OPEN PUBLIC MEETING REQUIREMENTS UNDER THE BROWN ACT AND CALIFORNIA EDUCATION CODE

I. INTENT

A. Government Code section 54950 states the legislative intent underlying the Brown Act:

> **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 their deliberations be conducted openly.**
>
> **The people of this state do not yield their sovereignty to the agencies which serve them. 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. The people insist on remaining informed so that they may retain control over the instruments they have created.**

1. In light of this legislative policy, the Brown Act is liberally interpreted by the courts. (*Golightly v. Molina*, (2014) 229 Cal.App.4th 1501, 1511-1512.)

2. These principles are not recent inventions under California law. In *El Dorado County v. Reed* (1858) 11 Cal. 130, 132, the Supreme Court stated not long after California gained statehood:

> In order to give the amplest opportunity to the District Attorney, or citizens who desire to do so, to contest the allowance of improper demands against the Public Treasury, the business of the Supervisors is required to be transacted at the regular meetings provided by law; or if at special meetings, public notice must be given of the business to be so transacted, and unless such notice be given, the acts of the Supervisors are a nullity.

B. Courts rely on section 54950's statement of legislative intent to interpret the Brown Act:

1. The purpose of the Brown Act is to facilitate public participation in local government and to curb misuse of democratic process by secret legislation by public bodies. (*Golightly, supra,* at 1511; *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116.)

2. Under the Brown Act -"interested persons" entitled to sue to enforce its provisions are not confined to residents within the jurisdiction of the legislative body involved, nor to taxpayers therein. (*McKee v. Orange Unified School District* (2003) 110 Cal.App.4th 1310, 1316.)

C. In 2004, California voters adopted Proposition 59, which added subdivision (b) to section 3 of Article I of the California Constitution. This provision:

1. Adds to the state Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public.

2. Provides that statutes and rules furthering public access be broadly construed, or narrowly construed if they limit public access.

3. Requires new statutes and rules limiting access be adopted with findings justifying the necessity of the limitation.

4. Preserves the constitutional rights of privacy, due process, and equal protection, and expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies.

II. THE "RULE"

"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." (Government Code § 54953.)

If a given entity fits the definition of a legislative body, then it is subject to the requirements of the Brown Act.

III. WHAT IS A "LEGISLATIVE BODY"?

A. Government Code section 54952 defines a "legislative body" to include:

1. The governing body of a local agency or other local body created by statute. (Government Code § 54952(a).) Examples:

a. The governing board of a school or community college district, ROP, or JPA;

b. A city council;

c. A county board of supervisors;

d. A county board of education.

2. Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. (Government Code § 54952(b).) Examples:

    a. Personnel commissions;

    b. Academic senates (66 Ops.Cal.Atty.Gen. 252 (1983));

    c. Community college student body associations; such organizations are advisory to district boards and are therefore a legislative body and subject to the Brown Act (75 Ops.Cal.Atty.Gen. 145 (1992)).

3. "Legislative body" does *not* include advisory committees composed solely of the members of the legislative body that comprise less than a quorum of the legislative body. (Government Code § 54952(b).)

    a. Not all less-than-a-quorum committees are excluded from the definition of a legislative body. To be excluded, the committee must:

        1) Be "advisory" only;

        2) Not be "decision-making"; and

        3) Not be a standing committee.

        E.g., an ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body. (*Henderson v. Board of Education* (1978) 78 Cal.App.3d 875.)

    b. In *Golightly v. Molina*, (2014) 229 Cal.App.4th 1501, the Board of Supervisors delegated to the County CEO the authority to enter into Social Program Agreements. However, in addition to the County CEO's approval, the SPA's also had to be approved by the Auditor-Controller, the Executive Officer of the Board, and the County Counsel. Each official independently reviewed the SPA and there was no discussion among the offices.

        1) The court held that the four administrative signatories to the SPA were not a legislative body, because they do not engage in collective decisionmaking within the meaning of the Brown Act. (*Id.* at pp. 1512-1513.)

2) The four signatories were not a committee within the meaning of Government Code section 54952(b).

3) The Brown Act and its definition of "action taken" imply that for a legislative body to be formed it must engage in collective decision-making or be making a collective commitment or promise by a majority of the members of the body. (Government Code section 54952.6; *Roberts v. City of Palmdale*, (1993) 5 Cal.4th 363, 375.)

4) The action of one public official is not a "meeting" within the terms of the Brown Act. For example, "a hearing officer whose duty it is to deliberate alone does not have to do so in public." (*Golightly, supra*, at 1513, citing, *Wilson v. San Francisco Muni. Railway*, (1973) 29 Cal.App.3d 870, 878-879.)

c. If any members of the ad hoc committee are not members of the board, the Act will apply.

d. Committees appointed by the superintendent, without any formal action by the board, are not covered by the Act. However, the board must not in any way "instigate" the formation of the committee; the concept of "formal action" is broadly construed. (*Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805; and *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 792-793.)

e. Where a school district's board of trustees forms a committee, known as the district liaison council, consisting of eight representatives from the community, seven employees of the district, and one student, to interview candidates for the position of district superintendent, the committee is subject to requirements of the Brown Act (e.g., notice, agenda, and public participation). However, where appropriate, the committee may rely on the personnel exception in section 54957 and meet in closed session when interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the appointment. (80 Ops.Cal.Atty.Gen. 308 (1997).)

f. Meetings between unions representing a community college district's employees and the district's joint labor/management benefits committee were within the Educational Employment Relations Act "meeting and negotiating discussion between a public school employer and a recognized or certified employee organization" exemption from Brown Act open meeting requirements, since the benefits committee was a designated

representative of the district. (Government Code §§ 3543.3, 3549.1(a); *Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972.)

1) The joint labor/management benefits committee was created by the district's collective bargaining agreements, and not by the board's policy on the same subject.

2) The Court of Appeal and the Attorney General distinguished the district's joint committee, created through the collective bargaining process, from the textbook review committee created by board policy in *Frazer*, *supra*. (92 Ops.Cal.Atty.Gen. 102, 107 (2009).)

g. The Act applies to any "other body" a local agency creates, unless the other body consists of (1) less than a quorum of the local agency's members, and (2) is only advisory. (*Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123.)

h. Various councils and schoolsite advisory committees established under the Education Code are subject to some aspects of the Brown Act. (Education Code § 35147(b).) Examples:

1) District-wide advisory committees on bilingual education (Education Code § 52176);

2) Schoolsite councils (Education Code § 52852);

3) School advisory committee on compensatory education (Education Code § 54425(b));

4) Migrant education parent advisory council (Education Code § 54444.2);

5) Parent advisory committee and school site councils (Education Code § 62002.5); and

6) Parent involvement program committees (Education Code § 11503).

Education Code section 35147(c) provides modified rules for these councils and committees:

1) Any meeting held by the council or committee shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within its subject matter jurisdiction.

2) Notice of the meeting shall be posted at the school site, or other appropriate place accessible to the public, at least 72 hours in advance. The notice shall specify the date, time, and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon.

3) The council or committee may not take any action on any item of business that did not appear on the posted agenda, unless the council or committee members present, by unanimous vote, find there is a need to take immediate action and the need for action came to the attention of the council or committee after the agenda was posted.

4) Questions or brief statements made at a meeting by members of the council, committee, or public that do not have a significant effect on pupils or employees in the school or district or that can be resolved solely by providing information need not be described on an agenda as items of business.

5) If a council or committee violates these procedural meeting requirements. and upon demand of any person, the council or committee shall reconsider the item at its next meeting, after allowing for public input. (Education Code § 35147(c).)

6) Any materials provided to a schoolsite council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act (Government Code § 6250 et seq.). (Education Code § 35147(d).)

4. Standing committees of a legislative body, irrespective of their composition, that have continuing subject matter jurisdiction, or a meeting schedule fixed by resolution or other formal action of a legislative body, are legislative bodies for purposes of the Brown Act.

5. A board, commission, committee, or other multi-member body that governs a private corporation, limited liability company, or entity is a legislative body if it:

a. Is created by an elected legislative body to exercise authority that may lawfully be delegated by the elected body to a private entity (Government Code § 54952(c)(1)); or

b. Receives funds from a local agency *and* its membership includes a member of the local agency's legislative body appointed by the local agency's legislative body (Government Code § 54952(c)(2)).

