

Hi, this is Chris Micheli, a principal with the Sacramento governmental relations firm of Aprea & Micheli, and an adjunct professor of law at McGeorge's Capital Lawyering Program.

Thanks for joining today's podcast, where we take a look at whether the California state legislature can meet remotely and conduct its business.

As a result of the COVID-19 outbreak, numerous state legislatures around the country have been acting upon, or considering, measures to deal with their legislative operations, including issues like recesses, bill deadlines, and remote voting.

Let's take a brief look at how these different states are handling these questions. The first is recesses. About half of the states so far have either temporarily adjourned, or recessed, their legislative sessions. There are some states across the country who do not meet this year, or who've already adjourned their session.

California's one of those states that has a constitutional requirement that specifies the consent of both houses of the Legislature -- that is, the Assembly and the Senate -- must adopt a resolution to recess.

Specifically, the California Constitution provides that neither house may recess for more than 10 days without permission of the other. Now, the California Constitution, just like in many other states, does provide for some specific rules relating to legislative operations during emergencies. One of which is the use of special sessions.

In 36 states, a governor and the legislature have the ability to convene a special session. In the remaining 14 states, however, only the governor has that authority. California is one of those states where the governor calls the special session, and then of course the Legislature reacts by opening that special session.

Now, how about remote voting? At least eight states so far have been reviewing the use of electronic or remote meetings and votings during this pandemic going on. Most state constitutions that I've looked at require legislatures to meet in person and be open to the public.

As a result, they may be precluded from passing some sort of resolution, or rule change, or even adopting a statute that would allow them to engage in remote meetings or voting.

Now, the National Conference of State Legislatures has looked at this. They said, essentially in most normal circumstances, legislatures typically operate under a, if you will, "must be present on the floor and in committees" rule, meaning that legislatures have to be physically present, either in committees or on the floor, their respective chamber, in order to participate in the debate and in the voting on legislation.

As you can imagine, the rationale for this rule is to ensure the integrity of the legislative process. Basically, requiring legislators' physical presence ensures that there's a level of comfort, that the legislative procedures can be controlled, and that the public can actually witness and hear both the debate and the actual voting on the measures.

In two states, Oregon and Washington, they actually have specific provisions that allow remote or virtual meeting of the legislature, if there are certain emergencies that are existing. For

example, it was just in 2012 that Oregon approved a constitutional amendment in situations with catastrophic disaster.

Likewise, Wisconsin has a constitutional provision that allows their legislature to adopt different measures in light of any sort of pandemic or natural disaster occurring. Know in both of these instances that they are constitutional provisions.

Legislators in Pennsylvania and Utah are trying to move to remote sessions of their state legislatures, but, again, you have to examine whether or not the states are restricted from doing so.

Let's take a look at California. Of course, we turn to Article IV, which is the state Constitution's article that deals with the legislative branch of government, and specifically in Section 7 of Article 4 we find (c)1 that says, "The proceeding of each house, and the committee thereof, shall be open and public." And then it provides that closed sessions may be held for one of three specific purposes.

One is sort of a personnel. One is to consider matters of the safety and security of legislators and their employees. The third is the usual, receiving anything from their legal counsel about pending or anticipated litigation.

Despite this, the night that the California Legislature recessed, until April 13th, the State Senate adopted a new rule. It was adopted by voice in Senate Resolution 86. It added a new rule, 56. It's titled, "Remote Participation in Meetings During Emergencies."

Basically, it says that this rule only applies during an emergency. An emergency means a state or local emergency was declared by the governor. What it provides is that the leader of the Senate – the President Pro Tempore, or his or her designee -- can change the composition of any of the standing committees of the Senate, and they can appoint members and staff to any special committees.

Next, that the Pro Tem, or the Pro Tem's designee, can authorize any of these committees -- existing ones, or any special ones -- to conduct meetings by telephone or other electronic means.

Then, it says that the public may participate remotely. It also says that any senator who participates remotely shall be considered to be present and in attendance, for purposes of establish a quorum for voting.

It specifically authorizes during emergencies that the entire Senate can meet, and that one or more senators can participant in any meetings remotely, by telephone or any other electronic means. Again, that will still ensure that all the rules are being complied with.

There's also some special rules about how the senators will speak, and all that kind of stuff. It does request that they do so from the Senator's district office.

Now, this raises the question, of course, of whether or not this Senate Rule is permissible under the California Constitution. It is noteworthy that the California State Assembly did not adopt a similar resolution.

Under Senate Resolution 86, the new rule 56 of the Senate Rules, it certainly begs the question as to whether or not a full and robust debate would occur with legislation, and whether or by what means exactly the public would be able to participate.

If the Senate does resort to remote voting, and enacts any bills along those lines, the question then turns to whether or not some individual, or some group, would actually file a lawsuit to overturn such a statute for potentially violating Article 4 Section 7, or in fact whether any state courts would actually overturn a statute that were enacted under such a rule, considering the current circumstances.

Long story short, it's unknown, obviously, whether or not any use of remote voting is actually permissible under the California Constitution or not, and it'll be interesting to see whether or not the California State Senate attempts to do any remote participation in meetings, let alone voting, and whether or not their counterpart, the California State Assembly, will adopt a similar rule change that the State Senate did.

That's a brief look at whether or not the California legislature can meet remotely. I hope you enjoyed the podcast. Thank you for joining.