

Holding Productive Business Meetings...that Comply with the Brown Act

Chabot Las Positas Community College District | March 20, 2021

Presented by: Laura Schulkind

LCW LIEBERT CASSIDY WHITMORE

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Laura Schulkind / March 20, 2021

Overarching Principles

- **Transparency in government**
- **Public access/participation**
- **Within Context of a “Business Meeting”**

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Transparency in Government

Presumption: Government business is conducted in the open, subject to limited exceptions.

"The people in delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."

Ralph M. Brown Act, 1953

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Transparency in Government

Executive Compensation*

- Legislative body required to **orally report**
 - in open session
 - summary of recommendations for final actions on:
- Salaries, salary schedules, or compensation paid in the form of fringe benefits
 - For "local agency executives"
 - Includes executive officers, assistant officers, and deputies.

*Gov. Code, § 54953 subd. (c)

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Transparency in Government

Limit on Special Meetings*

- Governing boards prohibited from calling special meetings to approve “local education executive” contracts
- Existing contracts not abrogated
- New contracts and contract renewals must occur during a regular meeting

*AB 1344



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Public Access & Participation

TWO SOURCES OF LAW:

1. Brown Act
2. Education Code



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Public Access—Brown Act

Public Has the Right to:

- Timely posting of agenda
 - Sufficient information to decide whether to attend
- Attend
- Record and broadcast
- Inspect documents & recordings
- Address board on agenda items
 - “as such items are taken up”*
- Address board on matters within its jurisdiction

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Public Access—Education Code

Public Has the Right to:

- Place items on the agenda*
 - Directly related to community college business
 - Does not confer right to place on current or specific agenda

*Education Code §72121.5

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Public Access & Participation

- **What is a meeting?**

- Congregation of a majority of governing body
- Same time and place
- To “hear, discuss or deliberate”
- On any item within its subject matter jurisdiction.

- **What is *not* a meeting?**

- Attendance of a majority at conferences/seminars, community meetings, social events
 - If no discussion of district business

* Gov. Code § 54952.2

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Public Access: No Serial Meetings

- **No communications between board members that:**

- Come to include a majority through email, telephone, intermediaries, etc.
- To hear, discuss or deliberate on any item within the subject matter jurisdiction of the district.

Note: Prohibited “serial meetings” *not* limited to communications to develop a “collective concurrence.”

[Gov. Code § 54952.2(b)]

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Social Media and the Brown Act

AB 992 AMENDS: Section 54952.2 of Gov. Code

- Clarifies that the Brown Act does not prohibit Elected Officials from discussing with the public matters within the Agency's jurisdiction on Social Media

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Public Access to Documents

Right to Inspect Documents:

- Open session backup documents are public records
- Agenda must advise where they may be inspected
- If provided to a majority of trustees less than 72 hours before the meeting: must make available for public inspection at time of distribution to a majority of trustees.

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Public Access: Agenda is Key

Is The Meeting Properly Agendized?

- Timely
- Accessible to public, regardless of time of day
- States time and location
- Provides brief general description of each item
- Reflects all meetings commence in public session



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Public Access: Agenda is Key (cont.)

- Includes opportunity for public comment
 - on any matter of public concern
 - within subject matter jurisdiction of the board
 - before action taken on the item
 - Including closed session items
- States where public may inspect records



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Public Access: Agenda is Key

Agendas Should NOT:

- Use “place holders” for closed session (i.e. list generic items to cover things that may come up).

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Public Attendance

- Registries, attendance lists may *not* be required*
 - Voluntary lists are okay
- Teleconferenced meetings
 - Locations must be identified on agenda
 - Agenda posted at each location
 - Locations accessible by public
- Virtual meetings
 - Ensure proper control over virtual interface (muting, share screen, etc.)

*Gov. Code § 54953.3

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Governor's Executive Orders

- Exec. Order N-29-20 (March 17, 2020) temporarily waives several requirements for teleconferenced meetings such as:
 - Identification of location on agenda
 - Accessibility of location to public
 - Ability to address legislative body at each location
 - Physical posting of agenda at locations
 - Quorum within jurisdiction of district



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Governor's Executive Orders

- Exec. Order N-35-20 (March 21, 2020) allows:
 - Serial/simultaneous updates about declared emergency
 - Members of legislative body may ask questions during updates
 - Updates and questions without the public's access or attendance



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Compliance...In the Context of a Business Meeting

- **When Board may discuss or act:**

- 1) On a properly agendized item at a regular meeting
- 2) On a properly agendized item at a special meeting
- 3) At an emergency meeting
- 4) On an emergency matter at regular meeting
- 5) When immediate action is required
- 6) On a continued matter



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Compliance...In the Context of a Business Meeting

- **The challenge:**

- Boards generally get a few hours a month to advance the District's plans and programs.
- You need to make those hours count.