6. Even though a nonprofit corporation, which administered subsidized childcare and education services pursuant to a contract with a board of education, was not a legislative body within the meaning of the Brown Act, provisions in the nonprofit corporation's contracts with the board requiring the corporation to comply with the Brown Act "to the extent of the publicly funded program(s)" it administered were enforceable by members of the public in a breach of contract action for declaratory and injunctive relief, since the general public was the intended third-party beneficiary of the contractual provisions. (*Service Employees Inter. Union, Local 99 v. Options--A Child Care and Human Service Agency* (2011) 200 Cal.App.4th 869, 879.)

7. The governing board of a jointly administered trust fund, whose members are appointed equally by a city and a labor union representing city employees and whose purpose is to address labor-management issues relating to the health, safety, and training of city employees, is not required to hold its meetings open to the public. (87 Ops.Cal.Atty.Gen. 19 (2004).)

8. Other provisions of law may subject certain organizations to the Brown Act, e.g., community college district auxiliary organizations. (Education Code § 72674.)

B. "Member of a legislative body of a local agency" includes a person elected to serve as a member of a legislative body who has not yet assumed the duties of office. Such persons must conform their conduct to the requirements of the Brown Act, and will be treated, for purposes of enforcing the Act, as if they had already assumed office. (Government Code § 54952.1.)

A legislative body may require that each member be given a copy of the Act. Similarly, someone who has been elected to serve on the body, but has not yet assumed office, may be given a copy of the Act. (Government Code § 54952.7.)

1. Section 54952.7 does not define when a person is deemed elected.

2. However, and at least for some purposes, the California Supreme Court has stated: "if an election is in fact held, the prevailing candidate is elected on the day of the election." *Brown v. Hite*, (1966) 64 Cal.2d 120, 127.

3. This rule is consistent with the rules relating to the interpretation of the Brown Act.

IV. WHAT IS A MEETING?

A. The 1993 Amendments to the Brown Act added a specific definition of a meeting. This definition codified prior interpretations by the Attorney General and appellate courts.

1. A meeting is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1978) 263 Cal.App.2d 41; 61 Ops.Cal.Atty.Gen. 220 (1978) [luncheon meetings where public business is discussed are subject to the Brown Act].)

a. Deliberation in this context connotes not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. (*Frazer*, *supra*, 18 Cal.App.4th at p. 794.)

2. Meeting includes "study," "discussion," "informational," "fact-finding," or "pre-meeting" gatherings of a quorum of the members of a board. Whether action is taken is irrelevant. (42 Ops.Cal.Atty.Gen. 61 (1963).)

3. The passive receipt by individual board members of their mail is not a meeting. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.)

4. In *St. Croix v. Superior Court,* (2014) 228 Cal.App.4th 434, 445-446, citing *Roberts, supra,* 5 Cal.4th at 381, the court held: "Our determination that the (San Francisco City) charter incorporates the state law attorney-client privilege and its protection of written attorney-client communications is thus consistent with the "balance between the competing interests in open government and effective administration [that] has been struck for local governing bodies in the [CPRA] and the Brown Act."

B. Current definition of a meeting and prohibited communications.

1. By enacting Chapter 63, Statutes of 2008 (S.B. 1732), effective January 1, 2009, the Legislature established a new definition for a meeting in section 54952.2(a) and imposed new restrictions in section 54952.2(b).

a. As used in this chapter, "meeting" means any congregation of a majority of the members of a legislative body at the same time and location, *including teleconference location as permitted by Section 54953*, to hear, discuss, deliberate, *or take action* on any item that is within the subject matter jurisdiction of the legislative body.

b. (1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, *use a series of*

communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.

C. Serial, but less-than-a-quorum meetings of a district's governing board members with a mediator in an effort to reach a settlement for the termination of the district's president, constituted the collective acquisition and exchange of facts preliminary to an ultimate decision. The court found the mediator was an intermediary for purposes of section 54952.2(b). (*Page v. MiraCosta Community College District* (2009) 180 Cal.App.4th 471.)

1. The meetings in *Page* also violated the closed session exception for litigation, section 54956.9, discussed below, since they involved the board meeting not only with the district's legal counsel, but also with a mediator.

D. In *Galbiso v. Orosi Public Utility District* (2010) 182 Cal.App.4th 652, 668, the court held comments made by the utility district's attorneys did not create an inference that a secret meeting took place. One of the referenced comments was merely a statement in *The Fresno Bee* to the effect that OPUD "probably will consider" going forward with a tax sale. This comment was made in the context of the protracted litigation between the district and Ms. Galbiso.

E. The requirements of the Brown Act do not apply to:

1. Individual contacts or conversations between a member of a legislative body and any other person *that do not violate the serial meeting prohibition*. (Government Code § 54952.2(c)(1).)

2. The attendance of a majority of members at a conference or similar gathering open to the public that involves a discussion of issues of general concern to the public or agencies of the type represented by the legislative body, provided a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the agency's subject matter jurisdiction. This paragraph is not intended to allow members of the public free admission to a gathering where the organizers have required the other participants to pay a fee as a condition of attendance. (Government Code § 54952.2(c)(2).)

3. The attendance of a majority of members 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 members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their subject matter jurisdiction. (Government Code § 54952.2(c)(3).)

4. The attendance of a majority of the members at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. (Government Code § 54952.2(c)(4).)

5. The attendance of a majority of the members at a purely social or ceremonial occasion provided a majority of the members do not discuss among themselves business of a specific nature that is within their subject matter jurisdiction. (Government Code § 54952.2(c)(5).)

6. The attendance of a majority of members at an open and noticed meeting of a standing committee of that legislative body, provided the members who are not members of the standing committee attend only as observers. (Government Code § 54952.2(c)(6).)

   a. Members of the legislative body may not ask questions or make statements while attending a meeting of a standing committee of the legislative body "as observers." (81 Ops.Cal.Atty.Gen. 156 (1998).)

   b. Members of the legislative body may not sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body "as observers." (*Id*.)

F. Effective January 1, 2012: When two legislative bodies of the same local agency convene meetings to take place either simultaneously or subsequently, and one body is a quorum of the other, the compensation the members will receive for the meeting must be announced. (Government Code § 54952.3.)

V. PUBLIC MEETING PROCEDURES

A. Certain boards must meet at least monthly and must, by rule, fix the time and place for their regular meetings. (See Education Code §§ 1011, 35140, 35144, and 72000(c)(4); Government Code § 54954.)

1. The governing board of any union or joint union high school district, shall hold its regular meetings either monthly or quarterly. The governing board of any other high school district, shall hold its regular meetings monthly. (Education Code § 35141.)

2. "A notice identifying the location, date, and time of the meeting shall be posted in each community college maintained by the district at least 10 days prior to the meeting and shall remain so posted to and including the time of the meeting." (Education Code § 72000(d)(1)

B. Location of Meetings (Government Code § 54954(b) and (c).)

1. Regular and special meetings of school and college district boards must be held within the territory of the district, except to:

a. Comply with state or federal law or a court order, or attend a judicial or administrative proceeding to which the local agency is a party.

b. Inspect real or personal property that cannot conveniently be brought within the boundaries of the district, provided the topic of the meeting is limited to items directly related to the real or personal property.

1) A majority of the members of a city council may attend a tour of the extraterritorial water-district facilities if the tour is held as a noticed and public meeting of the council for the purpose of inspecting the facilities and the topics raised and discussed at the meeting are limited to items directly related to the facilities being inspected. (94 Ops.Cal.Atty.Gen. 33 (2011).)

c. Participate in meetings or discussions of multi-agency significance that are outside the jurisdictional boundaries of the district. However, the meeting must be held within the territory of one of the participating agencies and be noticed by all participating agencies as provided for in the Brown Act.

d. Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the district, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

e. Meet with state or federal officials, where a local meeting would be impractical, solely to discuss legislative or regulatory matters affecting the district over which the state or federal officials have jurisdiction.

f. Meet at or near a facility owned by the agency located outside its territory, if the meeting is limited to items directly related to that facility.

1) A majority of the members of a city council may not meet, either outside or inside the city's boundaries, to attend a private tour of the facilities of a water district that provides services to the city for the purpose of acquiring information regarding those services. (94 Ops.Cal.Atty.Gen. 33 (2011).)

2) However, "a majority of the members of a city council may attend a tour of the extraterritorial water-district facilities *if the tour is held as a noticed and public meeting of the council for the purpose of inspecting the facilities and the topics raised and discussed at the meeting are limited to items directly related to the facilities being inspected.*" (*Ibid.,* emphasis added.)

g. Meet at the office of the agency's attorney for a closed session on pending litigation, when to do so would reduce fees or costs.

