CHAPTER IV

LOCAL SCHOOL BOARDS

INTRODUCTION

Over the years, our office has responded to hundreds of questions about potential conflicts of interest of school employees and board members. In 2005, the California Fair Political Practices Commission (FPPC) published a revised pamphlet entitled, "Can I Vote?" The pamphlet, which is available on the FPPC web page, provides an overview of public officials' obligations under the Political Reform Act's conflict of interest rules. This memorandum will briefly summarize the recommendations contained in that pamphlet, as well as statutory law addressing contractual conflicts of interest. The purpose of this memo is to assist districts in identifying potential conflicts of interest, so that districts will recognize possible conflicts of interest and consult legal counsel or the FPPC, when appropriate.

California's conflict of interest statutes are based on the belief that a public official cannot serve two masters simultaneously, and that the duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office.[1] The purpose of the conflict of interest statutes is to eliminate temptation, avoid the appearance of impropriety, and limit the possibility of improper personal influence on a public official's decisions.

The California Legislature has enacted two important bodies of statutory law which address potential conflicts of interest of school district employees and board members:

1. Government Code sections 1090 et seq., pertaining to contractual conflicts of interest, and

2. The Political Reform Act of 1974 (Government Code sections 81000 et seq.).

The provisions of the Political Reform Act are not limited to contracts, but apply to all "governmental decisions."

CONTRACTUAL CONFLICTS OF INTEREST

A. Statutory Provisions

Government Code section 1090 provides in pertinent part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

[1] People v. Honig (1996) 48 Cal.App.4th 289; Thomson v. Call (1985) 38 Cal.3rd 633.

When Section 1090 applies, the entire governing board is precluded from entering into a contract. The financially interested member may not merely abstain from discussing and voting on a contract.[2] Government Code section 1092 provides that every contract made in violation of Section 1090 may be avoided by any party except the official who has the conflict of interest. Despite the permissive language of Section 1092, the courts have held that any contract made in violation of Section 1090 is not merely voidable, but is void.[3]

Section 1090 does not define when an official is "financially interested" in a contract. However, the courts and the California Attorney General have applied the prohibition to a broad range of interests. The following are a few examples of decisions and opinions in which a prohibited "financial interest" was found.[4]

On September 19, 2014, Governor Brown signed Senate Bill 952 effective January 1, 2015.[5]

Senate Bill 952 amends Government Code section 1090 and adds a subsection (b). Subsection (b) states that an individual shall not aid or abet a member of the Legislature or state, county, district, judicial district, or city officer or employee.

Senate Bill 952 amends Government Code section 1093 and adds a subsection (b). Subsection (b) prohibits an individual from aiding or abetting the treasurer, controller, a county or city officer or their deputy or clerk in violating the conflict of interest laws. Senate Bill 952 amends Government Code section 1097 and adds a subsection (b) which states:

> "An individual who willfully aids or abets an officer or person in violating a prohibition by the laws of this state for making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any number of the governing board of a school district, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison and is forever disqualified from holding any office in this state."

B. Prohibited Interests

In Fraser-Yamor Agency, Inc. v. County of Del Norte,[6] the Court of Appeal concluded that a public official who was a shareholder in an insurance brokerage firm, had a financial interest in the firm despite the creation of a financial arrangement which would assure that payments under an insurance contract with a city would not be used to pay the shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the

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[2] 70 Ops.Cal.Atty.Gen. 45, 48 (1987).

[3] People ex rel. State of California v. Drinkhouse (1970) 4 Cal.App.3d 931.

[4] See, for example, Eden Township Healthcare District v. Sutter Health, 33 Cal.App.4th 208 (2011) (the two officials involved did not have a financial interest in violation of Section 1090).

[5] Stats. 2014, ch. 483.

[6] 68 Cal.App.3d 201 (1977).

firm. Thus, to the extent that the firm benefited by increased business, so did the official, despite the fact that the benefit was indirect.

In People v. Vallerga,[7] the Court of Appeal found that a county employee had a financial interest in a contract where his private consulting contract was contingent upon the execution of the county's contract with the city.

In People v. Sobel,[8] Section 1090 was applied to remedy a classic self-dealing situation in which a city employee, involved in purchasing books, awarded contracts to a corporation in which he and his wife were the primary shareholders.

In a 2014 opinion,[9] the California Attorney General issued an opinion regarding conflict of interest under Government Code section 1090. The Attorney General concluded that except in instances of actual necessity, Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has a 50% ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decision.[10]

Government Code section 1090 states in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . ."

The Attorney General noted that Government Code section 1090 is a codification of the common wisdom that a person cannot serve two masters simultaneously, and that even well-meaning people may be influenced when their personal economic interests are at stake in an official board transaction. The Attorney General observed that an important purpose of Section 1090 is to avoid even the appearance of impropriety in government transactions.[11] As a result, Section 1090 is construed broadly.[12]

In the matter examined by the Attorney General, a member of a city council owned a 50% interest in a business that manufactures and sells glass products. The city's staff routinely makes retail purchase decisions without consultation with or direction from the city council. The Attorney General stated that the fact that city staff routinely makes retail purchase decisions does not affect the legal issues, nor does the fact that the council member would abstain from participating in purchasing decisions remove these contracts from the requirements of Section 1090. The Attorney General stated:

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[7] 67 Cal.App.3d 847 (1977).

[8] 40 Cal.App.3d 1046 (1974).

[9] 97 Ops.Cal.Atty.Gen. 70 (2014).

[10] This opinion from the Attorney General would apply to community college districts, school districts, and regional occupational programs as well.

[11] People v. Honig, 48 Cal.App.4th 289, 314 (1996).

[12] Id. at 314-15.

> "Where an officer is a member of a board that has the power to execute a contract, the member is conclusively presumed as a matter of law to be involved in the making of the board's contracts – regardless of whether the member actually participates in the making of a contract."[13]

The Attorney General then considered whether the common law "rule of necessity" might apply. The rule of necessity provides that a government agency may acquire essential goods or services from a conflict producing source only in cases of actual necessity after all possible alternatives have been explored, and only in cases of real emergency and necessity.[14] In a previous opinion, the Attorney General concluded that a city council could contract with a service station owned by one of its council members, when it was the only service station open at night, but only in cases of real emergency and necessity.[15] The Attorney General concluded that the rule of necessity did not apply in the present case because there were other businesses in the general vicinity (even if they were outside the city limits) that could provide products and services that the city needed.[16]

The Attorney General stated that the fact that contracting with sources farther from the city might result in increased costs or might be more inconvenient does not invoke the rule of necessity. The Attorney General concluded by stating:

> "We therefore conclude that except in instances of actual necessity – which are not apparent here – Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has a 50% ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decisions."[17]

In summary, districts should not contract with businesses in which a board member has an ownership interest.

In a 2015 opinion,[18] the Attorney General issued an opinion interpreting the conflict of interest provisions of Government Code section 1090. The Attorney General was asked whether a city council member who is associated, as an independent contractor, with a public relations firm that provides services to two non-profit organizations that have contracts with the city, has a prohibited financial interest in those contracts where the city council member performs no services for the two contracting non-profits and receives no compensation based on the firm's provision of services to those entities.

The Attorney General concluded that under Government Code 1090, a city council member who is associated, as an independent contractor, with a public relations firm that

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[13] 97 Ops.Cal.Atty.Gen. 70, 71 (2014). See, also, Thomson v. Call, 38 Cal.3d 633 (1985); Fraser- Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 211-12 (1977); 89 Ops.Cal.Atty.Gen. 49, 50 (2006).
[14] 4 Ops.Cal.Atty.Gen. 264 (1944).
[15] 4 Ops.Cal.Atty.Gen. 264 (1944).
[16] Lexin v. Superior Court, 47 Cal.4th 1050, 1097 (2010); 89 Ops.Cal.Atty.Gen. 217, 221-22 (2006).
[17] 97 Ops.Cal.Atty.Gen. 70, 72 (2014).
[18] 98 Ops.Cal.Atty.Gen. 102 (2015).

provides services to two non-profit organizations that have contracts with the city, does not have a prohibited financial interest in those contracts where the council member performs no services for the two contracting non-profits and receives no compensation based on the firm's provision of services to the those entities. The Attorney General noted that the city council member is not an employee of the public relations firm rendering services to the contracting non-profits nor is the city council member an owner or officer of the public relations firm.[19]

C. Prohibition on Self-Dealing

The Attorney General stated that Section 1090 was enacted to prevent "self-dealing" in contracts by public officials.[20]

In a 1983 opinion, the Attorney General stated:

> "Section 1090 of the Government Code codifies the common law prohibition and the general policy of this state against public officials having a personal interest in contracts they make in their official capacities. Mindful of the ancient adage, that 'no man can serve two masters,' a self-evident truth, as trite and impregnable as the 'law of gravity,' the section was enacted to ensure that public officials 'making' official contracts not be distracted by personal financial gain from exercising absolute loyalty and undivided allegiance to the best interest of the entity which they serve, and at least with respect to those contracts, it does so by removing or limiting the possibility of their being able to bring any direct or indirect personal influence to bear on an official decision regarding them. The mechanism of the section is one of prohibiting public officials from being personally financially interested as private individuals in any such contract . . ."[21] [Emphasis added.]

In a 1993 opinion, the Attorney General stated:

> ". . . Section 1090 is concerned with financial interests, other than remote or minimal interests, which would prevent officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies. Moreover, when Section 1090 is applicable to one member of the governing body of a public entity, the proscription cannot be avoided by having the interested member abstain; the entire governing body is precluded from entering into the contract. A contract which violates Section 1090 is void."[22]

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[19] Id. at 108.

[20] See, 66 Ops.Cal.Atty.Gen. 156, 157-158 (1983).

[21] Id. at 157-158.

[22] 76 Ops.Cal.Atty.Gen. 118, 119 (1993).

Even if the terms of the contract might be advantageous to the public agency, Section 1090 would still prohibit entering into the contract.[23]

In 1986,[24] the California Attorney General addressed a situation in which a school board member was married to a tenured district teacher. Noting that the board member had a financial interest in his spouse's salary by virtue of the state community property laws, the Attorney General opined that Section 1090 would prohibit the employed spouse from being promoted if such promotion involved any action by the board itself. The Attorney General had earlier opined that a board member who was married to a district teacher would be required to abstain from discussing and voting on a collective bargaining agreement affecting his spouse's salary, but that the board could vote on the agreement under the common-law "rule of necessity" (i.e., such agreements are statutorily mandated by the Educational Employment Relations Act).[25]

D. Financial Interest

In Eden Township Healthcare District v. Sutter Health,[26] the Court of Appeal held that there was no conflict of interest under Section 1090 because the two officials involved, George Bischalaney and Dr. Francisco Rico, did not have a financial interest in the contract.

The Court of Appeal concluded that Bischalaney received a salary from the nonprofit organization negotiating with the Healthcare District, but would not receive any increase in salary or benefits or decrease in salary or benefits as a result of the contract. Therefore, there was no violation of Section 1090. The Court of Appeal also found that Dr. Rico, by 2008, did not have a financial interest in the contract as he was providing very few services for the nonprofit organization involved in the contract.

The Court of Appeal held that the public officials' financial interest must be related to the contract to be a violation of Section 1090 of the Government Code. The purpose of the prohibition in Government Code section 1090 is to prevent a situation where a public official would stand to gain or lose something with respect to the making of a contract over which, in his official capacity, he could exercise some influence.[27]

In Davis v. Fresno Unified School District,[28] the Court of Appeal overturned the dismissal of a taxpayer's lawsuit against the Fresno Unified School District alleging that the district violated Government Code section 1090 which prohibits conflicts of interests involving contracts entered into by a district.

The Court of Appeal reviewed the provisions of Government Code section 1090(a) which prohibits members of a district board from being financially interested in any contract made by them in their official capacity. The prohibition is based on the rationale that a person cannot

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[23] See, Thomson v. Call, 38 Cal.3d 633, 645-646 (1985); Frazer-Yamor Agency, Inc. v. County of Del Norte, 68 Cal.App.3d 201, 214-215 (1977); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).

[24] 69 Ops.Cal.Atty.Gen. 255 (1986).

[25] 69 Ops.Cal.Atty.Gen. 102 (1986).

[26] 202 Cal.App.4th 208, 135 Cal.Rptr.3d 802 (2011).

[27] See, People v. Vallerga, 67 Cal.App.3d 847, 867, n. 5, 136 Cal.Rptr. 429 (1977).

[28] 237 Cal.App.4th 261 (2015).

effectively serve two masters at the same time. [29]

The Court of Appeal then addressed the issue of whether the conflict of interest provisions of Government Code section 1090 extend to independent contractors and consultants who are involved in the contract process on behalf of the public entity and have an interest in the result of contract.[30] The Court of Appeal in Davis held that in the civil context as opposed to criminal prosecutions the provisions of Section 1090 apply to independent contractors and consultants. Therefore, the Court of Appeal allowed the lawsuit to proceed on the conflict of interest cause of action as well.[31]

E. Exceptions to the Provisions of Section 1090

Exceptions to the prohibition of Section 1090 are provided by Government Code section 1091 for "remote interests" and by Section 1091.5 for what might be called "noninterests." A board member, who has a "remote interest" in a contract pursuant to Section 1091, must disclose that interest to the board and must abstain from attempting to influence other members and from voting on the contract. However, a board may approve a contract in which a member has only a remote interest, in contrast to the blanket prohibition of Section 1090, if the following conditions are met:

1. Discloses his or her financial interest in the contract to the public agency;

2. Such interest is noted in the body's official records; and

3. The officer completely abstains from any participation in the making of the contract.[32]

The following are some of the more frequently occurring "remote interests" which are listed in Section 1091:

- That of an officer or employee of a nonprofit, tax-exempt entity or a nonprofit corporation.[33]

- That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office.[34]

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[29] Lexin v. Superior Court, 47 Cal. 4th 1050, 1072 (2010).
[30] See, Hub City Solid Waste Services, Inc. v. City of Compton, 186 Cal.App.4th 1114, 1124-1125 (2010); California Housing Finance Agency v. Hannover/California Management and Accounting Center, Inc., 148 Cal.App.4th 682, 693 (2007).
[31] 237 Cal.App.4th 261, 299-302 (2015).
[32] See, 83 Ops.Cal.Atty.Gen. 246, 248 (2000).
[33] Section 1091(b)(1).
[34] Section 1091(b)(2).

- That of a landlord or tenant of the contracting party.[35]

- That of a person receiving salary, per diem, or reimbursement for expenses from a government entity.[36]

On October 4, 2015, Governor Brown signed Senate Bill 704[37] effective January 1, 2016.

Senate Bill 704 amends Government Code section 1091 and includes in the definition of "remote interest" the interest of a person who is an owner or partner of a firm serving as an appointed member of an unelected board or commission of the contracting agency, if the owner or partner recuses himself or herself from providing any advice to the contracting agency regarding the contract between the firm and the contracting agency, and from all participation in reviewing a project that results from that contract. Senate Bill 704 also includes in the definition of "remote interest" the interest of a planner employed by a consulting engineering, architectural, or planning firm.

As to the "noninterests" of Section 1091.5, these "noninterests" delineate situations which might technically create conflicts of interest under Section 1090, but which the Legislature has decided as a matter of policy are exempt from its operation. Unlike the "remote interest" exception of Section 1091, an interest which falls into one of the categories in Section 1091.5 is treated as no interest at all, and holding such an interest does not require abstention and generally does not require disclosure. Some of the more common "noninterests" specified in Section 1091.5 are the following:

- The ownership of less than 3 percent of the shares of a corporation for profit, provided the total annual income to the official from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.[38]

- That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duties.[39]

- That of a spouse of an officer or employee in his or her spouse's employment or office-holding if his or her spouse's employment or office-holding has existed for at least one year prior to his or her election or appointment.[40]

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[35] Section 1091(b)(5).
[36] Section 1091(b)(13).
[37] Stats. 2015, ch. 495.
[38] Section 1091.5(a)(1).
[39] Section 1091.5(a)(2).
[40] Section 1091.5(a)(6).

F. Financial Interest in Spouse's Salary and Benefits

If the board member's spouse has been a district employee in excess of one year prior to the board member's election or appointment, the member would not be deemed to be interested in the spouse's contract of employment and the spouse's employment could continue. However, the district could not change the spouse's employment status and/or promote the spouse during the board member's tenure on the Board.[41]

In a 1986 opinion,[42] the Attorney General stated that, where the spouse of a school board member had been employed by the district for several years before the member's election or appointment, Government Code section 1090 prohibited the employed spouse from being promoted or appointed to a different employment position with the district. The Attorney General concluded that the above-cited exception of Government Code section 1091.5(a)(6) applies only to the same employment with a school district, and does not apply where an employee is appointed to a new or different position. The Attorney General stated:

> "Thus, this subdivision [Government Code Section 1091.5(a)(6)] does not authorize an employee who has worked for a school district for a year or more to move from one type of employment to another after his or her spouse becomes a school board member. It is only when the spouse remains in the same employment that the board member-spouse may take contract actions affecting such employment without violating the proscription of Section 1090."
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> "Accordingly, under a strict construction of subdivision (a)(6) of Section 1091.5 of the Government Code, a certificated employee could not move across employment lines to become an employee in the classified service. Nor could a classified employee move from one position in the classified service (e.g., accountant) to a completely different position within the classified service (e.g., attorney). Different employments and different employment contracts would be involved . . ."[43]

Different employments would include a substitute employee attempting to become a permanent employee of the district since this would involve a new contract with the board and different employment rights such as tenure.

The Attorney General went on to discuss promotions:

> "If a promotion involved no action by the school board itself, we believe it would qualify as the same employment. The

[41] 69 Ops.Cal.Atty.Gen. 255 (1986).

[42] 69 Ops.Cal.Atty.Gen. 255 (1986). Ibid. In a 1997 opinion, 80 Ops.Cal.Atty.Gen. 320, the Attorney General opined that the prohibition applied to the hiring of a substitute teacher as well.

[43] Id. at 258-259.

situation which comes to mind is salary step or merit increases which usually require no action by the board itself.

"However, if, for example, a senior classroom teacher were to be 'promoted' to an administrative position such as a school principal, such a promotion would be to a different employment. The decision to appoint would be that of the board itself, since a new contract would clearly be required.

"Likewise in the classified service a promotion from one grade (e.g., Accountant II) would, we presume, involve significant discussion action by the board in approving the promotion . . . If this is the case under the rules adopted by the particular school board, then this again would constitute a different employment under our analytical framework. A new appointment would be made by the existing (new) board and hence a new contract would be made by them within the meaning of Section 1090. . . .

"In sum, we conclude that where the spouse of a school board member has been employed by a school district for several years before the board member's election or appointment, Section 1090 of the Government Code would prohibit the spouse from being appointed to a different employment position with the school board. It would also prohibit the spouse from being promoted if such promotion involved any action by the board itself."[44]

The Attorney General noted that the courts have held that Government Code section 1090 constitutes an absolute prohibition from entering into prohibited contracts by a governing board. Accordingly, its proscriptions cannot be avoided merely by having the interested board member abstain from any participation in making of the contract.[45]

In a 1998 opinion, the Attorney General stated that Section 1090 prohibits the reemployment of a probationary teacher (since it is a new contract) as a probationary or permanent teacher.[46] However, in a 2004 opinion, the Attorney General stated Section 1090 does not prohibit a probationary employee from being employed as a permanent teacher if the teacher has been a probationary teacher for more than one year before her spouse became a member of the governing board.[47] The Attorney General stated that such a change in classification may be considered the same employment for purpose of Section 1091.5(a)(6) since after two years of probation, the teacher must either be terminated or become a permanent employee.[48]

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[44] Id. at 259-260.

[45] Id. at 256.

[46] 81 Ops.Cal.Atty.Gen. 331 (1998).

[47] 87 Ops.Cal.Atty.Gen.23 (2004).

[48] Education Code section 44929.21(b).

In Thorpe v. Long Beach Community College District,[49] the Court of Appeal held that a person employed by the same community college district in which the employee's spouse is a member of the governing board may not seek a promotion that requires board ratification or action by the governing board. The Court of Appeal held that the governing board was barred from promoting the employee under Government Code section 1090, et seq., which define conflict of interest. The court held that the employee could not be promoted from the position of Accountant to a newly created position entitled, "Supervisor, Accounting Special Projects." The position was classified as a management position and the governing board was required to formally ratify the hiring of any candidate.[50]

In a 2009 opinion, the Attorney General stated that a school district may grant a teacher's transfer request from one teaching position to another that has the same compensation but involves different teaching duties. The teacher's spouse became a board member more than one year after the teacher's employment. Therefore, there was no violation of Government Code section 1090.[51]

In 2011, the Attorney General issued an opinion stating that when marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest in the income or assets of the other, the financial interests of one spouse are nevertheless attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090. The Attorney General concluded that notwithstanding such an agreement, one spouse's financial interest must be attributed to the other spouse for purposes of determining conflict of interest under Government Code section 1090.[52]

The Attorney General did not address whether the Political Reform Act prohibits public officials from participating in or attempting to influence governmental decisions in which they have a financial interest because Section 1090 was the sole focus of the question before the Attorney General. Therefore, the Attorney General did not address whether a prenuptial agreement might affect determinations under the Political Reform Act.[53]

The Attorney General noted that Section 1090 codifies the common law prohibition against "self-dealing" with respect to contracts. In a recent California Supreme Court decision, the Court recognized that the common law rule in Section 1090 recognized the truism that a person cannot serve two masters simultaneously.[54] In Lexin, the Court held that the term "financially interested" cannot be interpreted in a restricted or technical manner, but must be understood to encompass any situation where official judgment may be influenced by personal considerations rather than the public good.[55]

The Attorney General noted that in the case of married officials, it has long been held that a person's interest in a spouse's employment and income is a financial interest within the

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[49] 83 Cal.App.4th 655 (2000).

[50] Ibid.

[51] 92 Ops.Cal.Atty.Gen. 26 (2009).

[52] 94 Ops.Cal.Atty.Gen. 22 (2011).

[53] Id. at 22, n. 2.

[54] Lexin v. Superior Court, 47 Cal.4th 1050, 1073 (2010); see, also, Thomson v. Call, 35 Cal.3d 633, 637 (1985).

[55] Id. at 1073.

meaning of Section 1090. The Attorney General noted that in California, premarital agreements are governed by the Family Code.[56] Premarital agreements are defined as agreements between prospective spouses made in contemplation of marriage, and to be effective upon marriage.[57] Through premarital agreements, marital partners may override otherwise controlling statutory definitions of their respective property rights as spouses. Family Code section 1500 provides that, "The property rights of husband and wife prescribed by statute may be altered by a premarital agreement or other marital property agreement."

The Attorney General noted that there are some limitations to the scope and force of premarital agreements. For example, the law imposes an informative obligation on each spouse to support the other during the marriage and provides that, while marital partners are living together, such support shall come out of the separate property of the person when there is no community property or quasi community property. Similarly, the rights of children to support may not be adversely affected by a premarital agreement.[58] The Attorney General reviewed prior opinions regarding spouses and conflict of interest under Section 1090 and stated:

> "As we consider this question, we bear in mind that, even in the face of an airtight separate-property agreement, a marital partner could probably never be completely objective or disinterested when it comes to matters affecting the financial interests of his or her spouse or children. Indeed, it would 'be naive to assume that a husband has no concern about the property of his wife (or vice versa) simply because it is her separate property,' and such neutrality 'would be both unnatural and undesirable.' 'Common sense tells us that although an official may have no economic interest in [his spouse's separate] property, nevertheless, he may react favorably, or without total objectivity, to a proposal which could materially enhance the value of that property. By the same token, that official might naturally react unfavorably to proposals that could materially diminish the value of the spouse's separate property and cause her economic harm."[59]

The Attorney General noted that no matter how unequivocal a premarital agreement may seem to be in its purported separation and divestiture of interests, each spouse nevertheless retains at least an indirect or contingent material, financial interest in the income and assets of the other spouse.[60] Thus, the Attorney General stated, premarital agreements cannot nullify or diminish each spouse's legal obligation to utilize his or her separate property for expenses reasonably necessary to support the other according to the party's station in life during their marriage while the two are living together. Even with the premarital waiver of interest in a spouse's separate property, such property remains liable under law to fund the other spouse's

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[56] See, Family Code sections 1500-1620.

[57] See, Family Code section 1610(a), 1613.

[58] See, Family Code section 1612(b).

[59] 94 Ops.Cal.Atty.Gen. 22, 29 (2011).

[60] Id. at 30.

necessaries of life. This obligation to tap separate property for support occurs when there is no community property or quasi community property.[61]

Thus, the separate property of one spouse may serve both as an emergency reservoir of assets available to ensure one's own comfort in difficult times and as a hedge against the need to expend one's own separate assets to support that spouse, a dynamic that highlights the marital partner's continuing financial connection and interdependence, notwithstanding their prenuptial agreement.[62] In addition, premarital agreements do not defeat or diminish the party's legal obligation to apply their separate property to pay for the basic needs of their children and the cost of that obligation to one spouse would presumably depend to a significant extent upon the other spouse's financial ability to shoulder a share of the burden. This relationship demonstrates the continuing financial interest of one spouse and the separate property of the other.[63]

The Attorney General concluded:

> "Accordingly, and in harmony with judicial precedent in our earlier opinions, we conclude that one spouse's financial interests are attributable to the other spouse for purposes of determining conflicts of interest under Government Code section 1090, even when the marriage partners have entered into a premarital agreement specifying that each spouse has no present or future financial interest whatsoever in the income or assets of the other."[64]

In a 2014 opinion, the California Attorney General stated that a trustee of a community college district board who is married to a tenured professor in the district may participate in collective bargaining negotiations between the district and the bargaining unit that represents the professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and the collective bargaining agreement does not result in new or different employment for the spouse. The Attorney General further stated that a trustee of the community college district board who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees.[65]

In determining whether a trustee of a community college district who is married to a tenured professor in the bargaining may participate in collective bargaining negotiations, the Attorney General reviewed the provisions of Government Code section 1090. Government Code section 1090 provides in part:

> "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially

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[61] Id. at 30-31.

[62] Id. at 31.

[63] Id. at 31.

[64] Id. at 32.

[65] 97 Ops.Cal.Atty.Gen. 62 (2014). While this Attorney General opinion addresses community college districts, it would also apply to school districts and regional occupational programs.

> interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . ."

The purpose of Government Code section 1090 is to prohibit public officers from participating in decisions in which they have a personal financial interest. Section 1090 prohibits a public official who has a conflict of interest not only from approving a contract, but from participating in preliminary discussions, planning, influencing, compromising or otherwise participating in the process leading up to the formal making of the contract.

