

# The Brown Act In Times of COVID-19

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## Purpose

- Ralph M. Brown Act (Government Code §§54950-54963)
- State law governing the conduct of meetings of public bodies
- Purpose: open and transparent government
- Legislative intent: “The public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” (Gov’t Code §54950)

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## Why Does the Brown Act Matter?

- Violation may be a misdemeanor.
- Violation may invalidate action.

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## Keep the purpose in mind

- "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (Gov't Code §54953)
- Transparency: Allows the public to view and monitor the deliberation and decision-making of local appointed and elected bodies.
- Facilitates public participation.
- Limited exceptions for County Board of Supervisors Closed Session matters:
  - Exception must be expressly authorized by statute;
  - Exceptions are narrowly construed;
  - Examples: significant exposure to litigation, pending litigation, initiation of litigation, labor and employment, employee discipline, real property negotiations including franchise agreements.
- The focus of today's training for County Committees is Open Session.

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## Regular and Special Meetings

- Each legislative body except for advisory and standing committees must – by ordinance, resolution, by-laws, or other rule – provide for the time and place of holding regular meetings.
- If the meeting is held in a different time or place, it is a special meeting.

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## Posting the agenda

- Agendas for regular meetings must be posted at least 72 hours ahead.
- Agendas for special meetings must be posted at least 24 hours ahead.
- Post the agenda “in a location that is freely accessible to the public.” (Gov’t Code §§ 54954.2(a)(1), 54956)
  - Example: a location that is publicly accessible 24-hours /day, such as the protected bulletin board outside Government Center.
- If the agenda is posted in a building that is locked to the public over the weekend, that time does not count toward the required 72 or 24 hours.
- Posting on the web is not a substitute for posting the hard copy.

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## Agenda additions

A Brown Act body may take action on items not appearing on the posted agenda under the following circumstances:

- Urgency add-on. Requires a separate determination by 2/3 vote of the body (or a unanimous vote if less than 2/3 of the members are present) that:
  - There is a need to take immediate action; and
  - The need to take action came to the attention of the local agency subsequent to the posting of the agenda.
- Item continued from prior meeting not more than five days prior.

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## What is an emergency meeting?

“Emergency meetings” are a limited class of meetings held when an agency must take prompt action due to an actual or threatened emergency. They require little notice. (Gov. Code, § 54956.5.) An emergency means a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body. (Gov. Code, § 54956.5 subd. (a)(1).)

Emergency also means a dire emergency, which is a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body.

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## Public participation

- The public has a right to testify on every item on the agenda before action is taken.
- Every agenda must provide an opportunity for the public to comment on agenda items before or during consideration of the item.
- Agency may adopt “reasonable regulations” on time allotted for public testimony, such as limiting the time per speaker or limiting the total time allotted to public testimony.
- Reasonable time regulation must ensure that the intent of allowing public testimony on matters on the agenda is carried out.

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## Public participation

- May not require any member of the public to register his/her name or complete a questionnaire as a condition of attendance.
- If an attendance list is posted at or near the entrance or circulated at the meeting, it must state that completion of the document is voluntary.
- Regular meeting agenda must allow time for public testimony on matters not on the agenda under the body’s jurisdiction.
- Special meeting agendas must provide an opportunity for public testimony on items on the agenda.

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## Controlling the meeting

- The body may set reasonable regulations as to time.
- Local agency shall not prohibit public criticism of the agency.
- Do not disparage speakers or content of speech.
- The Brown Act does not confer any privilege or protection for expression beyond that otherwise provided by law.
- Robert's Rules of Order are not required by the Brown Act. They may be helpful guidance. Some agency bylaws require adherence to Robert's Rules of Order.

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## Loss of quorum

- A quorum is a majority of the membership (typically 51%).
  - 4/6 members for the Parks Advisory Committee.
- When the body loses a quorum, the meeting is over. If no quorum, the secretary may adjourn the meeting.
- Less than a quorum may adjourn the meeting to a time and place specified in the order of adjournment and may continue a noticed public hearing on an item to a subsequent meeting at a time and place specified in the order of adjournment.
- Post the written notice of adjournment on or near the door of the meeting place within 24 hours of the adjournment.

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## Loss of quorum, continued

- When there is no quorum, there is no meeting.
- Do not prepare minutes if no quorum or after quorum is lost.
- If less than a quorum elects to continue to conduct business, they are doing so outside of a meeting, with all of the risks of conducting business outside of a meeting.

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## Meeting location/Access

- Meetings must be held in a publicly accessible location, generally within the agency's geographic jurisdiction.
- Previously, teleconferencing was allowed only if specific criteria were met, including:
  - Agenda must be posted at the teleconference location;
  - The teleconference location must be identified in the agenda and must be accessible to the public;
  - Public must have ability to testify at the teleconference location;
  - With one exception, at least a quorum must participate from locations within the boundaries of the jurisdiction; and
  - All votes taken during a teleconferenced meeting must be by roll call.
- Calling in from a car does not satisfy these criteria.

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## Teleconferencing Under COVID-19

- Per the Governor’s Executive Order, members of a legislative body may now teleconference into a meeting without the requirements of:
  - 1) Location disclosure;
  - 2) Agenda posting; or
  - 3) Allowing public access to the location the member of the Brown Act Body is teleconferencing from.
- Requires:
  - 1) Allowing members of the public the ability to attend and participate via teleconference;
  - 2) Posting of access information on the agenda; and
  - 3) Roll Call votes for members of the legislative body.

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## What is a meeting?

- “any congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.” (Gov’t Code §54952.2(a).)
- Basic principle: Hearings, discussions, deliberations and actions by a Brown Act body on items within their subject matter jurisdiction should be conducted and taken openly.

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## Communications allowed outside the meeting

- Individual contacts between a member and other individuals that do not violate the serial meeting prohibition.
- Open and noticed meetings of other bodies: Members can attend so long as a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business within their subject matter jurisdiction.
- A social event or ceremony: Members can attend provided that a majority of the members do not discuss among themselves business within their subject matter jurisdiction.

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## Role of staff

- 2008 Amendment: Staff of the agency may have separate communications with members in order to answer questions or provide information, if staff does not communicate to members of the body the comments or position of any other member of the body.
- Exception for scheduling: The Brown Act allows for communication by staff of the agency with a majority of the members of a Brown Act body for the purpose of scheduling.

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## Prohibition on serial meetings

- A majority of the members cannot outside of their meeting “use a series of communications to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” (Gov’t Code §54952.2.)
- Avoid:
  - “daisy chain” (A to B, B to C, C to D) ; and
  - “hub and spoke” (A to B, A to C, A to D). Example: use of staff to communicate with members one by one for a decision.

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## Beware of e-mail

- Prohibited: use of e-mail among a majority to reach a shared view.
- E-mail may not be used among a majority of the members to discuss, deliberate or take action.
- Beware of potential for serial meetings via “reply all” or email chains.
- Case study: An e-mail is circulated among a majority of members. It is sent to the Chair and Secretary of the agency, posted on the agency website, and a printed version is reported on at the next open meeting. Is this permissible?
  - No. Per an Attorney General opinion, this violates the Brown Act because deliberations are conducted outside of the public view, and the debate be over before the public had the opportunity to participate. 84 Ops. Cal. Atty. Gen. 30 (2001).

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## Social Media

Per AB 992, effective until January 1, 2020, members of a legislative body may post on publicly available social media to answer questions or solicit information from the public provided that members do not use the social media platform to discuss business within the subject matter jurisdiction of the legislative body among themselves.

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## Questions?

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