BROWN ACT MEETINGS IN A TIME OF EMERGENCY
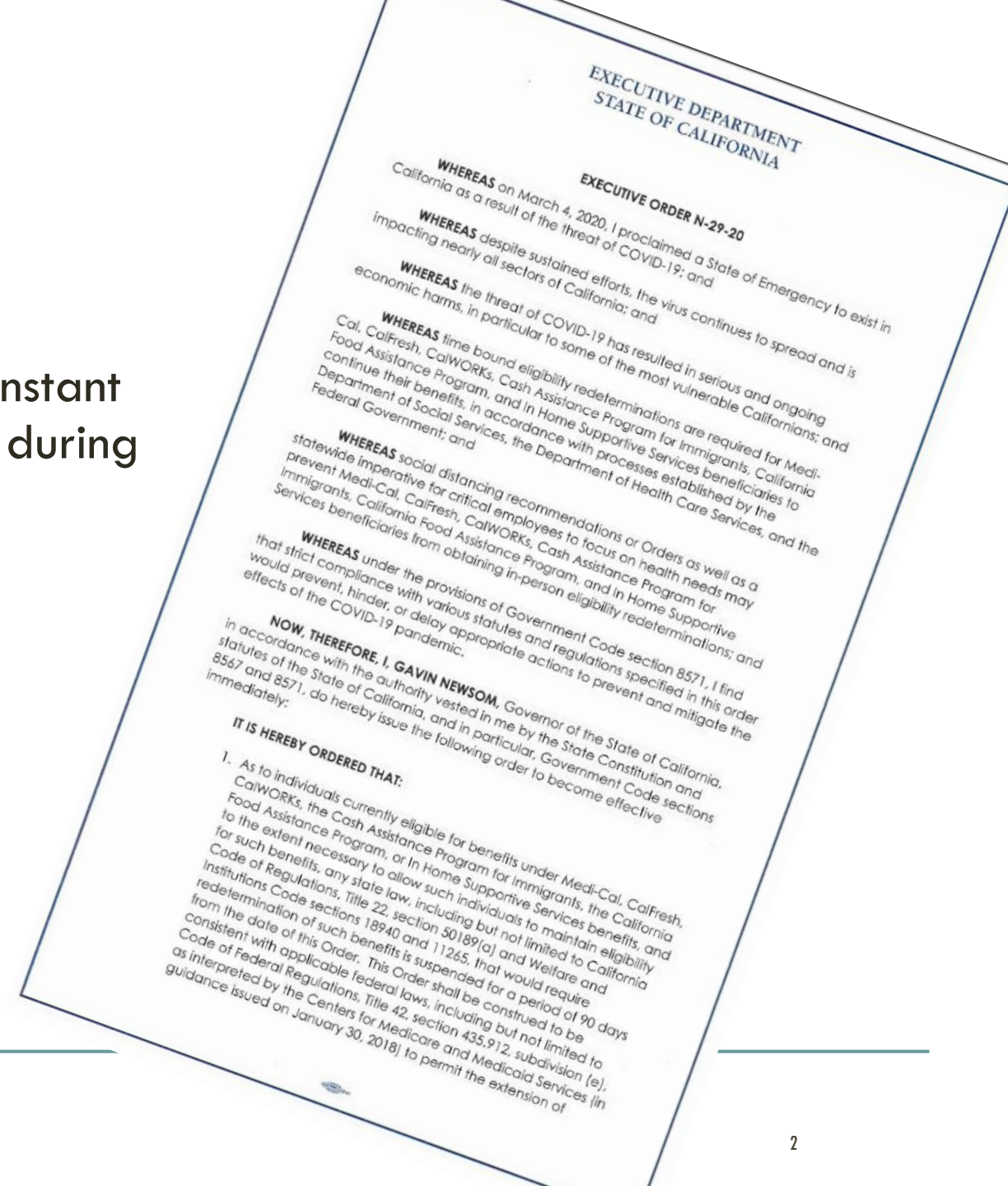
Osa Wolff
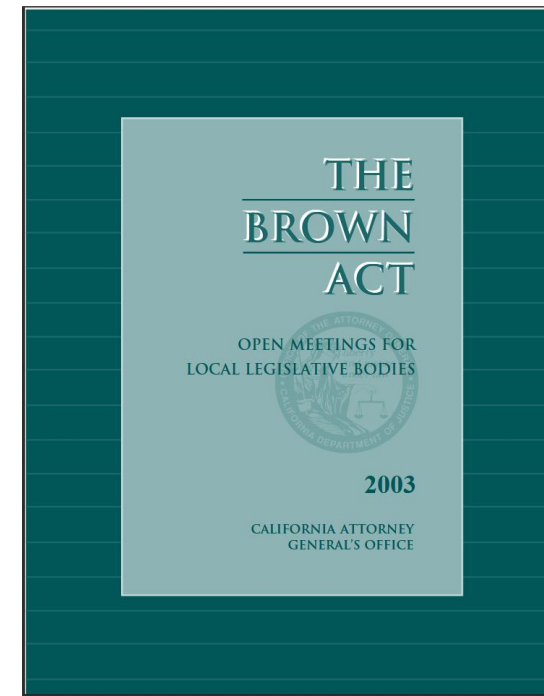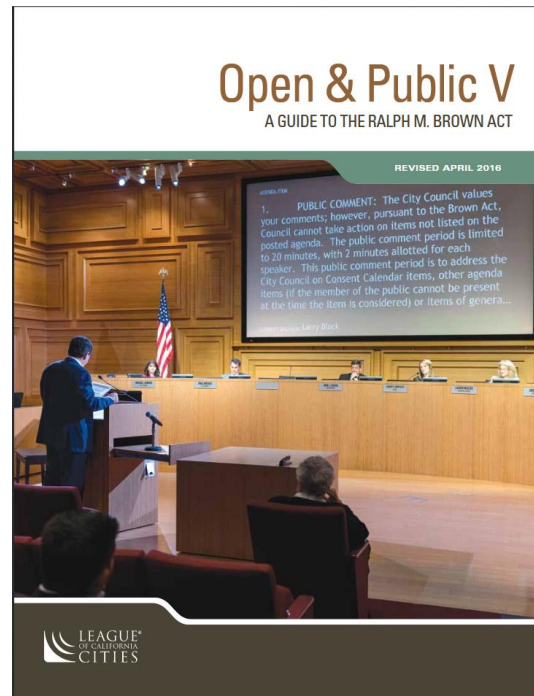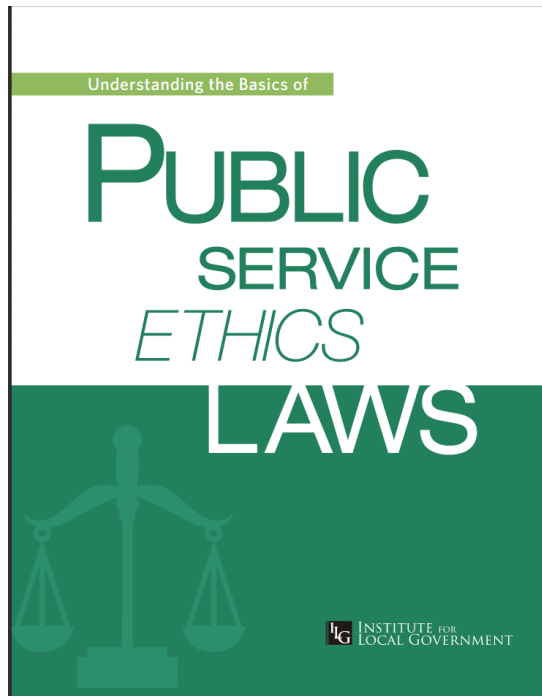Shute, Mihaly & Weinberger LLP

