with a closed session to consider case review or planning.)

- (h) With respect to every item of business to be discussed in closed session pursuant to sections 1461, 32106, and 32155 of the Health and Safety Code or sections 37606 and 37624.3 of the Government Code:

**REPORT INVOLVING TRADE SECRET**

Discussion will concern: (Specify whether discussion will concern proposed new service, program, or facility.)

Estimated date of public disclosure: (Specify month and year.)

**HEARINGS**

Subject matter: (Specify whether testimony/deliberation will concern staff privileges, report of medical audit committee, or report of quality assurance committee.)

- (i) With respect to every item of business to be discussed in closed session pursuant to section 54956.86:

**CHARGE OR COMPLAINT INVOLVING INFORMATION PROTECTED BY FEDERAL LAW**

(No additional information is required in connection with a closed session to discuss a charge or complaint pursuant to section 54956.86.)

NOTE: The Brown Act does not make any reference to the Education Code's authorization for closed sessions to discuss student discipline or student records. Since the public and press will be expecting to have reasons for closed sessions disclosed on the agendas, we recommend that agendas continue to include reasonable descriptions of student-related closed sessions. For example: "Student Expulsion Hearing: The board will hear five student expulsion cases"; or "Grade Change Appeal: The board will hear a student appeal of a grade." Consider adding, as well: "The Education Code requires closed sessions in these cases to prevent disclosure of confidential student record information."

### **PUBLIC ANNOUNCEMENT OF PURPOSE OF CLOSED SESSION PRIOR TO CLOSED SESSION**

In addition to the requirement that all closed sessions be agendaized with specific descriptive information (see above), before the legislative body adjourns to a closed session, it must announce in public session the item or items to be considered in the closed session. The announcement may give either all the information already agendaized, or it may simply refer the public to the item or items as they are listed on the agenda by number or letter. It is not sufficient for the board to announce the purpose of the closed session **after** the closed session. **Section 54957.7.** Certain matters require specific additional notice (for example, for a closed session on pending litigation, the board is required to identify the specific statutory authority authorizing the closed session and, if applicable, state the reason for failure to identify the litigation).

### **PUBLIC REPORT OF CLOSED SESSION AFTER THE CLOSED SESSION**

The Brown Act requires that certain actions taken in closed session be reported in public session at the same meeting after the closed session action. Again, the descriptions below are keyed to the closed session authorizations described above.

#### **1. Real Estate Negotiations.**

After an agreement is final, the approval given to the negotiator must be reported at the next public meeting. It must also be stated to anyone who inquires as soon as the agreement is final. If the board's own vote makes the agreement final, report the approval, the substance of the agreement, and the vote (including abstentions) of every member present in open session at the public meeting in which the closed session is held. If final approval requires approval by another party, the public agency must disclose the fact of that approval, the substance of the agreement, and the vote (including abstentions) of every member present to anyone who inquires as soon as the other party has approved the deal and informed the agency of that approval.



**2. Approval to Legal Counsel to Defend, Appeal or Not Appeal, or Otherwise Appear in Litigation.**

Report the action in open session at the public meeting in which the closed session is held. The vote (including abstentions) of every member present must be given. The report must also identify, if known, the adverse parties and the substance of the litigation.

**3. Approval to Legal Counsel to Initiate or Intervene in a Lawsuit.**

The announcement need not identify the action, defendants or other particulars. It must state that direction to sue or intervene has been given and that the details will be disclosed to anyone inquiring after the lawsuit is commenced unless doing so would jeopardize the agency's ability to serve process on one or more unserved parties, or doing so would jeopardize its ability to conclude existing settlement negotiations to its advantage. The vote (including abstentions) of every member present must be given.

**4. Approval Given to Legal Counsel to Settle Pending Litigation.**

Report final settlement at the next meeting and at any time to anyone who inquires after settlement. If the board's action accepts a signed offer from the other party(ies) and makes the settlement final, report the approval, the substance of the agreement, and the vote (including abstentions) of all members present in open session at the meeting during which the closed session is held. If final approval rests with the other party or with the court, report the fact of approval, the substance of the agreement, and the vote (including abstentions) of all members present to anyone who inquires once the settlement is final.  
**Section 54957.1**

**5. Disposition of Claims (Insurance Pooling JPA Member Agencies).**

For claims discussed by local agency members of insurance pooling JPAs under section 54956.45, report the name of the claimant(s), name of the agency claimed against, substance of the claim, monetary settlement agreed upon by claimant, and the vote (including abstentions) of all members present at the public meeting during which the closed session is held.