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Running Efficient (and Brown Act Compliant) Business Meetings

Four areas where boards can build efficiency and productivity:

1. Exercise board authority to impose content neutral rules on public comment
2. Time management
3. Effective/lawful use of closed session
4. Effective/lawful use of special & emergency meetings and board committees: "lawful agility"



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Productive Compliance: Managing Public Comment

1. Board authority to impose content neutral rules on public comment

- May adopt reasonable, neutral, regulations
 - Timing--so long as it is before Board acts on an item
 - Length--Be consistent
- May prohibit comments outside body's jurisdiction
- May control timing of matters agendized by public
- May prohibit disorderly conduct



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Productive Compliance: Managing Public Comment

Regulating Public Comment

Practice Tip: Public comment provides board with information to conduct its business. It is not a conversation with the public.

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Productive Compliance: Managing Public Comment

Disorderly Conduct During Meetings

- Remind disruptive individual(s) of Board rules re: willful interruption, proper decorum
- If disruption continues, may clear the room
- Media remains if did not participate in disruption
- Apply procedure for re-admittance of non-disruptive individuals

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Productive Compliance: Managing Public Comment

Board Response to Public Comment: What to do if a member of the public...

- In public comment before closed session speaks on a confidential personnel matter by name
- During general public comment states they are a district employee who is being discriminated against
- On an action item to award contract to a construction firm, states that this will violate conflicts of interest laws because it financially benefits "Trustee Smith".



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Productive Compliance: Time Management

2. Time management

- Agenda planning & preparation
- Permissible pre-meeting communications with administration
- Effective use of ad hoc committees
- Board packets & meeting preparation



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Productive Compliance: Time Management (cont.)

- Effective use of information items & staff reports
 - Relevant to current/up-coming action items
 - Relevant to shaping policy
 - Appropriate board reports
 - Directed to fellow trustees not the public
 - To inform on matters that will assist in shaping policy or taking action

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Productive Compliance: Time Management

- **Agendas: Tools for a Well Run Meeting**
 - Provide focus to the board & the public
 - Help legislative bodies plan & prioritize
 - Improve communication

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Productive Compliance: Time Management

• Agenda Preparation/Prioritization

- Right of public to place items on a *future* agenda; not right to control *which* agenda
- Board president discretion/authority to prioritize board member requests
- Board president planning with Chancellor
- Consider timing of public hearings & items of high public interest
- Consider timing of lengthy closed session items
 - Use continuation of closed session at end of meeting as safety valve

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Productive Compliance: Time Management

• Constructing Agendas that Get the Job Done

- **Goal:** Agendas that help boards complete their business.
- **Issues:**
 - When/how should agendas be constructed?
 - Each Board member has requested an 'urgent' matter be placed on the next meeting agenda.
 - **What do you do?**
 - A member of the public has requested a matter be placed on the agenda.
 - **What are your options?**

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Productive Compliance: Time Management

• **Permissible Communications With Administrators:**

- Between administrators and individual members or group less than a quorum;
- To convey information or answer questions; *if*
- Staff does not communicate board members' comments/positions or act as intermediaries.

[Gov. Code § 54952.2(b)(2)]

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Productive Compliance: Time Management

• **Board Packets and Meeting Preparation**

- Essential for efficient meetings
- Proper handling
 - For your eyes only
 - District will arrange public access to public portion

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Productive Compliance: Time Management

- **Information Items and Staff Reports**

- What is their purpose?
 - Give Board information relevant to matters within its purview

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Productive Compliance: Time Management

- **Board Reports**

- What is their purpose?
 - Give Board information relevant to matters within its purview
- What is *not* their purpose?
 - Communicate to the public regarding individual members' activities

Practice Tip:

To maximize efficiency & avoid blurring board business and campaigning, keep board reports brief and to the point.

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Productive Compliance: Closed Session

3. Effective & Lawful Use of Closed Session

- Exceptions to open session read narrowly
- Common Exceptions:
 - Pending litigation
 - Personnel matters—"discipline, dismissal, release"
 - Conference w/labor negotiator
 - Real property transactions
 - Student discipline/complaints
- Cardinal Rule:
 - Closed session is **CONFIDENTIAL**



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Productive Compliance: Closed Session

Effective and Lawful Use of Closed Session

Practice Tip:

If the Board is facing a matter that is controversial, embarrassing, messy or complicated and would love to handle it quickly and quietly in closed session....that's a pretty good indicator that the matter must be heard in open session.



