

2016  
OPEN MEETING LAW; 2016  
Legislative Amendments

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Adam Paul Laxalt  
Nevada Attorney General  
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# What is a Meeting?

Three requirements:

- 1. **Quorum** of members of a public body;  
**...and either, or both:**
- **Deliberation** amongst the quorum toward a decision, or:
- **Action:** which means making a decision, commitment or promise; (NRS 241.015(1)) over a matter within the public body's supervision, jurisdiction, control or advisory power.

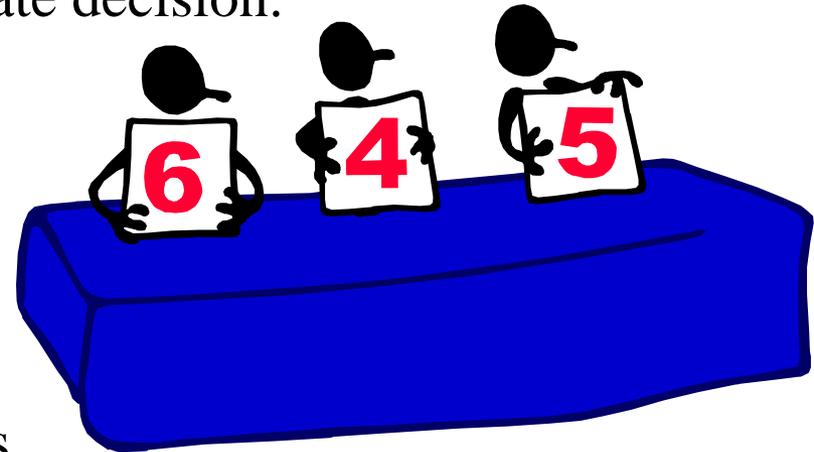
# Critical Definitions to understanding **how** public Bodies conduct business

- **Deliberation** is now legislatively defined. It means: “collectively to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, the collective discussion, or exchange of facts preliminary to the ultimate decision.”

- **Action** means voting:

(See Manual, section 5.01)

- includes promise or commitment;
- But no secret ballots or secret promises
- Action is an affirmative vote by a majority of the members during a public meeting; there is a difference between elected body and appointed body requirements for action.



# “Deliberation” / “Discussion,” are they Synonymous?



- Why does it matter to you?
- In NRS 241.020(2)(c), it states that public comment must come after the public body “**discusses**” the action item, but before it takes action?
- 2013: new Legislative definition of **deliberation**: it is the collective **discussion** or exchange of facts, prior to ultimate decision that constitutes “**deliberation.**”

# Agenda **Basic** Rule

## “Clear and Complete” rule

NRS 241.020(2)(c)(1)

- Cornerstone of OML
- Nevada S.Ct.: *Sandoval v. Bd. Of Regents*, 119 Nev. 148 (2003);
- *Rejected the so-called “germane” standard.*
- *Agenda topics must be specific to alert the public to topics that will be discussed.*