**6. Action Taken to Appoint, Employ, Dismiss, Accept the Resignation of or Otherwise Affect the Employment Status of an Employee.**

Report action and vote (including abstentions) of all members present at the public meeting during which the closed session is held, including the title of the position and any change in compensation. Reminder: No action may be taken in closed session regarding compensation for a superintendent or chancellor or assistant superintendent. **Sections 53260-53262**

However, do not report a dismissal or the nonrenewal of an employment contract until the first public meeting following exhaustion of administrative remedies, if any.

## **7. Approval of an Agreement Concluding Labor Negotiations Pursuant to Section 54957.6.**

Report after the agreement is final and has been accepted or ratified by the other party. Identify the item(s) approved and the other parties to the negotiations, also the vote (including abstentions) of all members present. **Section 54957.1**

How are the required reports of closed session actions to be made? Report orally or in writing. If a member of the public is present when the closed session ends, and has made either a standing request for notice of meetings (under sections 54954.1 or 54956) or submitted a written request within 24 hours of the posting of the agenda of the meeting at which the closed session was held, give that person copies of contracts, settlement agreements, or other documents finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to these documents, they may be retyped during normal business hours before being released, but the presiding officer or designee must orally summarize the amendments for the requester and others present who request the information. In addition, any person who requests may inspect the documents the next business day after the meeting or, in the case of substantial amendments, when all necessary retyping is done. Reminder: No action may be taken in closed session regarding compensation, a new contract, or amendment to a contract, for a superintendent or chancellor or assistant superintendent. **Sections 53260-53262**

### **IMMUNITY FROM LAWSUIT BY EMPLOYEE NAMED**

No employee, former employee, or person acting on their behalf may bring an action for injury to a reputational, liberty, or other personal interest against the agency because of the disclosures the board is required to make after closed session action in compliance with section 54957.1.

### **CLOSED SESSION MINUTES AND RECORDINGS**

The Brown Act authorizes, but does not require, that a closed session minute book be kept by a clerk or district employee, recording "topics discussed and decisions made at the meeting." This record is not public and is available only to board members. We believe that unauthorized distribution of this material may constitute a misdemeanor. A tape recording may also be made of closed sessions. This recording will likely be construed as a substitute for the minute book and may be subject to court review in a proceeding challenging the validity of a closed session. **Section 54957.2**

We strongly advise (except for employee or student disciplinary hearings) that:

1. No minutes are made of closed sessions.

2. No recordings are made of closed sessions.
3. No notes are taken in closed sessions except by staff members who record the specific directions given to them by the board.

However, a court that has determined that a violation of the closed session provisions of the Act has occurred may order the legislative body to tape record its closed sessions and preserve the tapes for a specified period of time for further possible legal action.

### **CONFIDENTIALITY OF CLOSED SESSIONS**

It is unlawful for any person to disclose confidential information acquired by being present in an authorized closed session, unless disclosure has been authorized by the legislative body itself. Confidential information is a communication made in closed session that is specifically related to the basis for holding the closed session. **Section 54963**

Violations of this confidentiality requirement may be addressed by the following means:

1. Injunctive relief to prevent public disclosure.
2. Disciplinary action against an employee who willfully discloses information. An employee may not be disciplined unless he or she has been given notice of or training regarding the statutory prohibition against disclosure.
3. Referral of a member of the legislative body to the grand jury.
4. Possible barring of the person from future closed sessions under certain circumstances.
5. Possible misdemeanor penalties for failure to perform duties required by law.

### **Section 1222**

No action can be taken against a person for:

1. Making a confidential inquiry or complaint to a district attorney or grand jury concerning the legality of an action taken or proposed to be taken in closed session.
2. Expressing an opinion about the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.
3. Disclosing information acquired by being present in closed session if the information is not confidential.

4. Making disclosure to appropriate authorities pursuant to whistleblower statutes.

### **LEGAL REMEDIES FOR VIOLATION OF THE BROWN ACT**

A district attorney or any interested person may sue to invalidate actions taken in violation of certain provisions of the Brown Act. Actions may also be brought (1) to determine the legal validity of a board rule or action to penalize or discourage the expression of one or more of its members, and (2) to compel the board to tape record its closed sessions based on a violation of the closed session authority for any of the following: license applications of persons who have a criminal record; real estate transactions; pending litigation; considering tort liability, public liability, or workers' compensation claims; personnel and security matters; and negotiations matters. In addition, a lawsuit may also be brought to obtain a judgment that action taken in closed session that was not properly agendaized is null and void, although such action may be "cured and corrected" in the same manner as other specified violations. **Sections 54960, 54960.1**

