



# **Dealing With Difficult Situations at City Council Meetings: Legal and Practical Considerations for City Attorneys**

**Friday, May 10, 2013 General Session; 10:30 – 11:15 a.m.**

**David Kahn, Renne Sloan Holtzman Sakai  
Facilitated by: Michael Jenkins, City Attorney, Hermosa Beach, Rolling Hills  
and West Hollywood**



**Dealings With Disruptions at Public  
Meetings: Legal and Practical  
Considerations for the Public Attorney**

by

**Randy Riddle, Esq.  
David E. Kahn Esq.**



**Renne Sloan Holtzman Sakai**  
**Public Law Group™**

**350 SANSOME ST., SUITE 300  
SAN FRANCISCO, CA 94104  
TELEPHONE: (415) 678-3800**

**TABLE OF CONTENTS**

Introduction ..... 1

The Legal Framework ..... 1

The Brown Act ..... 1

Other Statutory Provisions ..... 3

First Amendment Principles Governing Legislative Body Meetings ..... 4

General Considerations for Mitigating Disruptive Conduct ..... 7

Dealing With Specific Types of Disruptive Conduct By Members of the Public ..... 9

Practical Pointers ..... 13

## **DEALINGS WITH DISRUPTIONS AT PUBLIC MEETINGS: LEGAL AND PRACTICAL CONSIDERATIONS FOR THE PUBLIC ATTORNEY**

### **Introduction**

The Ralph M. Brown Act,<sup>1</sup> as well as court decisions applying broader constitutional principles, recognizes the general right of the public to attend and, to some extent participate in, meetings of local legislative bodies.<sup>2</sup> Those meetings often involve controversial, divisive and highly charged issues that can result in disruptions by members of the public and, at times, by members of the legislative body itself. This article discusses both legal and practical considerations for resolving disruptions at public meetings, with a focus on the role of the public attorney.

### **The Legal Framework**

A local legislative body seeking to address a disruption in its meetings must do so consistent with governing law, including the Brown Act, other state statutory provisions, and First Amendment considerations developed by federal and state courts. A public attorney plays a critical role in advising his or her clients about these legal constraints, and providing practical recommendations for conducting effective meetings with these legal considerations in mind.

### **The Brown Act**

The primary body of law governing the conduct of meetings of local legislative bodies in California is the Brown Act. This discussion focuses on those provisions of the Brown Act that address participation by members in meetings of legislative bodies, and the authority of those bodies to address behavior that disrupts the ability of the body to conduct the public's business. For a more comprehensive guide to the Brown Act, refer to *Open & Public IV: A Guide to the Ralph M. Brown Act*, published by the League of California Cities.<sup>3</sup>

---

<sup>1</sup> Government Code section 54950 *et seq.*

<sup>2</sup> The Brown Act applies to “legislative bodies” which is defined in Government Code section 54952.

<sup>3</sup> This excellent publication is available at <http://www.cacities.org/UploadedFiles/LeagueInternet/86/86f75625-b7df-4fc8-ab60-de577631ef1e.pdf>. The Attorney General's 2003 guide to the Brown Act, although now somewhat out of date, is another valuable source of information about this statutory scheme: [http://caag.state.ca.us/publications/2003\\_Main\\_BrownAct.pdf](http://caag.state.ca.us/publications/2003_Main_BrownAct.pdf).



The Brown Act seeks to strike a balance between the right of the public to participate in meetings of their legislative bodies with the need for those bodies to conduct the public's business effectively and productively. Of course, the extent to which the Brown Act strikes the proper balance is a matter for debate.

The Brown Act generally requires the public's business to be conducted in open and public meetings, and that the public be provided prior notice of the matters that will be considered at a meeting.<sup>4</sup> The Brown Act also recognizes the right of the public to participate in meetings by providing comment on agenda items, and on matters not on the agenda but within the subject matter jurisdiction of the body.<sup>5</sup> Moreover, individuals, as well as members of the news media, may record public meetings.<sup>6</sup>

The Brown Act specifically provides that a 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."<sup>7</sup> Federal courts, employing a First Amendment analysis, have similarly invalidated rules aimed at shielding public employees and officials from public criticism at meetings.<sup>8</sup>

The Brown Act authorizes legislative bodies to adopt reasonable regulations on public participation. This authority includes adopting regulations on public testimony.<sup>9</sup> Such regulations must be enforced fairly and without regard to the viewpoint of the speaker. Similarly, the body may regulate the recording or broadcast of the meeting upon making a

---

<sup>4</sup> Government Code §§ 54953 and 54954.