In situations in which Government Code section 1090 applies, it generally prevents not only the member with a conflict of interest, but also the entire governing board upon which the official sits, from making a contract. In limited circumstances, however, a rule of necessity may be employed to allow a governing board to perform essential business despite a member's conflict. In particular, the rule of necessity has been applied to allow school boards to contract with its employees in situations where a school board is the only entity empowered to contract on behalf of a community college district or school district (i.e., a district must employ teachers).[66]

The Attorney General noted that Government Code section 1091.5(a)(6) makes an exception if the spouse is an employee of a public agency and the employment has existed for at least one year before the officer's election or appointment. In a 1986 Attorney General opinion, the Attorney General noted if the spouse has not worked for more than a year for the district, then the board member could not participate in collective bargaining negotiations.[67]

The Attorney General concluded that a board member may participate in the making of a contract involving his or her spouse's employment only to the extent that the contract concerns the conditions applicable to the spouse's current class of employment, rather than creating some new or different employment for the board member's spouse. Therefore, the board member may participate in the making of a contract that affects the salary and benefits of a class of employees that includes the spouse, but the board member may not participate in the making of any contracts involving unique benefits to the spouse, such as decisions to promote, reclassify, or hire the spouse. In such cases, the trustee would be required to abstain from any involvement in the contract-making process.[68]

The Attorney General concluded:

> "Accordingly, we conclude that a trustee of a community college district board may participate in collective bargaining between the district and the bargaining unit that represents his professor-spouse, provided that the spouse attained that position more than a year before the board member took office, and that the collective bargaining agreement does not result in new or different employment for the spouse."[69]

[66] 73 Ops.Cal.Atty.Gen. 191, 195 (1990).
[67] 69 Ops.Cal.Atty.Gen. 102 (1986).
[68] 69 Ops.Cal.Atty.Gen. 102, 103, 112-13 (1986).
[69] 97 Ops.Cal.Atty.Gen. 62, 65 (2014).

As a retired community college president, the board member's health benefits are the same as those provided to the district's current employees. This circumstance gives rise to the question as to whether the board member may participate in the process of renegotiating current employee health benefits. The Attorney General concluded that the board member's personal financial interest in the level of current employee benefits requires the board member to abstain from bargaining on this subject. The Attorney General concluded:

> "Therefore, we conclude that a trustee of a community college district who receives retirement health benefits equal to benefits the district provides to current employees may not participate in the process of renegotiating health benefits provided to current employees."[70]

G. Financial Interest in Retirement Benefits

In Lexin v. Superior Court,[71] the California Supreme Court held that the conflict of interest statutes, Government Code sections 1090 et seq., were not violated by members of the San Diego City Employees Retirement System when the board members voted to increase the retirement benefits of all city employees. The members of the retirement system were also city employees and received the same pension increases.

The California Supreme Court held that Government Code section 1091.5(a)(3), the "Public Services" exception, applied. The Court of Appeal held that under Section 1091.5(a)(3), an officer or employee shall not be deemed to be interested in the contract if his or her interests is any of the following: "That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board." The California Supreme Court held that the benefits that the board approved (i.e., increasing the formula for retirement benefits and thus increasing benefits of retirees) was generally provided and, therefore, the board members could not be charged with a violation of the conflict of interest statutes.[72]

The California Supreme Court noted that the Legislature mandated the inclusion of employees on retirement boards. Therefore, the Legislature intended for retirement board trustees to share interests with their membership. The court noted that every decision a retirement board makes and every contract it enters is likely to affect the financial interests of its employee/retiree members. The court stated:

> "This is the same increase that applied to every non-safety city employee. These defendants' interests thus mirror those of their constituents; they received a pension benefit on the same terms and conditions as did a broad segment of their constituents, without regard to their board membership, and with no special tailoring or individualized consideration."[73]

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[70] 97 Ops.Cal.Atty.Gen. 62, 67 (2014).

[71] 47 Cal.4th 1050, 103 Cal.Rptr.3d 767 (2010).

[72] Id. at 1085-86.

[73] Id. at 1099.

However, the California Supreme Court held that one member of the retirement board who received retirement benefits both from his city salary and his union salary received an individually tailored benefit and, therefore, Section 1091.5(a)(3) did not apply. The Court of Appeal held this was a unique benefit that was not provided on the same terms and conditions as the other members of the retirement system.[74]

H. Effect of Conflict of Interest

Government Code section 1092 provides that every contract made in violation of Section 1090 may be avoided by any party except the official with the conflict of interest. Despite the wording "may be avoided," the case law holds that any contract made in violation of Section 1090 is void, not merely voidable.[75]

A public officer who is found guilty of willfully violating any of the provisions of Sections 1090, et seq., is punishable by a fine of not more than $1,000 or imprisonment in state prison.[76] Additionally, such an individual is forever disqualified from holding any office in this state. In People v. Honig,[77] the Court of Appeal affirmed the conviction of former State Superintendent of Public Instruction, Bill Honig, for violating Government Code sections 1090 and 1097.

I. Rule of Necessity

In 2006, the California Attorney General issued an opinion stating that when a member of the governing board of a community college district receives retirement health benefits from the district as a former faculty member under the terms of a collective bargaining agreement, the governing board may renegotiate the amount of health benefits provided under the current collective bargaining agreement so long as the financially interested board member does not participate in the decision making process.[78]

The Attorney General noted that the governing board of a community college district has broad authority to act in the manner not in conflict with the purposes for which community college districts are established, including establishing employment practices, salaries and benefits for district employees.[79] The Attorney General noted that Government Code section 1090 precludes the board of a public agency from entering into a contract in which one of its members has a personal financial interest. Section 1090 is concerned with financial interests that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their public agencies.[80] A contract that violates Section 1090 is void and a public official who willfully violates this statute is subject to criminal penalties.[81]

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[74] Id. at 1101-03.

[75] Thomson v. Call, (1985) 38 Cal.3d 633; People v. Drinkhouse, (1970) 4 Cal.App.3d 931.

[76] Government Code section 1097.

[77] People v. Honig, 48 Cal.App.4th 289 (1996); Thomson v. Call, 38 Cal.3d 633 (1985).

[78] 89 Cal.Atty. 217 (2006).

[79] Education Code section 70902(a); Education Code section 70902(b)(4); Service Employees International Union v. Board of Trustees, 47 Cal.App.4th 1661, 1665-1666 (1996); 84 Ops.Cal.Atty.Gen. 175, 176 (2001).

[80] Stigall v. Taft, 58 Cal.2d 565, 569 (1962).

[81] Thomson v. Call, 38 Cal.3d. 633, 646 (1985); Government Code section 1097; People v. Gnass, 101 Cal.App.4th 1271, 1297 (2002).

In previous opinions, the Attorney General has concluded that the modification of a collective bargaining agreement by a school district's governing board constitutes the making of a contract within the meaning of Section 1090.[82] The Attorney General noted that under Government Code sections 53201 and 53208, governing board members may vote to provide themselves with health benefits despite Section 1090's general prohibition against a board member having a personal financial interest in such an agreement. However, in the present case, the board member is receiving health benefits as a former faculty member.

The Attorney General noted that to preclude the entire governing board from renegotiating the collective bargaining agreement would be impractical and therefore the "rule of necessity" should be applied since the governing board of the community college district is the only entity empowered to contract on behalf of the community college district. For these reasons, the Attorney General concluded that the governing board of a community college district may renegotiate the amount of health benefits for its faculty members, so long as the financially interested board member refrains from participating in any discussions, negotiations or decisions regarding the agreement.

In a 2003 opinion, the Attorney General concluded that the city was not required to award the contract to the lowest responsible bidder and concluded that the "rule of necessity" did not apply.[83] The rule of necessity was explained in Eldridge v. Sierra View Local Hospital District[84] as follows:

> "The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest, and in nonprocurement situations it permits a public officer to carry out the essential duties of his/her office despite a conflict of interest where he/she is the only one who may legally act. The rule ensures that essential government functions are performed even where a conflict of interest exists."[85]

The Attorney General concluded that as long as other responsible bids were submitted, the rule of necessity does not apply and therefore, the public agency may not enter into a public works contract with the prime contractor even though the prime contractor is the lowest bidder for the project of the city's mayor is an officer, shareholder and employee of a listed subcontractor of the prime contractor and the mayor has not been a supplier of goods or services to the prime contractor for at least five years prior to his election as an officer.

J. Prohibition Even Where Contract is Advantageous

In 2003, the Attorney General stated that a city council may not enter into a contract with a law firm where a member of the city council is a partner in the law firm, even if the law firm would receive no fees from the city for the services and would agree to turn over to the city any attorney's fees that might be awarded in the litigation.

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[82] See, 65 Ops.Cal.Atty.Gen.305, 307 (1982).

[83] 86 Ops.Cal.Atty.Gen. 118 (2003).

[84] 224 Cal.App.3d 311 (1990).

[85] Id. at 321.

The Attorney General stated that Government Code section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The Attorney General concluded that Section 1090 would prohibit a city council from entering into such a contract even when the terms of the proposed contract are fair and equitable or plainly to the city's advantage.[86]

The Attorney General found that there would be a "financial interest" present in the form of a possible economic loss to the law firm which would place the city council member in a compromising situation where in the exercise of his official judgment or discretion he may be influenced by personal considerations rather than the public good. What might be in the best interest to the city in conducting the litigation when entering into settlement negotiations, may not be in the best interest of the law firm and what might be in the best interest of the law firm may not be in the best interest of the city.

Under the proposed agreement, the law firm would not receive any legal fees and would bear all litigation expenses normally borne by the client. In these circumstances, the city's interest and the firm's interest might diverge. Success in the litigation could be financially advantageous to the law firm with respect to the law firm's reputation and be to the council member's personal benefit by enhancing the value of his interest in the law firm. Therefore, the Attorney General concluded that the city may not enter into a contract with the law firm.

K. Delegation of Board Authority

In a 2004 Attorney General opinion, the Attorney General stated that a governing board of a school district may not avoid the conflict of interest provisions of Government Code section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district, and thus allow the superintendent to approve a promotion for the spouse of a member of the governing board, as well as lease school equipment from a firm that employs the spouse of another board member.[87]

The Attorney General noted that each school district in the state is under the control of a governing board and that a school board may act in any manner that is not inconsistent with state law and not inconsistent with the purposes for which school districts are established.[88] School boards may enter into contracts for employment and the purchases of goods and services.[89] The Attorney General concluded that the Education Code thus provides that a school district's authority to enter into contracts, whether related to employment or the purchase or lease of equipment, remains vested in the governing board, and when a district superintendent or other administrator participates in the making of a contract, he or she does not do so independently, but on behalf of the governing board.[90]

The Attorney General concluded that a governing board may not avoid the conflict of interest provisions of Section 1090 by adopting a policy delegating its authority to the district

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[86] Thomson v. Call, 38 Cal.3d 633, 645 (1985).

[87] 87 Ops.Cal.Atty.Gen. 9 (2004).

[88] See, Education Code sections 35010, 35160.

[89] See, Education Code sections 45100 et seq., Sections 17595 et seq.; Public Contract Code section 20111.

[90] Education Code section 35161.

superintendent to enter into contracts. The Attorney General noted that while a governing board may delegate its contractual authority pursuant to Education Code section 35161 to the district superintendent, the superintendent's contractual powers remain subject to the review and control of the governing board as a matter of law.

L. Awarding of Civil Damages

In County of San Bernardino v. Walsh,[91] the Court of Appeal held that the County of San Bernardino may file a civil action and recover compensatory and punitive damages against individuals who were found guilty of bribery and conflict of interest under Government Code section 1090.

The former chief administrative officer of the County of San Bernardino and several individuals doing business with the County of San Bernardino were found guilty of bribery and conflict of interest. The County of San Bernardino initiated a civil action and obtained a money judgment against the individuals involved. The individuals challenged the method of determining damages.[92]

With respect to the waste management contract, the Court of Appeal held that the County of San Bernardino suffered damages as a result of the bribery and conflict of interest in the amount of millions of dollars. The Court of Appeal held that damages were properly based on unjust enrichment and the court was justified in requiring the individuals to give up all of the proceeds received in the bribery scheme. In addition to awarding compensatory damages over $4.2 million, the court also assessed $1 million in punitive damages against one individual and $500,000 in punitive damages against another individual on the breach of fiduciary and fraud causes of action.[93]

With respect to the billboard lease issue, the court found that individuals paid bribes to the former chief administrative officer to expedite the permit and construction process and to allow the assignment of leases. The trial court awarded the County $3.8 million in damages. The Court of Appeal affirmed the trial court's findings and held that under Government Code section 1090, the County had a right to recover restitution damages and to require the individuals involved to give up all profits made as a result of their fraud and conflict of interest.[94] The Court of Appeals stated:

> "Because contracts in violation of Section 1090 are against fundamental public policy, parties who participate in the unlawful making of the contract should forfeit all interest flowing from the contract to avoid the prospect of unjust enrichment. An actual loss to the public entity is not necessary. . . .
>
> "We conclude, however, that under the circumstances of this case, an award of damages representing the price paid by a

[91] 158 Cal.App.4th 533, 69 Cal.Rptr.3d 848 (2007).

[92] Id. at 537-40.

[93] Id. at 547-49.

[94] Id. at 549.

> third party to obtain benefits under a contract which violates Section 1090 is warranted. Such a remedy is consistent with the purpose of Section 1090 to prevent an offending party from benefitting from a contract that involves self-dealing by a public official. . . . As with the principal of unjust enrichment, Section 1090 focuses on the wrongdoer rather than the victim. Disgorgement of profits is a logical extension of the rationale of Section 1090 that public officials cannot profit by a breach of their duty or take advantage of their own wrongdoing."[95]

This decision should be beneficial to public agencies that are the victim of fraud, bribery or conflict of interest. This decision will allow public agencies to not only recover damages from the public officials involved but also from the individuals who bribed or induced the public officials to engage in a conflict of interest, fraud or bribery.

In San Diegans For Open Government v. Har Construction, Inc.[96] the Court of Appeal affirmed the lower court decision, dismissing an anti-SLAPP motion under Code of Civil Procedures section 425.16. The Court of Appeal held that Har Construction's motion was untimely and the anti-SLAPP statute is inapplicable because Plaintiffs fell within the statute's public interest exemption under Code of Civil Procedure section 425.17(b).

The underlying facts were that the San Diego County District Attorney filed a criminal complaint against the former district Superintendent and three board members of the Sweetwater Union High School District in January 2012, for alleged wrongdoing related to construction projects at district schools. The Plaintiffs then filed a taxpayers' action against the contractors involved in those projects, seeking to invalidate their contracts with the school district under Government Code section 1090. The Plaintiffs challenged the district's contract for work at Southwest Middle School and Southwest High School, alleging that the contractors bribed the Superintendent and board members by providing them with gifts in exchange for approving unjustified change orders.

The Court of Appeal held that taxpayers may sue under Government Code section 1090 to have improper contracts declared void. These lawsuits may be against public agencies as well as the private parties who entered into the improper contract with public agencies.

However, a taxpayer may not bring an action on behalf of a public agency unless the governing body has a duty to act, and has refused to do so. Where the public agency has expended funds illegally or for an unlawful purpose and its management is in the hands of the accused of the wrongdoing, the taxpayer is not required to make a demand on the public agency as it would be unavailing.

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[95] Id. at 550-51.
[96] 240 Cal.App.4th 611 (2015).

M. Criminal Prosecution for Conflict of Interest

In People v. Christiansen,[97] the Court of Appeal held that an independent contractor was not an employee capable of committing a criminal offense under the conflict of interest laws.

Karen Christiansen was charged with four counts of conflict of interest in violation of Government Code section 1090, which generally prohibits public officials from being financially interested in contracts they make in their official capacity. A jury convicted Christiansen on all counts, and the trial court sentenced her to four years and four months in prison and ordered her to pay restitution of approximately $3.5 million.[98]

On appeal, the Court of Appeal held that because Christiansen was not a member, officer, or employee of the school district, Section 1090 does not apply to her. Therefore, the Court of Appeal reversed her convictions, vacated her sentences, and restitution award, and directed the Superior Court to dismiss all charges against her.

N. Conflict of Interest – Fair Political Practices Commission

Assembly Bill 1090[99] added Government Code sections 1097.1, 1097.2, 1097.3, 1097.4, and 1097.5, effective January 1, 2014. Assembly Bill 1090 expanded the jurisdiction of the Fair Political Practices Commission (FPPC) to allow the FPPC to investigate or initiate an administrative or civil action (including fines) against an officer or other person for violation of Government Code section 1090. Government Code section 1090 prohibits public officials and employees from having financial interest in any contract made by them in their official capacities, or by any body or board of which they are members.

Government Code section 1097.1(a) states that the FPPC shall have the jurisdiction to commence an administrative action, or a civil action, against an officer or person prohibited by Section 1090 from making or being interested in contracts, or from becoming a vendor or a purchaser at sales, or from purchasing SCRIP, or other evidences of indebtedness, including any member of the governing board of a school district, who violates any provision of those laws or who causes any other person to violate any provisions of those laws. Section 1097.1(b) states, "The FPPC shall not have jurisdiction to commence an administrative or civil action or an investigation that might lead to an administrative or civil action against a person except upon written authorization from the District Attorney of the county in which the alleged violation occurred. A civil action alleging a violation of Section 1090 shall not be filed against a person pursuant to Section 1091.7, if the Attorney General or a District Attorney is pursuing a criminal prosecution of that person pursuant to Government Code section 1097.

Government Code section 1097.1(c)(1) states that, "The FPPC's duties and authorities under the Political Reform Act of 1974[100] to issue opinions or advice shall not be applicable to Sections 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5, 1091.6 or 1097, except as provided in Section 1097.1(c)." Section 1097.1(c)(2) states that a person subject to Government Code section 1091 may request the FPPC to issue an opinion or advice with respect to his or her duties

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[97] 216 Cal.App.4th 1181, 157 Cal.Rptr.3d 451 (2013).

[98] See, Government Code section 1097.

[99] Stats. 2013, ch. 650.

[100] Government Code section 81000 et seq.

under Section 1090, 1091, 1091.1, 1091.2, 1091.3, 1091.4, 1091.5 and 1091.6. The FPPC shall decline to issue an opinion or advice relating to past conduct. The FPPC is required to forward a copy of the request for an opinion or advice to the Attorney General's office and the local District Attorney prior to proceeding with the advice or opinion.[101]

When issuing the advice or opinion, the FPPC shall either provide to the person who made the request a copy of any written communications submitted by the Attorney General or a local District Attorney regarding the opinion or advice, or shall advise the person that no written communications were submitted. The failure of the Attorney General or a local District Attorney to submit a written communication shall not give rise to an inference that the Attorney General or local District Attorney agrees with the opinion or advice.[102]

The opinion or advice, when issued, may be offered as evidence of good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice. Any opinion or advice of the FPPC issued pursuant to Section 1097.1 shall not be admissible by any person other than the requester in any proceeding other than a proceeding brought by the FPPC pursuant to Section 1097.1. The FPPC shall include in any opinion or advice that it issues a statement that the opinion or advice is not admissible in a criminal proceeding against any individual other than the requester.[103]

Government Code section 1097.1(d) states that any decision issued by the FPPC, pursuant to an administrative action commenced pursuant to the jurisdiction established by Section 1097.1(a), shall not be admissible in any proceeding other than a proceeding brought by the FPPC pursuant to Section 1097.1. The Commission shall include in any decision it issues a statement that the decision applies only to proceedings brought by the FPPC.[104]

Government Code section 1097.1(e) states that the FPPC may adopt, amend, and rescind regulations to govern the procedures of the FPPC consistent with the requirements of Sections 1097.1, 1097.2, 1097.3, 1097.4 and 1097.5. These regulations shall be adopted in accordance with the Administrative Procedure Act.[105]

Government Code section 1097.2(a) states that upon the sworn complaint of the person or on its own initiative, the FPPC shall investigate possible violations of Section 1090, as provided in Section 1097.1. After complying with the notice provisions to the Attorney General and local District Attorney, the FPPC shall provide a written notification to the person filing a complaint. Government Code section 1097.2 sets forth the procedures under which the FPPC may bring an administrative action. Section 1097.3 establishes the requirements which authorize the FPPC to file a civil action for an alleged violation of Section 1090. A person held liable for such a violation shall be subject to a civil fine payable to the FPPC for deposit in the general fund of the state and in an amount not to exceed the greater of $10,000 or three times the value of the financial benefit received by the defendant for each violation.

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[101] Government Code section 1097.1(c)(3).

[102] Government Code section 1097.1(c)(4).

[103] Government Code section 1097.1(c)(5).

[104] Government Code section 1097.1(d).

[105] Government Code section 1097.1(e).

Government Code section 1097.4 states that in addition to any other remedies available, the FPPC may obtain a judgment in Superior Court for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties. Section 1097.5 states that if the time for judicial review of the final FPPC order or decision has lapsed, or if all means of judicial review of the order or decision has been exhausted, the FPPC may apply to the Clerk of the Superior Court for a judgment to collect the penalties imposed by the order or the decision.

In summary, Assembly Bill 1090 expands the authority of the FPPC to investigate violations of Government Code section 1090.

POLITICAL REFORM ACT

A. Purpose of the Political Reform Act

The second important body of statutory law which governs conflicts of interest is the Political Reform Act of 1974 (Government Code sections 81000, et seq.). Chapter 7 of the Act (Sections 87100, et seq.) deals with conflicts of interest. Section 87100 states the basic prohibition as follows:

> "No public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

In general, a public official has a conflict of interest with regard to a particular government decision if it is sufficiently likely that the outcome of the decision will have an important impact on their financial interests. It is important to emphasize that a conflict of interest under the Political Reform Act can only arise from particular kinds of financial interests.

The disqualification provisions of the Act hinge on the effect a decision will have on a public official's financial interest. When a decision is found to have the requisite effect, the official is disqualified from making, participating in the making, or using his or her official position to influence the making of the decision at any level of the decision-making process.

B. Statutory Provisions

The Political Reform Act of 1974, prohibits board members from participating in decisions if the board's decision (including, but not limited to contracts) will have a material effect on the board member or his immediate family.[106] Government Code section 87100 states:

> "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

[106] Government Code sections 81000 et seq.

Government Code section 87103(c) states:

> "An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:
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> * * *
>
> "(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollar ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made."

However, Government Code section 82030(b)(2) states that "income" does not include:

> "Salary and reimbursement for expenses or per diem received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide educational, academic, or charitable organization."

If the spouse's salary is received from a local government agency, it does not constitute "income" within the meaning of Government Code section 87103(c).[107] A regulation of the California Fair Political Practices Commission further defines this exception, as follows:

> "(c) Notwithstanding subsection (a) an official does not have to disqualify himself or herself from a governmental decision if:
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> "(1) The decision only affects the salary, per diem, or reimbursement for expenses the official or his or her spouse receives from a state or local government agency. This subsection does not apply to decisions to hire, fire, promote, demote, or discipline an official's spouse, or to set a salary for an official's spouse which is different from salaries paid to other employees of the spouse's agency in the same job classification or position."[108]

Government Code section 87103(d) states in part:

> "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect,

[107] See, also 61 Ops.Cal.Atty.Gen. 412, 414-415 (1978); Bach v. McNelis, (1989) 207 Cal.App.3d 852, 866-67.

[108] Title 2, California Code of Regulations section 18702.1(c)(1). See, also, Education Code section 35107(e), which states that a board member may participate in collective bargaining decisions affecting a relative or a spouse's salary and benefits, but may not participate in decisions to fire, demote, or discipline a spouse.

> distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: . . . (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management."

Government Code section 82005 defines a "business entity" of purposes of the Political Reform Act[109] as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. Section 82005 does not include a non-profit organization in the definition of a "business entity" within the meaning of the Political Reform Act.[110] Therefore, service on the board of directors of a nonprofit organization, for example, would not create a conflict of interest.

Government Code section 87207 adds to the definition of a gift for reporting purposes any travel payments, advance or reimbursement, and states that the gift is received when the travel payment advance or reimbursement is received.

Government Code section 89506(f), as amended, states that a nonprofit organization that regularly organizes and hosts travel for elected officials and that makes payments, advances, or reimbursements that total more than ten thousand dollars ($10,000) in a calendar year, or that total more than five thousand dollars ($5,000) in a calendar year for a single person, for travel by an elected state officer or local elected officeholder shall disclose to the Political Practices Commission the names of donors who did both of the following in the preceding year:

1. Donated one thousand dollars ($1,000) or more to the nonprofit organization.

2. Accompanied an elected officeholder, either personally or through an agent, employee, or representative, for any portion of travel.

C. Settlement of Lawsuit

In a 2003 opinion, the Attorney General stated that a member of a board of directors of a community services district may remain on the board after filing a lawsuit against the district challenging a board action. However, if the member of the board remains on the board, the district and the board member may not enter into an agreement settling the lawsuit.[111]

The Attorney General was asked whether a member of the board of directors of a community service district may remain on the board after filing a lawsuit against the district challenging the board's issuance of a development permit to the owner of property adjacent to the board member's property.

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[109] Government Code sections 81000 et seq.

[110] See also 2 Cal. Code of Regulations section 18703.1(d).

[111] 86 Ops.Cal.Atty.Gen. 142 (2003).

The Attorney General reviewed the Political Reform Act of 1974,[112] which prohibits public officials from participating in government decisions in which they have a financial interest. The Attorney General noted that the Political Reform Act and its regulations,[113] requires the board member having a financial interest to abstain from participating in every aspect of the decision making process. The board member may not be counted for purposes of establishing a quorum and is prohibited from attending any closed session affecting his interest and the board member may not obtain any confidential information from the closed session.

However, the Attorney General concluded that the disqualified board member is not required to forfeit his public office but is only required to play no part in the particular deliberations and decisions affecting his economic interest. The Attorney General also concluded that nothing in the Political Reform Act prohibits a board member from filing a lawsuit against a public agency of which he is a board member or requires his resignation from office for having done so.

The Attorney General went on to state that if the affected board member remains on the board after filing the lawsuit, the district and the affected board member may not enter into an agreement settling the lawsuit since settlement agreements are contractual in nature and any attempt by the board and the board member to execute an agreement would violate the conflict of interest provisions of Government Code section 1090.

Section 1090 prohibits public officers, acting in their official capacities, from making contracts in which they are financially interested. If as here, the public officer is a board member, this prohibition extends to the entire board.[114]

The purpose of Section 1090 is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on the official's decision, as well as to avoid contracts which are actually obtained through fraud or dishonest conduct.[115] The Attorney General noted that Section 1090 is intended not only to strike at actual impropriety but also to strike at the appearance of impropriety.[116]

Section 1090's prohibition applies even when the terms of the proposed contract are demonstratively fair and equitable or plainly to the local agency's advantage under Section 1090. No matter how carefully or completely a board member attempts to avoid participating in or influencing the execution of a contract, the board member is conclusively presumed to have "made" the contract for purposes of Section 1090 and the contract is void.

The Attorney General concluded that the possible settlement of the board member's lawsuit would present an unavoidable conflict and the interested director would be presumed to be making the contract as part of the board as well as for himself. Absent some exception, Section 1090 would prohibit entering into a settlement agreement.

