

§ 5.01 General; statutory definitions

NRS 241.015(2)(a)(1) and (2) define “meeting” as:

- (1) The gathering of members of a public body at which a quorum is present to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
- (2) Any series of gatherings of members of a public body at which:
 - (I) Less than a quorum is present at any individual gathering;
 - (II) The members of the public body attending one or more of the gatherings collectively constitute a quorum; and
 - (III) The series of gatherings was held with the specific intent to avoid the provisions of this chapter.

As discussed in §4.05, NRS 241.015(2) excludes from the definition of meeting:

Any gathering or series of gatherings of members of a public body, as described in paragraph (a), at which a quorum is actually or collectively present:

- (1) Which occurs at a social function if the members do not deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.
- (2) To receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.

Some of the key words in that definition are:

“Gathering” In Op. Nev. Att’y Gen. No. 85-19 (December 17, 1985), the Office of the Attorney General defined “gathering” to mean to bring together, collect, or accumulate and to place in readiness. Accordingly, a “gathering” of members of a public body within the conception of an open meeting would include any method of collecting or accumulating the deliberations or decisions of a quorum of these members.

- “Quorum” A “quorum” of a public body is defined in NRS 241.015(4) as a simple majority of the constituent membership of a public body or another proportion established by law.
- “Present” The Office of the Attorney General believes the term “present” means being in view or immediately at hand, being within reach, sight or call, being in a certain place and not elsewhere, ready at need. Presence may be either actual or constructive and a quorum of the membership of a public body is constructively present whenever the attendant acts, circumstances, and conduct demonstrate that the members should be deemed by the law as being together for the purpose of conducting the business of the public. Op. Nev. Att’y Gen. No. 85-19 (December 17, 1985).
- “Deliberate” To “deliberate” is to examine, weigh, and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only **collective discussion**, but also the **collective acquisition** or the exchange of facts preliminary to the ultimate decision. *See Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 97, 64 P.3d 1070, 1077 (2003) and *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors*, 69 Cal. Rptr. 480 (Cal. Ct. App. 1968) discussed in § 5.02 below. *See* OMLO 2010-06 (September 10, 2010) (collective deliberation is required to constitute a meeting of Board of School trustees).
- “Action” Under NRS 241.015(1), “action” means: (a) a decision made by a majority of the members present during a meeting of a public body; (b) a commitment or promise made by a majority of the members present during a meeting of a public body; (c) if a public body may have a member who is *not* an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body; or (d) if all the members of a public body *must* be elected officials, an affirmative vote taken by a majority of all the members of the public body.

Application of the definitions to common circumstances follows.

§ 5.02 Informal gatherings and discussions that constitute deliberation

The Nevada Supreme Court cited *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, (see § 5.01 above, for citation) for clarification of the meaning of “deliberation.” All five members of the Sacramento County Board of Supervisors went to a luncheon gathering with the county counsel, a county executive, the county director of welfare, and some AFL-CIO labor leaders to discuss a strike of the Social Workers Union against the county. Newspaper reporters were not allowed to sit in on the luncheon, and litigation resulted. The board of

supervisors contended that the luncheon was informal and merely involved discussions that were neither deliberations nor actions in violation of California's open meeting law.

The California Court of Appeals disagreed and upheld an injunction against the board, ruling that California's open meeting law extended to informal sessions or conferences designed for discussion of public business. Among other things, the Court observed:

“Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, rather it comprehends both and either.”

“To deliberate is to examine, weigh and reflect upon the reasons for or against the choice. . . . Deliberation thus connotes not only collective discussion, but the collective acquisition or the exchange of facts preliminary to the ultimate decision.”

“An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. **There is rarely any purpose to a nonpublic, pre-meeting conference except to conduct some part of the decisional process behind closed doors.** Only by embracing the collective inquiry in discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. As operative criteria, formality and informality are alien to the law's design, disposing it to the very evasions it was designed to prevent. Construed in light of the Brown Act's objectives, **the term “meeting” extends to informal sessions or conferences of board members designed for the discussion of public business.** The Elks Club luncheon . . . was such a meeting.”

Id.

There are important objectives to be achieved from requiring the deliberations and actions of public agencies to be open and public. As stated in the article Access to Government Information in California:

“The goal in requiring that deliberations take place at meetings that are open and public is that committee members make a conscientious effort to hear viewpoints on each issue so that the community can understand on what their premises are based, add to those premises when necessary, and intelligently evaluate and participate in the process of government.”

