

Introduction to The Brown Act

Presented by: Todd A. Goluba, Partner



**CCLC Executive
Assistants Workshop
Hyatt Regency
Valencia**


May 3, 2018

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**Atkinson, Andelson
Loya, Ruud & Romo**
A Professional Law Corporation

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**The Top 10 Most Common
Brown Act Violations and
How to Avoid Them**

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10. Not Making a “Facts and Circumstances Statement” Prior to Going Into Closed Session to Meet with Legal Counsel



Closed Sessions – Litigation Advice of Counsel

- A board may meet in closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session would prejudice the position of the district in the litigation.
 - Gov. Code, § 54956.9
- The board must either state on the agenda or publicly announce the authority for the closed session and, when known, the title of the case.
- Litigation is pending when:
 - Proceedings before a court, administrative body, hearing officer, or arbitrator have been initiated;
 - Based on existing facts and circumstances, there is a significant exposure to litigation; or
 - Deciding whether to initiate litigation.

Closed Sessions – Litigation Advice of Counsel

- Significant exposure to litigation based on "existing facts or circumstances" consists of:
 - Facts and circumstances that might result in litigation and which are not known to the potential plaintiff;
 - ✶ Facts and circumstances that might result in litigation which are known to the plaintiff and which are publicly stated on the agenda or announced;
 - Receipt of a tort claim or other writing threatening litigation, which shall be available for public inspection;
 - A statement made in a public meeting threatening litigation; or
 - A statement threatening litigation outside of a public meeting for which there is a contemporaneous record that is made available for public inspection

• Gov. Code, § 54956.9

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4

The Board Has Not Violated The Brown Act In Regard To Closed Session Communications With Its Lawyer In Which Of The Following Situations:

- A. The board packet contains an opinion of counsel on a sexual harassment investigation. No opportunity to discuss the opinion is scheduled on the agenda.
- B. The attorney meets with the board to discuss changes to its student discipline policies.
- C. The Chancellor briefs the board on discussions he has had with the attorney on an alleged Brown Act violation.
- D. The board meets with the attorney under the agenda item description, "Conference With Legal Counsel – Anticipated Litigation – One Case" to consider a complaint against the Vice-President of the college. No other description of what will be discussed is provided.

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5

Answer

- A. The board packet contains an opinion of counsel on a sexual harassment investigation. No opportunity to discuss the opinion is scheduled on the agenda.



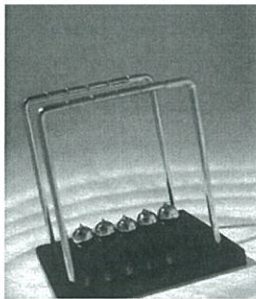
9. Subsidiary Bodies Not Complying with The Brown Act

Legislative Bodies



- The governing board of a school or community college district, ROP or JPA, etc.
 - Gov. Code, § 54952(a)
- Commissions, committees, boards, or other **subsidiary bodies** of a local agency, whether permanent or temporary, decision-making or advisory, **created by resolution or some other formal action** of a legislative body.
 - Gov. Code, § 54952(b)
- Community College Auxiliary Organizations are subject to the Brown Act Code (Ed. Code § 72670)
- Academic Senates and other shared governance structures.

Not Legislative Bodies



- **Ad Hoc Advisory** committees composed **solely** of the members of the legislative body which are less than a quorum of the legislative body.
 - Gov. Code § 54952(b)
- Except: **Standing committees** of a legislative body, irrespective of their composition, which have a **continuing subject matter jurisdiction**, or a meeting schedule fixed by resolution or other formal action of a legislative body, **are legislative bodies** for purposes of the Brown Act.

Other Legislative Bodies

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

You Must Post An Agenda For Which Of The Following Meetings:

- A. The Chancellor appoints a campus community committee to assist him/her in establishing priorities for the next academic year. NO
- B. The board appoints an advisory committee consisting of employees, students and community members to interview candidates for the position of Chancellor. YES
- C. The board meets for the sole purpose of hearing a Level 3 Grievance by an instructor. NO
- D. A board-approved advisory committee of two board members visits several built-out architectural designs for a new auditorium. NO

Answer

- B. The board appoints an advisory committee consisting of employees, students and community members to interview candidates for the position of Chancellor.