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[112] Government Code sections 81000, et seq.

[113] 2 California Code of Regulations section 18704.2(a)(1).

[114] See, Thomson v. Call, 38 Cal.3d 633 (1985).

[115] See, Stigall v. City of Taft, 58 Cal.2d 565 569 (1962).

[116] See, City of Imperial Beach v. Bailey, 103 Cal.App.3d 191, 197 (1980).

The reasoning of the Attorney General's opinion would apply to community college districts, school districts and regional occupational programs as well. The practical implications of the Attorney General's opinion are that if an individual board member were to file a lawsuit against the board, the lawsuit could not be settled until after the board member resigned.

D. Prospective Employment

Effective January 1, 2004, the Legislature amended Government Code section 87407.[117] Section 87407, as amended, prohibits public officials from making, participating in making, or using their official position to influence any governmental decision directly relating to any person with whom he or she is negotiating or has any arrangement concerning prospective employment.

Previously, Government Code section 87407 applied only to state officials. The amendment to Government Code section 87407 expanded the prohibition to public officials, which is defined as every member, officer, employee or consultant of a state or local government agency.[118]

Government Code section 87407, as amended, states:

> "No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment."

Therefore, if any officer or employee of a district is negotiating or has an arrangement concerning prospective employment with an individual or company, that officer or employee should not be involved in making, participating in making, or using his or her official position to influence any decision by the district relating to that individual or their company.

E. Charter Schools

The above discussion regarding conflict of interest applies to charter schools as well since charter schools are a part of the public school system.[119] In Knapp v. Palisades Charter High School,[120] the Court of Appeal held that a charter school was not a separate legal entity for purposes of the Government Tort Claims Act. Most likely the courts would also rule that a charter school would not be a separate legal entity for purposes of conflict of interest as well.

COMMON LAW CONFLICT OF INTEREST

In a 2009 opinion,[121] the Attorney General concluded that it was a common law conflict of interest violation for a city redevelopment agency board member to participate in any official

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[117] Stats. 2003, ch. 778, A.B. 1678.

[118] See, 2 California Code of Regulations section 18701.

[119] Wilson v. State Board of Education, 75 Cal.App.4th 1125, 1141 (1999).

[120] 141 Cal.App. 4th 780, 46 Cal.Rptr.3d 295, 210 Ed.Law Rep. 765 (2006).

[121] 92 Ops.Cal.Atty.Gen. 19 (2009).

action or to influence the discussion, negotiations or both, concerning a proposed commercial property improvement loan from the city redevelopment agency to the board member's adult non-dependent son who also resides with the board member in the same rented apartment.

The Attorney General concluded that the redevelopment agency board was not precluded by Government Code section 1090 from entering into the contract. The Attorney General also concluded that the provisions of the Political Reform Act, Government Code sections 87100 et seq. were not violated. However, the Attorney General found a common law conflict of interest violation.

The Attorney General stated that the common law doctrine of conflict of interest prohibits public officials from placing themselves in a position where their private, personal interest may conflict with their official duties.[122] The Attorney General noted that while the focus of Government Code sections 1090 and 87100 is on actual or potential financial conflicts, the common law conflict of interest prohibition extends to non-economic interests as well.[123] The Attorney General stated that even where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the common law doctrine of conflict of interest.[124]

The Attorney General concluded that even if the agency board member does not have a statutory financial interest in their son's contract with the redevelopment agency within the meaning of Section 1090 or the Political Reform Act, the agency member, most likely, has a private or personal interest in whether her son's business transactions are successful. The Attorney General concluded that the appearance of impropriety or conflict would arise by the member's participation in the negotiations and voting upon an agreement that, if executed, would presumably benefit the board member's son financially.[125]

The Attorney General noted that a public officer is bound to exercise their powers with disinterested skill, zeal and diligence for the benefit of the public. Actual injury is not the principle the law proceeds on. Fidelity to the public interest is the purpose of conflict of interest laws.[126] The Attorney General concluded:

> "In our view, the agency board member's status as the private contracting party's parent and co-tenant places her in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence' in the public interest, thereby presenting a potential conflict. In an earlier opinion, we advised that a common law conflict of interest may 'usually be avoided by [the official's] complete abstention from any official action' with respect to the

[122] Id. at 23; citing, Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1171 (1996); 64 Ops.Cal.Atty.Gen. 795, 797 (1981); Kunec v. Brea Redevelopment Agency, 55 Cal.App.4th 511, 519 (1997).

[123] Ibid.; see, also, 70 Ops.Cal.Atty.Gen. 45, 47 (1987); 64 Ops.Cal.Atty.Gen. 795, 797 (1981); Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1171, note 18 (1996).

[124] Ibid.; see, also, 53 Ops.Cal.Atty.Gen. 163, 165-167 (1970).

[125] Id. at 23-24.

[126] See, Noble v. City of Palo Alto, 89 Cal.App. 47, 51 (1928); Clarke v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1170-1171 (1996).

> transaction or any attempt to influence it. Under these circumstances, we believe that the only way to be sure of avoiding the common law prohibition is for the board member to abstain from any official action with regard to the proposed loan agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement."[127]

In summary, the Attorney General concluded that the redevelopment agency board member, to avoid a conflict between her official and personal interests, must abstain from any official action with regard to the proposed loan agreement and make no attempt to influence the discussions, negotiations, or vote concerning that agreement.[128]

THE FPPC'S EIGHT STEP ANALYSIS

To determine whether a conflict of interest exists under the Political Reform Act, the Fair Political Practice Commission (FPPC) has published a pamphlet that discusses the eight steps or eight questions that must be asked. The first three questions are comparatively easy to answer, while the remaining questions can be quite technical. Thus, if a district determines that the answer to the first three questions is "yes," this is an indication of a potential conflict of interest. The district may then contact legal counsel or the FPPC.

STEP 1 – Are you a "public official," within the meaning of the rules?

The first step in the analysis is usually a formality. If you are an elected official or an employee of a state or local government agency, you are a "public official." Tougher cases involve consultants, investment managers and advisors, and public-private partnerships. If you have any doubts, contact legal counsel or the FPPC.

STEP 2 – Are you making, participating in making, or influencing a governmental decision?

The Act's conflict of interest rules apply when a public official:

- **Makes** a governmental decision (for example, by voting or making an appointment);
- **Participates** in making a governmental decision (for example, by giving advice or making recommendations to the decision-maker); or
- **Influences** a governmental decision (for example, by communicating with the decision-maker).

A good rule of thumb for deciding whether a public official's actions constitute making, participating in making, or influencing a governmental decision is to ask if the official is

[127] Id. at 23-24; see, also, 70 Ops.Cal.Atty.Gen. 45, 47; 64 Ops.Cal.Atty.Gen. 795, 797; McQuillin, The Law of Municipal Corporations, Vol. 4, Section 13.35, pp. 840-841 (3d ed., Rev. 1992); 26 Ops.Cal.Atty.Gen. 5, 7 (1955).
[128] Id. at 24.

exercising discretion or judgment with regard to the decision. If the answer is "yes," then the conduct is probably covered.

STEP 3 – What are your financial interests? That is, what are the possible sources of a financial conflict of interest?

As we have noted, the Act's conflict of interest provisions apply only to conflicts of interest arising from financial interests. There are six kinds of such financial interests:

- **Business Investment.** You have a financial interest in any business entity in which you, your spouse, your registered domestic partner, or your dependent children, or anyone acting on your behalf has invested $2,000 or more.

- **Business Employment or Management.** You have a financial interest in a business entity for which you are a director, officer, partner, trustee, employee, or hold any position of management.

- **Real Property.** You have a financial interest in real property in which you, your spouse, your registered domestic partner, or your dependent children, or anyone acting on your behalf has invested $2,000 or more, and also in certain leasehold interests.

- **Sources of Income.** You have a financial interest in anyone, whether an individual or an organization, from whom you have received (or from whom you have been promised) $500 or more in income within 12 months prior to the decision about which you are concerned. Additionally, under California's community property laws, a person for whom your spouse or registered domestic partner receives income may also be a source of a conflict interest to you.

- **Gifts.** You have a financial interest in anyone, whether an individual or an organization who has given you gifts which total $390[129] or more within 12 months prior to the decision about which you are concerned.

- **Personal Financial Effect.** You have a financial interest in your personal expenses, income, assets or liabilities, as well as those of your immediate family. This is known as the "personal financial effects" rule. If these expenses, income, assets or liabilities are likely to go up or down by $250 or more in a 12-month period as a result of a

[129] The current gift limit of $390 is subject to increases determined by an inflation factor.

governmental decision, then the decision has a "personal financial effect" on you.

STEP 4 – Are your financial interests directly or indirectly involved in the governmental decision?

In general, a financial interest which is directly involved in – and therefore directly affected by – a governmental decision creates a bigger risk of a conflict of interest than does a financial interest which is only indirectly involved in the decision. Therefore, the FPPC's conflict of interest regulations distinguish between financial interests that are directly involved and interests that are indirectly involved. These regulations are rather technical. If a district has reached Step 4 of the analysis, we recommend consultation with legal counsel and/or the FPPC, for assistance in applying the correct standard.

STEP 5 – What kinds of financial impacts on your financial interests are considered important enough to trigger a conflict of interest?

The FPPC has adopted regulations for deciding what kinds of financial effects are important enough to trigger a conflict of interest. These rules are called "materiality standards," that is, they are the standards that should be used for judging what kinds of financial impacts resulting from governmental decisions are considered material or important.

In general, if the financial interest is directly involved in the governmental decision, the standard or threshold for deeming a financial impact to be material is stricter (i.e., lower). This is because a financial interest that is directly involved in a government decision presents a bigger conflict of interest risk for the public official who holds the interest. On the other hand, if the financial interest is not directly involved, the materiality standard is more lenient, because the indirectly involved interest presents a lesser danger of a conflict of interest.

Again, these FPPC regulations are complex, and we recommend consultation with legal counsel and/or the FPPC for assistance with this analysis.

STEP 6 – Is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your financial interests?

For a conflict of interest to exist, the Political Reform Act requires that it be "reasonably foreseeable" that a governmental decision will have a material financial effect on a public official's financial interests. The FPPC has interpreted these words to mean "substantially likely." Generally speaking, the likelihood need not be a certainty, but it must be more than merely possible.

STEP 7 – If you have a conflict of interest, does the "public generally" exception apply?

If the answer to questions one through six is "yes," a conflict of interest exists. However, Steps 7 and 8 specify exceptions that permit you to participate anyway.

The "public generally" exception exists because a public official is less likely to be biased by a financial impact when a significant part of the community has financial interests that are substantially likely to feel essentially the same impact from a governmental decision that the

official's financial interests are likely to feel. The FPPC has adopted specific regulations for identifying the specific segments of the general population with which an official may compare their financial interests, and specific regulations for determining whether the financial impact is substantially similar. Again, we recommend consultation with legal counsel and/or the FPPC.

STEP 8 – Even if you have a disqualifying conflict of interest, is your participation legally required?

The "legally required participation" exception applies only in very specific circumstances in which the official's government agency would be paralyzed, unable to act. Districts are encouraged to seek advice from legal counsel and/or the FPPC before acting under this exception.

The foregoing discussion of the Political Reform Act's conflict of interest rules is derived from the FPPC's publication entitled, "Can I Vote?" Districts may directly contact the FPPC on its website (www.fppc.ca.gov), or on its toll-free telephone advice line (1-866-275-3772).

INCOMPATIBILITY OF OFFICES

Effective January 1, 2006, the Legislature enacted Government Code section 1099.[130] Section 1099 prohibits a public officer from simultaneously holding two public offices that are incompatible unless expressly authorized by law.

Public offices are considered incompatible if:

1. Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.

2. Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.

3. Public policy considerations make it improper for one person to hold both offices.[131]

When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office when sworn in to the second office.[132] The prohibition does not apply to positions of employment, including a civil service position[133] or a governmental body that has only advisory powers.[134] The statutory prohibition codifies the common law rule prohibiting an individual from holding incompatible public offices.[135]

[130] Stats. 2005, ch. 254 (SB 274).
[131] Government Code section 1099(a).
[132] Government Code section 1099(b).
[133] Government Code section 1099(c).
[134] Government Code section 1099(d).
[135] Government Code section 1099(f).

The common law rule has been established in California in several court cases and in a series of Attorney General opinions.[136] Under the common law rule, offices are incompatible if one of the offices has supervisory, auditory or removal power over the other, or if there would be any significant clash of duties or loyalties in the exercise of official duties. Only one potential, significant clash of duties is necessary to make offices incompatible. If the performance of the duties of either office could have an adverse effect on the other, the doctrine of incompatible offices precludes acceptance of the second office. If the second office is accepted, such acceptance constitutes an automatic resignation from the first office.

In a recent opinion, the Attorney General analyzed the authority of municipal water districts and determined that municipal water districts have the authority to acquire, control, distribute and sell water, at a rate of its determination, to public agencies and persons, and acquire, construct and operate sewage and storm water facilities, among other powers and duties.[137] A municipal water district may also undertake a water conservation program to reduce water usage and may restrict the usage of district water during any emergency caused by a water shortage. The governing board of a school district has the responsibility of obtaining necessary water supplies and sewage disposal services for the district. The Attorney General noted that in prior opinions, there could be a clash of loyalties between the individual=s duties to the municipal water district and the school district, since the water district is interested in conserving water, particularly in an emergency, and the district is interested in obtaining water.[138] In essence, what might be in the best interests of the school district might not be in the best interest of the water district. Therefore, a person holding both offices would have divided loyalties in considering the issue.

Therefore, the Attorney General concluded that the offices of a trustee of a school district and a director of a water district were incompatible and could not be held simultaneously.[139]

There are a series of Attorney General Opinions (see table below) with respect to trustees of school districts and community college districts holding incompatible offices.

TABLE OF ATTORNEY GENERAL OPINIONS
INCOMPATIBLE OFFICES AND EDUCATION AGENCIES

21 Ops.Atty.Gen. 94 (1953)	An individual may not simultaneously hold the office of county supervisor and school board member where the county and school district have territory in common.
21 Ops.Atty.Gen. 117 (1953)	An individual may simultaneously hold the offices of city clerk and assessor and school board member. The offices were deemed to be compatible.

[136] See, People v. Rapsey, 16 Cal.2d 636, 640-644 (1940); Eldridge v. Sierra View Local Hospital District, 224 Cal.App.3d 311, 319 (1990).
[137] 85 Ops.Cal.Atty.Gen. 60 (2002).
[138] See, 73 Ops.Cal.Atty.Gen. 183, 185 (1990); 73 Ops.Cal.Atty.Gen. 268, 271 (1990).
[139] In a 2012 opinion, the California Attorney General stated that the Offices of the Director of the Costa Mesa Sanitary District and Commissioner of the Costa Mesa Planning Commission may be incompatible and granted an application to file an action in quo warrant for a determination by the courts as to whether the offices are incompatible. See, 98 Ops.Cal.Atty.Gen. 67 (2012).

56 Ops.Atty.Gen. 488 (1973)	The offices of county planning commissioner and school board member are incompatible.
58 Ops.Atty.Gen. 241 (1975)	The offices of district attorney and school board member are incompatible.
62 Ops.Atty.Gen. 615 (1979)	District superintendent may serve on State Board of Education. District superintendent is considered an employee not an officer, therefore, no incompatibility of offices.
63 Ops.Atty.Gen. 710 (1980)	Deputy district attorney may not simultaneously hold office of school district trustee in the same county.
65 Ops.Atty.Gen. 606 (1982) 73 Ops.Atty.Gen. 354 (1990) 48 Ops.Atty.Gen. 141 (1966)	The offices of city councilman and school district board member are incompatible where the city and school district have territory in common.
66 Ops.Atty.Gen. 382 (1983)	The office of city attorney and school district board member are incompatible where the city and school district have territory in common.
68 Ops.Atty.Gen. 171 (1985) 79 Ops.Atty.Gen. 204 (1996)	The same individual cannot serve simultaneously as a trustee of a high school district and an elementary school district which lies within the high school district.
73 Ops.Atty.Gen. 183 (1990) 75 Ops.Atty.Gen. 112 (1992)	The offices of school board member and community services district board member are incompatible.
73 Ops.Atty.Gen. 268 (1990)	The offices of school board member and water district director are incompatible.
79 Ops.Atty.Gen. 155 (1996)	A county planning commission may not simultaneously serve as a member of the county board of education.
80 Ops.Atty.Gen. 74 (1997)	A city manager may not serve simultaneously on the school board where city and school district have territory in common. The assistant city manager is considered an employee and may serve simultaneously on the school board.
82 Ops.Atty.Gen. 83 (1999)	An individual may serve simultaneously on the school board and as the community development director of a city that lies within the school district since the position of community development director is considered an employee not an officer.

83 Ops.Atty.Gen. 50 (2000)	An individual may not serve simultaneously as a member of the governing board of a school district and a community school district if the school district and community college district have territory in common.
84 Ops.Atty.Gen. 91 (2001)	An individual may not serve simultaneously as a member of a city planning commission and as a member of the school board if the city and the school district have territory in common.
85 Ops.Atty.Gen. 60 (2002)	An individual may not serve simultaneously as a member of the governing board of a water district and as a member of the school board if the water district and the school district have territory in common.

THE RALPH M. BROWN ACT
CALIFORNIA'S OPEN MEETING LAW

PURPOSE AND SCOPE OF THE BROWN ACT

The Brown Act states that it is the intent of the law that the actions of public legislative bodies be taken openly and that their deliberations be conducted openly.[140] The Brown Act is intended to give the citizens of California access to government agencies and prohibit governmental decisions from being made in secret. As a result, the Brown Act requires that all meetings and deliberations, including discussion, debate, and the acquisition of information be conducted in public and subject to public scrutiny, except when the closed meeting exception applies.[141] The Brown Act does not apply to employees of public agencies and therefore, employees may conduct private staff meetings.[142]

In addition, under the Education Code, the governing board of a school district may only exercise its powers and must take all actions authorized or required by law at properly noticed meetings open to the public. Minutes must be taken at each meeting and all actions taken by the governing board must be recorded in the minutes and made available to the public.[143]

DEFINITION OF LEGISLATIVE BODY

The Brown Act defines a "legislative body" as the governing body of a local agency or a commission, committee, board or other body of a local agency, whether permanent or temporary, decision making or advisory, created by resolution or formal action of the legislative body. Advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body, are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter

[140] Government Code section 54950.
[141] See, San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District, 44 Cal.Rptr. 3d 128, 139 Cal.App. 4th 1356 (2006).
[142] Government Code section 54952.
[143] Education Code section 35145.

jurisdiction, or a meeting schedule fixed by resolution or formal action of a legislative body, are legislative bodies for the purposes of the Brown Act.[144]

In essence, all committees created by formal action of a legislative body, whether permanent or temporary, decisionmaking or advisory, are subject to the Brown Act, except for advisory committees composed solely of board members that are less than a quorum. If that advisory committee is composed solely of two board members of a five member board (or three board members of a seven member board) and is not a standing committee (i.e., an ad hoc committee), then the Brown Act would not apply.[145] If the ad hoc committee includes non-board members, then the committee must comply with the Brown Act. In order to be an ad hoc committee exempt from the Brown Act, in our opinion, the committee would have to be convened for a single task, be given a brief time to complete its task, and dissolve immediately upon completion of the task.

In Joiner v. City of Sebastopol,[146] the Court of Appeal held that a proposed meeting of two members of a city council and two members of a city planning commission to interview candidates for a vacancy on the planning commission was subject to the Brown Act. The court concluded that the city council took formal action to form the committee, even though a formal resolution was not adopted, and since the committee was to report back its recommendation to the full city council, the committee acted as an advisory body to the city council and was subject to the Brown Act. The court rejected the city's argument that the Brown Act did not apply because the committee was made up of less than a quorum of the city council and planning commission.

In Frazer v. Dixon Unified School District,[147] the Court of Appeal held that the adoption of a policy by the board to establish a committee appointed by the superintendent was subject to the Brown Act because it was created by formal action of the board (i.e. the board voted to adopt the policy which created the committee). The court stated:

> "We think the focus of our inquiry should be first on the authority under which the advisory committee was created. In this case, we believe the authority originates with the board and not . . . with the superintendent. The next question is whether the creation of the committee pursuant to a standing policy is sufficient to constitute 'formal action.' We believe that it is."[148]

The court further stated:

> "We believe the adoption of a formal, written policy calling for appointment of a committee to advise the superintendent, and, in turn, the board (with whom rests the final decision), whenever there is a request for reconsideration of 'controversial reading matter' is sufficiently similar to the types of 'formal action' listed

[144] Government Code section 54952.
[145] Government Code section 54952.
[146] 125 Cal.App. 3d 799 (1981).
[147] 18 Cal.App. 4th 781 (1993).
[148] Id. at 792.

> in the [the Brown Act]. Accordingly, allegations that the review and hearing committee were created pursuant to Board Policy 7138 were sufficient to bring those advisory bodies within the coverage of the Brown Act. . . ."[149]

In a 1996 opinion,[150] the Attorney General stated that under the Brown Act, a committee made up solely of less than a quorum of the members of a public water district was subject to the Brown Act since it was a standing committee with continuing subject matter jurisdiction over providing advice concerning budgets, audits, contracts and personnel matters to the entire board. The Attorney General defined a "standing committee" as a committee that is permanent, that endures or remains.[151]

In a 1997 opinion,[152] the Attorney General stated that when the governing board of a school district forms a committee consisting of seven employees and one student, to interview candidates for the office of district superintendent and make a recommendation to the board, the meetings are subject to the Brown Act, but may be held in closed session. In summary, only an ad hoc committee made up of two board members is not subject to the Brown Act. An ad hoc committee that includes non-board members would be subject to the Brown Act.[153]

Any person elected to serve as a member of the legislative body who has not yet assumed the duties of office is required to comply with the requirements of the Brown Act. The Brown Act treats such persons in the same manner as persons who have already assumed office.[154]

In Californians Aware v. Joint Labor/Management Benefits Committee,[155] the Court of Appeal held that a committee created for the purpose of furthering the collective bargaining process between the Los Angeles Community College District and its unions is exempt from the open meeting requirements of the Ralph M. Brown Act. The Court of Appeal held that the committee was formed for the purpose of furthering the collective bargaining process and was thus exempt from the Brown Act under Government Code section 3549.1(a).

The Joint Labor/Management Benefits Committee was composed of one voting and one non-voting district member, six employee members, one from each of the unions, and the chair who was to be nominated by the President of the Los Angeles College Faculty Guild and confirmed by simple majority of the regular voting members. The purpose of the committee was to review the health benefits program and make any changes to the program that it deems necessary to contain costs while maintaining the quality of the benefits available to employees.[156] Government Code section 3549.1 states that, "All the proceeding set forth in subdivision (a) to (d), inclusive, are exempt from the provisions of the…Ralph M. Brown Act…unless the parties mutually agree otherwise: (a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization."

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[149] Id. at 793.
[150] 79 Ops.Cal.Atty.Gen. 69 (1996).
[151] Id. at 71.
[152] 80 Ops.Cal.Atty.Gen. 308 (1997).
[153] Government Code section 54952.
[154] Government Code section 54952.1.
[155] 200_Cal.App.4th_973, 133 Cal.Rptr.3d 766 (2011).
[156] Id. at 975.

The Court of Appeal agreed with an earlier Attorney General Opinion that JLMBC is not required to comply with the Brown Act.[157] The Attorney General noted that health benefits are matters of employee health safety and training which falls squarely within the recognized scope of collective bargaining and the formation of the JLMBC came directly from the collective bargaining and the exclusive bargaining representative of the employer's workforce.[158]

The Court of Appeal agreed with the Attorney General that the JLMBC was created as part of, and for the purpose of furthering, the collective bargaining process under the EERA and, as such, is not subject to the provisions of the Brown Act.[159]

DEFINITION OF MEETINGS

The term "meeting" is defined in the Ralph M. Brown Act (hereinafter "Brown Act") as including any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any matter which is under its subject matter jurisdiction.[160] Under this definition, face to face gatherings of a governing board of a school district in which issues under the subject matter jurisdiction of the governing board are discussed, decided, or voted upon are subject to the Brown Act. Effective January 1, 2009, all serial communications within the subject matter jurisdiction of the board are prohibited. Government Code Section 54952.2 states:

> "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."

It is recommended that board members limit their communications, particularly e-mail communications, to a single individual (e.g., district superintendent or one other board member). Board members also are advised not to copy other board members on e-mail communications, or forward e-mails they have received from board members to other board members since this might result in a majority of the board members receiving the e-mail in violation of the Brown Act. It is permissible for an employee or official of a local agency to engage in separate conversations or communications outside of a meeting with members of the legislative body in order to answer questions or provide information, as long as 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.[161]

The Brown Act exempts conferences and similar public gatherings that involve a discussion of issues of general interest to the public, provided that a majority of the members do

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[157] See, 92 Ops.Cal.Atty.Gen. 102, 107(2009). In a 2009 opinion, the Attorney General concluded that the Los Angeles Community College District Joint Labor Management Benefits Committee is not required to comply with the Ralph M. Brown Act. The Attorney General concluded that the committee was created by collective bargaining agreement and not action of the legislative body. Therefore, it did not come within the definition of a legislative body under Government Code section 54952 and was not subject to the requirements of the Brown Act.[157]

[158] See, 92 Ops.Cal.Atty.Gen. 102, 107 (2009).

[159] 200 Cal.App.4th 973, 978-82 (2011).

[160] Government Code section 54952.2(a).

[161] Government Code section 54952.2(b)(2).

not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the governing board.[162] Also exempted are individual conversations between a board member and any other person.[163]

Board members may also attend open and publicized meetings organized to address a topic of local community concern by a person or organization other than the governing board provided that a majority of the members do not discuss among themselves, other than the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the board.[164] A majority of the board members may attend an open and noticed meeting of another local agency provided that 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 the subject matter jurisdiction of the governing board.[165] The majority of the board members may attend purely social or ceremonial functions provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the governing board.[166]

In 2011, the California Attorney General issued an opinion stating that a majority of city council members may not attend a private tour of water district facilities which provides services to the city to acquire information regarding services. The Attorney General held that under the Brown Act, a majority of the members of the city council may tour facilities outside of their boundaries if it is a public meeting of the council in which public notice is given and the agenda is posted.[167]

Members of the city council and employees of a city in Southern California were invited on a trip to tour water facilities located in Northern California and owned by the Metropolitan Water District. The tour would not be open to the public at large, but only to invited guests. Given these circumstances, the Attorney General stated, in its opinion, the Brown Act applies and if a majority of the members of the city council wish to meet outside of the city boundaries to attend a tour of the facilities of the water district, it will be determined to be a meeting and it must be open to the public.[168]

The Attorney General opined that a tour of facilities is a "meeting" under the definition of the Brown Act which defines a meeting as ". . . any congregation of the majority of the members of the legislative body at the same time and location, including teleconference location . . ., to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body."[169] The Attorney General stated that the Brown Act's

[162] Government Code section 54952.2(c)(2). In our opinion, this exception does not apply to public forums sponsored or organized by the district. Therefore, if a quorum of the board attends, it should be treated as a meeting of the governing board under the Brown Act. Also, it is unclear whether a news conference of the entire board would fall within the exception of Section 54952.2(c)(2). Although a news conference would be open to the public and the news conference involves a discussion of issues of general interest to the public and to the community college districts, it is not clear whether a news conference is the type of conference referenced in Section 54952.2(c)(2). Also, since the majority of the members of the board would be present at the news conference, it is very likely that they would discuss among themselves their views and opinions which could lead to a violation of the Brown Act.
[163] Government Code section 54952.2(c)(1).
[164] Government Code section 54952.2(c)(3).
[165] Government Code section 54952.2(c)(4).
[166] Government Code section 54952.2(c)(5).
[167] 94 Ops.Atty.Gen. 33 (2011).
[168] Id. at 33-34.
[169] Government Code section 54952.2(a).

definition of "meeting" encompasses informal, deliberative, and fact finding sessions, in addition to sessions to which formal action is taken.[170] The Attorney General stated that a "meeting" includes sessions conducted for the collective acquisition and exchange of facts preliminary to the ultimate decision.