<sup>5</sup> Government Code § 54954.3; see *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1075 (The Brown Act's objectives "include facilitating participation in local government decisions. . . .").

<sup>6</sup> Government Code § 54953.3.

<sup>7</sup> Government Code § 54953.3.

<sup>8</sup> See *Baca v. Moreno Valley Unified School Dist.* (C.D. Cal. 1996) 936 F.Supp. 719; *Leventhal v. Vista Unified School Dist.* (S.D. Cal. 1997) 973 F.Supp. 951.

<sup>9</sup> Government Code § 54953.3.



finding that the noise, illumination, or obstruction of view from the recording would constitute a persistent disruption of the proceedings.<sup>10</sup>

Significantly, the Brown Act also expressly authorizes the legislative body to remove from a meeting those persons who willfully interrupt the proceedings.<sup>11</sup> If order still cannot be restored, the legislative body may order that the room be cleared. The legislative body must allow members of the news media who have not participated in the disturbance to remain in the meeting room and observe the meeting. The legislative body may establish a process to permit individuals not responsible for the disturbance to reenter the meeting room.<sup>12</sup>

### **Other Statutory Provisions**

Independently of the Brown Act, California Penal Code section 403 makes it a misdemeanor to willfully disturb or break up a lawful assembly or meeting unless the person has legal authority to do so. *McMahon v. Albany Unified School District*<sup>13</sup> discusses the application of this statute.

In *McMahon*, the plaintiff dumped bags of garbage on the floor during a school board meeting. He was arrested for violating section 403, and sued for unlawful arrest. The court concluded that the plaintiff's arrest was proper because he initially had been warned not to dump the trash, and the body was unable to proceed with the meeting because of plaintiff's conduct. As the court explained, absent arresting the plaintiff, “[e]ither the meeting would have been further delayed at some point while McMahon picked up the garbage or other speakers would have had to stand near the trash in order to address the board and audience members would have been forced to peer over a mound of garbage in order to watch a public body perform its duty.”<sup>14</sup> Accordingly, the court concluded, the trash dumping did not merely “disturb the sensibilities” of the board members. Rather, it actually impaired the ability of the body to effectively conduct its meeting.

Finally, California Government Code section 36813 – which is not part of the Brown Act – authorizes a city council to address disruptions by members of the council. That provision states

---

<sup>10</sup> Government Code §§ 54953.5 and 54953.6.

<sup>11</sup> Government Code § 54957.9.

<sup>12</sup> *Ibid.*

<sup>13</sup> (2002) 104 Cal.App,4th 1275.

<sup>14</sup> *Id.* at 1289.



that a city council “may punish a member or other person for disorderly behavior at a meeting.” In exercising this authority, the council must act within constitutional constraints.<sup>15</sup>

### **First Amendment Principles Governing Legislative Body Meetings**

Providing advice to a body about its ability to address disruptions of its meetings would be difficult enough if the governing law consisted solely of these state statutory provisions. Courts, however, have concluded that a city council meeting is a *limited* public forum for purposes of First Amendment analysis.<sup>16</sup> As the Ninth Circuit has explained, “[c]itizens have an enormous first amendment interest in directing speech about public issues to those who govern their city.”<sup>17</sup> Accordingly, the provisions of the Brown Act and Penal Code section 403 authorizing the legislative body to address disruptions must be implemented consistent with First Amendment principles.

In *White v. City of Norwalk*, the Ninth Circuit Court upheld a city ordinance that authorized the city council to order removed individuals who uttered “personal, impertinent, slanderous or profane” remarks if the remarks “disrupted, disturbed, or otherwise impeded” the conduct of the meetings. The court explained that the presiding officer should not rule speech out of order “simply because he disagrees with it, or because it employs words he does not like.”<sup>18</sup> The court explained, however, that under the challenged ordinance, “[s]peakers are subject to restriction only when their speech ‘disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.’ So limited, we cannot say that the ordinance on its face is substantially and fatally overbroad.”<sup>19</sup> More specifically, the court stated:

A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient

---

<sup>15</sup> See *Nevens v. City of Chino* (1965) 233 Cal.App.2d 775, 778 (in invalidating prohibition on tape recording city council meetings, court explained that rules adopted under section 36813 cannot be “too arbitrary and capricious, too restrictive and unreasonable.”).