8. Failure to Report Out of Closed Session Properly

After Closed Session

- After closed session, the board must reconvene in open session (prior to adjournment) and report any action taken in closed session, including the vote or abstention of every member present.
 - Gov. Code, § 54957.1
- The reports may be made either orally or in writing.
 - Gov. Code, § 54957.1(b).
- Any documents referred to in a report of final action must be made available on the next business day following the meeting or, in the case of substantial amendments, when any necessary rewriting is complete.
 - Gov. Code, § 54957.1(c)

Reporting Out Requirements

Settlement of Litigation

Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as follows:

- A. If the legislative body accepts a settlement offer signed by the opposing party, the 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.
- B. If final approval rests with some other party to the litigation or with the court, then as soon as the 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.

Not best practice

Reporting Out Requirements

Personnel Actions

- Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

7. Allowing Discussion on Non-Agenda Items to Occur During Public Comment

Responses to Public

- The Brown Act limits board members' responses to public comments at any public meeting. Board members and staff may only:
 - Briefly respond to statements made or questions posed by persons making public comments;
 - Ask clarifying questions or make brief announcements;
 - Provide a reference to staff or other resources for factual information; and/or
 - Request staff to report back or place a matter on the agenda for a future meeting.
- Gov. Code, § 54954.2(a)

Has this Board Violated the Brown Act?

- A. At a CCLC Workshop, as part of the official program, a majority of the board speaks about the district's takeover by a State Trustee.
- B. All five board members attend a welcome reception for the new chancellor. Each one tells the chancellor about his/her biggest pet peeve.
- C. Three of five board members show up at a city council meeting. They talk about a pending student matter while waiting for the meeting to start.
- D. Three of five board members show up at a planning commission meeting and each speaks out during public comment about the need for a new college campus to be located in the community.

Answer

- C. Three of five board members show up at a city council meeting. They talk about a pending student matter while waiting for the meeting to start.



6. Not Complying with Teleconferencing Rules

Teleconferencing Requirements

- Teleconference meetings must comply with all requirements of the Act.
- All votes taken during a teleconference meeting must be by roll call.
- Agendas must be posted at each teleconference location, identify each teleconference location, and each 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 jurisdiction of the local agency.
- The agenda must provide an opportunity for members of the public to address the legislative body directly from each teleconference location.

5. Adding Items to the Regular Meeting Agenda Less than 72 Hours Without Making the Required Findings

Notice of Meetings

When a regular or special meeting is called, the local agency must post the agenda on its Internet website, if it has one. This applies to 1) a legislative body of a local agency or any other local body created by state or federal statute, or 2) a commission, committee, board, or other body of a local agency as defined in Gov. Code, § 54952(b).

- Gov. Code, § 54954.2(a)(1) and (d) and § 54956(c)

Notice of Meetings and Agendas

- A regular meeting agenda may **not** be **changed** within the 72-hours preceding the meeting, **unless**:
 - A majority determines that an emergency exists pursuant to Gov. Code, § 54956.5; or
 - Two-thirds of the board members present determine that there is a need for immediate action and the need to take action came to the district's attention after the posting of the agenda; or
 - The item was previously posted for a meeting occurring not more than five days prior and the item was continued to the next meeting.
 - Gov. Code, § 54954.2(b)
- If no exception applies, the board must either postpone consideration of the item for at least 72 hours, or call and notice a special meeting.

Notice of Meetings

- Special Meetings:
 - A special meeting may be called by either the **president or by a majority** of the board.
 - Notice of a special meeting must be **mailed or delivered** to the media **and posted** not less than **24 hours** in advance of the meeting.
 - Board may **only** consider **business specified** in the notice.
 - No requirement to schedule “general public comment” not related to agenda items.
 - Board **may meet in closed session** as part of a special meeting.
 - Gov. Code, § 54956
 - A special meeting may not be called regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Government Code section 3511.1.

