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Brown Act and Conflict of Interest Laws

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THE CHARTER LAW FIRM

YM&C Firm Overview

- Partners have over 100 years of collective experience working with charter schools
- 32 attorneys working with charter schools throughout the state in all areas of charter school law (e.g., employment/labor, special education, nonprofits, litigation, audits, facilities, etc.)
- Wayne Strumpfer brings over 20 years of public service experience to YM&C. Wayne's career includes:
 - Executive Director of the Fair Political Practices Commission
 - Chief Counsel at the California State Auditor
 - Prosecutor specializing in public corruption with the State Attorney General
 - Deputy District Attorney with Sacramento County
- Jerry Simmons has worked on charter school governance and conflict of interest issues for 15 years.
- Represent most of California charter schools
- Conduct workshops for charter schools in all areas of legal compliance

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Understanding the Brown Act

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Purpose of The Brown Act



What Is the Purpose of the Brown Act?

- To Foster Broad Public Access



"... The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."



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Meetings



Brown Act Applies to Meetings of the Board

- Basic Definition
 - When any congregation of a majority of the members of the body meet to hear, discuss, deliberate, or take action on any item of Charter School business
- Interpreted Broadly
- Also applies to committees, subject to an exception



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Meetings



Brown Act Committees

As a general rule, all committees must follow the Brown Act

Committees

- Permanent or temporary
- Decision-making or advisory
- Created by charter, ordinance, resolution, or a Board's formal action

A standing committee must comply with the Brown Act even if it is an advisory committee composed solely of the members of the Board who are less than a quorum.

Standing Committees

- A committee is a standing committee if it:
 - Has continuing subject matter jurisdiction; or
 - Has a meeting schedule fixed by charter, ordinance, resolution, or a Board's formal action
- Brown Act applies regardless of whether the standing committee is:
 - Composed solely of Board members or not
 - Less than a quorum of Board members or not
- Examples: Budget Committee; Facilities Committee, etc.



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Not Brown Act Committees

There is one exception for certain advisory committees that are not subject to the Brown Act. The advisory committee must be composed solely of the members of the Board that are less than a quorum, and must not be a standing committee.

Certain Advisory Committees

- Must be advisory, not decision-making
- Must be composed solely of the members of the Board
- Must be less than a quorum of the Board
- Must not be a standing committee

Meetings



Serial Meetings

- Limit on One-Way Communications Outside a Properly Noticed Meeting
 - While an employee or official may engage in separate conversations or communications outside of a meeting with other members of the body in order to answer questions or provide information regarding a matter of Charter School business, that person may not communicate to members of the board the comments or position of any other member or members of the Board.

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Meetings



Teleconference Meetings
Six Additional Requirements:

1. Agenda must be posted at all teleconference locations.
2. Each teleconference location must be identified in the notice and agenda of the meeting.



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Meetings



Teleconference Meetings

3. All votes taken must be by roll call.
4. Each teleconference location must be accessible to the public. (ADA-compliance required.)
5. Members of the public must be able to hear and must have the right to address the Board directly from each teleconference location.
6. A quorum of the Board must participate from within the Charter School's "jurisdiction." (Safest interpretation is the school district's boundaries.)

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Meetings



A Word on Meeting Minutes

- Include all material motions and votes or abstentions of every Board member
- Does not need to be a verbatim transcript
- Include disclosures of any conflicts of interest, recusal and leaving the room, and additional Board findings required by Corporation Code
- Codify a process for preparing, adopting, and distributing minutes

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Meetings



Executive Compensation

- Approval of CEO/Executive Director's compensation must occur at a regular (not special) meeting
- NEW LAW (SB 1436): Prior to final action, Board must orally report a summary of the recommendation for final action, including the salary, salary schedule, and fringe benefits, during the open meeting where final action will be taken. (Jan 1, 2017)
- Final action in open session

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Meetings



SB 1436 applies to "local agency executives".... This includes:

- CEO, Deputy CEO, Assistant CEO
- Head of a department

(Government Code section 3511.1(d).)

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Notice Requirements



Notice and Agendas

General Rule: The agenda shall be posted properly in advance of a meeting and must include a brief description of items to be transacted or discussed. With a few exceptions, if an item is not on the agenda, the Board cannot discuss it.