<sup>16</sup> *White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

manner. Indeed, such conduct may interfere with the rights of other speakers.

Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion. Undoubtedly, abuses can occur, as when a moderator rules speech out of order simply because he disagrees with it, or because it employs words he does not like. But no such abuses are written into Norwalk's ordinance, as the City and we interpret it. Speakers are subject to restriction only when their speech 'disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.' So limited, we cannot say that the ordinance on its face is substantially and fatally overbroad.<sup>20</sup>

In *Norse v. City of Santa Cruz*,<sup>21</sup> the Ninth Circuit explained that city councils may "regulate not only the time, place, and manner of speech in a limited public forum, but also the content of speech – as long as content-based regulations are viewpoint neutral and enforced that way."<sup>22</sup> Indeed, the city council may "close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed."<sup>23</sup>

---

<sup>20</sup> *Ibid.*; see also *Steinburg v. Chesterfield County Planning Comm'n* (4th Cir. 2008) 527 F.3d 377, 384-385 (rejecting First Amendment challenge to removal of individual for failing to address matters relevant to the subject of the meeting); *Rowe v. City of Cocoa* (11th Cir. 2004) 358 F.3d 800, 803 ("As a limited public forum, a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand"); *Eichenlaub v. Township of Indiana* (3d Cir. 2004) 385 F.3d 274, 281 (body may remove a "repetitive and truculent" speaker in order to prevent 'badgering' and 'constant interruptions.');" *Galena v. Leone* 199 (3d Cir. 2011) 638 F.3d 186 (member of the public who continues to interrupt meeting by making "objections" may be removed from meeting); *Jones v. Heyman* (11th Cir. 1989) 888 F.2d 1328, 1329 (presiding officer may require that speakers adhere to the agenda); *Scroggins v. City of Topeka, Kansas* (D. Kan. 1998) 2 F.Supp.2d 1362 (upholding a viewpoint neutral city council rule prohibiting personal attacks); but see *Richard v. City of Pasadena* (C.D. Cal. 1995) 889 F.Supp. 384 (invalidating rule requiring members of the city council "[t]o perform responsibilities in a manner that is efficient, courteous, responsive and impartial" on the ground that it was unconstitutionally vague and did not require that the regulated conduct be disruptive); see generally *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet* (2009) 41 Urb.Law 579.

<sup>21</sup> (9th Cir. 2010) 629 F.3d 966.

<sup>22</sup> *Id.* at 975.

<sup>23</sup> *Ibid.*



The *Norse* court emphasized, however, that city councils may not “extinguish all First Amendment rights” at a public meeting.<sup>24</sup> For example, a member of the public may not be ordered removed from the meeting merely for making an inflammatory gesture, such as a “Nazi salute,” unless this conduct was itself *actually* disruptive.<sup>25</sup> The court in *Norse* emphasized that city councils are not free to define “disruption” in whatever manner they choose. Rather, the court explained that “[a]ctual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc*<sup>26</sup> disruption, or imaginary disruption.”<sup>27</sup>

The Ninth Circuit recently emphasized the requirement that both the city rules of order regulating conduct at public meetings – and the actual application of those rules – be limited to conduct that is *actually* disruptive, at least to the extent that the person is to be removed from the meeting for the conduct.<sup>28</sup> Because the challenged ordinance regulating “insolent” conduct during a meeting could not be narrowly construed to apply only when the “insolent” conduct actually disrupted the meeting, the court invalidated that provision of the ordinance.<sup>29</sup>

In applying rules prohibiting disruptions of meetings, the requirement of viewpoint neutrality is critically important. Courts have invalidated orders that individuals be removed from meetings where the courts concluded that the actions were based on the viewpoints of the speakers, or speech offended the sensibilities of the public officials.<sup>30</sup>

California courts have also applied First Amendment principles to limit the circumstances in which a body may order a member of the public removed from a meeting for behavior the body

---

<sup>24</sup> *Id.* at 975-976.

<sup>25</sup> *Id.* at 976; see also *Leonard v. Robinson* (6th Cir. 2007) 477 F.3d 347, 352 (single utterance of obscenity did not constitute disruption sufficient to justify individual’s removal from meeting).

<sup>26</sup> I.e., “disruption” that is determined retroactively.