2. Additionally, school boards may meet outside the district for specific purposes:

a. To attend a conference on non-adversarial collective bargaining techniques;

b. To interview members of the public residing in another district regarding the potential employment of an applicant for the position of superintendent; or

c. Interview a potential employee from another district. (Government Code § 54954(c).)

3. Community college districts must hold their meetings within their own jurisdiction, unless certain very limited exceptions apply:

a. Meeting with another local agency; or

b. Meeting in closed session with counsel to discuss pending litigation (Education Code § 72000(d)(2)(A) and (B));

It is not clear whether Education Code section 72000(d)(2) is intended to be the only authority for holding community college district board meetings outside of the district, or whether the exceptions in Government Code section 54954(b) also apply.

4. A JPA must meet within the territory of at least one of its member agencies, unless one of the exceptions in paragraph 1(a) through (g) above applies. (Government Code § 54954(d).)

5. If, because of a fire, flood, earthquake, or other emergency, it is unsafe to meet in the usual place, meetings may be held for the duration of the emergency at a place designated by the presiding officer or his/her designee, in a notice to the local media that have requested notice, by the most rapid means available at the time. (Government Code § 54954(e).)

C. All meetings of a legislative body of a local agency that are open and public must comply with the Americans with Disabilities Act of 1990. (Government Code § 54953.2, citing 42 U.S.C. § 12132.)

D. Mailed Notice of Meetings

1. Any person may request that a copy of the agenda or the documents constituting the agenda packet be mailed to that person. The agenda and documents in the agenda packet shall be made available, if requested, in appropriate alternative formats to person with a disability as required by the ADA, 42 USC section 12132, and the federal rules and regulations adopted in implementation thereof. Upon receipt of the written request, the legislative body, 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 all, of the members of a legislative body, whichever occurs first. (Government Code § 54954.1.)

2. The agenda shall include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made. (Government Code § 54954.2(a)(1).)

3. Any request to receive agenda materials shall be valid for the calendar year in which the request is filed, and must be renewed following January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet, which fee shall not exceed the cost of providing the service.

4. Failure of the requesting person to receive the agenda or agenda packet pursuant to this section shall not constitute grounds for invalidation of the actions of the legislative body taken at the meeting for which the agenda or agenda packet was not received.

E. Special Meetings - 24-Hour Notice (Government Code § 54956)

1. The board may consider only business specified in the notice. (Government Code § 54956.)

2. The board may hold a closed session as part of a special meeting.

3. Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in

the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget. (Government Code § 54956(b).)

4. Notice of the special meeting must be mailed or delivered to the media and posted 24 hours in advance of the meeting. The notice must also be posted on the district's website (effective January 1, 2012).

5. A special meeting may be called by either the president of the board or a majority of the board.

6. Effective January 1, 2012, a special meeting may not be called regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in Government Code section 3511.1(d).A local agency may call a special meeting to discuss the local agency's budget.

F. Emergency Meetings in Emergency Situations (Government Code § 54956.5.)

1. Where an emergency involves the potential for disruption, or threatened disruption, of public facilities, a board may hold an emergency meeting without providing normally-required notice and posting.

2. An "emergency situation" is defined as either:

a. An "emergency," defined as:

1) Work stoppage;

2) Crippling activity; or

3) Other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the Governing Board.

b. A "dire emergency," defined as:

1) Crippling disaster;

2) Mass destruction;

3) Terrorist act; or

4) Threatened terrorist activity that poses peril so immediate and significant that requiring the board to provide one-hour notice may endanger public health, safety, or both, as determined by a majority of the board.

3. At least one hour's notice to the media (those who previously requested notice of special meetings) is required. However, in a "dire emergency," notice must be made at or near the time the presiding officer or designee notifies other board members. Notice must be made by telephone, unless telephone service is not functioning, in which case notice of the meeting and any actions taken is made as soon as possible thereafter.

4. The board may meet in closed session following a two-thirds vote of the board or unanimous vote if fewer than two-thirds of members are present.

5. Special meeting requirements of section 54956 apply, except 24-hour notice.

G. Agendas

1. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

2. An agenda must be conspicuously posted at least 72 hours prior to the time of regular meetings and on the district's web site. The web site requirement became effective January 1, 2012. (Government Code § 54954.2(a).)

3. The location where the agenda is posted must be publicly accessible at all times during the required 72-hour period. For example, the agenda cannot be posted inside a building that is locked and inaccessible to the public during evening hours. (78 Ops.Cal.Atty.Gen. 327 (1995).)

   a. The agenda of a meeting may be posted on a touch-screen electronic kiosk accessible without charge to the public 24 hours a day, 7 days a week, in lieu of posting a paper copy of the agenda on a bulletin board. (88 Ops.Cal.Atty.Gen. 218 (2005).)

4. Effective January 1, 2019, meeting agendas must be posted on the local agency's "primary Internet website," accessible "through a prominent, direct link to the current agenda" (not a contextual menu). All online-posted agendas must be retrievable, downloadable, indexable, and electronically searchable, be independent and machine readable, and be available free of charge without restriction. Local agencies may use "an integrated agenda management platform" that meets these specified requirements and that, among other things, ensure the current agenda is the first agenda available at the top of the integrated agenda management platform. (Government Code § 54954.2(a)(2), added by Statutes of 2016, chapter 265, § 1.)

5. A board may not change its posted agenda within the 72-hour period preceding a regular meeting unless one of these exceptions applies:

a. A majority determines an emergency exists pursuant to Government Code section 54956.5;

b. A two-thirds vote of the members present determines there is a need to act immediately and the need to take action came to the district's attention after the posting of the agenda;

c. The item was previously posted for a meeting occurring not more than 5 days prior to the meeting when the action is taken, and at the prior meeting the item was continued to the meeting where action was taken. (Government Code § 54954.2(b).)

If no exception applies, the board must either postpone consideration of the item for at least 72 hours or call and notice a special meeting.

6. The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting. (*Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196 [action taken pursuant to a defective agenda may be void]; *Los Angeles Times Communications v. Los Angeles County Board of Supervisors* (2003) 112 Cal.App.4th 1313, 1321-1322; and *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177-1178 [in the context of failing to agendize the potential adoption of a mitigated negative declaration under CEQA, the court restated the rule, consistent with *Carlson*, *supra*, that the purposes of the Brown Act "include ensuring that the public is adequately notified of what will be addressed at a meeting in order to facilitate public participation and avoid secret legislation or decision-making"].)

7. The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A "brief general description" of an item generally need not exceed 20 words.

8. In *Castaic Lake Water Agency v. Newhall County Water District* (2015) 38 Cal.App.4th 1196, 1206-1207, the court held that the County Water District's meeting agenda describing its closed session items authorizing the initiation of litigation against Castaic, a public water wholesaler, was in substantial compliance with the Ralph M. Brown Act, and thus the Brown Act did not void the District's decision to initiate the lawsuit, even though the agenda did not specify that the District "has decided to initiate or is deciding whether to initiate litigation," where the notice stated that the closed session would include a meeting with legal counsel to discuss two potential lawsuits.

a. The court concluded that irrespective of the variance between the given notice/agenda and the statutorily prescribed notice, the given notice was in substantial compliance with the statute. (*Ibid.)*

b. The court concluded that Castaic's argument was hypertechnical and elevated form over substance. The notice given by Newhall clearly advised members of the public that on March 14, 2013, the Newhall Board would be meeting with its legal counsel, in closed session, to discuss potential litigation in two cases. *(Ibid.)*

c. "The citation in the given notice to subdivision (c) instead of subdivision (d)(4) of section 54956.9 could not possibly have misled or confused anyone. Subdivision (d)(4) of section 54956.9 states: '*Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.'"* (Italics added.) (*Ibid.)*

d. Although the notice given by Newhall did not direct the reader to the correct subdivision of section 54956.9, it was sufficient to apprise the public that the Newhall Board would be meeting with its legal counsel, in closed session, to discuss potential litigation in two cases. (*Ibid.)*

9. In *Moreno v. City of King* (2005) 127 Cal.App.4th 17, 26-28,the agenda for a special meeting stated that the city council would only consider, in closed session, the employment contract of a public employee. Six days later, the city manager gave the employee a memorandum that detailed five alleged incidents of misconduct that led the city manager to terminate his employment. The appellate court upheld the trial court's finding the agenda was inadequate because its description provided no clue that the dismissal of a public employee would be discussed at the meeting.

a. The city did not cure its failure to agendize the issue of the employee's dismissal when the only action reported after a later meeting was the denial of the employee's tort claim. *(Ibid.)*

b. The employee was deprived of the opportunity to respond to specific accusations, in violation of Government Code section 54957, because the city failed to give him advance notice that the city council would hear the city manager's accusations at its closed meeting. *(Ibid.)*

10. Agendas of public meetings and any other writings, when distributed to all, or a majority of, the members of a legislative body by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act (Government Code § 6250 et seq.), and shall be made available upon request without delay. This requirement does not apply to certain records made exempt from public disclosure by the Public Records Act. (Government Code § 54957.5(a).)