The Attorney General gave an example in which a school board and a consortium of three real estate brokers meet to garner information about the broker's qualifications to perform future services. The Attorney General stated that this constituted a "meeting" for Brown Act purposes even though the board did not commit to retain any of the brokers.[171]

The Attorney General concluded that a majority of the members of the city council may attend a tour of the water district facilities if the tour was 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. The same requirements would apply to the community college districts, school districts and regional occupational programs. If a majority of the members of the governing board of a community college district, school district, or regional occupational program wish to tour facilities outside the district's boundaries, it must be held as a noticed and public meeting of the governing board of the district in compliance with the Brown Act.[172]

OPEN MEETING REQUIREMENTS

Under the Brown Act, all meetings of the legislative body of the local agency are required to be open and public, except for authorized closed sessions. All members of the public must be permitted to attend any meeting of the legislative body of a local agency, unless they are disruptive.[173]

All action taken by the legislative body must be taken in open session unless authorized in closed session. Action taken is defined as a collective decision made by a majority of the members to make a positive or negative decision, and may include an actual vote by a majority of the members.[174]

The Brown Act prohibits taking action by secret ballot and prohibits the legislative bodies of a local agency from restricting the broadcast of open and public meetings unless it is disruptive. Members of the public may record open public meetings.[175]

Teleconferencing (either audio or video, or both) may be used during meetings under limited circumstances. All votes taken during a teleconference must be by roll call. If the legislative body elects to use teleconferencing, the legislative body must post agendas at all teleconference locations, and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of the local agency.[176]

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[170] See, Roberts v. City of Palmdale, 5 Cal.4th 363, 375-376 (1993).
[171] Rowen v. Santa Clara Unified School District, 121, Cal.App.3d 231, 233-234 (1981).
[172] 94 Ops.Cal.Atty.Gen. 33, 37-38 (2011).
[173] Government Code section 54953.
[174] Government Code section 54952.6.
[175] Government Code section 54953.5.
[176] Government Code section 54953(b).

Each teleconference location must be identified in the notice and agenda of the meeting and each teleconference location must be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction. The agenda must provide an opportunity for members of the public to address the legislative body at each teleconference location.[177]

No legislative body shall take action by secret ballot, whether preliminary or final. The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.[178] Prior to taking final action, the legislative body shall orally report a summary of a recommendation for a final action on the salaries, salary schedules, or compensation paid in the form of fringe benefits of a local agency executive,[179] during the opening meeting in which the final action is to be taken and prior to taking that final action. This new provision does not affect the public's right under the California Public Records Act to inspect or copy records created or received and the process of developing the recommendation on the salary, salary schedules or compensation of a local agency executive.

A legislative body may not require a member of the public, as a condition to attendance at a meeting of the legislative body, to register his or her name, to provide other information, to complete a questionnaire or otherwise to fulfill any condition to his or her attendance. If an attendance list, register, questionnaire or other similar document is posted at or near the entrance to the room where the meeting is held, or is circulated to the persons present during the meeting, the attendance list, register, or questionnaire shall state clearly that the signing, registering or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers or completes the document.[180]

Any person attending an open and public meeting of the legislative body shall have the right to record the proceedings with an audio or video tape recorder. In the absence of a reasonable finding by the legislative body that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute a persistent disruption of the proceedings, the legislative body must allow the recording.[181]

Any tape or film record of an open and public meeting, made for whatever purpose, by or at the direction of the local agency, shall be subject to inspection under the California Public Records Act. Such tape or film record may be erased or destroyed thirty days after the taping or recording. Any inspection of a video or tape recording shall be provided without charge on a video or tape player made available by the local agency.[182]

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[177] Government Code section 54953(b).
[178] Government Code section 54953(c).
[179] A local agency executive is defined in Government Code section 3511.1 as including any person who is the chief executive officer, deputy chief executive officer or an assistant chief executive officer (e.g. chancellor, superintendent, deputy chancellor or superintendent, or any assistant or vice chancellor or superintendent) of a local agency, or person who has an employment contract between the local agency and that person.
[180] Government Code section 54953.3. Districts may wish to include language in their guidelines relating to public comments which states, "Completion of the information below, including name and address, is voluntary." If a person refuses to fill in their name, they may give their name orally to the secretary of the board so that they may be called on for public comments.
[181] Government Code section 54953.5(a).
[182] Government Code section 54953.5(b).

Section 54952.3[183] states that a legislative body that has convened a meeting and whose membership constitutes a quorum of any other legislative body may convene a meeting of that other legislative body, simultaneously or in serial order, only if a clerk or a member of the convened legislative body verbally announces, prior to convening any simultaneous or serial order meeting of that subsequent legislative body, the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the simultaneous or serial meeting of the subsequent legislative body. However, the clerk or member of the legislative body shall not be required to announce the amount of compensation if the amount of compensation is prescribed in statute and no additional compensation has been authorized by a local agency.

Section 54952.3(b) states that compensation and stipend shall not include amounts reimbursed for actual and necessary expenses incurred by a member in the performance of the member's official duties, including, but not limited to, reimbursement of expenses relating to travel, meals, and lodging.

TIME AND PLACE OF MEETINGS

Each legislative body of a local agency shall provide the time and place for holding regular meetings. Meetings of advisory committees or standing committees, for which an agenda is posted at least 72 hours in advance of the meeting, shall be considered regular meetings of the legislative body.[184]

Regular and special meetings of the legislative body shall be held within the boundaries of the territory over which the local agency exercises jurisdiction, except to do any of the following:

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

2. Inspect real or personal property which cannot be conveniently brought within the boundaries of the territory over which the local agency exercises jurisdiction, provided that the topic of the meeting is limited to items directly related to the real or personal property.

3. Participate in meetings or discussions of multi-agency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision shall take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies as provided for in the Brown Act.

[183] Stats. 2011, ch. 91.
[184] Government Code section 54954(a).

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

5. Meet outside their immediate jurisdiction with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.

6. Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.

7. Visit the office of the local agency's legal counsel for a closed session on pending litigation when to do so would reduce legal fees or costs.[185]

In addition, the governing boards of a school district may meet outside the territory of the school district to do any of the following:

1. Attend a conference on nonadversarial collective bargaining techniques.

2. Interview members of the public residing in another district with reference to the potential employment of an applicant for the position of the superintendent of the district.

3. Interview a potential employee from another district.[186]

Meetings of a joint powers authority shall occur within the territory of at least one of its member agencies, or as provided above. However, a joint powers authority which has members throughout the state may meet at any facility in the state which complies with the requirements of Section 54961 and is accessible to all members of the public.[187] If by reason of fire, flood, earthquake or other emergency, it is unsafe to meet in the facility designated, the meetings of the legislative body shall be held for the duration of the emergency at the place designated by the presiding officer of the legislative body or his or her designee in a notice to the local media that have requested notice by the most rapid means of communication available at the time.[188]

[185] Government Code section 54954(b).
[186] Government Code section 54954(c).
[187] Government Code section 54954(d).
[188] Government Code section 54954(e).

AGENDA REQUIREMENTS

Members of the public and the media may request that the agenda of each meeting and all documents constituting the agenda packet be mailed to them. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability as required by the Americans with Disabilities Act and its regulations.[189]

At least 72 hours before a regular meeting, an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting shall be posted.[190] The description must be sufficient to give the public notice of the items to be discussed or acted upon. For example, in Moreno v. City of King,[191] the Court of Appeal held that an agenda item that stated: "Public employee (employment contract)," was insufficient. The court stated, "The agenda's description provided no clue that the dismissal of a public employee would be discussed at the meeting."[192]

The agenda must be freely accessible to the public and posted on the agency's website, if the local agency has a website.[193] The agenda must specify the time and location of the regular meeting and must be posted in an area accessible to the public.[194] Members of the public may place matters directly related to district business on the agenda and shall be able to address the board regarding items on the agenda as the items are taken up.[195] If requested, the agenda shall be made available in appropriate alternative formats to persons with disabilities in conformance with the Americans with Disabilities Act (ADA).[196]

No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of the governing board or its staff may briefly respond to statements made or questions posed by persons expressing their public testimony rights during public comments. The board may also ask staff members to report back to the board on a matter and place the matter on the agenda at a future board meeting.[197]

Government Code section 54954.2(a)(2) states that for a meeting occurring on and after January 1, 2019, of a district that has an Internet website, the following provisions shall apply:

1. An online posting of an agenda shall be posted on the primary Internet website homepage of the district that is accessible through a prominent, direct link to the current agenda. The direct link to the agenda shall not be in a

[189] Government Code section 54954.1.
[190] Government Code section 54954.2.
[191] 127 Cal.App.4th 17, 25 Cal.Rptr.3d 29 (2005).
[192] Id. at 27.
[193] Government Code section 54954.2(a)(1).
[194] Ibid. The California Attorney General issued an opinion stating that a local agency may post its meeting agenda on a touch screen electronic kiosk accessible, without charge, to the public, 24 hours a day, seven days a week, in lieu of posting a paper copy of the agenda on a bulletin board. The Attorney General interpreted the language of Government Code section 54954.2 and concluded that the term "posted" includes making agendas available on an electronic kiosk. The Attorney General held that the term "posting" includes making use of an electronic format. 88 Cal.Atty.Gen. 218 (2005).
[195] Education Code sections 35145.5, 72121.5.
[196] Government Code section 54954.2(a)(1).
[197] Government Code section 54954.2(a)(3).

contextual menu;[198] however, a link in addition to the direct link to the agenda may be accessible through a contextual menu.

2. An online posting of an agenda including, but not limited to, an agenda posted in an integrated agenda menu and platform shall be posted in an open format that meets all of the following requirements:

   A. Retrievable, downloadable, indexable, and electronically searchable by commonly used Internet search applications.

   B. Platform independent and machine readable.

   C. Available to the public free of charge without any restrictions that would impede the reuse or redistribution of the agenda.

3. A district established by the state that has an Internet website in an integrated agenda management platform shall not be required to comply with requirements of Section 1 above if all of the following are met:

   A. A direct link to the integrated agenda management platform shall be posted on the primary Internet website homepage of a district. The direct link to the integrated agenda management platform shall not be in a contextual menu. When a person clicks on the direct link to the integrated agenda management platform, the direct link shall take the person directly to an Internet website with the agendas of the legislative body of a district established by the state.

   B. The integrated agenda management platform may contain the prior agendas of a district for all meetings occurring on or after January 1, 2019.

   C. The current agenda of the district shall be the first agenda available at the top of the integrated agenda management platform.

   D. All agendas posted in the integrated agenda management platform shall comply with these requirements.

[198] Districts should consult with their Information Technology Director regarding the technical issues raised by this legislation.

4. The term "Integrated agenda management platform" means an Internet website of a district dedicated to providing the entirety of the agenda information for the district.

5. The provisions of this paragraph shall not apply to a district that was established by the legislative body of a school district or political subdivision established by the state.

Under the Brown Act,[199] the agenda must be posted 72 hours in advance but there is no requirement that the materials given to the board must be available to the public or posted 72 hours in advance. Rather, the Brown Act[200] states that other writings, when distributed to the board members in connection with a matter that will be discussed at an open board meeting, shall be made available to the public upon request without delay and at the time the distribution is made shall be available for public inspection at the district office or the office where the board meets. These writings must be made available in alternative formats consistent with the ADA upon request.[201]

No action shall be taken on any item not appearing on the posted agenda unless two-thirds of the members of the governing board (or if less than two-thirds of the members are present, then by a unanimous vote) determine that the need to take action arose after the posting of the agenda.[202]

In Cohan v. City of Thousand Oaks,[203] the Court of Appeal held that under the provisions of Government Code section 54954.2(b) there must be an urgent need to amend the agenda. The Court of Appeal held in Cohan that public opposition at a public meeting does not authorize the amendment of an agenda.[204]

Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public within the agency's jurisdiction before or during the board's consideration of the item, whether in open or closed session.[205] However, the legislative body may adopt reasonable regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.[206] The legislative body may not prohibit public criticism of the policies, procedures, programs or services of the agency or of the acts or omissions of the legislative body.[207]

The agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with disabilities, as required by the Americans with Disabilities

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[199] Government Code section 54954.2.
[200] Government Code section 54957.5.
[201] Government Code section 54954.2.
[202] Government Code section 54954.2.
[203] 30 Cal.App.4th 547, 35 Cal.Rptr.2d 782 (1994).
[204] Id. at 555-56.
[205] Government Code section 54954.3; see, also, Leventhal v. Vista Unified School District, 973 F.Supp. 951 (S.D. Cal. 1997), Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (S.D. Cal. 1996).
[206] Government Code section 54954.3(b); see, also, Chaffee v. San Francisco Public Library Commission, 134 Cal.App.4th 109, 36 Cal.Rptr.3d 1 (2005), in which the Court of Appeal held that the San Francisco Library Commission did not violate the Brown Act by reducing the public comment period for each speaker from three minutes to two minutes.
[207] Government Code section 54954.3(c).

Act in its implementing regulations.[208] If requested, the agenda shall be made available in appropriate alternative formats to persons with disabilities, as required by the Americans with Disabilities Act and its implementing regulations.[209] In addition, the agenda shall include information on how, to whom, and when a request for disability related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.[210] Documents in the agenda packet must also be made available in an appropriate alternative format upon request by a person with disabilities as required by the Americans with Disabilities Act and its implementing regulations.[211]

Special meetings may be called at any time by the presiding officer or a majority of the members of a legislative body. Twenty-four hours' notice must be given of special meetings and the legislative body of a local agency must post the agenda for a special meeting on the local agency's internet website, if the local agency has a website. Only the business on the special meeting notice may be considered at special meetings.[212]

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 Government Code section 3511.1(d). A local agency may call a special meeting to discuss the local agency's budget. Therefore, salaries, salary schedules or compensation paid in the form of fringe benefits, may only be discussed or acted upon at a regularly scheduled board meeting.[213]

In Boyle v. City of Redondo Beach,[214] the Court of Appeal held that Government Code section 54956 is the controlling section and that the City Council of the City of Redondo Beach could not amend the agenda of the special board meeting. The Court of Appeal further held that since the City Council of the City of Redondo Beach did not take any action in closed session, a citizen could not successfully maintain a lawsuit against the City of Redondo Beach under Government Code section 54960.1. The court ruled that under Section 54960.1, the purpose of the lawsuit must be to nullify or void any action taken by the City Council. However, since no action was taken by the City Council, the lawsuit must be dismissed.

In Castaic Lake Water Agency v. Newhall County Water District[215] the Court of Appeal held that the defendant Newhall County Water District did not violate the Brown Act because its notice and agenda item regarding closed session substantially complied with the Brown Act.

The underlying facts were that the Newhall County School District erroneously cited Government Code section 54956.9(c) instead of Government Code section 54956.9(d)(4) when it

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[208] Government Code section 54954.1.
[209] Government Code section 54954.2(a).
[210] Government Code section 54954.2.
[211] Government Code section 54957.5.
[212] Government Code section 54956. The requirement that no other business shall be considered at the special meeting refers to the items of business specified on the call and notice. Therefore, the agenda for the special meeting may only include the items on the call and notice and additional items of business may not be added to the agenda after the notice and call has been posted 24 hours before the special meeting. A district may have a closed session on pending litigation at a special meeting if it was included in the notice and call for the special meeting and notice was given 24 hours in advance. If the closed session was not in the notice and call for the special meeting, it cannot be added to the agenda for the special meeting.
[213] Government Code section 54956.
[214] 70 Cal.App.4th 1109 (1999).
[215] 238 Cal.App. 4th 1196 (2015).

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.[216]

The Court of Appeal held that the notice and agenda of the March 14, 2013 meeting substantially complied with the Brown Act. The Court defined "substantial compliance" as meaning the actual compliance in respect to the substance essential to every reasonable objective of the statute. The Court held that since it was clear that the Board was going to meet in closed session with its legal counsel to discuss two cases, the substance essential to every reasonable objective of the Brown Act was complied with.[217]

In Hernandez v. Town of Apple Valley,[218] the Court of Appeal held that the Town of Apple Valley violated the Brown Act and, thus, the initiative that the city council placed on the ballot is null and void.

In Hernandez, the trial court granted a motion for summary judgment in favor of plaintiff, Gabriel Hernandez. The case involved a measure passed by the electorate on November 19, 2013, in a special election that amended the general plan to allow for a 30-acre commercial development which would include a Wal-Mart Supercenter. Wal-Mart provided a gift to the Town of Apple Valley to pay for the election and the town accepted the payment by adopting a memorandum of understanding at a regular council meeting held on August 13, 2013.

Hernandez alleged that the town council violated the Brown Act for actions taken at the town's council meeting on August 13, 2013. Specifically, Hernandez argued the agenda for the town's council meeting failed to provide proper notice of the actions to be taken at the meeting (e.g. that the town council would vote to send the initiative to the voters and approving the MOU that accepted the gift from Wal-Mart to pay for the special election).

Wal-Mart was not specifically named in the initiative, but it was clear from the other ballot materials that Wal-Mart was identified. The trial court granted the motion finding that the MOU and initiative were void and invalid.

The town appealed and the Court of Appeal affirmed the trial court's decision that the Brown Act had been violated. The Court of Appeal held that the agenda was not sufficient to give the public notice of the action to be taken by the town council. The agenda only listed the Wal-Mart initiative measure. The agenda did not indicate that the town council was going to accept a gift from Wal-Mart in order to pay for a special election to pass the initiative.

The legislative body of a local agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may adjourn from time to time. If all members of the legislative body are absent from any regular or adjourn regular meeting, the clerk or secretary of the legislative body may declare the meeting adjourned.[219]

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[216] Id. at 1198.
[217] Id. at 1207.
[218] 7 Cal.App.5th 194 (2017).
[219] Government Code section 54955.

Meetings may be called in the event of an emergency. An emergency is defined as a work stoppage, crippling activity or other activity that severely impairs public health, safety, or both, as determined by a majority of the legislative members.[220]

CLOSED SESSION – PERMISSIBLE TOPICS

The governing board of a school district may meet in closed session for certain specified reasons.[221] Prior to holding any closed session, the governing board of the school district shall disclose in an open meeting the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda.[222] In the closed session, the legislative body may consider only those matters covered in its statement.[223] After the closed session, the governing board shall reconvene into open session prior to adjournment and report any action taken in closed session as required by the Brown Act.[224] The announcement required to be made in open session may be made at the location announced in the agenda in the closed session, as long as the public is allowed to be present at that location for the purpose of hearing the announcements.[225]

CLOSED SESSION – STUDENTS

Under the Education Code, the governing board may meet in closed session to consider the discipline of a student if a public hearing would divulge confidential information contained in the student's records[226] or to deliberate with respect to the expulsion of a student.[227] The governing board may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints or charges brought against a public employee unless the employee requests a public hearing.[228]

CLOSED SESSION – PERSONNEL

The Court of Appeal has ruled that the term "evaluation of performance" includes the discussion of the criteria for the evaluation, the evaluation form, the evaluation process, feedback to the employee on their job performance, and particular aspects or instances of the employee's job performance.[229]

In Duval v. Board of Trustees,[230] the Court of Appeal held that under evaluation of performance, the governing board could discuss matters relating to the job duties of the employee after appointment. The Court of Appeal held that evaluation of performance was not

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[220] Government Code section 54956.5(a).
[221] Education Code section 35146; Government Code section 54957.
[222] Government Code section 54957.7(a).
[223] Ibid.
[224] Government Code sections 54957.1, 54957.7.
[225] Government Code section 54957.7.
[226] Education Code section 35146.
[227] Education Code section 48918.
[228] Government Code section 54957. Government Code section 54957 does not authorize a discussion of an employee's resignation in closed session, but the governing board may discuss the evaluation of performance, discipline or dismissal of the employee in closed session. Nor does Section 54957 authorize a school district board to meet in closed session to discuss the discipline or dismissal of a ROP employee. The ROP is a separate public entity of which the school district is a part. See, 85 Ops.Cal.Atty.Gen. 77 (2002) (county board may not meet in closed session regarding employees of the county superintendent).
[229] Duval v. Board of Trustees, 93 Cal.App.4th 902 (2001).
[230] 93 Cal.App.4th 902 (2001).

limited to the annual or periodic comprehensive formal and structured review of job performance, but also included an informal review of the superintendent's job performance, including particular instances of job performance. The court held that evaluation of performance may properly include consideration of the criteria for such evaluation, consideration of the process for conducting an evaluation or other preliminary matters, to the extent those matters constitute an exercise of the district's discretion in evaluating a particular employee. The court ruled that preliminary considerations are an integral part of the actual evaluation of the superintendent, are properly a part of the governing board's consideration of the evaluation of performance of the superintendent and feedback to the employee is a traditional part of the formal evaluation process and fall under the "evaluation of performance" closed session exception.[231]

However, the courts have held that the governing boards of districts may not discuss the salary level of the superintendent/chancellor in closed session.[232] In San Diego Union v. City Council, the Court of Appeal held that when the discussion turns to the salary level of a particular management employee, a discussion must be held in open session. The court stated:

> "We envision the two-step process of an executive session evaluating the performance of the public employee and a properly noticed, open session for setting that particular employee's salary as a facile matter, not negatively affecting the review process."[233]

> "[E]valuating a specific employee's performance is a matter within the ambit of the 'personnel exception' . . .; however, upon the determination a particular public employee is deserving of a salary increase, various other factors must be considered such as available funds, other city funding priorities, relative compensation of similar positions within the city and in other jurisdictions, before determining the salary increase. Each of these considerations is of acute public interest."[234]

Therefore, the scope of the discussion in closed session regarding the evaluation of an employee's performance must be limited to the formal process and informal process of evaluating the employee's performance and providing the employee with feedback for improvement. Salary levels and compensation must be discussed in open session.

In Hofman Ranch v. Yuba County Local Agency Formation Commission,[235] the Court of Appeal held that a contractor assigned to perform "executive officer services" for the county Local Agency Formation Commission (LAFCO) was an officer of LAFCO and, thus, an employee within the meaning of the statute authorizing local agencies to hold closed sessions to consider an employee's appointment, employment, or performance evaluation. Therefore, LAFCO's use of a closed session to consider renewal of his contract did not violate the Brown

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[231] Id. at 909-10.
[232] San Diego Union v. City Council, 146 Cal.App.3d 947, 953, 196 Cal.Rptr. 45 (1983).
[233] Id. at 955-56.
[234] Id. at 955. See, also, Government Code section 54957(b)(4) which states, "Closed sessions . . . shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline."
[235] 172 Cal.App.4th 805, 91 Cal.Rptr.3d 458 (2009).

Act, even if the contractor provided similar services to four other county LAFCOs, and even though the contract stated that the contractor was not an officer or employee, and was not subject to LAFCO's day-to-day direction and control. The court noted that the contractor processed LAFCO related applications, prepared California Environmental Quality Act (CEQA), and LAFCO related reports and documents, reviewed projects of concern, prepared responses for LAFCO, and prepared LAFCO's budget.

A reorganization or reclassification of employees is a proper subject for closed session only if the discussion will involve the job performance of particular individuals.[236] Thus, a general discussion concerning the creation of a new position and the workload of existing positions is inappropriate for a closed session. Moreover, the "personnel exception" to the Brown Act must be construed narrowly and does not apply to discussions concerning an employee of another entity.[237]

In Santa Clara Federation of Teachers v. Governing Board,[238] the Court of Appeal held that a board's consideration of a hearing officer's decision concerning teacher layoff policy must be conducted in open session. In a 1980 Attorney General's opinion,[239] the Attorney General concluded that abstract discussions concerning the creation of a new administrative position and the workload of existing positions were inappropriate for a closed session.

The Court of Appeal has also ruled that advisory committees and boards may meet in closed session to interview applicants for a position. The court held that public consideration of applicants could potentially expose them to embarrassment and the unwanted disclosure of their interest in the position. The court noted that if it ruled otherwise, qualified applicants would be lost, the interviewing process would be inhibited, and the entire hiring procedure would be unworkable.[240]

As a condition of holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his/her right to have complaints or charges heard in open session at least 24 hours in advance and must be provided an opportunity to rebut the allegations before action is taken.[241] Government Code section 54957(b)(2) states:

> "As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of

[236] 63 Ops.Cal.Atty.Gen. 153 (1980). The Attorney General stated, "Whether the workload of existing positions would be a proper subject for executive session would depend on whether the discussions are with regard to the positions in the abstract, or whether they involve discussions of the work which is being performed by the individuals who are incumbents of such positions. In the latter case, the discussions would be a proper subject for executive sessions so long as the positions are those of employees within the meaning of Section 54957 of the Act." Id. at 153.

[237] 85 Ops.Cal.Atty.Gen. 77 (2002). The Attorney General also stated that discussion of the establishment of the new administrative positions would not be a proper subject for closed session since the positions are not yet in existence and hence have no incumbents. However, if the establishment of new positions arises in the context of a reorganization which might involve a discussion of the job performance of particular individuals, then a closed session could be held pursuant to Section 54957. 63 Cal.Ops.Atty.Gen. 153 (1980).

[238] 116 Cal.App.3d 831, 846 (1981).

[239] 63 Ops.Cal.Atty.Gen. 153 (1980).

[240] Gillespie v. San Francisco Public Library Commission, 67 Cal.App.4th 1165, 79 Cal.Rptr. 2d 649 (1998).

[241] Moreno v. City of King, 127 Cal.App.4th 17, 25 Cal.Rptr.3d 29 (2005).

> his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void."