<sup>27</sup> *Id.* at 976.

<sup>28</sup> *Acosta v. City of Costa Mesa* (9th Cir. 2012) 694 F.3d 960, 971-972.

<sup>29</sup> *Ibid.* The court, however, severed that provision from the ordinance to save it from complete invalidation. See *id.* at 977-978.

<sup>30</sup> *Norse, supra*, 629 F.3d at 976; see also *Monteiro v. City of Elizabeth* (3d Cir. 2006) 436 F.3d 397; *Musso v. Hourigan* (2d Cir. 1988) 836 F.2d 736, 739; *Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266, 270-71 (“[L]imitations on speech at meetings must be reasonable and viewpoint neutral. . .”).



deems to be disruptive. *In re Kay*<sup>31</sup> involved the scope of Penal Code section 403. The court recognized that the orderly conduct of public meetings protects the right to free speech because “[f]reedom of everyone to talk at once can destroy the right of anyone effectively to talk at all.”<sup>32</sup> The court concluded, however, that Penal Code section 403 does not “grant to the police a ‘roving commission’ to enforce Robert’s Rules of Order.”<sup>33</sup>

Accordingly, the court held that section 403 must be limited to those situations where a member of the public substantially impairs the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known.”<sup>34</sup> The court expressly cautioned that, “[i]f any audience participation is permitted the rules regulating who may speak cannot be used to silence a participant merely because his views happen to be unpopular with the audience or with the government sponsors of the meeting.”<sup>35</sup>

### **General Considerations for Mitigating Disruptive Conduct**

With these legal principles in mind, and before discussing specific disruptive situations, we will provide some general thoughts on steps that can be taken to prevent or reduce the degree of disruption at public meetings, based on our experience.

#### **1. Encourage the Adoption of Council Rules That Clarify the Types of Behavior Deemed Disruptive.**

Having specific rules that identify the types of conduct deemed disruptive, rather than have this issue addressed through ad hoc rulings, is a critical first step. In adopting your rules, look to rules that have been upheld by courts, such as those challenged in *White v. City of Norwalk*. Consistent with *Norwalk* and *Norse*, those rules should make clear that they prohibit only behavior that *actually* disrupts the meeting, and that they will be applied in a viewpoint neutral manner.

---

<sup>31</sup> (1970) 1 Cal.3d 930.

<sup>32</sup> *Id.* at 941.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Id.* at 943.

<sup>35</sup> *Id.* at 943, fn.10.



**2. If a Highly Charged Issue is on the Agenda, Encourage the Presiding Officer to Explain These Rules, and How They Will Be Applied.**

We think that this practice serves multiple purposes. First, it reminds the presiding officer and other council members of how disruptions must be handled, and that the rules must be applied in an even-handed manner. Second, it lets the audience know at the outset that rules prohibit disruptions, and what the consequences will be if someone does choose to actually disrupt the meeting. Third, should someone be removed from the meeting, and later challenge the removal in court, it will assist in the defense of the action.

**3. Meet With the Presiding Officer, and if Appropriate a Police Department Representative, Before the Meeting to Ensure That Everyone is on the Same Page About How Disruptions Will Be Handled.**

In many cities, a police officer serves as the sergeant-at-arms responsible for carrying out the directives of the presiding officer, or city council. In addition, to the extent that a member of the audience engages in conduct that violates Penal Code section 403, police officers may be involved in arresting an individual for violating that section. We have found that it is very helpful to meet with the presiding officer, police chief or designee, and, if appropriate, the city manager to ensure that everyone has the same understanding and expectations about the circumstances and process that would lead to a member of the audience being removed, and perhaps cited for violating Penal Code section 403. For example, everyone should be on the same page about the need for the challenged conduct to be actually disruptive, that actions to address such conduct be done even-handedly without reference to the viewpoint of the member of the public, and the interaction between the presiding officer and police officer or other sergeant-at-arms.

**4. Encourage the Presiding Officer to Provide at Least One Warning Before Ordering a Disruptive Individual from the Meeting Room.**

Given the rights of the public under the Brown Act and First Amendment, it is our view that except in the most extreme cases, the presiding officer should clearly warn the individual that his or her conduct is actually disrupting the meeting, and request that it cease, before taking action to have the individual removed from the meeting room.