11. If a writing that is a public record and relates to an agenda item for an open session of a regular meeting is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection at the time the writing is distributed to all, or a majority of, the members of the body. (Government Code § 54957.5(b)(1) and (b).)

    a. A local agency shall make any such writing available for public inspection at a public office or location that the agency shall designate for this purpose.

    b. The address of this office or location must appear on the agendas for all meetings of the legislative body and may be posted on the agency's Web site in a position and manner that makes it clear the writing relates to an agenda item for an upcoming meeting.

    c. Documents prepared by the agency must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting. (Government Code § 54957.5(c).)

    d. Nothing in the Act prevents the agency from charging a fee or deposit for a copy of a public record as authorized by the Public Records Act. (Government Code §§ 54957.5(d) and 6253.)

    e. No additional charge may be imposed on persons with disabilities to make these documents available in appropriate alternative formats. (Government Code § 54957.5(b)(2) and (d).)

H. Public Participation (Government Code § 54954.3; Education Code §§ 35145.5 and 72121.5)

1. Members of the public must be allowed to place on the agenda matters directly related to district business.

    a. In *Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 233, the court in interpreting Education Code § 35145.5 held that "the statutory language reveals that the duty it imposes on a school district to permit a member of the public to place an item on the school board's agenda is not purely ministerial but is mixed with discretionary power."

    b. The first two sentences of section 35145.5 deal with different subjects. The first sentence provides that the Legislature's "intent" is that members of the public "be able to place matters directly related to school district business on the agenda...." The Legislature's use of the words "intent" and "be able" does not affirmatively reflect that it intended an inflexible mandate. Instead, this language indicates that the Legislature intended to encourage

school districts to provide this opportunity to members of the public. (*Ibid.)*

2. Members of the public must be able to address the board regarding items on the agenda before or during the board's consideration of the item. (Education Code § 35145.5; Government Code § 54954.3.) However, Education Code section 72121.5, relating to community college districts, provides that members of the public must be able to address the board regarding items on the agenda as such items are taken up.

3. In *Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1109, the court held that while Government Code section 54954.3 permits members of the public to provide input, it does not mandate that they do so. Nothing in the plain language of Government Code section 54954.3 supported the city's proposed construction – that members of the public must raise a given legal concern about a potential action before any course of action has been adopted, or be forever barred from raising that concern in court.

4. Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any item of interest to the public, within the subject matter jurisdiction of the board.

    a. No action shall be taken until the matter is properly noticed on an agenda or an exception to the 72-hour rule is established.

    b. Every notice of a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item appearing on that agenda before or during consideration of that item. (Government Code § 54954.3(a).) However, with respect to community college districts, public comment with respect to agenda items must be allowed at the time the item is taken up by the board. Education Code section 72121.5 does not distinguish between a regular and a special meeting.

    c. In *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461, the Court of Appeal held that the Act contemplated only one public comment period per agenda, even when the agenda is covered at meetings occurring on different days.

        1) The decision assumes speakers wishing to address a topic on the agenda will be permitted to speak when that item is before the body, and not as a group in advance of reaching the item on the agenda.

        2) This assumption is at odds with the practice of many boards that require all speakers wishing to address an agenda item

to speak at the beginning of meetings as a group and not at the time the agenda item is brought up. (See also *Galibiso v. Orosi Public Utility District*, (2008) 167 Cal.App.4th 1063,1079 [adopting the *Chaffee* court's statement regarding allowing speakers to speak when the agenda item is reached, and holding the board could not prohibit public comments that relate to pending litigation the board intended to discuss in closed session].)

5. The Act imposes limitations on board members' responses to public comments. (Government Code § 54954.2(a).) In response to public comments, board members and staff may only:

   a. Briefly respond to statements made or questions posed by persons making public comments;

   b. Ask questions for clarification or make a brief announcement;

   c. Provide a reference to staff or other resources for factual information;

   d. Request staff to report back to the body at a later meeting; or

   e. Direct staff to place the matter on a future agenda.

6. In *Cruz., v. City Of Culver City et al.*, (2016) 2016 WL 4182502 the court held that based on its review of the meeting transcript and video that the city council "did no more than ask for clarification as to the appropriate avenue of response to the church's letter. Engineer Herbertson answered those questions and advised the council that the matter could be placed on a future agenda, with all parties given notice and an opportunity to comment." The court found this conduct was consistent with the limitation on public official's responses to the presentation of unagendized exceptions to the requirement that discussion made not be had on topics not appearing on the agenda as set forth in Government Code § 54954.2(a).

7. The board may adopt reasonable rules and regulations to ensure the proper functioning of the meeting. (75 Ops.Cal.Atty.Gen. 89 (1992); *White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421; *Kindt v. Santa Monica Rent Control Board* (9th Cir. 1995) 67 F.3d 266 [regulations governing when the public may address the board are reasonable, content-neutral time, place, and manner restrictions].)

8. In *Chaffee v. San Francisco Public Library Commission*, *supra*, the plaintiff asserted state law and a San Francisco "sunshine" ordinance required the commission to provide each speaker with up to 3 minutes to make comments at a meeting. At the meeting in question, the

commission's president announced that public comment on each agenda item would be limited to 2 minutes per speaker, instead of the 3 minutes normally allotted.

a. The court held the commission did not violate the Brown Act or the sunshine ordinance by shortening the time allotted to each speaker.

b. The president stated in his declaration that before the meeting, he anticipated four agenda items would be lengthy. Based on his judgment of the time required for the commission to consider those four items and the other items on the agenda, he concluded the commission would not be able to complete its meeting in a reasonable time unless public comment was shortened. The minutes indicated the meeting lasted more than four hours. Chaffee failed to establish that the president's expectation was unreasonable or that the commission applied its bylaws improperly in the circumstances.

c. The Brown Act does not specify a 3-minute time period for comments, and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion. (*Id.* at p. 116.)

9. Dumping gallons of garbage on the floor of a schoolroom during a school board meeting was sufficient to support an arrest for disturbing a public meeting and was not speech protected by the First Amendment. (*McMahon v. Albany Unified School District* (2002) 104 Cal.App.4th 1275.)

10. "The legislative body . . . shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." (Government Code § 54954.3(c).)

a. This provision, and the *Baca* case discussed below, make it clear that statements made at a public meeting generally are not subject to defamation claims.

b. This provision raises concerns relating to privacy and reputation issues for public employees.

11. The superintendent of a high school district may not prohibit an administrative employee of the district from speaking during the public comment period of a public school board meeting on an agenda item concerning his demotion from assistant high school principal to a teaching position. (90 Ops.Cal.Atty.Gen. 47 (2007).)

12. In *Baca v. Moreno Valley Unified School District* (C.D. Cal. 1996) 936 F.Supp. 719, the court held the board's policy prohibiting the airing of charges or complaints against identifiable district employees was unconstitutional.

    a. The district's policy was similar to many throughout the state:

    "No oral or written presentation in open session shall include charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee . . . . All charges or complaints against employees must be submitted to the board under provisions of board policy . . . . "Any individual who violates this policy will be warned to discontinue his/her comments immediately. If the individual willfully interrupts the meeting by refusing to comply with the warning, the board President may authorize the removal of the individual pursuant to Government Code Section 54957.9." (*Id. a*t p. 725.)

    b. Plaintiff Baca, who was active in the Mexican Political Association (MPA), accused a school principal and the district's superintendent of ignoring numerous complaints brought to them by parents and acting in a discriminatory manner. Ms. Baca was warned and removed by Riverside County Sheriffs. (*Id. a*t p. 726.)

    c. The court held speech criticizing district employees, even if later proved to be defamatory, is protected by both the California and U.S. Constitutions from government censorship and prior restraint.

        1) The public sessions of a board meeting are limited public forums. As a result, government may limit speech to certain subjects but may not engage in viewpoint discrimination within a given subject matter area. (*Id. a*t pp. 729-730.)