TRAINING TAKEAWAYS

- Review of normal Brown Act rules

- What rules have changed & remained constant under Governor's Executive Orders (EOs) during Covid emergency?

- Look ahead

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FORMAT

- Questions:
  - I'll leave ~10 minutes @ end
  - Use "raise hand" function

- Interactivity:
  - Instant polling:
    https://pollev.com/osawolff479

THE BROWN ACT: ONE OF CALIFORNIA'S KEY TRANSPARENCY LAWS

THE BROWN ACT: COVID-19 & EXECUTIVE ORDERS HAVE CHANGED OUR DEMOCRACY

TELECONFERENCING UNDER EXECUTIVE ORDER

Background Rule
• Agenda specifies teleconferencing locations
• Agenda posted at each location
• Quorum+ within jurisdictional territory • Each teleconference location accessible to the public with full rights to participate
• All votes by roll call

What's different?

- Board and public can participate by teleconference from anywhere
- No physical location required
- Public not allowed at remote locations with Board members
- Need more explanation of process (agenda description + script)

What's the same?

- All votes by roll call
- Confirm Board can hear & see
- ADA compliance
- Items allowed on agenda (not limited to "essential" business)

POSTING NOTICE OF MEETINGS
(REGULAR, SPECIAL & EMERGENCY)

Background Rules		
Regular	**Special**	**Emergency (rare)**
72 hours notice	24 hours notice	Little (or no) notice if consequences are so immediate and significant that providing more notice would endanger public health/safety. Special notice required after.

EO Direction:

- Include with notice info re: how public can observe & comment.
- Use web posting & email notice tools to communicate rapidly.
- Physical posting (exterior bulletin board) remains in effect even though no physical meeting location required.

PUBLIC COMMENT

Background Rule

Public comment opportunity for:
• All agenda items: prior to Board action
• Public forum:
    • Required for regular meetings
    • Good practice for special meetings
• Non-action items (e.g., ceremonial & reports)

EO Changes: None

- But the practical details are complex
- Let's dive into these aspects
  - How
  - When
  - How Long
  - What

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THE "HOW" OF PUBLIC COMMENT

- **Speaker slips:**
  - *Normally:* Requested (not required) for in-person speakers
  - *Now:* Virtual requests to speak (e.g., Zoom "raise hand" function, emails, voicemails)

- **Written correspondence:**
  - *Normally:* Circulated before & at meeting
  - *Now:* Good practice = 3 pm cutoff for written correspondence circulated/posted on website. Later written correspondence posted to web after meeting, sometimes read by staff.