**5. Encourage the Agenda to Be Organized in the Manner Most Likely to Ensure that the Critical Business of the Council Can Be Completed Even if Disruptions Are Anticipated With Respect to a Particular Agenda Item.**

This is a practical, rather than legal consideration, and must be assessed on a case-by-case basis. If there are important, but not controversial, matters on the same agenda as a highly charged item, it may be best to have the council address those matters early in the meeting, before tensions rise, nerves fray, and the decision-making process becomes impaired.

**6. Encourage All of Your Clients to Remain Calm and Focused, and Provide an Example Through Your Own Demeanor.**

Again, this is a practical consideration, but an important one. It has been our experience that the public feeds off of rancor and discord among members of the council. There are certainly limits as to what a city attorney can do when tempers flare, but addressing legal questions that arise in a calm and assured manner may help the situation.

**Dealing With Specific Types of Disruptive Conduct By Members of the Public**

We cannot, of course, address every type of disruption that might occur during a public meeting. Nevertheless, we will now discuss types of disruption that we have seen arise with some frequency, offer some suggestions for addressing them, and hopefully spark further suggestions at the conference discussion of this topic, and on the listserv. One important role the public attorney can play, apart from providing guidance to the council and presiding officer “on the fly” when disruptions occur, is to discuss these more common types of disruptions with new presiding officers, and advise the officers of the legal constraints under which they must operate.

**1. A Speaker Refuses to Leave the Microphone After His or Her Speaking Time Has Expired.**

In our experience, this is one of the most common types of “disruptions” that can occur during a council meeting. The Ninth Circuit has identified this type of conduct as one that can result in an actual disruption, and one that is within the discretion of the presiding officer to address.<sup>36</sup> Nonetheless, this is the quintessential example of a situation where at least one warning should be issued before any effort is made to remove the speaker for disrupting the meeting. We have

---

<sup>36</sup> *White v. City of Norwalk, supra*, 900 F.2d at 1425.



found that it can be effective to provide to the city clerk – who is likely to be viewed as more impartial than an elected presiding officer – the ability to turn off the microphone (if one is used) once the person has been warned that his or her speaking time has expired.

This is a situation where enforcing the rule in an even-handed is extremely important. If the audience senses that the presiding officer is not enforcing the time limits against speakers on one side of an issue, the ability to enforce the time limits can be undermined, and it can lead to unruly behavior by others in the audience.

## **2. Speakers Insist on Addressing Matters Clearly Not Relevant to the Agenda Item.**

This type of “disturbance” can be a difficult one to properly police. It can arise in different ways. First, a speaker may use his time to comment on something that is indisputably irrelevant to the specific agenda item. For example, in connection with an item to declare June as City Attorney Month, a speaker uses his time to talk about the need to fix potholes on Main Street. Second, a speaker may seek to speak during general public comment about a specific item on that agenda but that the council has not yet reached, and that will have its own time set aside for public comment. Third, a speaker may attempt to discuss a subject that is not on the agenda, nor within the subject matter jurisdiction of the city council, such as using his time to advertise for sale his used Subaru.

Again, the approach to be used depends on the extent of the problem caused by this practice. If there are thirty items on the agenda, and it becomes apparent that the individual is committed to speaking about the same clearly irrelevant subject on each of those items, then after a clear warning to the individual, ordering him or her removed may be appropriate. In more isolated cases, we believe that the more practical solution is encourage the person to address the agenda item, and leave it at that. Apart from the fact that it is unlikely that a single isolated instance will rise to the level of an actual disruption, it is likely to take more time to remedy the problem than it would be to hear the person out.

## **3. Verbal Disruptions from the Audience**

A council’s consideration of a particularly controversial matter can lead to heated emotions on both sides of the issue. At times these emotions can manifest themselves in the form of outbursts



from the audience, either while individuals are providing public comment, or during the council's deliberation of the issue.

Addressing this species of disruption depends on how widespread, noisy and continuous the outbursts are. If individual members of the audience causing the actual disturbance can be identified – and if warnings are not effective in quieting the outbursts – those specific individuals may be removed. If the outbursts come from a significant portion of the audience, removing individuals is unlikely to be effective, and may even exacerbate the problem with the remaining audience members. Instead, following warnings, the more practical and effective practice would be to call a brief recess. In addition to giving the crowd an opportunity to cool off, it also provides an opportunity to confer with the presiding officer, city manager and police representative about next steps in the event the nature of the outbursts constitute an actual disturbance of the meeting.