        2) The court found the following concerns were either not compelling, or sufficiently compelling to justify limiting Ms. Baca's speech:

            a) Defamation; (*Id. a*t p. 731.)

            b) The employee's privacy rights; (*Id. a*t pp. 731-733.)

            c) The employee's liberty interests; (*Id. a*t pp. 733-734.)

            d) The district's interest in regulating its own meetings. (*Id. a*t p. 734.)

3) Alternate means of communication between plaintiff and the board, or between plaintiff and other members of the public, did not justify or validate the otherwise unconstitutional policy. Specifically, since California law establishes as privileged statements made in board meetings, requiring persons to bring complaints against district employees outside of such meetings does not provide an adequate alternative. (*Id. a*t pp. 734-736.)

13. In *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1251-1254,the plaintiff city councilmember claimed that placing public comment as the final order of business, when city council meetings frequently ran late into the night, violated the constitution and the Brown Act. Plaintiffs sought to compel the city council to end its meetings by 11:00 p.m.

a. The court concluded that, with respect to plaintiffs' constitutional claims and asserted violations of the Brown Act, the causes of action arose from protected activity. Plaintiffs failed to show that preventing the city council from conducting legislative business after 11:00 p.m. benefited the public.

b. The court also concluded that, when plaintiffs accepted their seats on the city council, they forfeited Brown Act standing they would otherwise have had as California citizens to sue the city council.

1) Plaintiffs asserted no interest that differed from that of the general public and claimed no personal damages or consequences distinct from those of the populace that could create a beneficial interest.

2) As no beneficial interest in the workings of the city council was conferred by serving on that entity, plaintiffs did not establish any interest sufficient to confer standing.

14. Minutes shall be taken recording all actions taken by the governing board. The minutes are public records. (Education Code §§ 35145(a) and 72121(a).)

15. No action may be taken by secret ballot. (Government Code § 54953(c)(1).)

16. Effective January 1, 2014, legislative bodies must publicly report any action taken and the vote or abstention on that action of each member present for the action. (Government Code § 54953(c)(2), added by Statutes of 2013, chapter 257, § 1.)

17. Effective January 1, 2017, in addition to existing law prohibiting action at a special meeting on salaries, salary schedules, or compensation paid in the form of fringe benefits for a "local agency executive," prior to such final action at a regular meeting an individual must "orally report a summary of the recommendation for final action" related to salaries, salary schedules, and/or fringe benefits. A written agenda item for final action is not, by itself, enough. (Government Code § 54953(c)(3), added by Statutes of 2016, chapter 175, § 1.)

I. Government Code section 54953(b) permits teleconferencing — not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body.

1. Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

2. Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

3. All votes taken during a teleconferenced meeting must be by roll call.

4. Agendas must be posted at each teleconferencing location and identify each teleconferencing location; each location must be accessible to the public.

5. Teleconferenced meetings must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." (Government Code § 54953(b)(3).)

6. During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the agency's territorial boundaries.

7. The agenda shall provide an opportunity for members of the public to address the legislative body directly *at each teleconference location*.

J. Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings. (Government Code § 54953.5(a).)

1. A board may not prohibit or restrict the broadcast of its proceedings. (Government Code § 54953.6.)

2. Any tape or film recording made by or at the direction of the board shall be subject to inspection pursuant to the Public Records Act, but may be destroyed or erased 30 days after the taping or recording. Any inspection of a video or audio tape recording shall be provided without charge on a

tape recorder made available by the agency. (Government Code § 54953.5(b).)

VI. CLOSED SESSION

Government Code section 54957(a) authorizes a board to meet in closed session for specified purposes. The right to consider any of the authorized matters in closed session generally includes the ability to take action in closed session. (75 Ops.Cal.Atty.Gen. 14 (1992).)

A. Closed session meetings are authorized for the following purposes:

1. To confer with the Governor, Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or facilities. (Government Code § 54957(a).)

2. To consider the appointment, employment, evaluation of performance, discipline, or dismissal of an employee. (Government Code § 54957(b)(1).)

   a. This exception permits boards to meet in closed session to discuss and act on the hiring, firing, intermediate discipline, and evaluation of particular employees, even though, on its face, the statute authorizes only a closed session to "consider" such personnel matters. (*Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988; see also *Southern California Edison Co. v. Peevey* (2003) 31Cal.4th 781, 799.)

   b. When the legislative body meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not required to publicly report its decision and the vote or abstention of each member. (89 Ops.Cal.Atty.Gen. 110 (2006).)

   c. A county board of education may not meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of certificated or classified employees because the county board is not the employer. (85 Ops.Cal.Atty.Gen. 77 (2002).)

   d. The closed session discussion must relate to a particular individual.

e. The Brown Act does not limit whom the Board may choose to advise it when it conducts meetings involving employment matters. In *Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 62, the court held the board did not violate the Act by having legal counsel present in closed session to advise it. In *Duval v. Board of Trustees of the Coalinga-Huron Unified School District* (2001) 93 Cal.App.4th 902, the Court of Appeal held "evaluation" extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal, and is not limited to the consideration of formal evaluations. "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance." (*Id.* at p. 909.)

1) The court also concluded evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation. All of these considerations must still relate to the employer's exercise of discretion with respect to the evaluation of a particular employee.

2) Under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.

f. Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session. (*Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 822.)

g. "Appointment" includes the process of reviewing resumes, interviewing, discussing qualifications, and arriving at a decision prior to the actual appointment. (80 Ops.Cal.Atty.Gen. 308 (1997).)

1) Contrary to the general rule, closed sessions held pursuant to the "personnel exception" may not include discussion or action on *proposed compensation* except for a reduction of compensation that results from the imposition of discipline. (Government Code § 54957(b)(4).)

2) A city library commission's closed session meeting, held to select nominees for acting city librarian, fell within the personnel exception; although the mayor had the power to ultimately select successful candidate, he shared the power of appointment with the commission. (*Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165, 1169.)

3. To consider complaints or charges brought against a public employee by another person or employee, unless the employee requests a public hearing. (Government Code § 54957(b)(2).)

a. As a condition to holding a closed session on specific complaints or charges against an employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session. The notice must be delivered to the employee personally or by mail at least 24 hours before the meeting. If notice is not given, any action against the employee based on the complaints or charges is null and void.

1) In *Furtado v. Sierra Community College District* (1998) 68 Cal.App.4th 876, the court held that when a board considers performance evaluations in connection with a decision to nonreelect a probationary faculty member, it is not hearing "specific complaints or charges" within the meaning of section 54957. The court reasoned the Legislature's use of the disjunctive "*or* to separate the phrase "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee" from the phrase "to hear complaints or charges brought against an employee by another person or employee unless the employee requests a public session" indicated an intent that a public employee's right to a public hearing should apply only when a board is hearing "complaints or charges."

2) In *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87, the court held the mere consideration of reasons for nonreelection of a teacher did not constitute the hearing of specific complaints or charges brought against an employee.

3) *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568 involved complaints or charges against a police officer by fellow officers. The court held the 24-hour notice was not required where the commission met in closed session only to deliberate on whether to accept the findings and recommendation of a hearing officer.

Consideration of the recommended decision did not constitute the hearing of specific complaints or charges. By analogy, this case supports the conclusion that a governing board need not provide the 24-hour notice when merely deliberating and acting on the recommended decision of a hearing officer in a classified employee dismissal.

4) By contrast, in *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, the court concluded the governing board's consideration of the findings of a CIF commissioner constituted the hearing of specific complaints or charges brought by another person when the board's consideration of the CIF's findings led to termination of a coaching assignment for an otherwise tenured teacher.

5) In *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860, the Court of Appeal held that where the governing body of a public entity, in a case involving employee discipline, rejects its hearing officer's findings of fact and engages in its own fact-finding, it is conducting a "hearing" on the charges against the employee, and the employee must be given notice of the right to have the hearing conducted in open session.