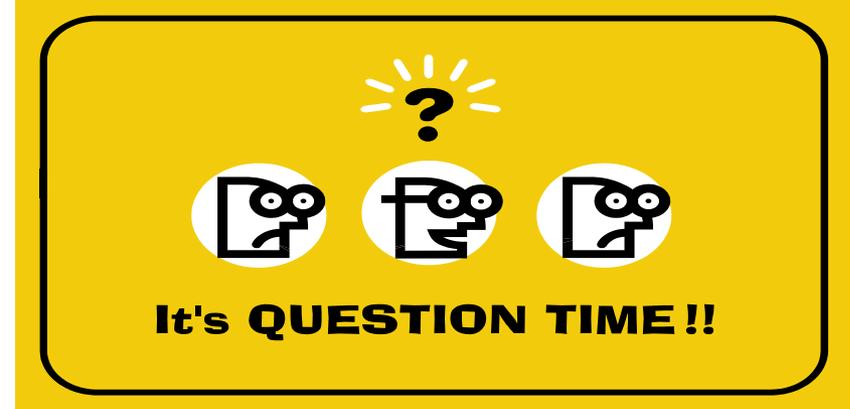


# The agenda: “Is it clear and complete” ??



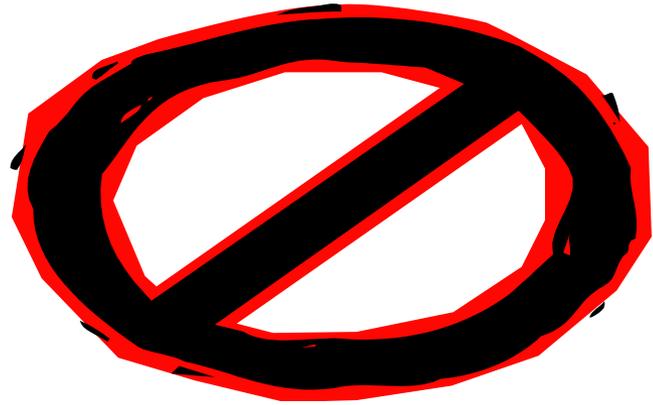
- Does the agenda item provide complete list of topics scheduled for consideration by the public body?
- Related matters to a agenda topic may not be discussed or the public body may have strayed from the agenda.
- Sandoval v. Bd. Of Regents, 119 Nev. 148
- AG’s Manual sec. 7.02 and 7.03

# Are these items “clear and complete?”



- Many public bodies have used the following phrase on their agenda:  
    “.... and all matters related thereto.”
- How about an agenda item announcing negotiations on a new city franchise agreement for waste disposal. In part it stated: “.... [public body will] address general issues relating to the upcoming franchise renewal for waste disposal, including **special provisions for inclusion in a new franchise agreement(s).**” [see next slide for result]

**No!** After investigation it was determined **not to be clear and complete.**



Review of meeting video showed a motion had been made to direct staff to include mandatory trash service as a part of the bidding process for franchise agreement renewal or perhaps obtaining new services from other contractors.

- ✓ **“higher degree of specificity is needed when the subject to be debated is of special or significant interest to the public.”**  
*Sandoval v. Board of Regents of the University and Community College System of Nevada, 119 Nev. 148, 154-155, 67 P.3d 902, 905-906 (2003).*
- ✓ *We found that the matter of mandatory trash pickup and billing issues were of a significant interest to the public. The agenda item was not clear and complete. Public body “cured” violation at next meeting.*

# Another important Public Meeting Basic rule

**Stick to the Agenda:** Members and/or counsel must prevent public body discussion from wandering to related topics;

Example: Board of Regents agenda item:

*"Review state, federal statutes, regulations, case law and policies that govern the release of materials, documents, and reports to the public."*

So far, so good. But ...[next slide]

# Board strayed from topic despite warning from counsel!



- Board discussed details of a Nevada Division of Investigation report into an incident on the UNLV campus; Board criticized the UNLV police department, and commented on the impact of drug use on campus among other items of discussion. Counsel warned the Board that they were straying from the agenda on several occasions.
- Supreme Court opinion said: Agenda did not inform public that these matters would be topic of discussion.
- Court rejected the “germane” standard for agenda items.
- *Sandoval v. Board of Regents of the University and Community College System of Nevada*, 119 Nev. 148 (2003).

**OPENNESS** IS THE  
NORM,  
**NOT** THE EXCEPTION;

The OML is:

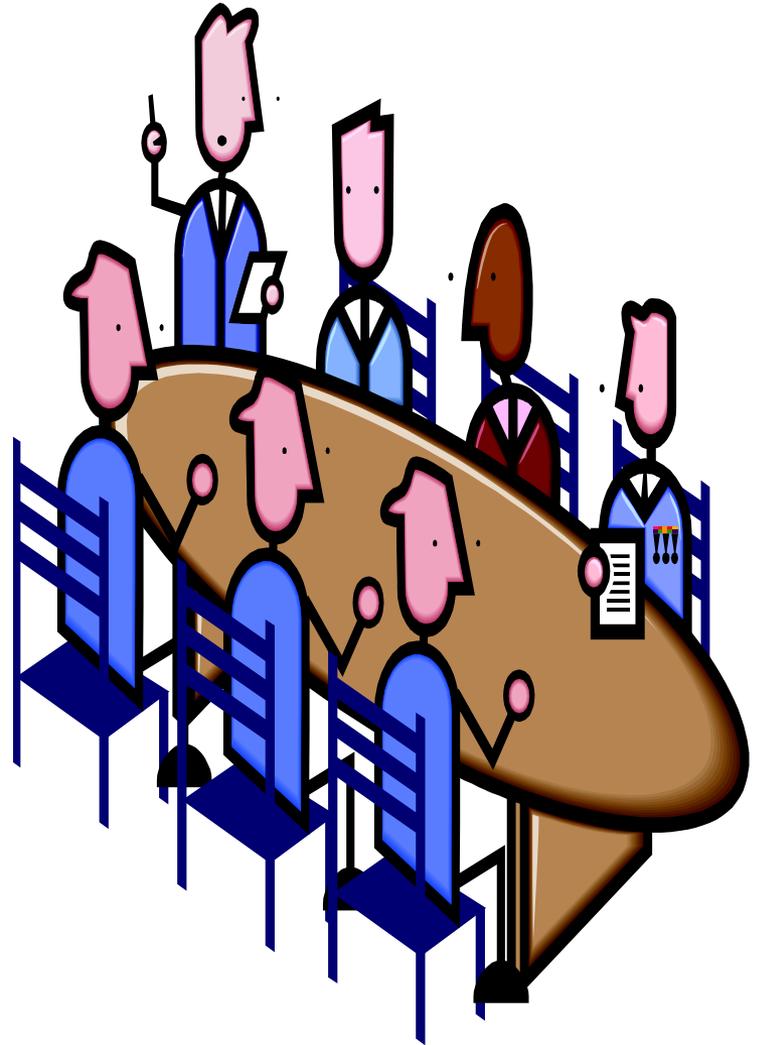
“...for the public benefit  
and should be liberally  
construed and broadly  
interpreted to  
promote openness in  
government.”

*Dewey v. Redevelopment  
Agency of City of Reno,  
119 Nev. 87, 94 (2003)*



...But, the *Dewey Court* also said:

- OML does not prohibit every private discussion of a public issue by members of public body or even forbid lobbying for votes, but;
- ...a **quorum** must **not** be involved.
- see: ***McKay v. Bd of County Commissioners, (103 Nev. 490: 1987)*** members of public bodies may discuss matters with colleagues, but the “OML only prohibits collective deliberations or actions where a quorum is present.”