And that brings us to the “nuclear” option: ordering that the room be cleared. We have never seen that option exercised, and there are compelling reasons – legal, political and practical – for choosing not to resort to an option that could result in photos in the next day's newspaper of police officers ushering folks out of a public meeting. We believe that almost any alternative is preferable – including threatening the use of the option, or continuing the matter to later in the meeting or to some future meeting.

If the option is to be exercised, strict adherence to the statutory requirement – including allowing the press back in and determining whether others should be allowed in – should be followed. You may also wish to consider allowing individuals back in one at a time to provide public comments, and broadcasting the audio of the meeting to an area where those who have been removed can listen, assuming the availability of the necessary technology.

#### **4. When It's a Council Member Who is Difficult**

Council meetings are difficult enough for a City Attorney when it is members of the public that engage in belligerent and disruptive behavior. The issues in dealing with disruptive behavior are compounded when it is a member of the City Council or a city board or commission who is misbehaving or disrupting the meeting by refusing to comply with the mayor's request for order

or by making *ad hominem* personal attacks or accusations involving other Council members or staff.

In addition to the First Amendment rights that all citizens speaking at public meetings have, as discussed above, elected officials have the additional First Amendment protection arising from holding public office. In *Carter v. Commission on Qualifications of Judicial Appointments*,<sup>37</sup> the court stated that “the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship.”<sup>38</sup> Restrictions on the First Amendment rights of elected and appointed officials is likely subject to more stringent review than those of non-elected citizens.<sup>39</sup> In the case involving the refusal of the Georgia House of Representatives to seat Julian Bond because of his statements on the Vietnam draft, the U.S. Supreme Court stated that “the manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.”<sup>40</sup> In *Miller v. Town of Hull*,<sup>41</sup> the First Circuit affirmed a 42 U.S.C section 1983 jury verdict, including punitive damages, against a town council that attempted to remove members of an appointed city redevelopment authority based on the authority’s exercise of First Amendment rights in supporting a subsidized housing project that the town council opposed.

In addition, as previously noted, the Brown Act in Government Code section 54954.3 protects public criticism of the agency:

The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

It follows that a city attorney must exercise great caution in advising that a council member or board member is disruptive and subject to removal from a public meeting. Absent clear behavior that is threatening to public safety or involves physical conduct that disrupts a meeting, a court is

---

<sup>37</sup> (1939) 14 Cal.2d 179.

<sup>38</sup> *Id.* at 182.

<sup>39</sup> See *Huntley v. Public Util. Com.* (1968) 69 Cal. 2d 67.

<sup>40</sup> *Bond v. Floyd* (1966) 385 U.S. 116, 135-136.

<sup>41</sup> (1st Cir. 1989) 878 F. 2d 523.



likely to find issues of fact precluding summary judgment and requiring an evidentiary showing of the constitutional basis for the exclusion.

For example, in *Vacca v. Barletta*,<sup>42</sup> acting chair Barletta told Vacca, a member of the school board, that he would not continue with a “screaming debate” where Vacca was “aggressively challenging” the school superintendent. Barletta called a recess, and shortly after the meeting resumed three police officers physically dragged the protesting Mr. Vacca from his seat, handcuffed him, and took him to the police station for the duration of the meeting. Good drama, but bad decision, as the summary judgment for Barletta was reversed by the First Circuit based on disputed facts on whether Vacca’s removal was content-neutral for disruption or for constitutionally protected speech. It should be noted that the case does not say that Barletta acted on the advice of the board’s counsel, who perhaps was not present and did not have the chance to counsel his client.

### **Practical Pointers**

- Be extremely cautious in advising that an elected Council member can be removed or excluded from a public meeting, as absent compelling evidence on a tape of the meeting it will be setting the Council member up to claim he/she is being targeted for First Amendment expression, is likely to aggravate rather than calm the situation in the long term, and may result in a lawsuit against the agency and mayor claiming violation of federal constitutional rights.
- If a meeting becomes unruly or difficult, a recess is often a good way to provide a short respite from the arguing and accusations and to provide the opportunity for Council members to cool down and hopefully return as adults to the podium.
- When a Councilmember continues to return to points already made and wants to speak multiple times and at length on the same issues, the parliamentary procedure motion to end debate and call the question is an effective method to move the item along.

---

<sup>42</sup> (1st Cir. 1991) 933 F. 2d 31.

*This page left intentionally blank.*