6) The court in *Kolter v. Commission on Professional Competence of the Los Angeles Unified School District* (2009) 170 Cal.App.4th 1346 concluded the district need not issue a 24-hour notice to a certificated employee before commencing dismissal proceedings. This decision is a departure from the widespread precautionary practice of giving employees 24-hour notice pursuant to Government Code section 54957, when a governing board considers any "charges" in closed session, regardless of whether disciplinary action will be taken as a direct result of the closed session.

   a) The governing board met in a closed session to initiate the process to dismiss Kolter from employment as an elementary school teacher pursuant to Education Code section 44934. (See Education Code § 87672, applicable to community college districts.) LAUSD did not give Kolter any pre-meeting notice that the board would be considering charges against her. After the closed session, the district sent Kolter notice that it would

seek to dismiss her and informed her of her right to a public hearing.

b) The court, in ruling that the 24-hour notice was not required, held the board must provide the 24-hour notice only when "hearing" complaints or charges against the employee and not when merely "considering" whether to initiate discipline.

b. The discussion of complaints or charges that are of legitimate public concern need not be held in closed session. "Although Section 54957 allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors." (*Leventhal v. Vista Unified School District* (S.D. Cal. 1997) 973 F. Supp. 951, 958; *Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1439.)

c. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000).]

d. For purposes of the personnel exception, the term *employee* is defined to include an officer or independent contractor who functions as an officer or an employee. (Government Code § 54957(b)(4).) Elected officers are not employees.

1) A contractor assigned to perform "executive officer services" for a county local agency formation commission (LAFCO) was an "officer" of LAFCO and thus an "employee" within meaning of section 54957(b). (*Hofman Ranch v. Yuba County Local Agency Formation Commission* (2009) 172 Cal.App.4th 805, 811.)

2) Thus, LAFCO's use of a closed session to consider renewal of his contract did not violate the Brown Act, even though the contractor provided similar services to four other county LAFCOs, the contract stated the contractor was not an officer or employee and was not subject to LAFCO's day-to-day direction and control, the contractor performed executive tasks including the duties described by statute as the day-to-day business of LAFCO; and the contractor processed LAFCO-related applications, prepared reports and documents, reviewed projects of concern and prepared responses for LAFCO, and prepared LAFCO''s budget. (*Ibid*.)

4. Based on the advice of counsel, to confer with, or receive advice from, legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the agency in the litigation. (Government Code § 54956.9.)

   a. Litigation is *pending* when any of the following circumstances exist:

      1) Proceedings before a court, administrative body, hearing officer, or arbitrator to which the district is a party, have been formally initiated. (Government Code § 54956.9(c) and (d)(1).)

      2) A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation. (Government Code § 54956.9(d)(2).)

      3) The board meets to decide whether to litigate or whether closed session is proper based on existing facts and circumstances. (Government Code § 54956.9(d)(3).)

      4) Based on existing facts and circumstances, the board has decided to initiate litigation, or is deciding whether to initiate litigation. (Government Code § 54956.9(d)(4).)

   b. The "significant exposure" to litigation determination must be made from the "existing facts or circumstances." "Existing facts or circumstances" consist only of one of the following:

      1) Facts and circumstances that might result in litigation but which the district believes are not known to the potential plaintiff, which facts and circumstances need not be disclosed. (Government Code § 54956.9(e)(1).)

      2) Facts and circumstances including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the district and that are known to the plaintiff. These facts shall be publicly stated on the agenda or announced. (Government Code § 54956.9(e)(2).)

      3) Receipt of a tort claim or other written communication threatening litigation, which claim or communication shall be made available for public inspection. (Government Code § 54956.9(e)(3).)

4) A statement made by a person in a public meeting threatening litigation on a specific matter within the agency's area of responsibility. (Government Code § 54956.9(e)(4).)

5) A statement threatening litigation outside of a public meeting on a specific matter within the responsibility of the agency so long as the official or employee of the agency who knows of the threat makes a record of the statement prior to the meeting and the record is made available for public inspection. (Government Code § 54956.9(e)(5).)

c. The board must either state on the agenda or publicly announce the subparagraph of section 54956.9, subdivision (d) that authorizes the closed session, and, when known, the title of the case. (Government Code § 54956.9(g).)

d. In *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 801, the Supreme Court interpreted corresponding provisions of the Bagley-Keene Act *not* to require a state body to announce its proposed decision relating to settlement of a case in public session — *identifying the litigation involved* — and accept public comment on the proposed settlement before voting on it. In *Peevey*, the PUC recessed to closed session pursuant to the counterpart to Government Code section 54956.9(g), which does not require identification of the case by name prior to holding the closed session if doing so would jeopardize pending settlement negotiations.

1) Although section 54956.9 does not expressly so provide, it has been construed, generally, to permit a local legislative body to approve settlements in closed session. (See *Southern California Edison Co. v. Peevey*, *supra*, 31 Cal.4th at pp. 798-799 [discussing 75 Ops.Cal.Atty.Gen. 14 (1992), which so opined]; *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 185.)

2) Section 54957.1(a)(3), specifying when to report a settlement in public session, also supports the interpretation that settlements may be approved in closed session.

3) As "emphasized" in the Attorney General's manual on the Brown Act, "the purpose of (Section 54956.9) is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." (Cal.Atty.Gen. Office, *The Brown Act* (2003) p. 40.)

4) Thus, section 54956.9's implied allowance for adoption of settlements in closed session is subject to limits:

"And whatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to take, as part of a nonpublicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard. As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit." (*Trancas Property Owners Assn.*, *supra*, 138 Cal.App.4th at p. 187.)

e. In *County of Los Angeles v. Superior Court* (2005) 130 Cal.App.4th 1099, the court considered whether closed session records were discoverable in litigation. A third party issued a deposition subpoena to the county district attorney, who had conducted an investigation into whether the board of supervisors violated the Brown Act during two closed sessions.

1) The court held the documents were not discoverable because closed session minutes were exempt from disclosure under section 54957.2. The closed sessions were properly convened under Section 54956.9 to discuss anticipated litigation related to a federal agency's decision to terminate Medicare funding to a medical center under investigation. The minutes of the closed sessions were confidential and were not subject to discovery.

2) Under section 6254.5(e) of the Public Records Act, the board did not waive any privilege by disclosing the minutes to the district attorney. The letters in the district attorney's investigation file were exempt from disclosure under Government Code sections 6254(f) and 6254.5(e).

f. Section 54956.9 does not authorize the practice of mediating disputes or discussing potential litigation with opposing parties and their counsel. (*Page v. MiraCosta Community College District*, *supra*, 180 Cal.App.4th 471; *Shapiro v. Board of Directors of Centre City Development* (2005) 134 Cal.App.4th 170, 182-183; 62 Ops.Cal.Atty.Gen. 150 (1979).)

g. A board member may not publicly disclose information that has been received and discussed in closed session concerning pending

litigation unless the information is authorized by law to be disclosed. (80 Ops.Cal.Atty.Gen. 231 (1997).) (NB: Much of the reasoning of this opinion is equally applicable to the improper disclosure of other closed session discussions.) (See Government Code § 54963; *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334 ["We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act."].)

h. While the Brown Act, as a matter of California law, recognizes a privilege for litigation matters discussed in closed session of a deliberative body with its counsel, this privilege is not recognized under federal law. (*North Pacifica, LLC v. City of Pacifica* (N.D.Cal. 2003) 274 F.Supp.2d 1118.)

i. In 86 Ops.Cal.Atty.Gen. 210 (2003), the Attorney General concluded that where a member of a city council or county board of supervisors is appointed to sit as that body's representative on the board of another local agency, the appointee may not disclose to his or her appointing authority or its legal counsel information received in a closed session of the other agency's board.

1) Section 54956.96 was added to the Act in 2004 to permit joint powers agencies to adopt policies or bylaws, or include in their joint powers agreement, provisions that authorize a member of a legislative body of a member local agency to disclose information obtained in closed sessions of the JPA that has direct financial or liability implications for that local agency to legal counsel for the member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency, or to other members of the legislative body of the local agency present in a closed session of that member local agency. (Government Code § 54956.96.)

j. Closed session access generally is permitted only to people who have "an official or essential role to play" in the closed meeting. (83 Ops.Cal.Atty.Gen. 221, 225 (2000); see also 82 Ops.Cal.Atty.Gen. 29, 33 (1999); 46 Ops.Cal.Atty.Gen. 34, 35 (1965).)

5. To consider student disciplinary action, unless a public hearing is requested in writing (see the specific provisions of Education Code §§ 35146 and 72122), and challenges to a student's records (Education Code §§ 49070(c) and 76232(c)).

6. To confer with the board's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits to represented and unrepresented employees, and for represented employees, any other matter within the scope of representation. (Government Code §§ 3549.1 and 54957.6; see also *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947.)

   a. The Attorney General has concluded that, since the county board of education is not an employer, it may not meet in closed session pursuant to the labor negotiations exception. (85 Ops.Cal.Atty.Gen. 77 (2002).)

   b. Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative.

   c.

   d. Closed session held pursuant to section 54957.6 shall not include final action on the proposed compensation of one or more unrepresented employees.