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Productive Compliance: Closed Session

- **Closed session—who attends?**

- Members of the governing board
- Support staff necessary to inform/assist on specific matter
- Outside consultants necessary to inform/assist on specific matter
- Staff not need should be excused

Practice Tip: Where board is acting in “quasi-judicial” capacity in a disputed matter, administrators and counsel representing District should be excused unless both sides are present for a hearing.

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Pending Litigation Exception

- Permitted purpose: to confer with legal counsel
- “Pending litigation” includes:
 - Ongoing litigation
 - Decisions to initiate litigation
 - Settlement discussions
 - Significant exposure to litigation

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Personnel Matters Exception

- Closed session permitted for:
 - Appointment
 - Employment
 - Evaluation of performance
 - Discipline/dismissal/release
 - Includes release of probationary & high-level employees
 - Complaints/charges*
 - NOT Compensation – except a reduction due to discipline

*If 24-hour notice provided of right to have matter heard in open session.



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Labor Negotiations Exception

- Purpose of closed session meeting:
 - To review position and instruct the district's representative, and
 - To discuss any other matter within the "scope of representation"



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Productive Compliance: Closed Session

Open Or Closed?

- Chancellor wants to update board on status of a contract grievance arbitration
- Board wants to discuss budget with labor negotiator
- HR Vice Chancellor wants to discuss layoffs under “dismissal, discipline release”
- Board wants to meet with legal counsel to understand options for hiring procedures
- Board wants to discuss a board member conflict of interest issue



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Productive Compliance: Closed Session

Reporting After Closed Session:

- Board must always reconvene into open session before adjourning
- In open session, report all ***final*** actions taken in closed session
 - Including vote of each trustee



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Productive Compliance: Closed Session

Confidentiality of Closed Session:

- No disclosure of personal recollection of closed session discussions
 - Members are prohibited from disclosing the contents of a closed session
 - Disclosure cannot be compelled
- Sanctions include civil & criminal penalties!



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Productive Compliance: Lawful Agility

4. Handling time-sensitive, time-intensive & special/emergency business

General dos and don'ts

DO:

- Follow notice and subject matter requirements

DON'T:

- Over-use
- Use for approval of executive contracts



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Productive Compliance: Lawful Agility

Three kinds of lawful meetings:

- Regular
- Special
- Emergency



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Productive Compliance: Lawful Agility

What is a Regular Meeting?

- Meeting held at a time & place specified by applicable bylaw/rule
- Occurs at a regularly scheduled time
- Agenda posted at least 72 hours prior
- Posting location freely accessible
- Agenda encompasses notice



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Productive Compliance: Lawful Agility

Addressing nonagendized matters at a regular meeting:

- For emergencies where there is need for immediate action
- Emergency must be declared by a majority of the board
- Need for immediate action must be declared by 2/3 vote of board, or unanimous vote if less than 2/3 present:
 - a need to take immediate action; and
 - such need came to the attention of the District subsequent to posting agenda
- Does not apply where the matter was mistakenly not agendized.

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Productive Compliance: Lawful Agility

Items continued from a prior regular meeting:

- Item was posted on a regular meeting agenda
- At the regular meeting, the Board acts to continue the item
- Meeting at which item is addressed is no more than 5 calendar days after the regular meeting

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Productive Compliance: Lawful Agility

Special Meetings

- **Requirements**
 - 24-hour notice
 - Must post agenda
- **Opportunity for Efficiency: Use for unique, time-intensive matters**
 - study sessions
 - public hearings
 - ...but afford more than minimum required notice

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Productive Compliance: Lawful Agility

Emergency Meetings:

- 1-hour telephone notice to media unless “dire” emergency
- Emergencies: work stoppage, crippling activity, or other activity that severely impairs public health and/or safety
- “Dire” emergencies: natural disaster, terrorist act, or peril so immediate that one-hour notice may endanger public health and/or safety
- Upon convening, declare emergency by majority of full board
- Closed session by 2/3 vote of body or if less than 2/3 present, by unanimous vote
- Post minutes for 10 days

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Productive Compliance: Lawful Agility

Use of Board Member Committees

- **Allows for progress between meetings**
 - Evaluate data related to board work
 - Prepare recommendations for full board
 - Examples:
 - Interview firms to assist with CEO search; make recommendation to full board.
 - Develop draft CEO evaluation for presentation to full board.
 - Initial review of concerns/complaints against trustees.

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Productive Compliance: Lawful Agility (cont.)

- **Not bodies subject to the Brown Act if:**
 - Advisory only;
 - Composed solely of trustees;
 - Less than a quorum;
 - Not a standing committee; *and*
 - Meeting schedule is not fixed

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Thank You!

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