The Chancellor’s Executive Assistant Has Made A Mistake When She:

- A. Posts the agenda for a regular meeting four days in advance.
- B. Posts a notice of a special meeting two days in advance which starts one hour before the regular meeting.
- C. Posts the agenda on a bulletin board in the inside reception area of the district office.
- D. The Chancellor’s Executive Assistant does not make mistakes.

Answer

- C. Posts the agenda on a bulletin board in the inside reception area of the district office.

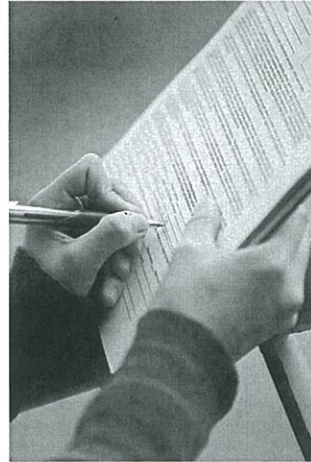


Which Of The Following Statements Is Wrong:

- A. A special meeting can be scheduled by posting an agenda 24 hours in advance and emailing the agenda to local media.
- B. The board president can call a special meeting without consulting the rest of the board.
- C. The board may consider closed session business during a special meeting.
- D. The board can decide to reschedule the date of its next regular meeting.

Answer

- D. The board can decide to reschedule the date of its next regular meeting.



4. Not Announcing Closed Session Agenda Items in Open Session and Taking Public Comment on Them Prior to Going Into Closed Session

Prior to Closed Session

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

Which Rule For The Conduct Of Board Meetings Is Illegal:

- A. Each member of the public who wishes to address the board must turn in a speaker card indicating the agenda item on which he or she wishes to speak.
- B. Each member of the public is limited to three minutes of speaking time.
- C. Any person who wishes to complain against a public employee by name must follow the district's complaint procedure which requires that such matters be discussed only in closed session.
- D. Any videotape recording of the meeting by the public must be from designated locations only.

Answer

- C. Any person who wishes to complain against a public employee by name must follow the district's complaint procedure which requires that such matters be discussed only in closed session.



Meeting Practices



- Minutes shall be taken recording all actions taken by the governing board. The minutes are public records.
 - Ed. Code, § 72121(a)
- No action may be taken by secret ballot.
 - Gov. Code, § 54953(c)(1)
- 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. **[NEW]**
 - Gov. Code, § 54953(c)(2).
- Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding of persistent disruption.
 - Gov. Code, § 54953.5(a)

3. Failure to Permit Public Inspection of Board Meeting Materials Provided to Board After Agenda is Distributed

Meeting Material – Public Records

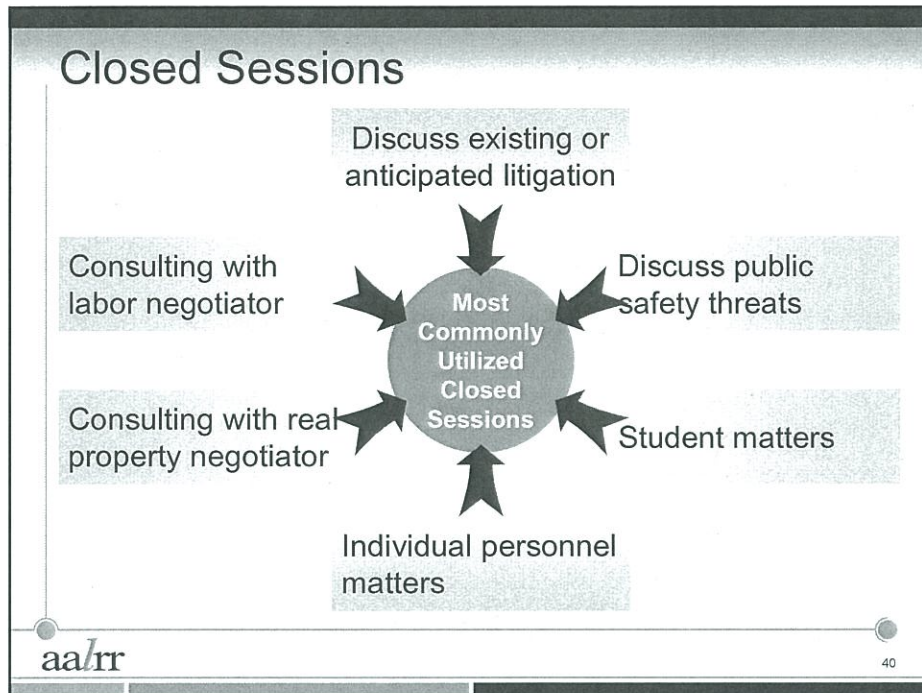
- If a public record that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body.
 - Gov. Code, § 54957.5(b)(1)
- The district must make any writing described above available for public inspection at a public office or location that the agency designates for this purpose.