Any disciplinary action or other action taken by the governing board in the closed session will be held to be null and void if notice is not appropriately given.[242] However, the 24-hour notice provision applies only when the board hears specific complaints and charges, not when it considers the appointment, employment, evaluation of performance, discipline or dismissal of a public employee.[243] The review of a probationary employee's evaluation and termination of the probationary employee's contract does not require the 24-hour notice.[244]

In Kolter v. Commission on Professional Competence of the Los Angeles Unified School District,[245] the Court of Appeal held that the governing board of a school district may convene in closed session to initiate the process to dismiss a permanent certificated teacher without complying with the provision of the Brown Act that requires 24-hour written notice to an employee of the right to have the matter heard in an open session. The court held that the determination to initiate a dismissal proceeding is not a "hearing" on the charges and, therefore, such notice is not required.[246]

The Court distinguished another case involving charges against a teacher who also served as a football coach in the district. In Bell v. Vista Unified School District,[247] the board heard the charges against the football coach and decided to remove him from the coaching assignment. The Court in Kolter held that the decision to initiate dismissal proceedings under Education Code section 44934 does not effectuate the employee's termination.[248]

Therefore, if a governing board is considering whether to initiate the dismissal process for a permanent certificated employee, it is not necessary to give the 24-hour notice to the teacher under Government Code section 54957. However, if the board is hearing specific complaints or charges against an employee for the purpose of imposing discipline (such as termination of a coaching assignment or termination of a classified employee), the 24-hour notice must be given.[249]

CLOSED SESSION – REAL PROPERTY NEGOTIATIONS

The governing board may meet in closed session with its negotiator prior to the purchase, sale, exchange or lease of real property to give instructions to its negotiator regarding the price

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[242] Government Code section 54957.
[243] Fischer v. Los Angeles Unified School District, 70 Cal.App. 4th 87, 82 Cal.Rptr.2d 452 (1999).
[244] Furtado v. Sierra Community College, 68 Cal.App.4th 876, 80 Cal.Rptr.2d 589 (1998).
[245] 170 Cal.App.4th 1346, 88 Cal.Rptr.3d 620 (2009).
[246] Id. at 1349.
[247] 82 Cal.App.4th 672 (2000).
[248] Id. at 1352.
[249] Id. at 1353-54.

and terms of payment for the purchase, sale, exchange or lease.[250] In 2011, the Attorney General issued an opinion[251] stating that the real property negotiations exception to the open meeting requirements of the Brown Act permits discussion in closed session of the following:

> 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.
>
> 3. Items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.[252]

The Attorney General noted that the Ralph M. Brown Act was adopted to ensure the public's right to attend the meetings of public agencies, as well as to facilitate public participation in all phases of local government decision-making and to curb misuse of the democratic process by secret legislation by public bodies.[253] The Brown Act makes an exception for real property negotiations. Government Code section 54956.8 states in part:

> "Notwithstanding any other provision of this chapter, a legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.
>
> "However, prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate." [Emphasis added.]

The Attorney General recognized that there is a need for a closed door exception for real property negotiations, noting that no purchase of real property would ever be made for less than the maximum amount a public agency would pay if the public (including the seller) could attend the session at which the maximum price was set. The Attorney General noted that the same would be true for minimum sales prices and lease terms.[254]

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[250] Government Code section 54956.8.
[251] 94 Ops.Cal.Atty.Gen. 82 (2011).
[252] Id. at 87.
[253] Government Code sections 54950-54963. See, also, Freedom Newspapers Inc. v. Orange County Employees' Retirement System, 6 Cal.4th 821, 825 (1993); Cohan v. City of Thousand Oaks, 30 Cal.App.4th 547, 555 (1994).
[254] See, Kleitman v. Superior Court, 74 Cal.App.4th 324 (1999).

The Attorney General then went on to analyze what is meant by the phrase "regarding price and terms of payment for the purchase, sale, exchange, or lease" of real property. The Attorney General concluded that the word "price" is the amount of consideration given or sought in exchange for the real property rights that are at stake. The Attorney General concluded that the phrase "terms of payment" is the form, manner, and timing upon which the agreed upon price is to be paid (e.g., all cash, installments, a seller-financed mortgage, and exchange of property). The Attorney General concluded that the phrase "terms of payment" limits the authority for closed session discussions to terms of payment and rules out discussions of any terms of the transaction as a whole. The Attorney General also stated that the legislative history of amendments to Government Code section 54956.8 support this view.[255]

Therefore, the Attorney General concluded that the real estate negotiations or real property negotiations exception to the Brown Act authorizes a local agency to discuss two topics in closed session:

1. The negotiator's authority regarding the price; and

2. The negotiator's authority regarding the terms of payment.[256]

The Attorney General stated that the Brown Act does not allow closed session discussions of issues that might affect the economic value of the transaction or to discuss such issues as the availability of easements on the subject property, the credit worthiness of the buyer or seller, or the financial condition of the local agency itself. The Attorney General noted that in Shapiro v. San Diego City Council,[257] a city council was considering a development project that included the construction of a new baseball stadium for the San Diego Padres. The city council argued that the complexity of the proposed transaction justified closed session discussion of various matters reasonably related to the ballpark deal, including land acquisition matters, design work of architects and engineers, infrastructure and parking development, capping interim expenses, environmental impact report considerations, issues of alternative sites, traffic, stadium naming rights, expert consultants, and the impact of the ballpark project on the homeless. The Court of Appeal in Shapiro rejected the city's argument that these matters could be discussed in closed session.[258]

Based on the court's decision in Shapiro, the Attorney General concluded that while the real property negotiations exception should be narrowly construed, it must still be interpreted in a manner that gives effect to the underlying purpose of the law. Among those purposes is the need to conserve scarce public resources through effective negotiation of real property transactions. Therefore, the Attorney General concluded that a closed session discussion regarding price or terms of payment must allow the public agency to consider the range of possibilities for payment that the agency might be willing to accept, including how low or how high to start the negotiations with the other party, the sequencing and strategy of offers or counteroffers, as well as various payment alternatives. Information designed to assist the agency in determining the value of the property in question, such as the sales or rental figures for

[255] 94 Ops.Cal.Atty.Gen. 82, 85-87 (2011).
[256] Id. at 86.
[257] 96 Cal.App.4th 904 (2002).
[258] Id. at 924.

comparable properties, should also be permitted, because that information is often essential to the process of arriving at a negotiating price.[259]

In conclusion, the Attorney General stated that the purpose of the real property exception to the Brown Act is to protect a local agency's bargaining position, not to keep confidential its deliberations as to the wisdom of the proposed transaction. Therefore, a local agency is permitted to discuss in closed session the amount of the 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, the form, manner, and timing of how that consideration will be paid and items that are essential to arriving at the authorized price and terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.[260]

CLOSED SESSION – LABOR NEGOTIATIONS

Further, while a general discussion about budget priorities, budget cuts and/or layoffs must be held in open session, the governing board may meet in closed session with its labor negotiator to discuss salaries, salary schedules and fringe benefits for the purpose of reviewing its position and instructing its negotiator.[261] For example, the board may meet in closed session to indicate, by consensus, to its designated representative whether it approves or disapproves of a tentative agreement. If the board approves, it may direct staff to place the matter on the agenda for discussion and approval in open session at the next meeting, or may meet in closed session at the next meeting to discuss approval of the agreement in its final form after it has been accepted and ratified by the employee organization and report that action in open session. However, the entire governing board may not meet in closed session with union representatives since Government Code section 54957.6(a) states, in part, "Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency's designated representatives…" Such meetings must be held in open session.

In addition, the Brown Act distinguishes between represented employees and unrepresented employees. With respect to represented employees, the governing board may meet in closed session with its designated representative to review the status of collective bargaining negotiations including the provisions of a tentative agreement reached at the bargaining table. The governing board may indicate, by consensus, to its designated representative whether it approves or disapproves the tentative agreement. If the board approves the terms of the tentative agreement, the board may direct staff to place the matter on the agenda for discussion and approval in open session at the next meeting or meet in closed session at the next meeting to discuss approval of the agreement in its final form after it has been accepted and ratified by the employee organization and report that action in open session.

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[259] See, also, Government Code section 6254(h), which exempts from public disclosure under the Public Records Act the contents of real estate appraisals made for or by a local agency relative to the acquisition of property until after the property has been acquired.

[260] 94 Ops.Cal.Atty.Gen. 82, 88 (2011). In our opinion, a broad discussion about the process for selling surplus real property must be held in open session.

[261] Government Code sections 3549.1, 54956.8; 54957.6. In our opinion, this exception would allow a discussion of a proposed salary decrease or change in fringe benefits in closed session.

With respect to unrepresented employees, the Brown Act requires a somewhat different process. The Brown Act states that closed session shall not include final action on the proposed compensation of one or more unrepresented employees. The board may discuss the job performance of unrepresented employees (if agendized) and discuss whether the unrepresented employees should receive a salary increase and may receive a recommendation from its designated representative as to the amount of the raise but any discussion or comments by board members as to the amount of the salary increase must take place at a public meeting with proper notice to the public.

Government Code section 3549.1 authorizes a governing board of a district and its designated representative to meet in closed session, ". . . for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives."

The Brown Act, Government Code section 54957.6, states that notwithstanding any other provision of law, a legislative body of a local agency may hold a closed session with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees. A local agency may also meet in closed session to discuss any other matter within the statutorily provided scope of representation with respect to represented employees. Prior to the closed session, the legislative body of the local agency must hold an open and public session in which it identifies its designated representative. The purpose of the closed session must be for the purpose of reviewing the local agency's position and instructing the local agency's designated representative.

The closed session may take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees. Closed sessions may include discussion of the agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. Closed session ". . . shall not include final action on the proposed compensation of one or more unrepresented employees."[262]

The Brown Act, Government Code section 54957.6(a) states in part:

> "Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation. . . .
>
> Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency's designated representatives.

[262] Government Code section 54957.6(a). [Emphasis added.]

> Closed sessions, as permitted in this section, may take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees.
>
> 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. . . ."

CLOSED SESSION – RECOMMENDED AGENDA FORMAT

For purposes of describing closed session items, the Brown Act recommends a specific agenda format which, if specifically complied with, satisfies the requirements of the Brown Act.[263] The closed session exceptions that most frequently apply to school districts are:

> **CONFERENCE WITH REAL PROPERTY NEGOTIATORS**
>
> Property: (specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation).
>
> Agency negotiator: (specify names of negotiators attending the closed session). (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator as long as the name of the agent or designee is announced at an open session held prior to the closed session).
>
> Negotiating parties: (specify name of party (not agent)).
>
> Under negotiation: (specify whether instruction to negotiator will concern price, terms of payment or both).
>
> **CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION**
>
> (Subdivision (a) of Section 54956.9).
>
> Name of case: (specify by reference to claimant's name, names of parties, case or claim numbers) or case name unspecified: (specify whether disclosure would jeopardize service of process or existing settlement negotiations).

[263] Government Code section 54954.5; see, also, Shapiro v. San Diego City Council, 96 Cal.App.4th 904 (2002).

CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

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

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

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

LIABILITY CLAIMS

Claimant: (specify name unless unspecified pursuant to Section 54961).

PUBLIC EMPLOYEE APPOINTMENT

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

PUBLIC EMPLOYMENT

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

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

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

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

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

CONFERENCE WITH LABOR NEGOTIATORS

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

Employee organization: (specify name of organization representing employee or employees in question) or unrepresented employee: (specify position title of unrepresented employee who is the subject of the negotiations) or unrepresented employee: (specify position title of unrepresented employee who is the subject of the negotiations).

CLOSED SESSION - PENDING LITIGATION

The governing board may meet in closed session with its legal counsel to confer with or receive advice from its legal counsel regarding pending litigation if discussion in open session would prejudice the position of the school district in the litigation. Litigation includes any adjudicatory proceeding, including eminent domain, before a court, administrative body, hearing officer or arbitrator. For this purpose, litigation is pending when any of the following occurs:

1. Litigation to which the agency is a party has been initiated formally;

2. The agency has decided or is meeting to decide whether to initiate litigation; or

3. In the opinion of the governing board and its legal counsel, there is a significant exposure to litigation if matters related to specific facts and circumstances are discussed in open session.[264]

Governing boards are authorized to meet in closed session to consider whether a significant exposure to litigation exists based on existing facts and circumstances.[265] These are defined as follows:

1. The governing board believes that facts creating significant exposure to litigation against the district are not yet known to potential plaintiffs and need not be disclosed.[266]

2. Facts (e.g., accident, disaster, incident, or transaction) creating significant exposure to litigation are known to potential plaintiffs.[267]

3. A claim pursuant to the Tort Claims Act or other written communication threatening litigation is received by the agency.[268]

[264] Government Code section 54956.9.
[265] Government Code section 54956.9(b)(2).
[266] Government Code section 54956.9(b)(3)(A).
[267] Government Code section 54956.9(b)(3)(B).
[268] Government Code section 54956.9(b)(3)(C).

4. A person makes a statement in an open and public meeting threatening litigation.[269]

5. A person makes a statement outside of an open and public meeting threatening litigation, and an agency official having knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting.[270]

Prior to conducting a closed session under the pending litigation exception, the governing board must state on the agenda or publicly announce the subdivision of the Brown Act, Government Code section 54956.9, which authorizes the closed session. If litigation has already been initiated, the governing board must state the title of the litigation unless to do so would jeopardize service of process or settlement negotiations.[271]

Under the pending litigation exception, a governing board or school district generally must be a party or a potential party to litigation in order to meet in closed session with its attorney. In addition, it is possible that a governing board may receive advice from its legal counsel concerning its participation in litigation as an *amicus curiae.* The purpose of the exception is to permit the governing board to receive legal advice and make litigation decisions only. The Attorney General has stated that it may not be used as a subterfuge to reach nonlitigation oriented policy decisions.[272]

The purpose of the pending litigation exception is to protect confidential attorney-client communications. Nonconfidential communications between an attorney and his or her client are not protected.[273]

It should be noted that the Brown Act does not limit the attorney-client privilege as to written communications between public sector attorneys and their clients. Written attorney-client communications are privileged and exempt from disclosure under the California Public Records Act.[274]

Settlement negotiations, however, may be conducted by the attorneys for the respective litigating bodies, and a limited closed session, pursuant to the attorney-client exception, may be held by each body to consult with its attorney about the settlement.[275]

CLOSED SESSION – PUBLIC REPORT OF ANY ACTION TAKEN

The legislative body must publicly report any action taken in closed session and the vote or abstention of every member present. Reports may be made orally or in writing. Documents approved or adopted by the governing board in closed session must be made available to the

[269] Government Code section 54956.9(b)(3)(D).
[270] Government Code section 54956.9(b)(3)(E).
[271] Government Code section 54956.9
[272] 71 Ops.Cal.Atty.Gen. 96 (1988).
[273] 62 Ops.Cal.Atty.Gen. 150 (1979).
[274] See, St. Croix v. Superior Court, 228 Cal.App.4th 434, 445, 175 Cal.Rptr.3d, 202, 210 (2014); Roberts v. City of Palmdale, 5 Cal.4th 363, 20 Cal.Rptr.2d 330 (1993).
[275] Ibid.

public upon request. Districts may keep minutes or record closed sessions, but are not required to do so.[276]

The public report of closed session shall include the approval of an agreement concluding real estate negotiations after the agreement is final. If the agency's own approval renders the agreement final, the legislative body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held. If final approval rests with the other party to the real property negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.[277]

The legislative body must publicly report approval given to the agency's legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as amicus curiae, in any form of litigation, as the result of a consultation. Approval given to legal counsel of the settlement of pending litigation shall be reported after the settlement is final. If the legislative body accepts a settlement offer signed by the opposing party, the legislative body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held. If final approval rests with some other party to the litigation or with the court, then as soon as a settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement. Dispositions reached as to claims discussed in closed session shall also be reported publicly.[278]

The legislative body shall report any action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session. Any action taken shall be reported at the public meeting during which the closed session is held and identify the title of the person.[279] If no action is taken on the proposed personnel action, no public report is required.[280] It is recommended that the minutes from the public session reference employee numbers as opposed to employee names.

The report of a dismissal or the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of the administrative remedies, if any. Approval of an agreement concluding labor negotiations with represented employees shall be reported after the agreement is final and has been accepted and ratified by the other party.[281]

Government Code section 54957.1 set forth the circumstances in which the governing board of a school district must publicly report any action taken in closed session to approve a labor agreement. Section 54957.1 states in part:

> "The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows: . . .

[276] Government Code sections 54957.1, 54957.2.
[277] Government Code section 54957.1(a).
[278] Government Code section 54957.1(a).
[279] Government Code section 54957.1(a).
[280] 89 Ops.Cal.Atty.Gen. 110 (2006).
[281] Government Code section 54957.1(a).

> (6) Approval of an agreement concluding labor negotiations with represented employees 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 shall identify the item approved and the other party or parties to the negotiation."

The legislative body shall provide to any person who has submitted a written request copies of any contracts, settlement agreements or other documents that were finally approved or adopted in closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present in requesting the information.[282]

The documents shall be made 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 substantive amendments, when any necessary retyping is complete.[283]

DISRUPTION OF PUBLIC MEETINGS

A person who disrupts a public meeting may be removed or arrested.[284] In McMahon v. Albany School District, the California Court of Appeal held that the First Amendment free speech rights of a member of the public were not violated when the individual was arrested for dumping gallons of garbage on the floor of a school room during a school board meeting. The Court of Appeal held that there was sufficient evidence to support an arrest for disturbing a public meeting and that the free speech clause of the First Amendment was not violated.[285]

At an April 1996 meeting of the school board of the Albany Unified School District, Mr. McMahon, who had previously complained about high school students leaving trash in his neighborhood, brought five 13-gallon bags of trash to a board meeting. During the public comment period, Mr. McMahon addressed the board. During his public comments, he went to the back of the room and retrieved two or three bags, gloves and a plastic tarp. Mr. McMahon opened the tarp, spread the tarp on the floor and untied the bag. The multipurpose room where the school board meeting was held was used as the school's cafeteria and student assembly room and for an after school child care program. Meals for the school and other elementary schools were cooked in the kitchen adjacent to the multipurpose room.[286]

Mr. McMahon, wearing gloves, lifted a bag and dumped its contents on the tarp despite the principal's protest, who was sitting in the front row. Some of the trash spilled on to the floor. The police were then called, the meeting was adjourned and the board left the room. The school board remained in the adjoining kitchen while Mr. McMahon continued emptying trash and speaking to the audience.[287]

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[282] Government Code section 54957.1(b).
[283] Government Code section 54957.1(c).
[284] Government Code section 54957.9.
[285] McMahon v. Albany Unified School District, 104 Cal.App.4th 1275 (2002).
[286] Id. at 1279-1280.
[287] Id. at 1281.

Mr. McMahon was still talking to the audience when the police arrived. A board member made a citizen's arrest of Mr. McMahon for willfully disturbing a public meeting since the police sergeant refused to arrest Mr. McMahon because he had not committed a felony, nor did he commit a misdemeanor in the presence of a police officer. Based on the citizen's arrest, Mr. McMahon was placed in handcuffs and taken to the police station. The board meeting resumed and Mr. McMahon was issued a citation and released. No criminal charges were filed against Mr. McMahon.[288]

Mr. McMahon then sued the district, its board members and the superintendent alleging false arrest and false imprisonment. After trial, the jury returned a verdict in favor of the school district. Mr. McMahon filed a motion for a directed verdict to overturn the jury's decision. His motion was denied and Mr. McMahon appealed to the Court of Appeal.[289]

The Court of Appeal affirmed the lower court's refusal to find in favor of Mr. McMahon. The Court of Appeal noted that Mr. McMahon was arrested for violating Penal Code section 403, which makes it a misdemeanor to willfully disturb or break up any assembly or meeting that is not unlawful in character. The California Supreme Court in a previous decision[290] upheld the constitutionality of Penal Code section 403.

The Court of Appeal noted that Mr. McMahon was allowed to exercise his First Amendment rights and to complain about the trash in his neighborhood. Mr. McMahon was allowed to illustrate his point by holding up a bag of discarded items he had collected. However, the jury concluded and the Court of Appeal agreed that the dumping of trash on the floor was another matter. Mr. McMahon had told the audience that the bags contained drug paraphernalia and bottles of alcohol. The Court of Appeals held, "It is well within the jury's province to conclude that McMahon's conduct exceeded the bounds of constitutionally protected speech and crossed the line into the tumult of license."[291]

The Court of Appeal noted that Mr. McMahon substantially impaired the conduct of the school board meeting.

The decision in McMahon should be beneficial to districts when a disruption occurs at a public meeting. While members of the public may address the governing board of a district on issues under the jurisdiction of the governing board, members of the public may not act in such a way (e.g., dumping of garbage) as to disturb or disrupt the conduct of a public meeting. Certainly, any type of conduct which is noisy, loud, disruptive, disturbing, or creates a health or safety risk to other members of the public would be considered disruptive and not protected free speech under the First Amendment. When such conduct occurs, districts should contact local law enforcement to remove or arrest the offending member of the public.

[288] Ibid.
[289] Id. at 1281-1282.
[290] In re Kay, 1 Cal.3d 930 (1970).
[291] Id. at 1286-1287.

PARTICIPATION IN PUBLIC MEETINGS

In Lacy Street Hospitality Services, Inc. v. City of Los Angeles,[292] the Court of Appeal held that the failure of members of the City Council to pay attention during an administrative hearing on a company's request in a zoning matter deprived the company of due process.

The company was seeking a modification of city ordinances relating to the regulation of adult business. After holding a public hearing, the city zoning administrator granted the modification sought by the company. Neighborhood and community members who opposed the modifications appealed the zoning administrative decision to the Los Angeles City Council which scheduled a public hearing.

The public hearing was videotaped. The tape shows that when the City Council heard the matter, only two council members were visibly paying attention. Other council members were engaged in other activities, including talking with aides, eating, reviewing paperwork, talking with each other, talking on the cell phone, and walking around the room. The videotape showed that council members engaged in similar behavior when speakers in opposition to the zoning change spoke.

The Court of Appeal stated:

> "We do not presume to tell the city council how it must conduct itself as a legislative body. Here, however, the city council was sitting in a quasi-judicial role, adjudicating the administrative appeal of constituents. A fundamental principle of due process is 'he who decides must hear.'… The inattentiveness of council members during the hearing prevented the council from satisfying that principle. . . .
>
> . . . [T]he tape shows the council cannot be said to have made a reasoned decision based upon hearing all the evidence and argument, which is the essence of sound decision making and to which [the company] was entitled as a matter of due process."[293]

The holding in Lacy Street points out that when the governing boards of districts conduct a hearing on employee discipline matters, student discipline matters, and other similar issues, the governing board is acting in a quasi-judicial role and that the decorum, demeanor and the method of conducting the hearing all contribute to the process of conducting a fair hearing and providing all parties with due process under the law.

In a 2007 Attorney General's opinion, it was determined that a school district superintendent may not prohibit a management employee of the district from attending a public school board meeting and speaking during the public comment period concerning his demotion from assistant principal to a teaching position.[294]

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[292] Lacy Street Hospitality Services, Inc. v. City of Los Angeles, 125 Cal.App.4th 526, 22 Cal.Rptr.3d 805 (2004).
[293] Id. at 530-531.
[294] 90 Ops.Cal.Atty.Gen. 47 (2007).

DISTRIBUTION OF DOCUMENTS

Agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of the legislative body of the local agency by any person in connection with a matter subject to discussion or consideration at a public meeting of the legislative body are disclosable public records under the California Public Records Act and shall be made available upon request without delay.[295] However, any writing that is exempt from public disclosure shall not be included. Writings that are public records and are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of the legislative body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats upon request by a person with a disability in conformance with the Americans with Disabilities Act.[296]

Beginning July 1, 2008, if a writing that is a public record that is related to an agenda item for 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 a majority of the board members. The writing must be made available for public inspection at a public office or location. The address of the location shall be listed on the agendas of the meetings of the district and shall be posted on the district's Internet web site in a manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.[297]

When members of a legislative body are authorized to access a writing of the body or of the agency in the administration of their duties, the local agency may not discriminate between or among any of the members of the legislative body as to which writing or portions thereof is made available or when it is made available.[298]

STATUTORY PENALTIES FOR VIOLATION OF THE BROWN ACT

Each member attending a meeting of the governing board where the public is intentionally deprived of information to which the member knows or has reason to know the public is entitled to is in violation of the Brown Act and may be charged with a criminal offense.[299] In addition, the district attorney or any interested person may bring a civil action against a school district for past violations, ongoing violations, or threatened future violations of the Brown Act and recover costs and attorney fees.[300]

Prior to any action being commenced, the District Attorney or interested person shall make a demand on the legislative body to cure or correct the action alleged to have been taken in violation of the open meeting requirements, agenda requirements, or notice requirements of the Brown Act. The written demand shall be made within 90 days from the date the action was taken, unless the action was taken in open session but in violation of Government Code section 54954.2 (agenda requirements), in which case the written demand shall be made within 30 days

[295] Government Code section 54957.5.
[296] Government Code section 54957.5(b).
[297] Government Code section 54957.5(b).
[298] Government Code section 6252.7.
[299] Government Code section 54959.
[300] Government Code sections 54960, 54960.1, 54960.5.

from the date the action was taken. Within 30 days of the receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct, or inform the demanding party in writing of its decision not to cure or correct the challenged action. A court may award court costs and reasonable attorney's fees to the plaintiff in an action if it is found that the legislative body violated the Brown Act. The court may also order the legislative body to tape record its closed sessions and preserve the tape recordings for the period deemed appropriate by the court if the court finds that the legislative body violated the closed session requirements of the Brown Act.[301]

With respect to past violations, the District Attorney or any interested person must submit a cease and desist letter by mail or fax. The cease and desist letter must be submitted to the governing board within nine months of the alleged violation and state the time during which the governing board may respond to the cease and desist letter. The governing board may respond within 30 days after receiving the cease and desist letter. Within 60 days of the governing board's response to the cease and desist letter, if there is no unconditional commitment to cease all further violations, the District Attorney or any interested party may commence an action in court. If the governing board elects to respond to the cease and desist letter with an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate the Brown Act, Government Code section 54960.2, states that the response shall be in the following form:

> 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.

[301] Government Code sections 54960, 54960.1.