Contents

- Brief description = usually not more than 20 words
- "Safe Harbor" language for closed sessions
- How to request disability-related accommodation
- Location for inspection of docs distributed to Board

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Notice Requirements



Notice and Agendas

When?

- Regular meetings – 72 hours notice
- Special meetings – 24 hours notice
- Emergency meetings – 1 hour notice (rare)

Where?

- Physically at a publicly accessible location within the jurisdiction during the entire posting period
- At all teleconference locations, if any
- On the website – homepage (new law – takes effect for meetings on or after Jan. 1, 2019)

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Notice Requirements



AB 2257 (signed by Governor on Sept. 9, 2016)

"It is in the public interest to ensure that members of the public can easily and quickly find and access meeting agendas of legislative bodies ... on the Internet homepage of those certain local agencies."

- Applies to meetings on or after Jan. 1, 2019
- Prominent, direct link to agenda on homepage
- If agency uses an "integrated agenda management platform," current agenda must be at the top.
- Agenda must be (1) retrievable, downloadable, indexable, and electronically searchable; (2) platform independent and machine readable; and (3) available to the public free of charge.

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Notice Requirements



Exceptions

1. Upon a determination by a majority vote of the Board that an "emergency situation" exists (54956.5)
2. Upon a determination by a 2/3 vote of the Board or a unanimous vote of those present if less than 2/3 of the members are present that:
 - a. There is a need to take immediate action; and
 - b. The need for action came to the attention of the "agency" (i.e. entire Charter School) after the agenda was posted.


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Notice Requirements



Exceptions

3. The agenda item was posted for a prior meeting of the Board that:
 - a. Occurred not more than 5 calendar days prior to the date the action was taken on the item;
 - b. At the prior meeting the item was continued to the meeting at which action is taken.
4. Board direction to staff
5. Brief response/clarifying questions/announcements
6. Adding agenda items to a future Board meeting


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Rights of the Public



Rights to enable access and participation

- Give oral testimony at meeting
 - Addressing disruptive speakers
- Audio record and broadcast
- Limitations on conditions of public attendance
- Non-discriminatory facilities
(reasonable accommodations under ADA)
- Copies of agendas and other public writings

NEW LAW (AB 1787): Must provide 2x the time for public testimony to persons utilizing a translator to ensure equal opportunity. (Jan. 1, 2017)


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Closed Sessions



"Let's never forget that the public's desire for transparency has to be balanced by our need for confidentiality."

Funny cartoon, but remember, closed session is only permitted when specifically authorized by statute.

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Closed Sessions



What Are the Permissible Closed Sessions?

1. Pending/anticipated litigation (conference with legal counsel)
2. Pupil discipline (Education Code)
3. Personnel (appointment, employment, evaluation, discipline, dismissal)
 - Caveat: 24 hour written notice to employee is required if Board will hear complaints and/or charges
4. Real estate negotiations
5. Labor negotiations
6. Public security

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Closed Session



Requirements

- Use "Safe Harbor" agenda language (54954.5)
- Prior to Closed Session:
 - Board Must Make a Public Announcement of Reasons for Closed Session Prior to Closed Session
 - Public Must Have an Opportunity to Comment
- After Closed Session:
 - Board Must Make a Public Report of Action Taken in Closed Session and Vote or Abstention of Every Board Member
- Semi-closed meetings are prohibited
- Confidentiality is required

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Enforcement



What are the Penalties & Remedies for Violations?

- Civil remedies
 - Board action may be declared null and void
 - Injunctive relief may be obtained
 - Prevailing plaintiff awarded attorneys' fees
- Criminal penalties apply if one or more Board members intend to deprive the public of information to which the member knows or has reason to know the public is entitled.
- Potential charter revocation

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Enforcement



Complaints and Challenges

- Notice and Demand for Cure or Cease and Desist
 - Can be brought by DA or member of the public
 - Board must cure/respond within 30 days
 - Seek advice from legal counsel on response

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Understanding Conflict of Interest Laws



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Goals for Session



1. This is a primer; non-exhaustive overview.
2. Charter petition, bylaws, Memorandum of Understanding with your authorizer(s), and school policies might obligate you even more stringent rules and higher standards than minimum requirements set by statute.
3. Limit disruptions and prevent civil or criminal liability for Board members in most common conflict of interest scenarios.
 - Disclaimers
 - Real problems are fact specific & complex. Consult legal counsel.
 - You should only speak to legal counsel about compliance issues to ensure the attorney-client privilege applies. Emails to staff are discoverable.
 - Only highlighting most common compliance issues.
 - Federal conflict of interest law is not covered in this presentation.