The consequences of a violation of the Brown Act (e.g., conducting an illegal closed session or meeting without properly giving notice of a regular or special meeting) are as follows:

1. Each board member who attends a meeting at which action is taken in violation of the Act, with wrongful intent to deprive the public of information to which it is entitled under the Act, is guilty of a misdemeanor, punishable by up to a \$500 fine and/or six months' imprisonment.
2. Threatened or continued violations of the Act may be enjoined and the court may declare that the law is being violated.
3. Any interested citizen who obtains an injunction or declaratory relief against threatened or continued violations is entitled to recover his or her costs and reasonable attorney's fees payable from the district's funds. As a practical matter, this recovery of attorney's fees may be the greatest direct cost resulting from a violation of the Act.
4. Action may be brought to determine the validity of any board rule or action to penalize or discourage free expression by board members, or to compel the board to tape record its closed sessions.
5. Actions taken in violation of the Brown Act may be declared invalid. This applies to:
  - A. Agenda posting violations, including inadequate descriptions of proposed actions.
  - B. Action on items not posted and for which no proper exception exists.

- C. Improper closed sessions.

### **INVALIDATING ACTIONS IN VIOLATION OF THE BROWN ACT**

The procedure to challenge validity of a board action is outlined below:

1. A demand to cure or correct the violation must be made:
  - A. In writing.
  - B. Clearly describing the challenged action and the nature of the alleged violation.
  - C. Within 30 days of the action, if taken in public session, or 90 days, if taken in closed session.
2. Corrective action (if any) may be taken by the board:
  - A. Within 30 days of receipt of the demand.
  - B. With notice of correction to demanding party.
  - C. With a failure to act in 30 days being deemed a decision not to act.
3. A lawsuit must be filed:
  - A. Within 15 days of receipt of the board's notice of decision to correct or not correct, or within 15 days of the end of the 30-day period to correct, whichever is earlier.
  - B. With failure to file on time barring any legal action.
4. The nature and conduct of the lawsuit:
  - A. Mandamus (a proceeding to seek a court order commanding the board to do something) or injunction may be used to obtain a determination that the action taken is null and void.
  - B. The action must be dismissed with prejudice (that is, it cannot be refiled) if the board proves it has cured or corrected the defect. It is unclear whether the correction must be timely (that is, within 30 days of the demand) to have this effect. We urge timely correction where it is warranted.
  - C. Action to cure or correct does not constitute an admission of a violation. Therefore, correction should be taken in all doubtful cases.

5. The following actions will not be declared null and void:

A. Actions taken “in substantial compliance” with the law. Note: This is not the same as acting in the honest but mistaken belief that the law has been followed.

B. Actions taken in connection with the sale or issuance of notes, bonds, other evidences of indebtedness and any contract, instrument, or agreement related to that sale or issuance.

C. Actions giving rise to contractual obligations, including competitively bid contracts, where a party has, in good faith, relied to its detriment on that action.

D. Actions in connection with the collection of a tax.

6. The consequences of a “null and void” determination are:

A. Attorney's fees of the challenger may be ordered paid by the district but not by board members or district employees.

B. The challenged action has no legal effect and must be taken again to be legal.

C. If the challenge is “clearly frivolous and totally lacking in merit” (a rare finding by any court), the challenger may have to pay the board's attorney's fees.

7. What to do when a written challenge is received:

A. Notify legal counsel immediately (the same business day) by telephone. Send legal counsel a copy of the demand to cure or correct.

B. Be prepared to take corrective action within 30 days if so advised.

8. Methods of correction: A demand to cure or correct is not necessarily a threat of litigation. A closed session may not be appropriate to reconsider the challenged action.

**NOTE:** Take no corrective action until you have consulted with counsel. The following illustrative list of options for corrective action is not all-inclusive.

A. Agenda Content or Posting Time Challenge: Post an agenda for another meeting, with proper description of the action proposed to be taken.

B. Action Allegedly Taken on Matter Not Listed on the Agenda: Unless the item properly falls into one of the three exceptions listed in the discussion on “Agendas of Regular Meetings” above (**Government Code section 54954.2**), post

an agenda for another meeting with a proper description of the action proposed to be taken.

C. Action Taken in Unauthorized Closed Session: Place the matter on an agenda for another meeting, deliberate, and act in open public session.

D. In all cases, if correction is to be made, all board members and district employees must conduct themselves as though the action has not yet been taken and the decision has not yet been made. The public has the right to address the board on each item on the agenda as it is taken up and before it is acted upon. **Education Code section 72121.5.** Public input should be welcomed and considered before the correction is made. Board members should be open-minded and prepared to reach a different decision on the matter in question.