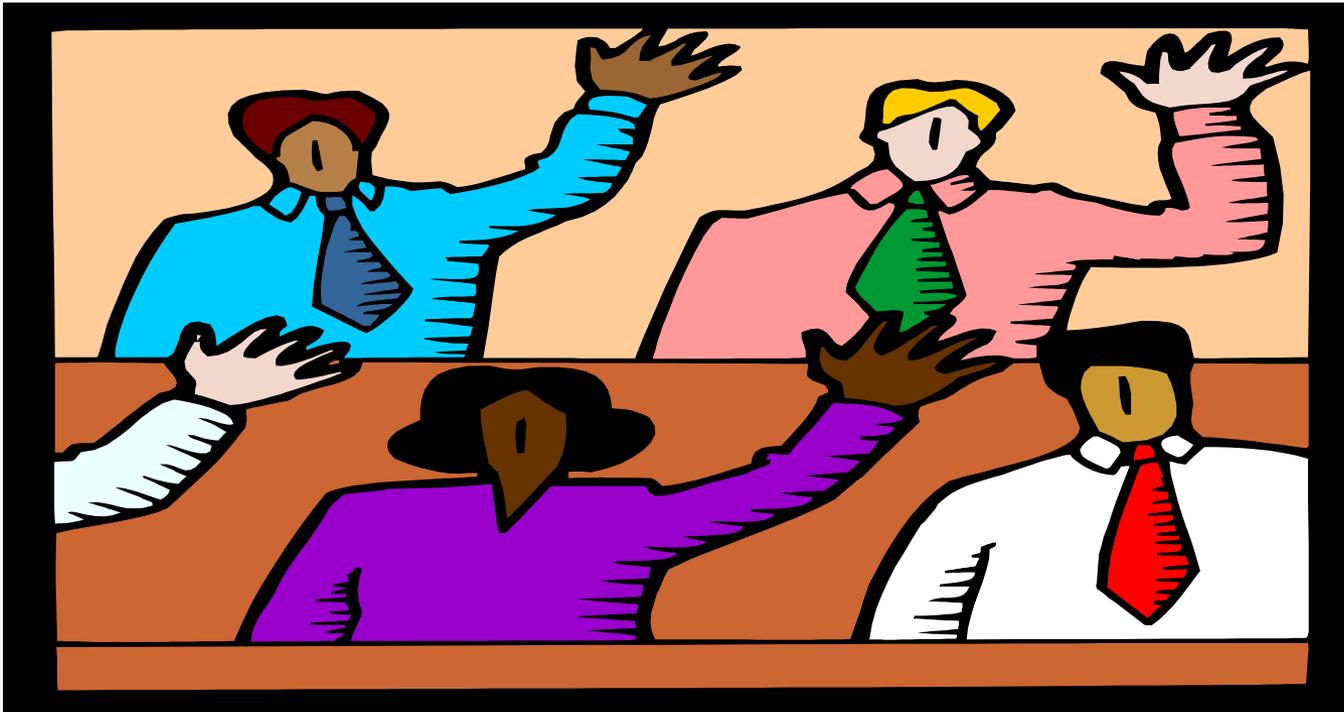


Serial communication amongst a quorum of a public body is prohibited!



# Committee or no committee:

- AG's Manual states: "...to the extent that a group is appointed by a public body and is given the task of making decisions for or recommendations to the public body, the group would be governed by the Open Meeting Law."



“Committees/subcommittees/... or any subsidiary thereof.” So, No matter what name it is known by,

- ... It may be a sub-committee. If a **recommendation to a parent body** is more than **mere fact-finding** because the sub-committee has to choose or accept options, or decide to accept certain facts while rejecting others, or if it has to make any type of **choice** in order to create a **recommendation**, then it has participated in the decision-making process and is subject to the OML. (unless specifically exempted by statute.)
- OML Manual: section 3.04

# Our Constitution is not a “Sunshine Law”



- Strong arguments can be made that the First Amendment could and should be interpreted to include a right of public access to the meetings of public bodies. However appealing that interpretation may be, it has not been adopted by the courts.



## Because ...

- U.S. Supreme Court has repeatedly has held that there is no Constitutional right of access in the public or the press to governmental proceedings.  
*Gannett Co. v. DePasquale*, 443 U.S. 368, 404, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Rehnquist, J., concurring)
- Violation of an open meeting law does not constitute a violation of due process unless arbitrary government action “shocks the conscience.”
- **However**, once a person is given a right to address a public body, [thereafter] that right may be limited only within constitutional parameters.  
*Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995);

# **1<sup>st</sup> Amendment:** public comment restrictions;

A public body may:

- restrict public speakers to the subjects within the body's supervision, control, jurisdiction or advisory power;
- limit public comment if the "speech becomes irrelevant or repetitious."
- apply reasonable time limitations to public comment,
- and it may limit caustic personal attacks by a speaker.
- **...But a public body may not limit public comment based disagreement with "viewpoint" of the speaker.**
- **NRS 241.020(2)(d)(3)(VII).**

# Public comment pitfalls



- Halting a citizen's comment based on belief defamation is occurring.
- Halting comment based on viewpoint of speaker.
- Halting critical comment of public official,
- But ... comment can be stopped if it strays from scope of agenda topic; or if an actual disturbance occurs.