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Why You Should Care About Conflict Law Compliance



- Potential criminal penalties
- Potential fines
- Potential charter revocation
- Loss of good reputation
- Potential loss of Foundation support and funding
- Distractions and public controversy
- Can lead to loss of accreditation

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Public Records Act Requests



Public Records Act Requests

- The process
- Legal concerns that may be raised in your responses.
- Be Careful: Avoid doing public business on private accounts!

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Conflicts of Interest



Broad Definition

- A *conflict of interest* arises when an individual who has a private financial interest in the outcome of a corporate contract or a public decision, participates in the decision-making process or influences or attempts to influence others making the contract or decision.
- In short, a conflict of interest is a clash between an individual's duty to his or her office and his or her personal interests.



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Conflicts of Interest



- Trend has been toward more legislation and investigations related to conflicts of interest.
- Landscape is shifting toward strict compliance and avoiding the appearance of impropriety.
- Many new charter schools are avoiding having either their employees or owners and employees of their vendors and landlords on their boards.



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Conflicts of Interest



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Financial Interests



Common Types of Financial Interests

- Ownership or investment in business entity
- Investment in real property
- Source of income
- Position in business entity (e.g., director, officer, partner, trustee, employee, management)
- Source of gifts
- Effect on personal finances

* Financial interests of immediate family members of Board members and employees typically are covered.



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Hoops to Jump Through



What happens if a Board member or employee has a conflict of interest in a decision (such as a proposed transaction or contract)?

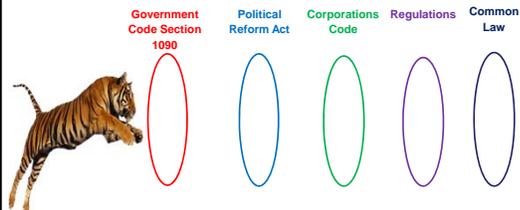
1. Disclose the interest.
 - Employees disclose in writing to supervisor
 - CEO and Board members disclose to Board and ensure it is noted in the minutes
2. Abstain from any vote or discussion before or during the meeting and do not participate in the matter (leave the room).
3. Determine whether the remaining members of the Charter School Board can enter into the transaction or contract under all of the laws and regulations we will talk about today. Must be able to jump through five hoops that we will talk about today. Consult with attorneys because minor facts of each case can change legal advice.



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Hoops to Jump Through



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Hoop #1:
Government Code Section
1090



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Hoop #1:
Government Code Section
1090

Elements

1. Public official (an officer, board member, or employee)
2. Making a public contract (for sale or purchase)
3. A financial interest

Applicability to Charter Schools Is Debated

- Text of Statute
- Governors' Vetos
- AG Opinion Requested
- Current District Attorney Prosecution Ongoing
- Positions Taken by School District Attorneys
- Positions Taken by Legislative Counsel

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Hoop #1:
Government Code Section
1090

What you need to know about Section 1090

- If board member has financial interest, the entire board is prohibited from entering into the contract; *even if it is with the best vendor at the best price and the interested board member abstains.* (Unless an exception applies.)
- Making a public contract is defined very broadly! Applies to earliest discussions, planning, solicitation for bids, etc., not just vote.
- Check your Charter, MOUs, Bylaws, COI Code, COI Policies (if any) for statements regarding commitment to comply with Section 1090 or District policies regarding ethics and/or conflicts.