Very truly yours,

_____

[Chairperson or acting chairperson of the legislative body][302]

The unconditional commitment must be approved by the governing board in open session at a regular or special meeting as a separate item of business (not on its consent agenda). If the governing board has provided an unconditional commitment to cease and desist from further violations, then an action in court shall not be commenced. If a lawsuit has been filed alleging a past violation of the Brown Act, if the court determines that the governing board has provided an unconditional commitment to cease and desist from further violations, the lawsuit shall be dismissed with prejudice (i.e., the lawsuit cannot be refilled).[303]

An unconditional commitment to cease and desist from further violations of the Brown Act shall not be construed or admissible as evidence as a violation of the Brown Act. If the governing board provides an unconditional commitment, the governing board shall not thereafter take or engage in the challenged action described in the cease and desist letter. If the governing board engages in the challenged action in the future, the violation shall constitute an independent violation of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act.[304]

The governing board may rescind an unconditional commitment by a majority vote of its membership taken in open session at a regular meeting as a separate item of business so long as it is not on its consent calendar. The agenda item shall state, "Rescission of Brown Act Commitment." The governing board must provide at least 30 days' notice prior to the regular meeting that the governing board intends to consider the rescission of the unconditional commitment and give notice to the District Attorney and each interested person. Upon rescission, the District Attorney or any interested person may file a lawsuit for violation of the Brown Act without regard to the procedural requirements for past action violations of the Brown Act.[305] A court may award court costs and reasonable attorney's fees to the plaintiff in a lawsuit when it is found that the governing board has violated the Brown Act. If the governing board has provided an unconditional commitment at any time after the 30-day period for making such a commitment, the court shall award court costs and reasonable attorney's fees to the plaintiff if the filing of the action caused the governing board to issue the unconditional commitment. The costs and fees shall be paid by the local agency, it shall not become a personal liability of any public officer or employee of the local agency.[306]

CASE LAW – VIOLATION OF THE BROWN ACT

In Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors,[307] the Court of Appeal held that absent special circumstances, a plaintiff who successfully sues a government agency for violation of the Brown Act is entitled to an award of

[302] Government Code section 54960.2.
[303] Government Code section 54960.2(c).
[304] Government Code section 54960.2(d).
[305] Government Code section 54960.2(e).
[306] Government Code section 54960.5.
[307] 112 Cal.App.4th 1313, 5 Cal.Rptr.3d 776 (2003).

attorneys' fees. In Los Angeles Times, the Court of Appeal found that the lawsuit was necessary to bring about change in the practices of the Los Angeles County Board of Supervisors. The Court of Appeal also found that the lawsuit remedied a public injury because it uncovered violations of the Brown Act on January 4, 2002 and January 8, 2002. The Court of Appeal also held that the Los Angeles Times, even though it had great resources, was entitled to an award of attorneys' fees. The Court of Appeal stated:

> "Given the strong public policy behind that act and the need to spur private enforcement through an award of attorneys' fees . . . we see no reason to distinguish between a well-funded major metropolitan newspaper and those with fewer resources. Even the well-heeled should be encouraged to enforce the Brown Act for the public's benefit with full assurance that, absent special circumstances, they, too, will recover their attorneys' fees."[308]

Thus, the courts will, in most cases, award successful plaintiffs attorneys' fees in cases involving violations of the Brown Act.

In Moreno v. City of King,[309] the Court of Appeal held that the City of King had violated the Brown Act and that it had not "cured" its violations in a subsequent meeting. The Court of Appeal held that the City had failed to give prior notice to the employee before discussing complaints or charges against the employee and the City Council's action terminating the employee was null and void. The Court of Appeal affirmed the lower court's order reinstating the employee.

In Moreno, the City terminated the finance director for the City and the finance director filed a lawsuit alleging that the City had violated the Brown Act when it allegedly terminated his contract. The finance director serves at the pleasure of the City Council.

On October 17, 2002, the City Council's agenda for a special meeting stated, "Per Government Code section 54957: Public Employee (employment contract)." The finance director was not notified that his employment would be discussed at the October 17, 2002 meeting. The minutes from the October 17, 2002 meeting stated that no reportable action was taken in closed session.

On October 23, 2002, the City Manager gave the finance director a copy of a two page memorandum that contained the details of five alleged incidents of the finance director's misconduct that led the City Manager to the decision to terminate the finance director's employment. The termination was effective at the end of the business day on October 23, 2002. The finance director was not given an opportunity to respond to the accusations in the City Manager's memo.

In December, 2002, the finance director filed a lawsuit against the City. The lawsuit alleged that the City had violated the Brown Act by failing to notify him that the City Council would be considering his employment or any complaints or charges against him and by failing to

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[308] Id. at 791.
[309] 127 Cal. App.4th 17, 25 Cal.Rptr.3d 29 (2005).

indicate in its agenda and minutes that action to terminate his employment would be considered or had been taken. On January 15, 2003, the finance director sent a letter to the City demanding that it cure or correct the action taken by the City Council on October 17, 2002 in violation of the Brown Act.

The agenda for the City Council's January 28, 2003 meeting included the following item: "Consent Agenda." "Deny Tort Claim of Roberto Moreno, Claimant v. City of King." The staff recommendation was to re-affirm its concurrence in and approval of the City Manager's termination of Roberto Moreno, the City's finance director, and denying Mr. Moreno's government tort claim. The addendum to the agenda contained a two page staff report prepared by the City Attorney.

The finance director claimed that the City had violated the Brown Act in three ways:

1. The inadequacy of the agenda of October 17, 2002, violated Sections 54954.2 and 54954.5;

2. The failure to report the action taken on Moreno's employment at the meeting of October 22, 2002, violated Section 54957.1; and

3. The failure to notify Moreno in advance of the meeting that the Council would be hearing "complaints or charges" against him violated Section 54957.

The finance director insisted that the City had not cured any of the violations at the January 28, 2003 meeting.

The City claimed that no complaints or charges had been heard by the City Council at the October 17, 2002 meeting, and that it had cured any Brown Act violations at the Council's January 28, 2003 meeting. At trial, the City Manager testified that the subject of the October 17, 2003 meeting was the prospective public employment contract with another individual to serve as interim finance director. The City Manager understood that, as a result of the approval of the hiring of the new interim finance director, he had the approval of the City Council to terminate Mr. Moreno's employment. The City Manager also testified, at another point in the trial, that the City Council approved of Roberto Moreno's termination as finance director at the October 17, 2002 meeting. The City Manager also testified that he had provided a draft of the memorandum containing the details of these five complaints about Mr. Moreno's conduct as finance director at the October 17, 2002 meeting. In response to the memorandum, the Council members discussed Mr. Moreno and the termination of his employment.

On May 14, 2003, the trial court issued a written ruling granting Mr. Moreno's petition with respect to the Brown Act violations. The court found that the City had violated Sections 54954.2, 54954.5, 54957 and 54957.1, and had not cured any of these violations. The court declared the City Council's action terminating Mr. Moreno null and void, and ordered the City to reinstate him as finance director and reserved the issues of damages, attorney's fees and costs to be decided at a later time.

The matter was appealed and the Court of Appeal affirmed the action of the trial court declaring the termination of Mr. Moreno null and void and reinstating Mr. Moreno to his position as finance director. The Court of Appeal agreed with the trial court that the City violated Section 54957 and that the trial court was correct in declaring the City's action terminating Mr. Moreno's employment null and void. The Court of Appeal also agreed with the trial court that the City failed to cure its violations of the Brown Act.

The Court of Appeal found that the City's agenda for the meeting of October 17, 2002, was deficient and it omitted the brief general description required by Section 54954.2 of the business to be transacted or discussed. The Court of Appeal found that the agenda which described the business as "Public Employee (employment contract)" did not give the public or Mr. Moreno notice that his employment was going to be discussed and that possible termination would be discussed. The Court of Appeal also held that the Council's January 28, 2003 meeting only referenced Mr. Moreno's tort claim and the only action reported after that meeting was the denial of his tort claim, and that this did not achieve a cure of the City's failure to agendize the issue of Mr. Moreno's dismissal.

The Court of Appeal also found that the Council heard complaints or charges at the October 17, 2002 meeting, against Mr. Moreno, and that under Section 54957(b)(2), Mr. Moreno was entitled to advance notice that the City would be holding a closed session on specific complaints or charges brought against him by the City Manager. The Court of Appeal held that when a public agency receives accusations of misconduct from others and considers whether to dismiss an employee based on those accusations, it must give advance notice to the employee because its actions amount to a hearing of complaints or charges.[310] Although the City Manager insisted he did not discuss the contents of the document with the accusations in it with the City Council, he admitted that the City Council responded to the document by spending a significant portion of the meeting of October 17, 2002 discussing Moreno and his potential termination.

The Court of Appeal held that the trial court could reasonably infer from this testimony that the City Council considered and discussed the City Manager's accusations against Finance Director Moreno, and that this amounted to a hearing of "complaints or charges" within the meaning of Section 54957. The Court of Appeal held that the purpose of Section 54957 is to provide an employee with the opportunity to respond to specific accusations made by another person. The Court of Appeal held when there is a failure to give an employee advance notice of the hearing on specific complaints or charges, any disciplinary or other action taken by the public agency against the employee based on specific complaints or charges in a closed session, is null and void.[311] The Court of Appeal then affirmed the trial court's order declaring the termination of Finance Director Moreno null and void and reinstated him as the City's Finance Director.

The Court of Appeal also noted that the City never reported the action taken by the City Council publicly in the minutes but since the trial court rendered relief based on Section 54957, the Court of Appeal declined to decide whether a violation of Section 54957.1 (action in closed session must be reported out) was violated.

[310] See, Bell v. Vista Unified School District, 82 Cal.App.4th 672, 683-684 (2000); Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners, 107 Cal.App.4th 860 (2003).
[311] Government Code section 54957.

In summary, if the governing boards of districts are going to discuss the possible termination of an employee based on reports from the public or other persons, they must give 24 hours advance notice to the employee under Section 54957 and give the employee an opportunity to rebut the allegations before they take action, or the action could be declared null and void by a court and the employee could be reinstated to his or her position.

DISCLOSURE OF CONFIDENTIAL INFORMATION

The Brown Act states that a person may not disclose confidential information that has been acquired by being present in closed session to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information. Confidential information is defined as a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session.[312] Violations of confidentiality may be addressed by the use of such remedies as are currently available by law, including, but not limited to:

1. Injunctive relief to prevent the disclosure of confidential information;

2. Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section;

3. Referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury.[313]

However, it is not a violation of the Brown Act to do any of the following:

1. Make a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency, or the potential illegality of an action that has been the subject of deliberation at a closed session, if that action were to be taken by a legislative body a of a local agency.

2. Express an opinion concerning the propriety or illegality of action taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

[312] Government Code section 54963.
[313] Government Code section 54963(c).

3. Disclosing information acquired by being present in a closed session under the Brown Act that is not confidential information.[314]

In addition, nothing in this provision of the Brown Act shall be construed to prohibit disclosures under the whistleblower statutes.[315]

EXEMPTIONS FROM THE BROWN ACT

The Education Code exempts meetings of councils or committees of school site advisory committees from the Brown Act.[316] Education Code section 35147(c) states that any meeting held by a specified 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 the subject matter jurisdiction of the council or committee. Under Section 35147, the following requirements apply:

1. Notice of the meeting shall be posted at the school site or other appropriate place accessible to the public at least 72 hours before the time set for the meeting. 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.

2. The council or committee may not take any action on any item or business unless that item appeared on the posted agenda or unless the council or committee member is present, by unanimous vote, find that there is a need to take immediate action and that the need for action came to the attention of the council or committee subsequent to the posting of the agenda. 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 a school or school district or that can be resolved solely by the provision of information need not be described on an agenda as items of business.

3. If a council or committee violates the procedural meeting requirements of this section, and upon demand of any person, the council or committee shall reconsider the item at its next meeting after allowing for public input on the item.

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[314] Government Code section 54963(e).
[315] Government Code section 54963(f).
[316] The councils and school site advisory committees which are exempt must be established pursuant to Education Code section 52012 (school site councils), 52065 (American Indian Advisory Committee), 52176 (Bilingual Advisory Committee), 52852 (school site councils), 54425(b) (Advisory Committee on Compensatory Education Programs), 54444.2 (Parent Advisory Committee for Migrant Education), 54724 (School Site Council for Motivation and Maintenance Programs), 62002.5 (School Site Councils and Parent Advisory Committees) or committees formed pursuant to Education Code section 11503 (committees formed under Chapter I programs) or 20 U.S.C. Section 2604 (committees formed under Chapter I programs).

Any materials provided to a school site council must be made available to any member of the public who requests the materials.[317] Special education community advisory committees are not included among the bodies exempted by the Education Code.[318] Therefore, special education community advisory committees which are formed by board action, pursuant to the local special education plan or SELPA plan, are subject to the requirements of the Brown Act, which defines a legislative body as a commission, committee, board or other body, whether permanent or temporary, decisionmaking or advisory, created by formal action of the legislative body.[319] Therefore, if the special education community advisory committee was formed by board action, it would be subject to the provisions of the Brown Act.

ROBERT'S RULES OF ORDER

The Brown Act does not require the adoption of Robert's Rules of Order. Generally, our office has recommended that school districts use Robert's Rules of Order as a guide.

Under the Brown Act, the board has the power to suspend or ignore its parliamentary rules if the rules are not required by Education Code or the Brown Act. The Education Code requires the governing boards of school districts and community college districts to act by a simple majority vote of the entire membership of the board.[320] In general, the board may suspend or repeal its own parliamentary rules, but it may not suspend or repeal any provisions imposed by law, including provisions of the Education Code and the Brown Act.[321]

TERM LIMITS FOR BOARD MEMBERS

Under California law, the governing board of a school district may adopt or the residents of the school district may propose, by initiative, a proposal to limit the number of terms a member of the governing board of the school district may serve.

Education Code section 35107(c) states that a proposal to impose term limits must be approved by the governing board of the school district or approved by the voters in an initiative. Any proposal to limit the number of terms a member of the governing board in the school district may serve on the governing board of the school district shall apply prospectively only and shall not become operative unless it is submitted to the electors of the school district at a regularly scheduled election and a majority of the votes cast on the question favor the adoption of the proposal.

Education Code section 35107(d)(1) states that an initiative measure proposed to limit the terms of governing board members must follow the procedures sent forth in Election Code section 9300 et seq. A proposal submitted to the electors by the governing board is subject to the provisions of Election Code sections 9500.

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[317] Education Code section 35147(d).
[318] Education Code section 35147.
[319] Government Code section 54952.
[320] Education Code sections 35164 and 72203.
[321] Grosjean v. Board of Education of the City and County of San Francisco, 40 Cal.App.434, 181 P.113 (1919).

BOARD MEMBER COMPENSATION

Education Code section 35120 establishes a monthly stipend for board members based on the size of the school district. The board member receives the entire stipend if the board member attends all meetings (regular and special) held that month. If the board member is absent from a meeting, the board member receives a prorated amount pursuant to section 35120(a)(8).

A board member may be excused from attendance and receive the full stipend if the board member was ill, on jury duty, or due to a hardship deemed acceptable by the board. Pursuant to section 35120(c), the board must adopt a resolution and include its findings in the minutes to authorize the full stipend.

BOARD VACANCIES

Vacancies on school district governing boards or community college district boards are caused by any of the events specified in Government Code section 1770. Government Code section 1770 states that an office becomes vacant on the happening of any of the following events before the expiration of the term:

1. The death of the incumbent.

2. An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness, or accident, and there is reasonable cause to believe that the incumbent will not be able to perform the duties of his or her office for the remainder of his or her term.

3. His or her resignation.

4. His or her removal from office.

5. His or her ceasing to be an inhabitant of the state, or local area for which the officer was chosen or appointed, or within which the duties of his or her office are required to be discharged.

6. His or her absence from the state without permission required by law beyond the period allowed by law.

7. His or her ceasing to discharge the duties of his or her office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.

8. His or her conviction of a felony or of any offense involving a violation of his or her official duties.

9. His or her refusal or neglect to file his or her required oath or bond within the time prescribed.

10. The decision of a competent tribunal declaring void his or her election or appointment.

11. The making of an order vacating his or her office or declaring the office vacant when the officer fails to furnish an additional or supplemental bond.

12. His or her commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate, or stimulant addict when the order of commitment becomes final.

13. The incumbent is excluded from office by holding another office or violating federal law.

A vacancy resulting from resignation occurs when the written resignation is filed with the county superintendent of schools having jurisdiction over the district, except where a deferred effective date is specified in the resignation, in which case the resignation shall become effective on that date. A written resignation, whether specifying a deferred effective date or otherwise, shall, upon being filed with the county superintendent of schools, be irrevocable.[322]

Whenever a vacancy occurs, or whenever a resignation has been filed with the county superintendent of schools containing a deferred effective date, the school district or community college district governing board shall, within sixty days of the vacancy or the filing of the deferred resignation, either order an election or make a provisional appointment to fill the vacancy. A governing board member may not defer the effective date of his or her resignation for more than sixty days after he or she files the resignation with the county superintendent of schools.[323]

In the event that the governing board fails to make a provisional appointment or order an election within the prescribed sixty-day period, as required by Section 5091, the county superintendent of schools shall order an election to fill the vacancy.[324] If a provisional appointment is made within the sixty-day period, the registered voters of the district may, within thirty days from the date of the appointment, petition for the conduct of a special election to fill the vacancy.[325]

A provisional appointment made pursuant to Section 5091 confers all powers and duties of a governing board member upon the appointee immediately following his or her appointment.[326] A person appointed to fill a vacancy shall hold office only until the next regularly scheduled election for district governing board members, whereupon an election shall be held to fill the vacancy for the remainder of the unexpired term. A person elected at an

[322] Education Code section 5090.
[323] Education Code section 5091(a).
[324] Education Code section 5091(a).
[325] Education Code section 5091(c)(1).
[326] Education Code section 5091(d).

election to fill the vacancy shall hold office for the remainder of the term in which the vacancy occurs or will occur.[327]

Education Code section 5091 authorizes the governing board of a school district to fill a vacancy on its board by appointment. As part of the appointment process, the governing board may establish an interview process.

Under the Brown Act, Government Code section 54953, all meetings of the legislative body of a local agency must be open and public. There are relatively few exceptions to this general rule. The closest exception that would apply to interviewing candidates for board vacancies would be Government Code section 54957, which allows closed sessions for personnel matters.[328] Section 54957 authorizes closed sessions to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. However, the term "employee" does not include any elected official, member of a legislative body, or other independent contractors other than independent contractors who function as employees.[329]

Based on the express language limiting closed sessions to appointment of employees and excluding appointment of members of the legislative body, we have advised districts in the past that all discussions regarding appointments to fill a vacancy on the governing board, including the interviews of each candidate, must be held in open session. The board may request that applicants for the vacancy not attend the interviews of other candidates, but the governing board of the school district cannot require candidates to do so.

Government Code section 1770 and Government Code section 1064. Government Code section 1770 states in part:

> "An office becomes vacant on the happening of any of the following events before the expiration of the term . . . (f) his or her absence from the state without the permission required by law beyond the period allowed by law."

The period of absence allowed for a school board member is addressed in Government Code section 1064, which states:

> "No member of the governing board of a school district or a community college district shall be absent from the state for more than 60 days, except in any of the following situations:
>
> (a) Upon business of the school district or community college district with the approval of the board.
>
> (b)(1) With the consent of the governing board of the school district or community college district for an additional period not to exceed a total absence of 90 days.

[327] Education Code section 5091(e).
[328] The other main exceptions relating to litigation (Government Code section 54956.9), real property (Government Code section 54956.8), and collective bargaining (Government Code section 54957.6) do not apply.
[329] Government Code section 54957(b)(4).

(2) In the case of illness or other urgent necessity, and upon a proper showing thereof, the time limited for absence from the state may be extended by the governing board of the school district or community college district.

(c) For federal military deployment, not to exceed an absence of a total of six months, as a member of the Armed Forces of the United States or the California National Guard. If the absence of a member of the governing board of a school district or community college district pursuant to this subdivision exceeds six months, the governing board may approve an additional six-month absence upon a showing that there is a reasonable expectation that the member will return within the second six-month period, and the governing board may appoint an interim member to serve in his or her absence. If two or more members of the governing board of a school district or community college district are absent by reason of the circumstances described in this subdivision, and those absences result in the inability to establish a quorum at a regular meeting, the governing board may immediately appoint one or more interim members as necessary to enable the governing board to conduct business and discharge its responsibilities.

(d) The term of an interim member of the governing board of a school district or community college district appointed pursuant to subdivision (c) may not extend beyond the return of the absent member, nor may it extend beyond the next regularly scheduled election for that office."

If a Board member is deployed for less than six months, there is no vacancy. If the deployment is scheduled to be longer than six months, the Board may – in its discretion – extend the length of permitted absence, but the total expected absence may be no longer than 12 months. If the Board does agree to extend the length of the absence, it may appoint an interim member to serve during the other Board member's deployment.

SWEARING IN A BOARD MEMBER

Education Code section 60 lists the persons authorized to administer and certify oaths. Among the list are the following:

1. Superintendent of Public Instruction.

2. Deputy and Assistant Superintendent of Public Instruction.

3. Secretary of the Superintendent of Public Instruction.

4. Members of the Board of Governors of the California Community Colleges.

5. The Chancellor of the California Community Colleges.

6. County Superintendents of Schools.

7. School Trustees.

8. Members of Boards of Education.

9. Secretaries and Assistant Secretaries of Boards of Education.

10. District Superintendents of Schools.

11. Assistant Superintendents of Schools.

12. Deputy Superintendents of Schools.

13. Principals of Schools.

Government Code sections 1362 and 1363 state that the oath of office may be taken before any officer authorized to administer oaths. An Attorney General Opinion states that an oath may be taken out-of-state so long as it is a place where the person administering the oath has authority to act.[330]

The board member may be sworn in by a military officer since Military and Veterans Code section 103 incorporates the Uniform Code of Military Justice. Under the Uniform Code of Military Justice,[331] Article 136, states:

"(a) The following persons on active duty or performing inactive-duty training may administer oaths for the purposes of military administration, including military justice:

(1) All judge advocates.

(2) All summary courts-martial.

(3) All adjutants, assistant adjutants, acting adjutants, and personnel adjutants.

(4) All commanding officers of the Navy, Marine Corps, and Coast Guard.

(5) All staff judge advocates and legal officers, and acting or assistant staff judge advocates and legal officers.

(6) All other persons designated by regulations of the armed

[330] See, 1 Ops.Cal.Atty.Gen. 83 (1943); 2 Ops.Cal.Atty.Gen. 140 (1943).
[331] 10 U.S.C. Section 936.

forces or by statute.

(b) The following persons on active duty or performing inactive-duty training may administer oaths necessary in the performance of their duties:

(1) The president, military judge, trial counsel, and assistant trial counsel for all general and special courts-martial.

(2) The president and the counsel for the court of any court of inquiry.

(3) All officers designated to take a deposition.

(4) All persons detailed to conduct an investigation.

(5) All recruiting officers.

(6) All other persons designated by regulations of the armed forces or by statute.

(c) The judges of the United States Court of Appeals for the Armed Forces may administer the oaths authorized by subsections (a) and (b)."

HEALTH AND WELFARE BENEFITS FOR BOARD MEMBERS

The Legislature has enacted a comprehensive statutory scheme authorizing the legislative bodies of the local agencies to provide health and welfare benefits to their officers and employees.[332] Government Code section 53205 authorizes a local agency to pay any portion of the premium, dues, or other charges for the health and welfare benefits from public funds. Government Code section 53208 authorizes members of the legislative body to participate in any plan of health and welfare benefits permitted by the Government Code.

Government Code section 53208.5 states in part:

> "(a) It is the intent of the Legislature in enacting this section, to provide a uniform limit on the health and welfare benefits for the members of the legislative bodies of all political subdivisions of the state, including charter cities and charter counties. The Legislature finds and declares that uneven, conflicting, and inconsistent health and welfare benefits for legislative bodies distort the statewide system of intergovernmental finance. The Legislature further finds and declares that the inequities caused by these problems extend beyond the boundaries of individual public agencies.

[332] See, Government Code sections 53200-53210.

> Therefore, the Legislature finds and declares that these problems are not merely municipal affairs or matters of local interest and that they are truly matters of statewide concern that require the direct attention of the state government. In providing a uniform limit on the health and welfare benefits for the legislative bodies of all political subdivisions of the state, the Legislature has provided a solution to a statewide problem that is greater than local in its effect.
>
> (b) Notwithstanding any other provision of law, the health and welfare benefits of any member of a legislative body of any city, including a charter city, county, including a charter county, city and county, special district, school district, or any other political subdivision of the state shall be no greater than that received by nonsafety employees of that public agency. In the case of agencies with different benefit structures, the benefits of members of the legislative body shall not be greater than the most generous schedule of benefits being received by any category of nonsafety employees.
>
> . . .
>
> (d) This section shall be applicable to any member of a legislative body whose first service commences on and after January 1, 1995." [Emphasis added.]

The question then becomes whether Government Code section 53208.5 was intended to apply to the employees' share of the premium, as well as the benefit structure under the plan. In a 2000 opinion, the Attorney General concluded that health and welfare benefits constitute compensation for services rendered and that a school district may not make cash payments to members of its governing board in lieu of providing them with health insurance benefits.[333] The Attorney General noted that while the Education Code governs the amount of compensation paid to school district board members, the Government Code controls whether, and to what extent, the board members may receive health insurance benefits.[334] The Attorney General stated:

> "Because of the 'notwithstanding' clause of the Government Code section 53208, a school district may provide its board members with health insurance benefits, without concern for the limitation upon compensation found in Education Code section 35120."[335]

However, the Attorney General concluded that cash payments received in lieu of health insurance benefits would not constitute "health insurance benefits" as defined in the Government Code. Therefore, the Attorney General concluded that a school district may not make cash payments to members of its governing board in lieu of providing them with health insurance

[333] See, 83 Ops. Cal.Atty.Gen. 124 (2000).
[334] Id. at 125.
[335] Id. at 127.

benefits.[336] The Attorney General further noted that violation of the compensation provisions in Education Code section 35120 or the health and welfare benefit limitations in Government Code sections 53200-53210 could subject members of the governing board to criminal prosecution depending on the circumstances, and to civil actions in which board members may incur personal liability, also depending on the circumstances.

In Martin v. City and County of San Francisco,[337] the Court of Appeal was required to review a city charter provision which required certain skilled employees to receive the same rate of pay as their counterparts in the private sector. In the private sector, workers received an hourly wage plus health benefits. The court found that the city could not deduct the cost of the workers' health benefits without diminishing their rate of pay, since the city workers were not receiving the same take home pay as their counterparts in private industry.[338] This would indicate that the courts look at the board member or employee contribution to the health plan as part of compensation. Therefore, the requirement in Government Code section 53208.5, that there be a uniform limit on the health and welfare benefits for the members of the legislative bodies that is no greater than the benefits received by nonsafety employees of that public agency, would be violated if the board members are not required to contribute toward the premium for the health and benefit plan in the same manner as employees of a school district.

FORFEITURE OF RETIREMENT BENEFITS OF PUBLIC OFFICERS

Senate Bill 39[339] added Government Code section 53244 effective October 12, 2013.

Government Code section 53244(a) states that a local public officer who is convicted by a state or federal trial court of any felony under state or federal law for conduct arising out of, or in the performance of, his or her official duties shall forfeit any contract right or other common law, constitutional, or statutory claim against a local public agency employer to retirement or pension rights or benefits, however those benefits may be characterized, including lost compensation, other than the accrued rights and benefits to which he or she may be entitled under any public retirement system in which he or she is a member.