      1) NB: Pursuant to Government Code section 53262(a), all contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, general manager, city manager, county administrator, "or other similar chief administrative officer or chief executive officer of a local agency" shall be ***ratified*** in an open session of the governing body which shall be reflected in the governing body's minutes.

      2) Pursuant to section 53262(b), copies of any contracts of employment, as well as copies of settlement agreements, shall be available to the public upon request.

7. To consider real property transactions. This exception permits a board to meet with its negotiator prior to purchase, sale, exchange, or lease of real property to grant authority to its negotiator regarding the price and terms of the transaction. Before discussing the transaction in closed session, the board must identify the real property at issue and the person with whom its negotiator may negotiate. (Government Code § 54956.8; see *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904.)

a. The real-estate-negotiations exception permits closed-session discussion of:

1) The amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction;

2) The form, manner, and timing of how that consideration will be paid; and

3) Items essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information the exception permits to be kept confidential. (94 Ops.Cal.Atty.Gen. 82 (2011).)

8. Other Closed Session Authorizations

a. The legislative body of a multijurisdictional law enforcement agency, or an advisory body of a multijurisdictional law enforcement agency, may hold closed sessions to discuss the case records of an ongoing criminal investigation of the law enforcement agency or of a party to the joint powers agreement, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases. (Government Code § 54957.8.)

1) "Multijurisdictional law enforcement agency" means a joint powers entity formed pursuant Government Code section 6500 that provides law enforcement services for the parties to the joint powers agreement for the purpose of investigating criminal activity involving drugs; gangs; sex crimes; firearms trafficking or felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft. (Government Code § 54957.8(a).)

2) This provision was added after the passage of Proposition 59, and provides an example of the legislative findings now required to justify a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies. (See Statutes of 2006, chapter 427, section 2.)

b. Districts that are members of a joint powers agency formed for the purpose of insurance pooling may meet in closed session to discuss a claim for the payment of tort liability losses, public liability

losses, or workers' compensation liability. (Government Code § 54956.95.)

c. Community college boards may meet in closed session to consider honorary degrees or gifts from a donor who wants to remain anonymous. (Education Code § 72122.)

d. The legislative body of a local agency that has received a confidential final draft audit report from the Bureau of State Audits may meet in closed session to discuss its response to that report. (Government Code § 54956.75.)

B. The right to consider any of the above matters in closed session includes the ability to take action in closed session. (75 Ops.Cal.Atty.Gen. 14 (1992).)

C. As a general rule, closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. (83 Ops.Cal.Atty.Gen. 221, 225 (2000).)

D. Agendizing Closed Sessions

The Act requires a brief, general description of each item of business to be transacted, including items to be discussed in closed session. With respect to closed sessions, this requirement is somewhat ambiguous. However, a "safe harbor" provision appears at section 54954.5, and substantial compliance with its suggested language will prevent a finding of a violation of the closed session notice requirements. Examples of the suggested language include:

1. CONFERENCE WITH REAL PROPERTY NEGOTIATORS

a. **Property**: (specify the street address, or if no street address, the parcel number or other unique reference to the property under negotiations.)

b. **Agency Negotiator**: (specify the name of the 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.)

c. **Negotiating parties:** (specify name of party - not agent.)

d. **Under negotiation:** (specify whether the instructions to the negotiator will concern price, terms of payment, or both.)

2. CONFERENCE WITH LEGAL COUNSEL — EXISTING LITIGATION *(Subdivisions (c) and (d)(1) of section 54956.9)*

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

or

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

3. CONFERENCE WITH LEGAL COUNSEL — ANTICIPATED LITIGATION

a. **Significant exposure to litigation pursuant to subdivision (d)(2) and (e) of section 54956.9:** *(specify the number of potential cases.)*

(In addition to the information noticed above, the district may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to paragraphs (2) to (5), of subdivision (e) of section 54956.9.) This may mean stating the existing facts and circumstances giving rise to a significant exposure to litigation against the district.) See the discussion of the content of paragraphs (2) to (5) of subdivision (e) of section 54956.9 at pages 27-28, above.)

b. **Initiation of litigation pursuant to subdivision (d)(4) of Section 54956.9:** *(specify the number of potential cases.)*

4. LIABILITY CLAIMS - GOVERNMENT CODE SECTION 54956.95

a. **Claimant:** (*specify name unless unspecified pursuant to section 54961.*)

b. **Agency claimed against:** *(Specify name.)*

5. THREAT TO PUBLIC SERVICES OR FACILITIES

a. **Consultation with**: (*specify name of law enforcement agency and title of officer.*)

6. PUBLIC EMPLOYEE APPOINTMENT

a. **Title:** (*specify description of position to be filled.*)

7. PUBLIC EMPLOYMENT

a. **Title:** (*specify description of position to be filled.*)

8. PUBLIC EMPLOYEE PERFORMANCE EVALUATION

a. **Title:** (*specify position title of employee being reviewed.*)

9. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

No additional information is required to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.

10. CONFERENCE WITH LABOR NEGOTIATORS

a. **Agency designated representatives:** (specify names of designated representatives attending the closed session.) (If circumstances necessitate the absence of a specified 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.)

b. **Employee organization:** (specify name of organization representing employee or employees in question.)

or

c. **Unrepresented employee:** (specify position title of unrepresented employee who is the subject of the negotiations.)

11. CONFERENCE INVOLVING JOINT POWERS AGENCY

a. **Discussion will concern:** (*specify closed session description used by the joint powers agency.*)

b. **Name of local agency representative on joint powers agency board:** *(specify name)*

12. AUDIT BY CALIFORNIA STATE AUDITOR'S OFFICE

E. Prior to holding a closed session, the board must disclose, in an open meeting, the items to be discussed in closed session. The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter. (Government Code § 54957.7.)

Nothing in section 54957.7 requires or authorizes disclosure of information prohibited by state or federal law.

F. After any closed session, the board must reconvene in open session prior to adjournment and make the disclosures required by Government Code section 54957.1. The board must report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

1. Approval of an agreement concluding real estate negotiations pursuant to section 54956.8:

   a. If the board's approval renders the agreement final then it must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held;

   b. If final approval rests with the other party, the board discloses the fact of approval and the substance of the agreement upon inquiry by any person as soon as the other party approves the agreement.

2. Approval given to legal counsel to defend, or seek or refrain from seeking appellate review or relief, or enter as amicus curiae in any form of litigation as a result of a consultation under section 54956.9 is reported in open session at the public meeting during which the closed session is held. The report identifies the adverse party and the substance of the litigation.

3. In the case of approval to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but specifies that the direction to initiate or intervene in an action has been given and that the particulars will be disclosed upon request once the litigation is formally commenced, unless to do so would jeopardize the agency's ability to complete service of process, or jeopardize the ability to conclude existing negotiations.

4. Approval given to a settlement of pending litigation is reported once the settlement is final:

   a. If the board accepts a settlement offer signed by the opposing party, the board reports its acceptance and identifies the substance of the agreement in open session at the public meeting during which the closed session is held.

   b. If final approval rests with the other party or the court, the board discloses the fact of approval and the substance of the agreement upon inquiry by any person as soon as the settlement becomes final. (Government Code § 54957.1(a)(3).)

   c. In *City and County of San Francisco v. PCF Acquisitionco, LLC*, (2015) 237 Cal.App.4th 90, 96-97, the court recognized that an immediate report of the settlement was not necessary where approval of the opposing party had not yet been obtained .

5. Disposition of claims discussed in closed session pursuant to section 54956.95 must be reported as soon as the decision is reached. The board identifies the name of the claimant, the local agency claimed against, the substance of the claim, and the amount of any settlement.

6. Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee is reported at the public meeting at which the closed session is held. The report must identify the title of the position. There is no requirement to identify the employee by name.

   However, the report of a dismissal or of the non-renewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

   If none of these specified types of "actions" is "taken" during the closed session, there is no duty to report the deliberations or the members' votes or abstentions. When the board meets in closed session to consider the proposed dismissal of a public employee but ultimately *rejects* that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. (89 Ops.Cal.Atty.Gen. 110 (2006).)

7. Approval of an agreement concluding labor negotiations pursuant to section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other parties to the negotiation.

G. Making the Required Reports

1. The public-session reports may be made orally or in writing. (Government Code § 54957.1(b).)

2. The board must provide to any person who has submitted a written request to the board within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. (Government Code § 54957.1(b).)