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Hoop #2:
Political Reform Act



DECISIONS

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Hoop #2:
Political Reform Act



Elements

1. Public officials (officers, board members, employees)
2. Participating in or attempting to influence a governmental decision
3. Public official has qualifying financial interest (e.g., (a) investment in business entity \$2k; (b) real property investment \$2k; (c) income of \$500 or more;(d) business position in entity; (e) gift of \$460 or more)
**Includes spouse and children*
4. Financial interest is material
 - See regulations

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Gifts



Restriction

Gifts from any individual can be no more than \$460.

Reportable

Any gift more than \$50 or cumulative gifts from one person in a year worth more than \$50.

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Gifts



What is a “gift?” – Exceptions

- Gifts from family
- Awards
- Presents at certain occasions
- Dating relationship
- Longstanding friends

Beware that the gift limits apply to your family, too!



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COI Code & Form 700



Conflict of Interest Code

- States who must file the Form 700
- Assigns disclosure categories



Form 700

- Statement of Economic Interests
- When it must be filed:
 - Assuming or reappointment to office or position (within 30 days)
 - Once annually (by April 1st)
 - Leaving office or position (within 30 days)
- Penalties for failure to file:
 - Criminal charges by Atty General or District Atty for deliberate failure to file
 - Civil or administrative action by FPPC or private citizen



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Hoop #3: Corporations Code



Nonprofit Boards



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**Hoop #3:
Corporations Code**



Board Composition (Corp. Code § 5227)
 No more than 49% of the persons serving on the Board of any nonprofit may be "interested persons".

- Any person currently being compensated by the corporation for services rendered to it within the previous 12 months, whether as a full- or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a director as director; or
- Any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of any such person.
- Be careful to monitor compliance when Board vacancies occur.

- *Even if 49% is permitted by Corp. Code, how do Section 1090 and the PRA impact Board composition? Is 0% required? Is 0% the best practice?*
- *What do your Charter School's Bylaws allow?*

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**Hoop #3:
Corporations Code**



Self-Dealing Transactions (Corp. Code § 5233)
 Director (i.e. Board member) must not have material financial interest in any contract or transaction unless:

- Fully disclosed/noted in the minutes;
- Transaction approved by directors without interested director's involvement (leaves room);
- Charter school could not obtain a better agreement with reasonable effort; and
- Transaction is in the best interest of charter school and is fair and reasonable at the time.

Recommended to make findings in resolution form.
**Must synthesize these requirements with PRA & Section 1090 (if applicable).*

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**Hoop #4:
Regulations**



Regulations

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Hoop #4: Regulations



- For charter schools accepting lease reimbursement funds from the State of California, special conflict of interest rules apply. See Title 4, California Code of Regulations Section 10170.14.
- IRS presumes that executive compensation is reasonable if approved in advance by the Board, without participation by interested persons, provided that the Board obtained and relied upon comparability data and adequately documented the basis for determining the reasonableness of the compensation. (IRS Reg. § 53.4958-6(a).) For IRS purposes, the definition of "interested persons" is broader than other laws. "Interested" for the purpose of approving an executive's compensation includes employees working for/under any person whose salary is at issue. (IRS Reg. § 53.4958-6(c)(1)(iii).)

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Hoop #5: Common Law on Conflicts of Interest



Prohibition Against Conflicts of Interest

- Public official engaging in transaction or influencing decision
Creating an appearance of impropriety (financial interest not necessarily required)



Doctrine of Incompatible Offices

- Public official holding two public offices simultaneously
- Offices are incompatible with each other (creating divided loyalties); overlapping jurisdictions



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Penalties



Political Reform Act

- Administrative sanctions (e.g., fines per violation, cease and desist orders, orders to file reports);
- Civil penalties (e.g., injunctions, damages and attorneys' fees)
- Criminal charges

Government Code Section 1090

- Criminal penalties (e.g., fine of up to \$1000 per violation or imprisonment in state prison)
- Disqualification from holding office in California
- Any contract made is void. Disgorge profits.

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Penalties



Charter Schools Act

- Potential charter revocation

Corporations Code

- Civil lawsuit against interested director

Common law

- Removal from office, if incompatible offices

Penal Code Section 70

- Criminal penalties (e.g., imprisonment up to 1 year) for asking for or receiving a bribe.

Accreditation

- Potential loss of accreditation

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QUESTIONS AND RESPONSES

THANKS FOR ATTENDING TODAY!

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