Meeting Material – Public Records

- Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency.
- The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.
- Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting.

• Gov. Code, § 54957.5(c)

2. Talking About Performance Problems When Not Considering Specific Discipline and Not Identifying the Title of the Employee Involved



- ### Other Authority for Closed Session
- Consideration of honorary degrees or gifts from a donor who wants to remain anonymous.
 - Ed. Code, § 72122
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Closed Sessions - Personnel

- A local legislative body may meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of an employee.
 - Gov. Code, § 54957(b)(1)
- Discussion must relate to a particular individual.
- However, prior meeting in closed session to hear specific complaints or charges against an employee, the employee must be given written notice, not less than 24 hours prior to the meeting, of his or her right to have the complaints or charges heard in open session.
 - Gov. Code, § 54957(b)(2)

Public Employee Evaluation

- For closed session discussions concerning personnel matters pursuant to Government Code 54957:
- Closed Session: Public Employee Performance Evaluation
 - Title: (Specify position title of employee being reviewed)
- Closed Session: Public Employee Discipline/Dismissal/Release
 - (No additional information is required in connection with a closed session to consider discipline, dismissal or release. "Discipline" includes potential reduction of compensation)

Public Employee Evaluation

- Evaluation extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal.
- Section 54957 is not limited to the consideration of formal evaluations.
- "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance."
 - *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902

Public Employee Evaluation

- Evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation.
- Under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.
- Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session.