   If the action taken results in one or more substantive amendments to the related documents requiring retyping during normal business hours, the documents need not be released until the retyping is completed, provided that the presiding officer of the legislative body or his designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

3. In addition, the documents referred to above shall be available to any person on the next business day following the meeting in which the action

referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete. (Government Code § 54957.1(c).)

4. No action for injury to a reputation, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with these provisions. (Government Code § 54957.1(e).)

VII. ENFORCEMENT OF THE BROWN ACT

A. **Criminal Consequences**: Each member of a board who attends a meeting of the board where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor. (Government Code § 54959.)

1. Action taken is defined to include "collective commitment." Mere deliberation of some action will not trigger the criminal penalty. (Government Code § 54952.6.)

2. Good faith reliance on an opinion of counsel that a closed meeting is proper, normally would preclude a finding of "wrongful intent to deprive the public of information." (See Attorney General Index letter 76-173 interpreting pre-amendment language.)

B. **Civil Remedies**: actions in civil court in the form of injunctions, writs of mandamus, or declaratory relief.

1. The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of:

a. **Stopping** or **preventing violations** or **threatened violations** of the Brown Act by members of a legislative body; or

b. Determining the applicability of the Brown Act to **ongoing actions** or **threatened future actions** of the legislative body; or

c. Determining the applicability of the Brown Act **to past actions** of the legislative body, subject to section 54960.2; or

d. Determining whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States; or

e. Compelling the legislative body to audio record its closed sessions as provided in the Act. (Government Code § 54960.)

2. The district attorney or any interested person may file an action to determine the applicability of this chapter to **past actions** of the legislative body pursuant to subdivision (a) of section 54960 only if all of the following conditions are met (Government Code § 54960.2(a).):

   a. The district attorney or interested person alleging a violation of this chapter first submits a cease and desist letter to the clerk or secretary of the legislative body being accused of the violation, clearly describing the past action of the legislative body and nature of the alleged violation. (Government Code § 54960.2(a)(1).)

   b. The cease and desist letter must be submitted to the legislative body within nine months of the alleged violation. (Government Code § 54960.2(a)(2).)

   c. The time during which the legislative body may respond to the cease and desist letter has expired and the legislative body has not provided an unconditional commitment. (Government Code § 54960.2(a)(3).)

   d. Within 60 days of receipt of the legislative body's response to the cease and desist letter, other than an unconditional commitment, or within 60 days of the expiration of the time during which the legislative body may respond, whichever is earlier, the party submitting the cease and desist letter commences the action or is thereafter barred from doing so. (Government Code § 54960.2(a)(4).)

   e. The provisions of the Brown Act requiring submission of a cease and desist letter applies only to litigation challenging past actions, and it does not apply to litigation to determine the Brown Act's applicability to ongoing or threatened future actions. *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1154-1157 reh'g denied (June 20, 2016) (The court of appeal addresses the legislative history of SB 1003 which enact Government Code § 54960.2. (See, Stats. 2012, ch. 732, §§ 1–2.)

3. The legislative body may respond to a cease and desist letter within 30 days of receiving the letter.

   a. The legislative body may provide an unconditional commitment to cease, desist from, and not repeat the past action, without admitting any violation of the Brown Act.

      1) The legislative body may provide an unconditional commitment at any time after the 30-day period expires, except in that event the court will award court costs and

reasonable attorney fees to the plaintiff in a legal action challenging past actions of the legislative body, if the legal action caused the legislative body to issue the unconditional commitment. (Government Code §§ 54960.2(b), 54960.5.)

b. If the legislative body elects to respond to the cease and desist letter with an unconditional commitment, that response must be "substantially" in the form provided in section 54960.2(c)(1):

To _____:

The [name of legislative body] has received your cease and desist letter dated [date] alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

[Describe alleged past action, as set forth in the cease and desist letter submitted pursuant to subdivision (a)]

In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the [name of legislative body] hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.

The [name of legislative body]) may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of Brown Act Commitment." You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment, or may be mailed to an address that you have designated in writing.

Very truly yours,

_____

[Chairperson or acting chairperson of the legislative body]

[Government Code § 54960.2(c)(1).]

c. An unconditional commitment is approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda. (Government Code § 54960.2(c)(2).)

d. No action may be commenced to determine the applicability of the Brown Act to any past action of the legislative body for which the legislative body has provided an unconditional commitment. During any action seeking a judicial determination regarding the applicability of this chapter to any past action of the legislative body, if the court determines the legislative body has provided an unconditional commitment, the action shall be dismissed with prejudice. (Government Code § 54960.2(c)(3).)

e. The fact that a legislative body provides an unconditional commitment is not construed or admissible as evidence of a violation of the Brown Act. (Government Code § 54960.2(c)(4).)

f. After providing an unconditional commitment, the legislative body may not take or engage in the challenged action described in the cease and desist letter. Violation of the commitments are independent violations of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act. A plaintiff may file an action alleging past violation or threatened future violation of a board's commitment without following the above procedural requirements. (Government Code § 54960.2(d).)

g. The legislative body may rescind an unconditional commitment by a majority vote in open session at a regular meeting as a separate item of business not on its consent agenda, and noticed on its posted agenda as "Rescission of Brown Act Commitment." At least 30 days prior to the regular meeting, the legislative body must provide written notice of its intent to consider the rescission to each person to whom the unconditional commitment was made, and to the district attorney. Upon rescission, the district attorney or any interested person may commence legal action. (Government Code § 54960.2(e).)

4. A court may impose the requirement that closed sessions be taped if it finds that the board has violated the statutes authorizing closed sessions. (Government Code § 54960(a).)

5. Tape recordings of closed sessions are disclosable under very limited circumstances.

C. Violations of the meeting notice and agenda provisions may result in having action taken adjudged null and void. The district attorney or by any interested

person can file a lawsuit seeking to nullify any board action taken in alleged violation of the Brown Act. (Government Code § 54960.1.) The following procedures apply:

1. Prior to filing such a lawsuit, the interested person or district attorney must demand in writing that the board cure or correct the alleged violation.

2. The written demand is made within 90 days unless the action was taken in an open session but in violation of the agenda requirements, in which case the demand must be made within 30 days from the date the action was taken.

3. Within 30 days of receiving the demand, the board must either cure or correct the alleged violation and inform the challenging party it has done so, or inform the challenging party of its decision not to cure or correct the action.

4. A lawsuit must be filed within 15 days of the board's decision whether it will cure or correct the alleged violation, or within 15 days after the expiration of the 30-day period to cure or correct, whichever is earlier. Even after a lawsuit is filed, the board may cure and correct and have the lawsuit dismissed.

5. Certain actions are not subject to rescission. (Government Code § 54960.1(d)(1)-(4).)

6. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily invalidate a decision. Appellants must show prejudice." (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555-556 [no prejudice shown from violation of Government Code § 54954.2 (a), which "requires that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda"].; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356; *Galbiso v. Orosi Public Utility District*, *supra*, 182 Cal.App.4th at p. 671.)

7. To state a violation of the Brown Act, the complaint must allege: (1) that a legislative body violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not correct the challenged action. (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116-1117. [mere conference with legal counsel and the giving of direction to staff did not constitute "an action taken" within the meaning of section 54952.6; council's rescission of all action relating to the improperly agendized litigation,

even though there was no action taken, constituted the cure and correction of the alleged violation].)

D. Attorney Fees

1. "A court may award court costs and reasonable attorney fees to the *plaintiff* in an action brought pursuant to Section 54960 or 54960.1 *where it is found that a legislative body of the local agency has violated this chapter.* The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency." (Government Code § 54960.5.)

2. Such awards are not mandatory, and are entrusted to the discretion of the court. (*Galbiso*, *supra*, 167 Cal.App.4th at p. 1077.)

3. In determining whether to award attorney fees, the court "should consider among other matters 'the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.'" (*Galbiso*, *supra*, 167 Cal.App.4th at p. 1083; *Bell v. Vista Unified School District*, *supra*, 82 Cal.App.4th at p. 686.)

4. "[T]he trial court has the discretion to deny successful Brown Act plaintiffs their attorneys fees, but only if the defendant shows that special circumstances exist that would make such an award unjust." (*Galbiso*, *supra*, 167 Cal.App.4th at p. 1077, quoting *Los Angeles Times Communications v. Los Angeles County Board of Supervisors*, *supra*, 112 Cal.App.4th at p. 1327.)

5. A court may award court costs and reasonable attorney fees to a local agency defendant in an action only where the defendant has prevailed in a final determination and the court finds the action was clearly frivolous and totally lacking in merit. (Government Code § 54960.5.)