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# **SCHOOLS LEGAL SERVICE**

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## **VOTING AT COMMUNITY COLLEGE BOARD MEETINGS AND RELATED BOARDSMANSHIP ISSUES**

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# VOTING AT COMMUNITY COLLEGE BOARD MEETINGS AND RELATED BOARDSMANSHIP ISSUES

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## Preliminary Note

“Voting at Community College Board Meetings” contains discussions and reference citations for companion questions. In addition, discussions of abstentions, both mandatory and voluntary, cover the impacts on voting caused by:

- ➡ the conflict of interest laws
- ➡ regulations of the Fair Political Practices Commission
- ➡ conduct of board members

**\*\*ALL REFERENCES ARE TO THE EDUCATION CODE UNLESS OTHERWISE INDICATED \*\***

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## THE GENERAL STATUTORY SETTING

### 1. *Majority Vote of Board Membership*

Section 72000(d)(5) provides: “The governing board shall act by majority vote of all the membership constituting the governing board.” In the absence of any other specific statute, this section governs the number of votes required for board action. No secret balloting is permitted. **Government Code section 54953**

For seven-member boards only, a special “vacancy” rule applies under section 72000(d)(5). If there are one or two (but not more) vacancies on such a board, those vacant positions shall not be counted to determine the members necessary to constitute a majority. For example, if a seven-member board has two vacancies, three votes (a majority of the five seated members) would be sufficient to take action. This exception does not apply to a five-member board with one or two vacancies, and three affirmative votes would still be required for action for such a board. Section 72000(d)(5) also provides, with respect to seven-member boards with one or two vacancies, that the vacancies shall be excluded from determining board membership when unanimous action of all or a specific number of members is required. This exception for seven-member boards also implies that wherever unanimous action by all board members is required, a five-member board with a vacancy is prevented from taking action since there is no authority to exclude the vacant position on a five-member board in determining the total membership of the board.

## **2. *Two-Thirds Vote of All Members***

(Four of five or five of seven, unless section 72000(d)(5) applies.)

- A. Resolution declaring intention to sell or lease real property. **Section 81365**
- B. Lease for no more than three months of district property having a residence thereon. **Section 81379**
- C. Resolution declaring intention to exchange real property. **Section 81471**
- D. Resolutions declaring intent and authorizing execution of deed dedicating right-of-way or easement. **Sections 81311, 81313**

## **3. *Unanimous Vote***

- A. Resolution determining that real property of the district may be leased for a value not exceeding \$50 per month. **Section 81369**
- B. Resolution prescribing the terms of a gas lease. **Section 81511**
- C. Resolution by unanimous vote of those members present that surplus property does not exceed a specified value or is of insufficient value to be sold. **Section 81452**
- D. Resolution by a unanimous vote to approve a contract for labor and materials or supplies without seeking bids in the event of an emergency, as specified in Public Contract Code section 20654. (Note: different rules apply for districts adopting the Uniform Construction Public Cost Accounting Procedures [see Public Contract Code sections 12035, 22050].)
- E. Resolution authorizing sale, exchange or lease of surplus real property between agencies. **Section 81432**
- F. Resolution authorizing exchange of real property to settle dispute with adjacent owner. **Section 81481**

## SPECIFIC APPLICATIONS OF THE LAW

### 4. ***Abstentions Defined***

A board member “abstains” by so announcing at the time a matter is first taken up. The term also includes a refusal to vote. In both cases, the board member should — and sometimes must — state for the record the basis for abstention or refusal to vote. The sole way to avoid announcing an abstention is to simply not be physically present when the matter is first taken up, and to remain absent until the next agenda matter is called.

The authorities have said that it is the duty of a member of a public body to vote affirmatively or negatively on matters being acted upon at meetings where the member is present (absent a conflict of interest). (*Dry Creek Valley Association, Inc. v. Board of Supervisors* [1977] 67 Cal.App.3d 839; 61 Ops.Cal.Atty.Gen. 243 [1978].) However, no statute expressly compels a trustee to cast a vote.<sup>1</sup>

Some abstentions may well be compelled by specific statutes. Three frequently encountered examples are:

**Selecting a New Board Member After a Deferred Resignation:** Section 72203.5 prohibits a board member who has resigned with a deferred effective date from participating in the decision on whether or who to appoint as his/her replacement.