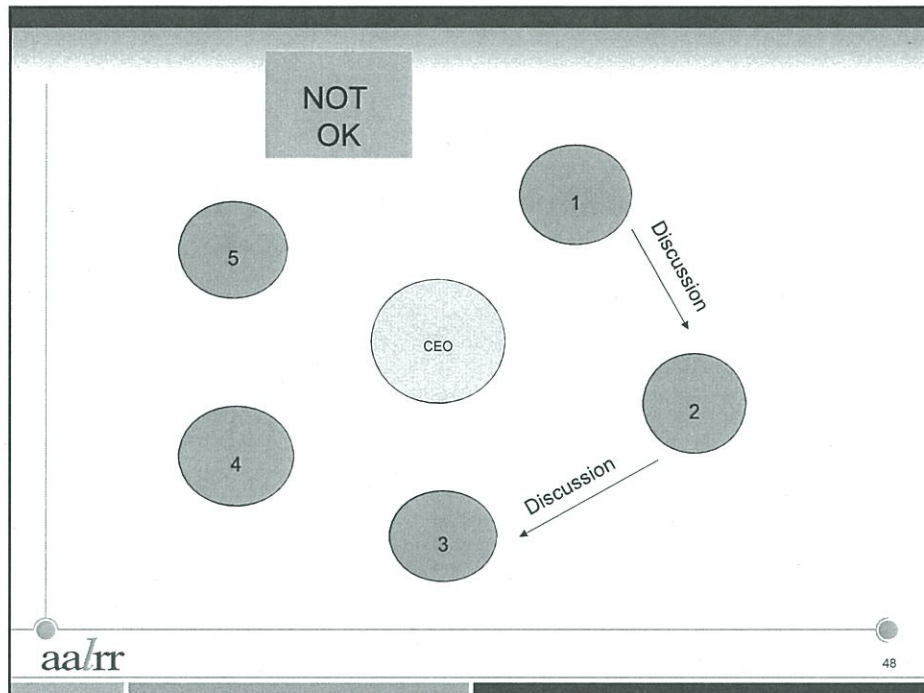
1. Engaging in Unlawful Serial Meetings

What is a “Serial Meeting”?



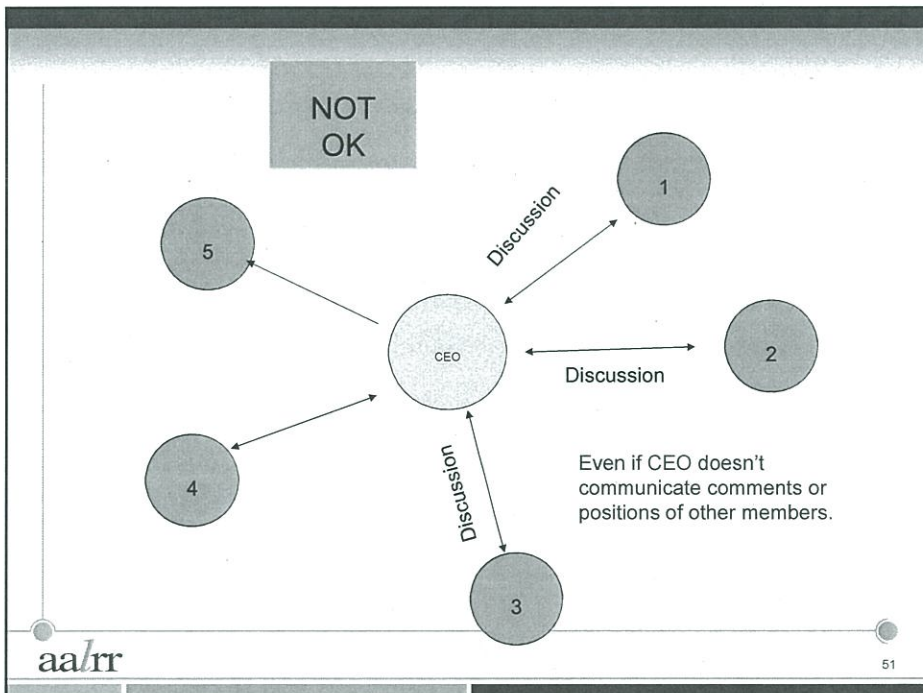
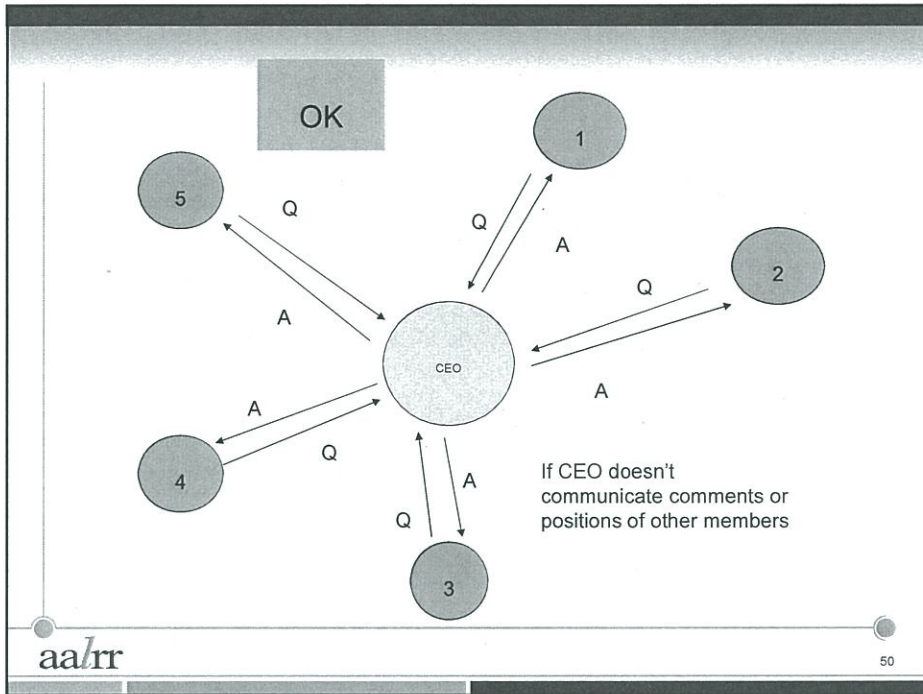
- A *series of communications*, each of which involves *less than a quorum* of the legislative body, but which taken as a whole *involves a majority* of the body's members.
- Any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.