54 Cal. L. Rev. 1650 (1966).

The Office of the Attorney General agrees with the foregoing and believes that if a majority of the members of a public body should gather, *even informally*, to discuss any matter over which the public body has supervision, control, jurisdiction, or advisory power, it must comply with the Open Meeting Law. *Cf.* Op. Nev. Att’y Gen. No. 241 (August 24, 1961), and Op. Nev. Att’y Gen. No. 380 (January 1, 1967), certain aspects of which were written before the statutory definition of “meeting” was established.

For an example of the foregoing discussion of informal meeting:

A quorum of the City Council discussed public business with a volunteer firefighter. Two members constituted a quorum of the City Council and these two were employed by the same employer. However, after interview with the witness firefighter, no evidence was uncovered which indicated that a commitment or promise about a matter within the City Council’s supervision, control, jurisdiction, or advisory power had been made. Warning was issued to the Council. AG File No. 08-003 (April 7, 2008).

Under some city charters, the mayor is not a member of the city council, and the mayor’s powers are usually limited to a veto or casting a tie-breaking vote. In such cases, the presence of the mayor is not counted in determining the presence of a quorum of the council. *See* Op. Nev. Att’y Gen. No. 2001-13 (June 1, 2001).

§ 5.03 Social gatherings

Nothing in the Open Meeting Law purports to regulate or restrict the attendance of members of public bodies at purely social functions. A social function would only be reached under the law if it is scheduled or designed, at least in part, for the purpose of having a majority of the members of the public body deliberate toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power. As described by the California Court of Appeals in *Sacramento Newspaper Guild, supra* at § 5.02:

There is a spectrum of gatherings of public agencies that can be called a meeting, ranging from formal convocations to transact business to chance encounters where business is discussed. However, neither of these two extremes is an acceptable definition of the statutory word “meeting.” Requiring all discussions between members to be open and public would preclude normal living and working by officials. On the other hand, permitting secrecy, unless there is a formal convocation of a body, invites evasion. Although one might hypothesize quasi-social occasions whose characterization as a meeting would be debatable, the difference between a social occasion and one arranged for pursuit of the public’s business will usually be quite apparent.

The definition of meeting now explicitly excludes a gathering or series of gatherings of members of a public body at which a quorum is actually or collectively present which occurs at a social function, if the members do not deliberate toward a decision or take

action on any matter over which the public body has supervision, control, jurisdiction or advisory power. *See* NRS 241.015(2)(b)(1).

§ 5.04 Seminars, conferences, conventions

When a majority of the members of a public body attend a state or national seminar, conference, or convention to hear speakers on general subjects of interest to public officials or to participate in workshops with their counterparts from around the state or nation, it usually may be assumed they are there for the purpose of general education and social interaction and not to conduct meetings to deliberate toward a decision or to take action on any matter over which their public body has supervision, control, jurisdiction, or advisory power, even if presentations at the seminar touch on subjects within the ambit of the public body's jurisdiction or advisory power. Thus, such seminars, conferences and conventions do not fall under the definition of "meeting" found in NRS 241.015(2). However, should the gathering have the purpose of or in fact exhibit the characteristics of a "meeting" as defined in NRS 241.015(2), then the provisions of the Open Meeting Law apply. *See* Op. Nev. Att'y Gen. 2001-05 (March 14, 2001).

§ 5.05 Telephone conferences/video conferences

Nothing in the Open Meeting Law prohibits a quorum of the members of a public body from deliberating toward a decision or taking action on public business via a telephone conference call or video conference in which they are simultaneously linked to one another telephonically. However, since this is a "meeting," the notice requirements of the Open Meeting Law must be complied with and the public must have an opportunity to listen to the discussions and votes by all the members through a speaker phone or video conference equipment. This may be accomplished by including in the meeting notice the location and address of a place where members of the public may appear and listen to the meeting discussion over a telephone speaker device or other electronic media. *See Del Papa v. Board of Regents of the Community College System of Nevada*, 114 Nev. 388, 956 P.2d 770 (1998) for a discussion regarding the applicability of the Open Meeting Law to a public body's use of telephones, fax machines and other electronic devices to deliberate and/or take action.

Although a telephone conference may be a lawful method of conducting the public's business, it should never be used as a subterfuge to avoid compliance with the Open Meeting Law and its stated intent that the actions of public bodies are to be taken openly and their deliberations conducted openly. NRS 241.030(4).

§ 5.06 Electronic polling

NRS 241.030(4) specifically provides that electronic communications must not be used to circumvent the spirit or letter of the Open Meeting Law in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory powers.

This statute applies to telephone polls (unless done as a part of an open meeting as discussed above), and to polls by facsimile or e-mail.

