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**Date:** December 8, 2020

**To:** County Boards, Commissions and Committees, and their  
Administrative Officers and Secretaries

**From:** Sharon L. Anderson, County Counsel

By: Mary Ann McNett Mason, Chief Assistant County Counsel

*M. A. M.*

**Subject:** Summary of Recent Changes to Open Meeting Laws

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This memorandum summarizes significant changes to the state open meeting law, the Ralph M. Brown Act,<sup>1</sup> ("the Brown Act") and discusses revised procedures for implementation of that law that will apply in 2021.

**A. New Rules for Board Members' Use of Social Media**

Since its inception, to ensure transparency for the public the Brown Act has limited how board members may communicate with one another outside of lawfully noticed public meetings. The Brown Act prohibits a majority of the board<sup>2</sup> members from using a series of outside communications of any kind, whether directly or indirectly or through intermediaries, to discuss, deliberate, or take action on any matter that is within the board's jurisdiction.<sup>3</sup> Such a series of outside communications by a board majority is commonly known as an unlawful "serial meeting." This prohibition has now been revised to acknowledge and address the pervasive use of social media by officials and the public.

**1. Individual Board Member's Use of Social Media Permitted.**

Effective January 1, 2021, the Brown Act expressly affirms that a board member may use social media to communicate their positions to constituents and the public without causing a serial meeting of the board. The amended law clarifies that most of a board member's communications with the public on social media are permissible. A board member may engage in separate conversations or communications about agency business on any internet-based social media platform that is open and accessible to the public, for the following purposes:

**1) To answer questions**

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<sup>1</sup> Gov. Code, §§ 54950 et. seq.

<sup>2</sup> "Board" refers to all types of legislative bodies, including commissions, committees, and municipal advisory councils.

<sup>3</sup> Gov. Code, § 54952.2 (b) (1).

- 2) To provide information to the public
- 3) To solicit information from the public regarding a matter in the board's jurisdiction.<sup>4</sup>

These permitted social media communications may include use of digital icons (emoji).

## 2. Response or Reaction by Second Board Member Prohibited.

Effective January 1, 2021, the Brown Act will expressly prohibit board members from replying or reacting to anything another member of the board posts or shares on social media regarding agency business.<sup>5</sup> This means that a board member may not post any sort of reply to the first board member's post about agency business, even if the reply is just a "smiley face" emoji. Similarly, a board member may not "like" or "dislike" or otherwise react to the first board member's post. This rule prohibits a second board member from responding or reacting, even when a board majority is not involved in the social media communication.

The new rules apply to all internet-based social media platforms that are open and accessible to the public.<sup>6</sup> For example, they apply to Facebook, Instagram, and Twitter, to comment sections on blogs and news articles, and to chatrooms. It is recommended that board members begin following these rules immediately, rather than waiting until January 1.

## **B. Threats of Litigation Must Be Included in Agenda Packet**

A recent case from the First Appellate District, *Fowler v. City of Lafayette*, (2020) 46 Cal.App.5<sup>th</sup> 360 held that public agencies must make a written record of a verbal threat of litigation and if that threat is to be discussed in a closed session, the agency must include that record in the agenda packet for the meeting at which the closed session will occur.<sup>7</sup> If the threat of litigation was made in writing, the letter or other communication containing the threat also must be included in the agenda packet for the meeting at which a closed session to discuss the threat will occur. The court reasoned that the Brown Act requires inclusion of threats of litigation in the agenda packet to ensure transparency by making the threat easily available for public inspection.

Should your board, office or department receive a threat of litigation please advise the County Counsel's Office immediately. This office will help you to ensure that proper steps are taken to record and report the threat of litigation.

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<sup>4</sup> Ch. 89, Stats., 2020, adding Gov. Code, § 54952.2 (b) (3).

<sup>5</sup> Id.

<sup>6</sup> Id. at § 54952.2 (b) (3) (B) (ii-iii.)

<sup>7</sup> *Fowler*, 46 Cal.App.5<sup>th</sup> 360 at 369-370.

### **C. A Return to Live Meetings**

One of many actions the Governor took to address the pandemic was issuance of Executive Order 29-20. This order expressly waived all Brown Act requirements for the physical presence of board members, the clerk, or the public as a condition of participation in, or to establish a quorum for a public meeting. The order permits boards to hold public meetings entirely via teleconference or electronically, e.g. by Zoom, and to take public comment through these means. The order provides that it applies only during the period in which state or local officials have imposed or recommended social distancing measures. Currently, Executive Order 29-20 remains effective. We will notify you when the order is rescinded and boards must again hold live meetings and permit live public comment. We cannot predict when this will occur but believe that it is likely to be at some point in 2021.

MAM/am

cc: Members, Board of Supervisors  
County Administrator  
Department Heads and Fire Chiefs  
Clerk of the Board  
County Public Information Officer  
Chiefs of Staff  
Executive Director, Housing Authority  
Executive Director, LAFCO