The forfeiture shall be in addition to, and independent of, any forfeiture of public retirement system rights and benefits pursuant to Government Code section 7522.70, 7522.72, or 7522.74. Section 53244(b) defines a "local public officer" as a person, either elected or appointed, who exercised discretionary, executive authority in his or her employment. Section 53244(c) states that Section 53244 shall apply to any claim filed prior to the effective date of the act enacting this section, and still pending on that date, and any claim commenced after that date.

Government Code section 53244(d) states that upon conviction, a local public officer and the prosecuting agency shall each notify the public employer who employed the local public officer at the time of the commission of the felony within 60 days of the felony conviction. The operation of Section 53244 is not dependent upon the performance of the notification.

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[336] Id. at 128.
[337] 168 Cal.App.2d 570, 574-576, 336 P.2d 239 (1959).
[338] Id. at 578.
[339] Stats. 2013, ch. 775.

FIRST AMENDMENT RIGHTS OF BOARD MEMBERS

In Blair v. Bethel School District,[340] the Ninth Circuit Court of Appeals held that a board member's First Amendment rights were not violated when his fellow school board members voted to remove him as their vice president. Blair was removed as vice president of the board because of his criticism of the school district's superintendent, Tom Seigel.

The Ninth Circuit Court of Appeals held that the First Amendment protects Blair's critical speech as a general matter, but it does not immunize him from the political fallout of what he says. Since 2000, Blair has been a persistent critic of the district's superintendent, repeatedly impugning the superintendent's integrity and competence. Early in the superintendent's first term, Blair apparently insinuated to the board and to the state auditor that the superintendent was defrauding the school district by requesting reimbursement for his moving expenses when, in fact, the superintendent had been moved by the military. Blair is the only board member who was dissatisfied with the superintendent and since 2005, he has consistently voted against renewing the superintendent's contract.[341]

On September 25, 2007, the board voted 4-1 to extend Seigel's contract and raise his pay. Blair was the lone dissenter. The next day, he explained his dissenting vote to a newspaper reporter, who then quoted Blair as saying: "My biggest issue with the superintendent is trust…I have too many examples to say he's doing a good job."[342]

In October, 2007, the board voted to remove Blair as vice president. Blair then sued the Bethel School District, alleging that he was retaliated against for exercising his First Amendment rights to free speech. The district court ruled in favor of the school district, finding that the board's action did not prevent Blair from continuing to speak out, vote his conscience, and serve his constituents as a member of the board. The Court of Appeals affirmed this finding and held that the First Amendment does not shield public figures from the give and take of the political process.[343]

The Court of Appeals noted that the First Amendment forbids government officials from retaliating against individuals for speaking out.[344] To recover for such retaliation, the plaintiff must prove:

1. He engaged in constitutionally protected activity;

2. As a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from continuing to engage in the protected activity; and

3. There was a substantial causal relationship between the constitutionally protected activity and the adverse action.[345]

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[340] 608 F.3d 540, 257 Ed. Law Rep. 854 (9th Cir. 2010).
[341] Id. at 542-43.
[342] Id. at 542.
[343] Id. at 543.
[344] Hartman v. Moore, 547 U.S. 250, 256 (2006); see, also, Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986).
[345] 608 F.3d 540, 543 (9th Cir. 2010); See, Pinard v. Clatskanie School District, 467 F.3d 755, 770 (9th Cir. 2006).

The Court of Appeals held that Blair's case was not a typical First Amendment retaliation case. The record indicates that Blair's fellow board members wanted a vice president who shared their views. The court held that Blair's removal as vice president was a small deprivation of benefits and privileges. Retaliatory actions that offend the First Amendment must be of a nature that would stifle someone from exercising their right to speak out. Here, the board member was free to continue speaking out and function as a full member of the board.

The Court of Appeals noted that it is common for political bodies to have internal leadership structures and for members of those bodies to openly vote for and against one another for leadership positions. It is expected that political officials will cast votes in internal elections in a manner that is consistent with their views and vote against candidates whose views differ from their own. The Court of Appeals noted that Blair's constituents could refuse to support his reelection due to his outspoken opposition to the district superintendent. Therefore, the board members could also exercise their First Amendment rights to oppose Blair. The Court of Appeals noted that all of the board members have a protected interest in speaking out and voting their conscience on the important issues they confront. Other courts had recognized that members of public bodies have a constitutionally protected right to speak out.[346]

In Phelan v. Laramie County Community College Board,[347] the Tenth Circuit Court of Appeals held that a community college board had the authority to censure one of its members for violating an ethics policy by placing a newspaper ad encouraging the public to vote against a pending measure. The Court of Appeals held that in censuring the board member, the other board members sought only to voice their opinion that she violated the ethics policy and to ask that she not engage in similar conduct in the future.

The Court of Appeals noted that disagreement is endemic to politics and naturally plays out in how votes are cast. The Court of Appeals stated, "While the impetus to remove Blair as Bethel School Board vice president undoubtedly stemmed from his contrarian advocacy against Seigel, the Board's action did not amount to retaliation in violation of the First Amendment."[348]

The decision in Blair is consistent with decisions in other circuits that it is not a violation of the First Amendment rights of board members to censure a board member or remove a board member from an internal office position. However, if a board were to retaliate against a board member in a manner that would chill a board member's ability to engage in free speech, a violation of the First Amendment could be found. Districts should consult with legal counsel when similar situations arise.

[346] Ibid. Stella v. Kelly, 63 F.3d 71, 75 (1st Cir. 1995). See, also, Zilich v. Longo, 34 F.3d 359, 361 (6th Cir. 1994); Phelan v. Laramie County Community College Board, 235 F.3d 1243, 1245-46 (10th Cir. 2000).
[347] 235 F.3d 1243, 1245-46 (10th Cir. 2000).
[348] Id. at 546.

GOVERNMENT SPEECH

A. Introduction

Freedom of speech is one of our most cherished freedoms. We usually think of freedom of speech in terms of individual rights and the limits the Constitution places on the government's ability to restrict the free speech rights of individuals.

The First Amendment states, "Congress shall make no law…abridging the freedom of speech."[349] In Texas v. Johnson, the United States Supreme Court declared, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[350]

We rarely consider the rights of government to speak out on its own behalf. Relatively few articles have been written on the subject and only recently have the courts begun to address this issue.[351]

Beginning in 1991, the Supreme Court began laying the groundwork for what has evolved into the government speech doctrine.[352] What began as challenges to the federal government's authority to express its point of view on policy issues has evolved into a broad government speech doctrine that authorizes federal, state and local governmental agencies, including school districts, to express the views of the governing body of the agency even when members of the public may object.[353]

This article will explore the holdings of the appellate courts that have extended the government speech doctrine to school districts and public schools as well as the Supreme Court decisions.

B. Supreme Court Decisions

In Rust v. Sullivan,[354] the United States Supreme Court upheld federal regulations which limited the ability of recipients of federal funds from engaging in abortion-related activities. In doing so, the Supreme Court held that the government was exercising the authority it possesses

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[349] U.S. Constitution, Amendment 1.

[350] 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed. 2d 342 (1989).

[351] Martha McCarthy, *When Government Expression Collides with the Establishment Clause*, 10 BYU EDU. and L.J. 113 (2010); Nelda H. Cambron-McCabe, *When Government Speaks: An Examination of the Evolving Government Speech Doctrine*, 274 Ed.Law Rep. 753 (2012); Smolla and Nimmer on Freedom of Speech, s 3:12, *Relaxing the Prohibition on Viewpoint Discrimination when the Government is the Speaker* (2012); Smolla and Nimmer, s 8:1.50, *The Interplay of Government Speech and Public Forum Doctrines* (2012).

[352] Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed. 2d 233 (1991).

[353] As the cases in this article clearly show, the emerging doctrine of government speech applies to local government agencies, including school districts, as well as state governments. While the emerging government speech doctrine clearly states that the First Amendment does not regulate government speech (Pleasant Grove City, UT v. Summum, 555 U.S. 460, 466, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009)), state government may, however, arguably restrict the free speech rights of local government agencies. In Ysura v. Pocatello Education Association, 555 U.S. 353, 362, 129 S.Ct. 1093, 1100 (2009), the Supreme Court upheld an Idaho law banning public employees' payroll deductions for political activities. The Supreme Court held that states are sovereign entities under the Constitution, but local government agencies are not. Local government agencies are subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions and the state "…may withhold, grant or withdraw powers and privileges as it sees fit." Id. at 362, quoting from Trenton v. New Jersey, 262 U.S. 182, 187, 43 S.Ct. 534, 67 L.Ed. 937 (1923).

[354] 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed. 2d 233 (1991).

to subsidize family-planning services which will lead to conception and child birth and decline to promote or encourage abortion.[355] The court stated:

> "The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other."[356]

The Supreme Court went on to state that this was not a case of the government suppressing a dangerous idea, but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope. The court held that to hold that the government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advancing certain permissible goals and, as a result, that program necessarily discourages alternative goals would render numerous government programs constitutionally suspect.[357]

The Supreme Court reiterated its holding in Rust v. Sullivan in a later case when it stated:

> "We recognize [in Rust v. Sullivan] that when the government appropriates public funds to promote a particular policy of its own, it is entitled to say what it wishes…When the government disperses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[358]

In Johanns v. Livestock Marketing Association,[359] the Supreme Court began to define the contours of the government speech doctrine. In Johanns, the Supreme Court considered whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. The court stated that the ". . . dispositive question is whether the generic advertising at issue is the government's own speech and, therefore, is exempt from First Amendment scrutiny."[360]

The Beef Promotion and Research Act of 1985[361] established a federal policy of promoting, marketing, and consumption of beef and beef products using funds raised by an assessment on cattle sales and importation. The statute directs the Secretary of Agriculture to implement a policy promoting beef products and specifies four key terms it must contain:

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[355] Id. at 193.
[356] Ibid.
[357] Id. at 194.
[358] Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed. 2d 700 (1995).
[359] 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed. 2d 896 (2005).
[360] Id. at 553.
[361] 99 Stat. 1597; 7 U.S.C. Section 2901(b).

1. The Secretary is to appoint a Cattleman's Beef Promotion and Research Board, whose members are to be a geographically representative group of beef producers and importers, nominated by trade associations.

2. The Beef Board is to convene an Operating Committee, composed of ten Beef Board members and ten representatives named by a federation of state beef councils.

3. The Secretary is to impose a one dollar per head assessment on all sales or importation of cattle and a comparable assessment on imported beef products.

4. The assessment is to be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary.[362]

Several associations whose members collect and paid the assessment and several individuals who raise and sell cattle sued the Secretary of Agriculture on a number of constitutional and statutory grounds. After trial, the U.S. District Court ruled in favor of the plaintiffs and declared the Beef Act and its regulations were unconstitutional in violation of the First Amendment. The Court of Appeals for the Eighth Circuit affirmed, holding that compelled funding of speech may violate the First Amendment even if the speech in question is government speech.[363]

The Supreme Court reversed and noted that it first invalidated an outright compulsion of speech in West Virginia Board of Education v. Barnette[364] when it ruled that a state may not require children in public schools to recite the pledge of allegiance while saluting the American flag. In Wooley v. Maynard,[365] the Supreme Court held that the State of New Hampshire could not require its citizens to display the state's motto, "Live Free or Die," on their car license plates. The court held that it was an impermissible compulsion of expression and that obligating people to use their private property as a mobile billboard for the state's ideological message amounted to impermissible compelled expression.[366] In all of these cases, the court noted that the speech was, or was presumed to be, speech of an entity other than the government itself. The court noted that its compelled speech cases consistently respected the principle that compelled support of a private association is fundamentally different from compelled support of government.[367]

The Supreme Court went on to state that when the government sets the overall message to be communicated and approves every word that is disseminated, ". . . it is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-governmental sources in developing specific messages."[368] The court further observed that,

[362] 7 U.S.C. Sections 2901, 2903, 2904.
[363] Johanns v. Livestock Marketing Association, 544 U.S. 550, 556-557, 125 S.Ct. 2055, 161 L.Ed. 2d 896 (2005).
[364] 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).
[365] 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed. 2d 752 (1977).
[366] Id. at 715.
[367] Johanns v. Livestock Marketing Association, 544 U.S. 550, 559, 125 S.Ct. 2055, 161 L.Ed. 2d 896 (2005).
[368] Id. at 562.

"Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech."[369] The court explained that the compelled funding of government speech is subject to democratic accountability and citizens who are dissatisfied with the compelled government speech may remove the legislators who enacted the underlying programs at the next election.[370]

In Pleasant Grove City, Utah v. Summum,[371] the Supreme Court went a step further and declared, "The free speech clause restricts government regulation of private speech; it does not regulate government speech."[372]

In Pleasant Grove, the Supreme Court was faced with the question of whether the free speech clause of the First Amendment entitles a private group to insist that a municipality place their proposed permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. However, the Supreme Court reversed and held that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which the forum analysis applies. The court stated, "Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is, therefore, not subject to scrutiny under the free speech clause."[373]

The Supreme Court pointed out that it is not easy to imagine how government could function if it lacked the freedom to speak for itself and was not exempt from First Amendment scrutiny. If every citizen were to have the right to insist that no one paid with public funds expressed a point of view with which they disagreed, the debate over issues of great concern to the public would be limited to those in the private sector and the process of government as we know it would be radically transformed. Rather, the Supreme Court held that a government entity may exercise the right to express its point of view when it receives assistance from private sources for the purpose of delivering a government-controlled message.[374]

The Supreme Court noted, however, that this does not mean that there are no restrictions on government speech. The court noted that the Establishment Clause of the First Amendment limits government speech and that government speech must limit itself to the confines of the Establishment Clause.[375] The court also observed that government speech is ultimately accountable to the electorate and the political process, and if citizens object they may elect new officials to advocate different viewpoints.[376]

In Pleasant Grove, the Supreme Court ruled that when a government entity arranges for the construction of a monument, it does so because it wishes to convey a point of view. The court stated:

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[369] Id. at 562.
[370] Id. at 563.
[371] 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009).
[372] Id. at 466.
[373] Id. at 464.
[374] Id. at 468.
[375] See, Johnson v. Poway Unified School District, 658 F.3d 954, 273 Ed.Law Rep. 110 (9th Cir. 2011), in which the Court of Appeals rejected the teacher's argument that government speech must be viewpoint neutral when it ordered a teacher to remove banners with religious slogans from the classroom.
[376] 555 U.S. 460, 468-469.

> "Just as government commissioned and government financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. Because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely - and reasonably - interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land."[377]

The Supreme Court noted that government decision makers frequently select the monuments that portray what they view as appropriate for their location, taking into account the history, aesthetics, and local culture. The court concluded, "The monuments that are accepted, therefore, are meant to convey, and have the effect of conveying, a government message, and they thus constitute government speech."[378]

The Supreme Court noted that public parks can accommodate only a limited number of permanent monuments and concluded, ". . . that the city's decision to accept certain privately donated monuments while rejecting respondents' is best viewed as a form of government speech. As a result, the city's decision is not subject to the free speech clause, and the Court of Appeals erred in holding otherwise. We, therefore, reverse."[379]

C. Appellate Cases

The appellate cases discussed below apply the government speech doctrine to public schools and state and local agencies in the context of bulletin boards, tiles placed on school buildings, the selection of textbooks, the use of a school website, e-mail system, mail system or newsletter, the display of pamphlets by a state park, and the removal of a mural from a state office. In each of these cases, the court applied to government speech doctrine.

D. School Bulletin Boards

In Downs v. Los Angeles Unified School District,[380] the Ninth Circuit Court of Appeals was faced with the question of whether the First Amendment compels a public high school to share the podium with a teacher whose views are contrary to that of the school district when the school seeks to speak to its own constituents on the subject of how students should behave towards each other while in school.[381] Robert Downs was a teacher at a high school in the Los Angeles Unified School District. He filed a lawsuit against the school district alleging that the school district violated his constitutional right to freedom of speech by removing competing

[377] Id. at 470-471.
[378] Id. at 472.
[379] Id. at 481.
[380] 228 F.3d 1003, 147 Ed.Law Rep. 855 (9th Cir. 2000).
[381] Id. at 1005.

information that Downs had posted in the school in response to materials posted on the bulletin boards by the high school staff members for the purpose of recognizing Gay and Lesbian Awareness Month. The U.S. District Court granted summary judgment in favor of the school district and Downs appealed.

Downs objected to the recognition of Gay and Lesbian Awareness Month at his school and created his own bulletin board across the hall from his classroom in response to postings by the school. The postings by Downs stated that most mainline religions in America condemned homosexual behavior and he cited passages from the Bible which condemned homosexuality. Downs asserted that he had a First Amendment right to post these materials.[382]

However, the Court of Appeals held that viewpoint neutrality does not apply to the school district's actions in this case because it was a case of the government speaking for itself. The school district was responsible for the recognition of Gay and Lesbian Awareness Month and the content of the bulletin boards through the school principal's oversight.[383] As a result, the court concluded that this case involved government speech in a nonpublic forum. Therefore, the court must decide to what extent the First Amendment allows others to interfere with it.

The Court of Appeals concluded that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards, but instead is measured by practical considerations applicable to any individual's choice of how to convey its message. The court stated:

> "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist. As applied here, the First Amendment allows LAUSD to decide that Downs may not speak as its representative. This power is certainly so if his message is one with which the district disagrees."[384]

The Court of Appeals concluded that when the state is the speaker, it may make content-based choices. When the government is formulating and conveying its message, it may take legitimate and appropriate steps to ensure that its message is clearly communicated by its individual messengers.[385] The Court of Appeals further stated:

> "An arm of local government – such as a school board – may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives. . . .
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> "Were we to invoke the Constitution to protect Downs' ability to make his voice a part of the voice of the government entity he served, Downs would be able to do to the government

[382] Id. at 1006-1008.
[383] Id. at 1011-1012.
[384] Id. at 1013.
[385] Id. at 1013-1014.

> what the government could not do to Downs: Compel it to embrace a viewpoint. . . .
>
> "Indeed, not only would the government be compelled to speak, but Downs' citation to passages from the Bible might present Establishment Clause problems."[386]

The Court of Appeals concluded by stating that the school board is elected by the public and until its current members are voted out of office, they speak for the school district through the policies they adopt. The court also observed that influence from the community does not end at the ballot box but continues through public school board meetings at which parents and other interested parties may express their satisfaction or dissatisfaction with the school board's policies or speech. The Court of Appeals concluded by stating:

> "We hold that when the school district speaks through bulletin boards that are not 'free speech zones' but instead are vehicles for conveying a message from the school district, the school district may formulate that message without the constraint of viewpoint neutrality. Here, LAUSD, an arm of local government, is firmly policing the boundaries of its own message. As such, LAUSD did not violate Downs' First Amendment free speech rights. Because we determined that Downs has no First Amendment right to speak for the government, his equal protection claim based upon the deprivation of this asserted right also fails to withstand summary judgment."[387]

E. Tile Painting Project

In Fleming v. Jefferson County School District R-1,[388] the Tenth Circuit Court of Appeals was required to decide whether a school district's guidelines governing a tile painting project at Columbine High School violated the plaintiffs' constitutional rights under the Free Speech Clause of the United States Constitution. The U.S. District Court ruled in favor of the plaintiffs and issued an injunction ordering the school district to provide an opportunity for some of the plaintiffs to paint the tiles they wished to paint, but were precluded from doing so under the guidelines. The U.S. District Court ordered the school district to post plaintiffs' tiles on school building walls even if they did not comply with the guidelines.[389] The Court of Appeals reversed and upheld the guidelines.

Columbine High School was the scene of a horrific incident in which twelve students were killed on April 20, 1999. Upon the reopening of the school the following fall, school officials decided to change the appearance of the building and proposed a project in which students would create abstract art work on four by four inch tiles that would be glazed, fired, and installed above the molding throughout the halls of the school. The purpose of the project was to ensure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy. The school district issued guidelines stating that there could

[386] Id. at 1014-1015.
[387] Id. at 1016-1017.
[388] 298 F.3d 918, 167 Ed.Law Rep. 649 (10th Cir. 2002).
[389] Id. at 919.

be no reference to the attack, to the date of the attack, no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive. Tiles that did not conform to the guidelines were not to be installed in the school buildings.[390]

During the summer of 1999, the district invited members of the affected community to participate in the tile project. In addition to current and incoming students, family members of the victims, rescue workers who responded to the shooting, and health care professionals who treated the injured were invited to paint tiles. The district court found that the purpose of the tile project was to assist in community healing by allowing the community to retake the school by participating in its restoration. Hundreds of people participated in painting tiles. Teachers from the school supervised the tile-painting sessions and informed the participants of the guidelines.[391]

The plaintiffs expressed dissatisfaction with the guidelines and told school officials supervising the painting that they wished to paint the names of their children and religious symbols on their tiles. These tiles contained messages such as "Jesus Christ is Lord," "4/20/99 Jesus wept," "There is no peace says the Lord for the wicked," names of the victims killed in the shootings and crosses. The teachers supervising the painting sessions told some of the plaintiffs that they could paint the tiles as they wished but informed them that the tiles that were inconsistent with the guidelines would not be affixed to the walls but would be given to them for their personal use. Approximately 80-90 tiles that were inconsistent with the guidelines were removed, including tiles with crosses, gang graffiti, an anarchy symbol, a Jewish star, angels, the blue Columbine ribbon, a skull dripping with blood, the date 4-20, and a mural containing red colors that were disturbing to some people.[392]

The district court held that the tiles at issue constituted neither government speech nor school-sponsored speech but were private speech in a limited public forum. The district court found that the school district's guidelines prohibiting the date of the shooting was not reasonable in light of the tile project's purpose and that the prohibition on religious symbols was not viewpoint neutral. The Court of Appeals disagreed and held that it was government speech and that when the government speaks it may choose what to say and what not to say.[393]

The Court of Appeals held that to determine whether expression is government speech, it applies a four factor analysis articulated in Wells v. City and County of Denver:[394]

1. Whether the central purpose of the project is to promote the views of the government or of the private speaker.

2. Whether the government exercised editorial control over the content of the speech.

3. Whether the government was the literal speaker.

4. Whether ultimate responsibility for the project rested with the government.[395]

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[390] Id. at 920-921.
[391] Id. at 921.
[392] Id. at 921-922.
[393] Id. at 923.
[394] 257 F.3d 1132, 1144 (10th Cir. 2001).

The Court of Appeals concluded that the central purpose of the project was to promote the views of the government and that the school district had two main pedagogal concerns in mind which were to ensure that the interior of the building remained a positive learning environment and that the building not become a memorial to the tragedy. In addition, the school district wanted to avoid divisiveness and disruption from unrestrained religious debate on the walls.[396]

The Court of Appeals determined that the school district exercised editorial control over the content of the speech by setting guidelines and that these guidelines were not required to be viewpoint neutral. The court also found that the school district sought to restrict religious references because these religious references might serve as a reminder of the shooting and the school district wanted to prevent the walls from becoming the situs for religious debate which would be disruptive to the learning environment.[397] The Court of Appeals concluded by stating:

> "If the district were required to be viewpoint neutral in this matter, the district would be required to post tiles with inflammatory and divisive statements, such as 'God is hate' once it allows tiles that say 'God is love.' When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it. The district could be forced to provide an opportunity for potentially thousands of participants to repaint their tiles without any meaningful restrictions by the district, leading to a potentially disruptive atmosphere in which to try to educate the students of Columbine High School."[398]

F. Selection of Textbooks

In Chiras v. Miller,[399] the Fifth Circuit Court of Appeals held that the State of Texas' selection and use of textbooks in public school classrooms constituted government speech and that the state did not violate the First Amendment rights of a textbook author when it refused to approve the author's environmental science textbook for state funding.[400] The Court of Appeals initially stated that any discussion of the constitutionality of a state's decision to reject a textbook for its public schools must begin with the recognition that the states enjoy broad discretionary powers in the field of public education. Central among these discretionary powers is the authority to establish curriculum which accomplishes the state's educational goals.[401]

The Court of Appeals noted that designing the curriculum and selecting textbooks is a core function of the state board of education and that it is necessary for the board to exercise editorial judgment over the content of the instructional materials it selects for use in the public school classrooms, and the exercise of that discretion will necessarily reflect the viewpoint of the

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[395] Id. at 1141.
[396] Fleming v. Jefferson County School District R-1, 298 F.3d 918, 932, 167 Ed.Law Rep. 649 (10th Cir. 2002).
[397] Id. at 933.
[398] Id. at 934.
[399] 432 F.3d 606, 205 Ed.Law Rep. 32 (5th Cir. 2005).
[400] Id. at 607.
[401] Id. at 611.

board members.[402] The purpose of the board is not to establish a forum for the expression of the views of the various authors of textbooks, but to promote the state's chosen message through the board's educational policy.[403]

G. School District Website and E-Mail System

In Page v. Lexington County School District,[404] the Fourth Circuit Court of Appeals held that a school district's advocacy of the defeat of pending legislation in the South Carolina Legislature was government speech and did not create a limited public forum on its website or its e-mail system. Therefore, a resident of the school district was not entitled to access these facilities to advocate a contrary point of view.[405]

On December 14, 2004, the board of trustees of the Lexington County School District unanimously passed a resolution expressing opposition to legislation pending in the South Carolina Legislature that would authorize tax credits for private and parochial school tuition and home-schooling expenses. The school district board of trustees believed that the enactment of the legislation would erode funding for public education and would undermine the state's commitment to ensure that all South Carolina children enjoy the right to a free quality public education.[406]

Following the adoption of the resolution, the Director of School/Community Relations for the school district communicated the school district's opposition to the proposed legislation through various channels to district committees and groups, staff and students, the school community in general, and the public at large. The school district included information opposing the legislation on its website. The website also contained links to documents on other websites that opposed the legislation. The Director of School/Community Relations made the decision as to which links to include on the website.[407]

The Director also utilized the school district's e-mail system to communicate the school district's opposition to the legislation. The Director sent e-mails to the school district's government relations committee and to other school district employees. The e-mails sometimes included information written by third parties which the Director included or attached for the purpose of promoting the school district's opposition to the legislation. The decision as to which information to include was made by the Director on her own.[408]

The Director also circulated fact sheets and opinion pieces to schools in the district to convey the board's opposition to the legislation. These materials included articles by third parties opposing the legislation. The articles were generally anti-tax credit and anti-school voucher and principals of two schools included information from the articles in newsletters that were sent home to students and parents.[409]

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[402] Id. at 614-615.
[403] Id. at 615.
[404] 531 F.3d 275, 234 Ed.Law Rep. 538 (4th Cir. 2008).
[405] Id. at 277-278.
[406] Id. at 278.
[407] Id. at 278.
[408] Id. at 278-279.
[409] Id. at 279.