In *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998), the Chairman of the Board of Regents of the University of Nevada sent by facsimile a draft advisory to all but one regent rebutting public statements made by that regent to the press. The draft advisory was accompanied by a memo requesting feedback on the advisory and sought advice from the other regents on whether to release the advisory to the press. The memo stated that no press release would occur without board approval. Of the ten regents who received the fax, five responded in favor of releasing the advisory, one wanted it released under the chairman's name only, one was opposed, two had no opinion, and one did not respond. The regents who responded did so by telephone calls to either the chairman or the interim director of public information for the University. In finding that the Board violated the Open Meeting Law by deciding whether to release the draft advisory privately by "facsimile" and telephone rather than by public meeting, the Nevada Supreme Court stated:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes. However, if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter in a public meeting.

Id. at 400.

Where two county commissioners (three were a quorum) discussed the termination of the County Manager between themselves, the OML was not offended because no other commissioner acknowledged discussion about termination with them. The failure to create a constructive quorum barred application of the OML. AG File No. 07-011 (June 11, 2007); NRS 241.015(2) sets the serial communication bar at "collective deliberations or actions" (exchange of facts that reflect upon reasons for or against the choice) involving a quorum of members of a public body. *Dewey* 119 Nev. at 87. See also AG File No. 07-015 (September 10, 2007) (allegation that Board of School Trustees created constructive quorum through emails and private meetings).

§ 5.07 Mail polls

In view of the legislative declaration of intent that all actions of public bodies are to be taken openly, the making of a decision by a mail poll that is not subject to public attendance appears inconsistent with both the spirit and intent of the law. See Op. Nev. Att'y Gen. No. 85-19 (December 17, 1985).

§ 5.08 **Serial communications, or “walking quorums”**

The Open Meeting Law forbids “walking quorums” or constructive quorums. Serial communication invites abuse if it is used to accumulate a secret consensus or vote of the members of a public body. Any method of meeting where a quorum of a public body discusses public business, whether gathered physically or electronically, is a violation of the OML.

Nevada is a “quorum state,” which means that the gathering of less than a quorum of the members of a public body is not within the definition of a meeting under NRS 241.015(2). Where less than a quorum of a public body participates in a private briefing with counsel or staff prior to a public meeting, it may do so without violating the Open Meeting Law. *Dewey* 119 Nev. at 99, 64 P.3d at 1078.

While the Nevada Supreme Court ruled that meetings between a quorum of a public body and its attorney are not exempt from the Open Meeting Law, it observed in *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987) that:

Nothing whatever precludes an attorney for a public body from conveying sensitive information to the members of a public body by confidential memorandum; nor does anything prevent the attorney from discussing sensitive information in private with members of the body, singly or in groups less than a quorum. Any detriment suffered by the public body in this regard must be assumed to have been weighed by the Legislature in adopting this legislation. The Legislature has made a legitimate policy choice-one in which this court cannot and will not interfere.

McKay, 103 Nev. At 495–96, 746 P.2d at 127.

In another case, the Nevada Supreme Court observed that the OML did not forbid all discussion among public body members even when discussing public business:

[A] quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction or advisory power violates the Open Meeting Law. *That is not to say that in the absence of a quorum, members of a public body cannot privately discuss public issues or even lobby for votes.* (Emphasis added.)

Del Papa, 114 Nev. at 400, 956 P.2d at 778.

Serial communication invites abuse of the Open Meeting Law if it is used to accumulate a secret consensus or vote of the members of a public body. In *McKay v. Board of County Commissioners*, 103 Nev. 490, 746 P.2d 124 (1987), the Court stated that sensitive information may be discussed in serial meetings where no quorum is present in any gathering. But there can be no *deliberation, action, commitment, or promise* made regarding a public matter in such a serial meeting.

In *Dewey v. Redevelopment Agency of the City of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), the Court reaffirmed its position in *McKay* and provided a substantial discussion regarding “serial communications” and non-quorum private briefings by staff. Please note that NRS 241.015(2)(a)(2), which defines “serial communications” as a “meeting” for purposes of the Open Meeting Law, was enacted after the *Dewey* case was decided. However, the Office of the Attorney General believes the Court’s analysis in *Dewey* provides substantial insight into the facts the Supreme Court will analyze to determine if “serial communications” occurred.

In *Dewey*, the Redevelopment Agency for the City of Reno (Agency) owned the Mapes Hotel, a historic landmark listed on the National Trust for Historic Preservation. In 1999, the Agency adopted a resolution in which it would accept bids to rehabilitate the Mapes Hotel. The Agency’s staff put together a request for proposals (RFP), which was sent to more than 580 developers. In response to the RFP, the Agency received six proposals to rehabilitate the Mapes Hotel.