**A “Remote” Interest Under the Various Conflict of Interest Laws or Regulations:** Both the conflict of interest laws (see Government Code sections 1090, et seq.) and the Fair Political Practices Act (Government Code sections 87100, et seq.) require abstention in certain situations.

The principal set of circumstances requiring abstention appears under the “remote interests” listed in Government Code section 1091. The Fair Political Practices Commission, by regulation and general advice to public officials, helps with interpretations of both the conflict of interest laws and the Fair Political Practices Act.

### 5. ***When Do Abstentions Figure into Vote Computations?***

An abstention (or a refusal to vote, however characterized) is not without effect. The *Dry Creek* case, cited above, confirms that an abstention counts as a vote in agreement with the greater number of affirmative or negative votes cast.

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<sup>1</sup>The Fair Political Practices Commission has informally opined that an abstention due to an actual conflict of interest cannot be counted under a *Dry Creek* theory. See FPPC regulations at Title 2, Division 6, of the California Code of Regulations.

On a five-member board with all members present, a vote of two “yes” and two “no” with one “abstain” means that the motion fails for lack of a majority of three votes. However, if one member is absent, two vote “yes,” one votes “no,” and one abstains, the matter passes by three votes: the two “yes” votes, plus the abstention. If all five members are present, three vote “yes” and two abstain, the motion passes by unanimous approval.

The same rule applies on a three-member board: one “yes,” one “no,” and one “abstain” means the motion fails because there is no greater number of affirmative or negative votes for the abstention to “side” with. However, if one votes “yes,” one abstains, and one is absent, the abstention joins the affirmative vote, and the measure passes.

On a seven-member board, four abstentions and three “yes” votes produces unanimous passage. Three “yes” and three “no” votes plus an “abstain” results in the failure of the motion. Three “yes” votes, one abstention, two “no” votes, and one absence results in passage of the measure by a four to two margin.

## **6. *Role of the Board President***

The president of the governing board is, first and foremost, a member of the board. In his or her capacity as an elected or appointed trustee, each member is empowered by the electorate to vote on all matters which come before the board for action. Indeed, the power to vote at an official meeting is the essential authority conferred upon a school trustee.

For this reason, no board-adopted rule or parliamentary custom or practice can deprive the president of the right to vote. It is our advice that the board president may vote on any and all items on which the board acts (unless required to abstain) and, further, that the president may — without relinquishing the chair — propose any motion and discuss any matter which is properly before the board.

## **7. *Public Participation***

Finally, members of the public are not members of the board. They do not have the right to rise to a “point of order,” “point of information,” or “point of personal privilege” during the course of a board meeting. The presiding officer (subject to being overruled by the majority) is free to recognize members of the public, or not, as he or she chooses. (See, however, the discussion of public participation at board meetings in our accompanying memorandum concerning the Brown Act.)

## **8. *Selected Boardsmanship Issues***

Someone once observed that the best test of a good board member is whether he/she can progress beyond being a one-issue candidate. Another sage suggested that

a good board member can accept being outvoted and go on to the next agenda item. Unfortunately, we see far too many examples of divisiveness even in experienced boards. The incidents can be distilled into two categories: (a) leaking confidential information, and (b) disruptive behavior. Each can lead to mischief — or worse.

**Violation of Closed Session Confidentiality:** Public policy is thwarted when a board member unilaterally reveals to anyone the contents or proceedings in a closed session. The Government Code's Brown Act requirements and possible penalties are discussed under the heading "Confidentiality of Closed Sessions" in the Brown Act summary in this pamphlet.

**Disruptive Behavior:** When a member disrupts the orderly conduct of business, the entire board can be made to look foolish and adrift. The chairperson should take care to follow established policy and regulate the manner and decorum of presentation by board members.

**Remedies Available to the Board:** Available remedies are few, but vary widely in approach and effect.

**Good Approaches:** The boardsmanship approach should focus on healing any breach in a collegial manner rather than attempting to ostracize the offending member.

**Difficult Alternatives:** We discourage boards from threatening or implementing any of the following remedies.

- ➡ Asking for civil judicial intervention, such as an injunction.
- ➡ Attempting to call for a censure vote at a board meeting.
- ➡ Calling for a motion to exclude a member from a closed session solely because he/she is engaging in a course of revealing closed session information.
- ➡ Referring a breach of confidentiality matter to the District Attorney or grand jury.

## **CONCLUSION**

Governing board members are guardians and keepers of the flame, the public trust. The term "trustee" implies fidelity and honor. Trustees must demonstrate undivided loyalty to the office, duties of a fiduciary as to the district's funds and operations, and full accountability to the public for their actions and voting record.

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