On March 1, 2005, Randall Page, a citizen and resident of Lexington County who supported the legislation establishing tax credits, sent a letter to the Lexington School District stating that he was disturbed by the information on the school district's website and the distribution of the information by e-mail to faculty and staff which was critical of the legislation.[410] Mr. Page requested equal access to the website and the school district's e-mail system which was denied by the school district. Mr. Page then filed a lawsuit alleging that his First Amendment rights had been violated and he sought a court order ordering the school district to comply with his request for equal access to present his viewpoint supporting the legislation on the school district's website and e-mail system.[411]

The U.S. District Court ruled in favor of the school district and Page appealed. Page argued that the government speech doctrine should not apply to speech in opposition to legislation, that the speech in this case was not government speech, and that the district court erred in finding that no forum for discussion was created.[412]

The Court of Appeals began its discussion of the legal issues raised by noting that it was well established that the government's own speech is exempt from First Amendment scrutiny. The court observed that even though government is supported by the taxes of all, its policies are not supported by all. Therefore, the government may advocate for its policies with speech that is not supported by all. The government, as a general rule, may support valid programs and policies with taxes binding on protesting parties. As a result, it is inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.[413]

The Court of Appeals ruled that whether speech is government speech depends on the government's ownership and control of the message, and the government's ownership and control of the message may be determined by the following factors:

1. The purpose of the program in which the speech occurred.

2. The editorial control exercised by the government over the message.

3. The identity of the person actually delivering the message.

4. The person bearing the ultimate responsibility for the content of the speech.[414]

The Court of Appeals noted that in this case the Lexington School District board of trustees established the message to oppose the tax-credit legislation adopting its view in a resolution urging that the legislation be defeated in the state legislature. In carrying out the board of trustees' direction, the Director of School/Community Relations employed the school district's website, its e-mail system, and its distribution channels to schools to communicate its

[410] Id. at 279.
[411] Id. at 279-280.
[412] Id. at 280.
[413] Id. at 280-281.
[414] Id. at 281.

position. The Court of Appeals rejected Page's contention that the school district maintained inadequate control over each of the channels of communication.

The Court of Appeals held that with respect to the school district's website, the inclusion of links to other websites did not cause the school district to lose control over the content. The court reasoned that the school district created the links and had the right to remove the links. The Court of Appeals stated:

> "In sum, we conclude that the school district sufficiently controlled this channel of communications so that its speech remained government speech and did not create a limited public forum by including links to other websites. The school district included every link to other websites on its own initiative, and did so only insofar as the link would buttress its own message. It thus retained sole control over its message."[415]

The Court of Appeals held that the same was true for the school district's e-mail system. Even though the school district attached information from outside sources, the choice of information was made by the school district. There was no suggestion that third parties had access to the school district's e-mail system. Therefore, the Court of Appeals concluded, "We conclude that the School District established its own message and effectively controlled the channels of communication through which it disseminated that message, as required for application of the government speech doctrine under Johanns, and therefore, that it did not create a limited public forum to which Page was entitled to access."[416]

The Court of Appeals also rejected Page's argument that the government speech doctrine should not apply when the government attempts to influence legislation. The court noted that school board members are elected and if the electorate disagrees with the manner in which the school board members have exercised their discretion, the electorate may vote them out of office at the next election.[417]

H. School Newsletter, Mailings, and Website

A similar result was reached in Sutliffe v. Epping School District.[418] In Sutliffe, a citizen's group that advocated reduced government spending filed a lawsuit alleging that the school district violated their First and Fourteenth Amendment rights when school officials advocated for approval of budgets and spending for school and town purposes through their newsletter, mailings, and other forms of communication, including the town website, while denying plaintiffs access to these same communication channels to express their opposing views.[419]

The Court of Appeals held that the government speech doctrine as applied by the U.S. Supreme Court controlled their analysis. The Court of Appeals noted that the Supreme Court has held that while the Free Speech Clause restricts government regulation of private speech, it does

[415] Id. at 285.
[416] Id. at 285.
[417] Id. at 287.
[418] 584 F.3d 314, 249 Ed.Law Rep. 715 (1st Cir. 2009).
[419] Id. at 318.

not regulate government speech. In essence, the Supreme Court has held that the government's own speech is exempt from First Amendment scrutiny.[420]

The Court of Appeals noted that the government speech doctrine may apply even when the government uses other parties to express its message or when it receives assistance from private sources for the purposes of delivering a government-controlled message. Where the government controls the message, it is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-government sources.[421]

More specifically, the Court of Appeals ruled that when the government uses its discretion to select the speech of third parties it will utilize and transmit through its communication channels, that decision constitutes an expressive act by the government that is independent of the message of the third-party speech. The Court of Appeals held that the town and school district engaged in government speech by establishing a town website and by selecting which hyperlinks to place on its website. When the town created a website to convey information about the town to its citizens and the outside world and by choosing only certain hyperlinks to place on that website, the town and school district communicated an important message about itself. Therefore, the town and school district effectively controlled the content of their message by exercising final approval authority over the selection of the hyperlinks on the website.[422]

The Court of Appeals concluded that the fact that the town and school district did not have a formal written policy in place as to which hyperlinks it would place on its website until the plaintiffs made their request was irrelevant as to whether the town's actions constituted government speech. The Court of Appeals noted that the town did have an unwritten policy of only adding links that would provide positive information about the town while refusing to add links that were contrary to that intent.[423]

The Court of Appeals rejected the plaintiff's attempt to frame the case in terms of forum analysis rather than government speech. The Court of Appeals held that the town's website was obviously not a traditional public forum.[424] The Court of Appeals noted that it is possible that there may be cases in which a government entity opens its website to private speech in such a way that its decisions on which links to allow on its website would be more aptly analyzed as government regulation of private speech, but the court held that the facts before it were clearly government speech and that the forum doctrine did not apply.[425]

I. The Display of Pamphlets

In Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources,[426] the Seventh Circuit Court of Appeals held that state park officials did not violate the free speech rights of a nonprofit organization by refusing to display its pamphlet at the state park. Illinois Beach State Park is a large state park next to Lake Michigan in northeastern Illinois. The

[420] Id. at 329, citing Pleasant Grove City v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009).
[421] Id. at 330.
[422] Id. at 330-331.
[423] Id. at 332.
[424] Id. at 333.
[425] Id. at 334-335.
[426] 584 F.3d 719 (7th Cir. 2009).

plaintiffs, a nonprofit corporation, filed a lawsuit seeking to require the state park to display its pamphlet with the state park's pamphlets in various buildings in the park. The state park had numerous display racks containing a variety of brochures and flyers selected by park officials.[427]

The Court of Appeals held that the state park had not created a traditional public forum for pamphlets. The Court of Appeals cited Pleasant Grove City v. Summum, Page v. Lexington County School District, and Sutliffe v. Epping School District as support for their ruling that the selection of pamphlets to be displayed in state park facilities was government speech and that the state park had the discretion to decide which pamphlets to display and which pamphlets not to display.[428]

J. Removal of a Mural

In Newton v. Le Page,[429] the U.S. District Court held that the removal of a mural was government speech and not subject to the Free Speech Clause's restriction on government regulation for private speech. The underlying facts were that the Governor of Maine removed a mural depicting Maine's labor history from the lobby of the Maine Department of Labor. The Director of the Maine State Museum filed legal action against the Governor seeking injunctive relief ordering the Governor to replace the mural.[430]

The district court held that the government itself has a right to speak for itself or in the case of the removal of the mural, the right not to speak. The district court cited the Supreme Court cases discussed earlier in this article and held that the mural was similar to the monuments in Pleasant Grove and that the mural and the removal of the mural was a form of government speech.[431] The district court concluded, "In sum, the overwhelming weight of authority indicates that government speech may say what it wishes regardless of viewpoint, and the plaintiffs are not likely to succeed in alleging a Free Speech Clause violation."[432]

The district court concluded that it is not the business of the federal court to decide what messages the elected leaders of the state of Maine should send about the policies of the state, to tell the current administration that it must not remove or replace a prior administration's art work, or tell a future administration which piece of state art, the new or the old, must stay or go. The court held that the messages from the state-owned works of art are government speech and Maine's political leaders, who are ultimately responsible to the electorate, are entitled to select the views they want to express.[433]

K. Summary of Case Law

As discussed above, a dynamic government speech doctrine is emerging and it can be expected to have a dramatic impact on public schools.

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[427] Id. at 721-722.
[428] Id. at 723-726.
[429] 789 F.Supp.2d 172 (D.Me. 2011).
[430] Id. at 173-174.
[431] Id. at 180-192.
[432] Id. at 192.
[433] Id. at 194.

The foundation for the government speech doctrine was laid by the Supreme Court in Rust v. Sullivan[434] when the Supreme Court stated that the federal government may selectively fund a program to encourage certain activities and exclude funding for other activities without violating the Constitution.[435] The Supreme Court then gave life to the government speech doctrine when it boldly declared that the Free Speech Clause of the First Amendment restricts government regulation of private speech, but the First Amendment does not regulate government speech.[436]

The Supreme Court's government speech doctrine has been applied in the public school context by a number of appellate courts. These decisions have given broad discretion to school districts to develop and communicate their policies and viewpoints through school bulletin boards, school websites, school e-mail systems, school newsletters, pamphlets, school textbooks, artwork, and school tile displays so that their message is neither garbled nor distorted.[437]

In Downs, the Court of Appeals held that simply because the school district chooses to speak out on a particular subject that does not give individuals the right to compel the school district to embrace a different viewpoint or to allow the individual to use school bulletin boards to express a contrary view.[438] The Court of Appeals held that the school district may formulate its message without the constraints of viewpoint neutrality and the school district may police the boundaries of its message by excluding contrary messages.[439]

The appellate courts have held that speech does not lose its character as government speech when the school district includes links on its website to information when it chooses the links or when it accepts assistance from private sources. Nor does public opposition to the school district's point of view restrict the ability of the school district to constitutionally communicate its viewpoint.[440]

It can be expected that in the future, the courts will continue to expand and define the limits of the emerging government speech doctrine. School districts that wish to communicate their viewpoint clearly and without distortion to staff, parents, and the community will find the

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[434] 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed. 2d 233 (1991).
[435] Id. at 193.
[436] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009).
[437] See, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed. 2d 700 (1995); Johanns v. Livestock Marketing Association, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed. 2d 896 (2005); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009); Downs v. Los Angeles Unified School District, 228 F.3d 1003, 147 Ed.Law Rep. 855 (9th Cir. 2000); Fleming v. Jefferson County School District R-1, 298 F.3d 918, 167 Ed.Law Rep. 649 (10th Cir. 2002); Chiras v. Miller, 432 F.3d 606, 205 Ed.Law Rep. 32 (5th Cir. 2005); Page v. Lexington County School District, 531 F.3d 275, 234 Ed.Law Rep. 538 (4th Cir. 2008); Sutliffe v. Epping School District, 584 F.3d 314, 249 Ed.Law Rep. 715 (1st Cir. 2009); Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources, 584 F.3d 719 (7th Cir. 2009); Newton v. Le Page, 789 F.Supp.2d 172 (D.Me. 2011).
[438] Downs v. Los Angeles Unified School District, 228 F.3d 1003, 1011-1017, 147 Ed.Law Rep. 855 (9th Cir. 2000).
[439] Id. at 1016-1017.
[440] See, Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed. 2d 233 (1991); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed. 2d 700 (1995); Johanns v. Livestock Marketing Association, 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed. 2d 896 (2005); Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed. 2d 853 (2009); Downs v. Los Angeles Unified School District, 228 F.3d 1003, 147 Ed.Law Rep. 855 (9th Cir. 2000); Fleming v. Jefferson County School District R-1, 298 F.3d 918, 167 Ed.Law Rep. 649 (10th Cir. 2002); Chiras v. Miller, 432 F.3d 606, 205 Ed.Law Rep. 32 (5th Cir. 2005); Page v. Lexington County School District, 531 F.3d 275, 234 Ed.Law Rep. 538 (4th Cir. 2008); Sutliffe v. Epping School District, 584 F.3d 314, 249 Ed.Law Rep. 715 (1st Cir. 2009); Illinois Dunesland Preservation Society v. Illinois Department of Natural Resources, 584 F.3d 719 (7th Cir. 2009); Newton v. Le Page, 789 F.Supp.2d 172 (D.Me. 2011).

courts sympathetic so long as school districts are mindful of the requirements of the Establishment Clause and other limitations in federal or state law.[441]

THE VOTING RIGHTS ACT OF 1965

A. Introduction

In 1965, Congress passed the Voting Rights Act[442] to implement the Fifteenth Amendment's guarantee that no citizens right to vote shall be "denied or abridged…on account of race, color, or previous condition of servitude."[443] In 1982, the Voting Rights Act was amended to allow liability based on discriminatory impact rather than requiring evidence of discriminatory intent.

Section 2 prohibits what is referred to as "minority vote dilution" (i.e., practices which would minimize or cancel out minority voting strength). Section 2(a) of the Act prohibits any electoral practice or procedure that results in a denial or abridgement of the right of any citizen to vote on account of race or color or membership in a language minority group. Section 2(b) of the Act specifies that the right to vote has been abridged or denied if based on a totality of the circumstances it is shown that the political processes are not equally open to participation by members of a racial or language minority group and its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.

B. Thornburg v. Gingles

In determining whether a violation of the Voting Rights Act has occurred, the population of those eligible to vote is considered by the courts. In Thornburg v. Gingles, the U.S. Supreme Court developed three criteria to consider when drawing district boundaries:

1. A minority group must be sufficiently large and geographically compact to constitute a majority of those eligible to vote in a district.

2. The minority group must historically vote in a manner that shows it is politically cohesive.

3. The white majority must vote as a block to defeat the minority's preferred candidate.[444]

If all three of the above criteria are met, the court must then look at the "totality of the circumstances" to determine whether the minority group has less opportunity than whites to participate in the political process and to elect representatives of their choice. Only when all three conditions are met will the court review the totality of the circumstances to determine whether a Voting Rights Act violation has occurred.

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[441] For example, some states may limit the ability of school boards to use public funds to support or oppose ballot measures. See, for example, California Education Code Section 7054.
[442] 42 U.S.C. Section 1973.
[443] U.S. Constitution, Amendment Fifteen.
[444] Thornburg v. Gingles, 478 U.S. 30 (1986).

Although the courts have considered a variety of circumstances in making this determination, one factor is frequently considered – the proportionality, or lack thereof, between the number of majority minority districts and the minority's share of the state's relevant population. For example, it would be very difficult for a minority group to win a Section 2 case if it constituted 20 percent of the population but effectively controlled 30 percent of the state's districts.[445] The court in DeGrandy found that the totality of the circumstances did not support a finding of dilution because the minority groups constitute effective voting majorities in the number of districts substantially proportional to their share in the population.[446] The court held that Section 2 does not mandate that a state create the maximum possible number of majority minority districts.[447]

C. Racially Polarized Voting

The most poignant example of racially polarized voting is illustrated by a case from Texas. In League of United Latin American Citizens v. Perry,[448] the Supreme Court held that the Texas Legislature's redistricting plan, under the totality of the circumstances, violated the Voting Rights Act's vote dilution provision.

The court noted that the most significant changes occurred to District 23 which was represented by an incumbent Republican, Henry Bonilla. Before the 2003 redistricting, the Hispanic share of the citizen voting age population was 57.5 percent and Bonilla's support among Hispanics had dropped with each successive election since 1996. Bonilla captured only 8 percent of the Hispanic vote and 51.5 percent of the overall vote in 2002. In the newly drawn district, the Hispanic share of the citizen voting age population dropped to 46 percent.[449]

The district court found that the change to District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency. In effect, Bonilla could be reelected in a district that had a majority of Hispanic voting age population, although not a majority of citizen voting age population.[450]

The Supreme Court noted that all three Gingles requirements were met and therefore the statutory standard was the totality of the circumstances. The Court noted that the polarization in District 23 was especially severe since 92 percent of Hispanics voted against Bonilla in 2002, while 88 percent of non-Hispanics voted for him.[451] The Court held that since the redistricting plan prevented the immediate success of the emergent Hispanic majority in District 23, there was a denial of opportunity.[452]

The Supreme Court held that the key test is not whether the redistricting plan's line drawing in the challenged area dilutes minority voting strength in the State of Texas, but whether redistricting plan dilutes the voting strength of the Hispanics in District 23. The Court noted that District 23 Hispanic voters were on the verge of electing their candidate of choice. Hispanic voters were becoming more politically active and were voting against the incumbent in greater

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[445] See, Johnson v. DeGrandy, 512 U.S. 997 (1994).
[446] Id. at 1024.
[447] Id. at 1017.
[448] 548 U.S. 399, 126 S.Ct. 2594 (2006).
[449] Id. at 424. The Hispanic share of the total voting age was just over 50 percent.
[450] Id. at 2613.
[451] Id. at 2615.
[452] Id. at 2615-16.

numbers. In 2002, Hispanic voters almost ousted the incumbent and when the Legislature redrew the lines they moved 100,000 Hispanics from District 23 to District 28. The Court held that even though the Legislature compensated for the change by creating a new district that had a Hispanic majority, there was still a violation of Section 2 of the Voting Rights Act.[453]

D. Preclearance of Changes in Voting Laws

In Shelby County v. Holder,[454] the United States Supreme Court held that the Voting Rights Act provision requiring preclearance of changes in voting laws by certain states and local entities was unconstitutional.

The United States Supreme Court noted that the Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act requires states to obtain federal permission before enacting any law related to voting which the court characterized as a drastic departure from basic principles of federalism. Section 4 of the Act applied that requirement only to some states which the court characterized as an equally dramatic departure from the principle that all states enjoyed equal sovereignty. The court noted that Congress determined that this remedy was needed to address entrenched racial discrimination in voting which it describes as an insidious and pervasive evil which had been perpetuated in certain parts of the country through unremitting and ingenious defiance of the Constitution.[455]

The Supreme Court noted that when it upheld Section 5 of the Voting Rights Act of 1965, exceptional conditions justified legislative measures that were not otherwise appropriate. The unprecedented nature of these measures were scheduled to expire after five years. The court noted that nearly 50 years later, they are still in effect and have become more stringent and are now scheduled to last until 2031. The court stated that the conditions originally justifying these measures no longer characterize voting in the covered jurisdictions and noted that the racial gap in voter registration and turnout was lower in the states originally covered by Section 5 than it was nationwide. The court noted that African American voter turnout has come to exceed white voter turnout in five of the six states originally covered by Section 5.[456] The court stated:

> "At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, 'the Act imposes current burdens and must be justified by current needs.'"[457]

The Supreme Court noted that Congress could have updated the coverage formula but did not do so. The court stated, "Its failure to act leaves us today with no choice but to declare Section 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."[458]

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[453] Id. at 2620-21.
[454] 133 S.Ct. 2612 (2013).
[455] See, South Carolina v. Katzenbach, 383 U.S. 301, 309, 86 S.Ct. 803 (1966).
[456] Id. at 2624-26.
[457] Id. at 2619.
[458] Id. at 2631.

The Supreme Court concluded that their decision in no way affects the permanent nationwide ban on racial discrimination in voting and indicated that Congress may draft another formula based on current conditions. The court stated:

> "Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an extraordinary departure from the traditional course of relations between the States and the Federal Government. . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[459]

CALIFORNIA VOTING RIGHTS ACT

A. Introduction

In 2002, the California Legislature passed the California Voting Rights Act.[460] In signing the legislation, Governor Gray Davis stated that the purpose of the legislation was to provide voters with a cause of action to challenge at-large elections when it can be shown that a minority's voting rights has been abridged or diluted.[461]

B. Definitions Under the California Voting Rights Act

Elections Code section 14026 defines the "at large method of election" as any one of the following methods of electing members of the governing body of a political subdivision:

1. One in which the voters of the entire jurisdiction elect the members of the governing body;

2. One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body;

3. One which combines at large elections with district based elections.

Election Code section 14026(b) defines "district based elections" as a method of electing members to the governing body of a political subdivision to which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district. Section 14026(d) defines "protected class" as a class of voters who are members of a race, color or language minority group, as defined in the federal Voting Rights Act.

Education Code section 14026(e) defines "racially polarized voting" as meaning voting in which there is a difference, as defined in case law under the federal Voting Rights Act in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the

[459] Ibid.
[460] Stats. 2002, ch. 129, Elections Code section 14025 et seq.
[461] Stats. 2002, ch. 129 (SB 976), Governor's Signing Statement.

electorate. The methodologies for estimating group voting behavior to establish racially polarized voting that have been approved by the federal courts to enforce the federal Voting Rights Act may be used for purposes of the California Voting Rights Act to prove that elections are characterized by racially polarized voting.

C. Racially Polarized Voting Under the California Voting Rights Act

Section 14027 states that an at large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of a dilution or abridgment of the rights of voters who are members of a protected class. Section 14028(a) states that a violation of Section 14027 is established if it is shown that racially polarized voting occurred in elections for members of the governing body or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and 14028(a) are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

Section 14028(b) states that the occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class, or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and Section 14028 is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and 14028. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative group-wide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

Section 14028(c) states that the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting or a violation of Section 14027 and 14028. It may be a factor in determining an appropriate remedy. Section 14028(d) states that proof of an intent on the part of the voters who are elected officials to discriminate against a protected class is not required.

Section 14028(e) states that other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and 14028.

Section 14029 states that upon a finding of a violation of Section 14027 and 14028, the court shall implement appropriate remedies, including the imposition of district based elections that are tailored to remedy the violation. Section 14030 states that in any action to enforce Section 14027 and 14028, the court shall allow the prevailing plaintiff a reasonable attorneys

fees and litigation expenses including, but not limited to, expert witness fees and expenses as part of the cost. Prevailing defendants shall not recover any costs, unless the court finds the action to be frivolous, unreasonable or without foundation.

Section 14032 states that any voter who is a member of a protected class and resides in a political subdivision where a violation of Section 14027 and 14028 is alleged may file an action pursuant to those sections in the Superior Court of the county in which the political subdivision is located.

D. Case Law Under the California Voting Rights Act

In Sanchez v. City of Modesto,[462] the plaintiffs sued the City of Modesto, alleging that because of racially polarized voting in the City, the City's at large method of electing city council members diluted the votes of Hispanic voters. The plaintiffs alleged a violation of the California Voting Rights Act. The trial court granted the City's motion for judgment on the pleadings and the plaintiffs appealed.[463]

The Court of Appeal reversed and held that the California Voting Rights Act was not unconstitutional on its face and remanded the matter back to the trial court. The Court of Appeal noted that the California Voting Rights Act is similar to the federal Voting Rights Act in that it creates liability for vote dilution. The Court of Appeal noted that at large elections in multi-member districts can minimize or cancel out the voting strength of minorities and noted that under federal law, plaintiffs must show the following:

1. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district.

2. The minority group must be able to show that it is politically cohesive.

3. The minority group must be able to demonstrate that the white majority vote sufficiently as a block to enable it to defeat the minority preferred candidate.[464]

However, the Court of Appeal noted that the federal Voting Rights Act, Section 2, does not allow states to use race in remedying vote dilution.[465] The Court of Appeal stated:

> "While state and local governments are commanded not to permit racial vote dilution that violates Section 2 of the FVRA, they are also forbidden to use race as the predominant factor in a redistricting scheme designed to avoid a violation, unless the use of race passes strict scrutiny. The court has assumed without deciding that race conscious measures undertaken to avoid

[462] 145 Cal.App. 4th 660, 51 Cal.Rptr.3d 821 (2006).
[463] Id. at 665.
[464] Id. at 668, citing Thornburg v. Gingles, 478 U.S. 30, 35, 106 S.Ct. 2752 (1986).
[465] Id. at 668, citing Shaw v. Reno, 509 U.S. 630, 641, 113 S.Ct. 2816 (1993); Bush v. Vera, 517 U.S. 952, 958-959, 116 S.Ct. 1941 (1996).

> Section 2 liability pass strict scrutiny if those measures use race no more than is reasonable necessary to achieve Section 2 compliance." [Emphasis added.][466]

As indicated above, under the California Voting Rights Act, Elections Code section 14028(a), a violation can be established if it is shown that racially polarized voting occurred in elections for the members of the governing board and elections conducted prior to the filing of an action are more probative to establish the existence of racially polarized voting in elections conducted after the filing of the action.

Conversely, in Bridges v. City of Wildomar[467] the Court of Appeal upheld the City Council's change of election procedures from by-district voting system to an at-large voting system.

The Court of Appeal upheld the trial court's decision finding the City Council's actions legal. The Court of Appeal held that the modification of the voting system does not violate Government Code sections 57378, 34448, 34871 and the modification of the voting system does not violate the California Constitution. The Court of Appeal did not discuss the California Voting Rights Act and its applicability to the circumstances involved.[468]

The Court of Appeal also held that the City Council's change from the by-district to at-large district voting system does not conflict with the California Constitution since it is revocable and the City Council in the future could go back to a by-district system.[469]

E. Attorneys' Fees

In Rey v. Madera Unified School District,[470] the Court of Appeal affirmed a lower court's decision and reduced a request for $1.7 million in attorneys' fees to $162,500. The Court of Appeal held that the Lawyers Committee for Civil Rights had billed an excessive number of hours and reduced the award to a fair and reasonable amount.

The Court of Appeal held that the trial court appropriately applied the legal criteria for awarding attorneys' fees in cases brought under the California Voting Rights Act. The Lawyers Committee for Civil Rights had filed suit against the Madera Unified School District alleging a violation of the California Voting Rights Act due to the school district's at-large voting system. The school district did not contest the lawsuit and modified its electoral system to a by-district system. The trial court found that the attorneys' fees sought by the Lawyers Committee for Civil Rights were excessive and involved a significant duplication of work and reduced the amount of the fees. In addition, the Court of Appeal held that the Madera County Board of Education, in its capacity as the County Committee on School District Organization, was not liable for attorneys' fees.

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[466] Id. at 668, citing Bush v. Vera, 517 U.S. 952, 976-979, 116 S.Ct. 1941 (1996).
[467] 238 Cal.App. 4th 859 (2015).
[468] Id. at 861-62.
[469] Id. at 869.
[470] 203 Cal.App.4th 1223, 138 Cal.Rptr.3d 192, 277 Ed. Law Rep. 381 (2012).

ADJUSTMENT OF TRUSTEE AREA BOUNDARIES

Education Code section 5019.5(a) states in part:

> "Following each decennial federal census . . . the governing board of each school district . . . in which trustee areas have been established, and in which each trustee is elected by the residents of the area he or she represents, shall adjust the boundaries of any or all of the trustee areas of the district . . ." [Emphasis added]

We interpret the language of Section 5019.5(a) as only applying to districts that elect their board members by district rather than at-large or by all of the voters of the school district. Our interpretation is supported by the California Department of Education (CDE) in their District Organization Handbook in which CDE states, "Only school districts with trustee areas, whereby governing board members residing within the trustee area are voted for only by the registered voters within that area, must comply [by rearranging trustee areas]."[471]

[471] California Department of Education, District Organization Handbook, p. 201.