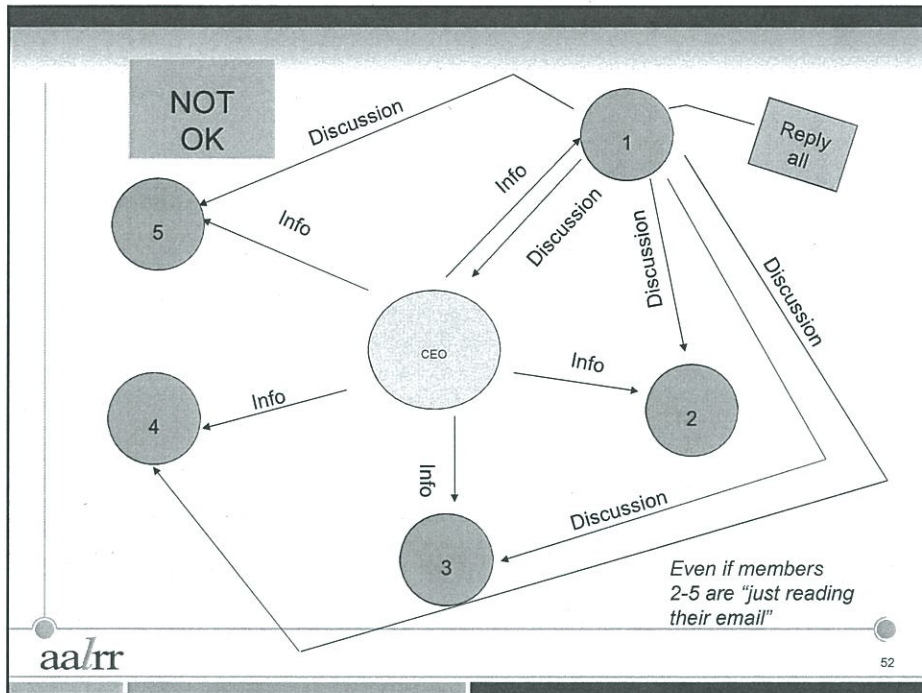
• Gov. Code, § 54952.2(b)



What is a Not a "Serial Meeting"?

- An **employee or official** of a local agency may engage in **separate conversations or communications** outside of a meeting with members of a legislative body in order **to answer questions or provide information** regarding a matter within the jurisdiction of the agency, if that person does **not communicate to the comments or position of any other member** or members of the legislative body.
 - Gov. Code, § 54952.2(b)(2)





This Is A "Serial Meeting" Of A Governing Board Which Would Violate The Brown Act:

- A. The Chancellor calls each member of the board to find out what would be a good date for a special meeting.
- B. One board member talks to another board member at a college football game about whether the coach should be fired.
- C. The Chancellor has her secretary call each member of the board to determine whether there is support for acquiring a piece of property adjacent to a particular college.
- D. A morning meeting where Cheerios are served.

Answer

c. The Chancellor has her secretary call each member of the board to determine whether there is support for acquiring a piece of property adjacent to a particular college.



Question & Answer Session

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56

Thank You

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