- **Staff reading public comments into record**
  - *Normally:* Sometimes done as accommodation or on request
  - *Now:* Beware "distasteful" comments (e.g., slanderous statement) sounding like they come from staff. Look into computer options for reading.

THE "WHEN" OF PUBLIC COMMENT

Normally

Familiar/normal structure:

- Chair introduces item

- Staff report

- Questions from Board

- Public comment

- Board deliberates & acts
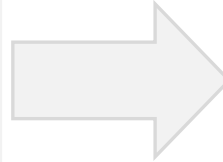
Now

Same process, but some things to note:

- Best practice = Real time public comment for <u>each</u> agenda item (oral, email or both)

- Some agencies have limited public to comments received pre-meeting, but then public does not have benefit of hearing staff report & questions from Board

- Emerging middle ground option/innovation: post PPT & recorded staff report with agenda <u>before</u> meeting

THE "HOW LONG" OF PUBLIC COMMENT

Normally

Reasonable time limits set by each jurisdiction

- Common: 3 minutes/person/item

- Less common: 30 minutes/item (shortening each person's time to fit within limit)

- Carefully order agenda keeping public comment in mind
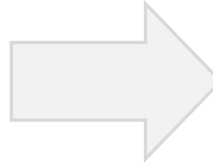
Now

- Best practice = Follow your normal time limits

- Challenge: Some jurisdictions find meetings are running long because members of public now comment on every item and/or more members of public comment

- Option: move public forum to end of meeting

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THE "WHAT" OF PUBLIC COMMENT
(ZOOM BOMBING AND DISRUPTIVE SPEECH)

Normally

- Disruptive speech is rare, but challenging
- Must allow speech critical of Board & District
- Some distasteful speech must be allowed per First Amendment
- Recording meetings (audio/video) = allowed if not disruptive

- *Best practice:* allow irrelevant (off topic) speech subject to time limit
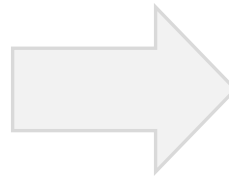- *Best practice:* allow clapping/booing if it doesn't disrupt meeting

Now

- Disruptive speech (Zoom bombing) is now easier to do anonymously & even more challenging than normally

- Same First Amendment issues

- *Option:* "Muting" available for extreme cases, but be judicious

- *Option:* Limit screen sharing & video participation

- *Option:* Tiny URL and other tech solutions

BOARD MEMBER PARTICIPATION & SPEECH

Normally	Now
• Recusal/conflict of interest: leave the room • Hot mic issue rare, but embarrassing • Video/audio recording & posting to web was common, but not universal	• Recusal/conflict of interest: leave virtually • Hot mic/live camera issue still, and embarrassing situations go viral • Video/audio recording & posting to web are increasingly expected

San Francisco Chronicle

LOCAL // BAY AREA & STATE

Vallejo planning commissioner throws cat, chugs from a bottle during live-streamed-video meeting

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CLOSED SESSION

Background Rule
• Allowed only for limited purposes (GC 54957) (e.g., labor, litigation, real estate) • Agenda notice is critical and tricky (consult with agency counsel) • Public comment allowed <u>before</u> closed session • Public report sometimes required <u>after</u> closed session

EO Changes: None

- **Practice tip:** Use innovative online meeting tools (e.g., breakout rooms)

- **Practice tip:** Ensure security/confidentiality, check who participates & avoid recording

- **Practice tip:** Reliance on GC 54957 (threat to public services or facilities) not advisable – for public trust, better to discuss virus response in open session (different from terrorist threat)

BRIEFINGS BY STAFF

Background Rule
Limited staff authority to <u>separately</u> brief Board members outside of Brown Act meeting (e.g., email, phone, meeting): • OK to answer questions • OK to provide information • Not OK to communicate one Board member's comments or position to other Board member

What's different under EO?

Staff may <u>simultaneously</u> update Board members on matters relevant to the emergency (e.g., impacts of COVID-19, government response) in order for Board to stay apprised of emergency operations and the impact of the emergency on their constituents.

- Not OK to take action

- Not OK to discuss (be careful: questions can seem like discussion)

WHAT'S NEXT?
LESSONS LEARNED FOR WHEN THINGS RETURN TO NORMAL

Public agencies have adapted quickly & well to "new normal" for public meeting

- **When will in-person meetings will return again?**
  - EO remains in place as long as state or local health officials have imposed or recommended social distancing measures.
- **Increased reliance on teleconferencing will likely remain**
  - Public health & safety
  - Busy people can participate more easily
  - Popular with some
  - Reduces travel time & expense
  - Video often better record of meeting than just audio
- **Access issues to watch**
  - ADA/accessibility
  - Internet speed/access

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QUESTIONS?

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