On August 31, 1999, the Agency’s staff conducted two private back-to-back briefings with a non-quorum of the Agency attending each briefing; three members attended one briefing and two members attended the other briefing. For the purposes of an Agency meeting, a quorum was four or more members.

The purpose of these meetings was to inform the Agency members of potential issues with the RFP responses. The testimony at trial was clear that the Agency members neither provided their opinions, voted on the issue, nor were they polled by staff as to their opinions or votes at the briefings. The purpose of the briefings was to provide Agency members with information regarding a complex public policy issue.

Dewey, as well as other plaintiffs, filed a lawsuit against the Agency alleging a violation of the Open Meeting Law. The trial court held that there was a violation of the Open Meeting Law because the meetings constituted a constructive quorum for purposes of the Open Meeting Law. However, the Court only issued an injunction and refused to void the Agency’s actions. In response, *Dewey* appealed the court’s final order in hopes of voiding the Agency’s actions, and the Agency cross-appealed alleging that the Court erred in finding an Open Meeting Law violation.

On appeal, the Nevada Supreme Court stated, “[W]e have . . . acknowledged that the Open Meeting Law is not intended to prohibit *every* private discussion of a public issue. Instead, the Open Meeting Law only prohibits collective *deliberations* or *actions* where a quorum is present.” (Emphasis added.) *Dewey*, 119 Nev. at 94–95, 64 P.3d at

1075. The Court stated, in part, that deliberations meant the collective discussion by a quorum. (*See* §5.01 *infra* for the full definition of deliberations.) Since a quorum of the Agency did not attend the back-to-back briefings, a collective discussion equaling deliberations could not have occurred. In order for a constructive quorum to exist, the Agency members or staff would have to participate in serial communications. The trial court shifted the burden to the Agency to prove that the Agency did not participate in serial communications. The Supreme Court held that shifting the burden was inappropriate because a quorum of the public body did not attend the briefings. Thus, the burden was on Dewey to provide substantial evidence that the Agency conducted serial communications.

The Court then reviewed the record to determine whether substantial evidence existed to prove serial communications occurred. The Court stated that the record did not provide substantial evidence that the Agency member's thoughts, questions, or opinions from one briefing were shared with the members of the other briefing. There was also no evidence of polling by the Agency's staff to determine the opinions or votes of the Agency's members. Further, there was no evidence in the record that the briefings resulted in the Agency taking action or deliberating on the issue. Finally, the record indicated that the Agency's staff intended to comply with the Open Meeting Law in conducting the briefings in the non-quorum back-to-back fashion. As a result, the Court held that substantial evidence did not exist to prove the briefings resulted in serial communications creating a constructive quorum, and that the Agency's back-to-back briefings were not "meetings" for purposes of the Open Meeting Law.

Further citations illustrating the discussion above:

The Office of the Attorney General accepts affidavits or written statements from members of a public body as evidence whether "serial communications" occurred. *See* OMLO 2004-16 (May 65, 2004).

See OMLO 2004-26 (July 21, 2004) for an example of "serial communications" in violation of the Open Meeting Law, and *see* OMLO 2003-11 (March 6, 2003) for an analysis finding no "serial communication" consistent with *Dewey*.

See OMLO 2008-010: Public body quorum met to discuss District business immediately following adjournment of noticed meeting. The meeting had been arranged without notification to the public that a quorum would remain after adjournment of the regularly scheduled meeting. The fact that the meeting only concerned discussion of matters not appearing on a public body's agenda did not exempt the discussion from the application of the OML. OML is applicable whenever a quorum of a public body deliberates or takes action on any matter over which the public body has supervision, control, jurisdiction or advisory power. AG File No. 08-010 (July 23, 2008); AG File No. 08-035 (November 17, 2008) (two members of public body were mistaken in their belief that a quorum can only be achieved by a physical gathering of a quorum at the same time and place.)

violation of “clear and complete” rule. Nothing in the OML prohibits a public body from rejecting or amending staff’s recommendation regarding school name, or that requires the public body to vote up or down on exact wording of any proposal brought before it. This is too narrow an interpretation of NRS 241.020(2)(c)(1)—the “clear and complete” rule. AG File No. 09-006 (February 2, 2009).

§ 7.03 Stick to the agenda

As discussed in § 7.02, *supra*, *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003) provided analysis of a public body’s failure to only discuss matters within the scope of its agenda. In that case, the Campus Environment Committee (Committee) held a meeting on September 7, 2000. The agenda item stated: “Review of UCCSN Policies on Reporting” It further described the item’s scope as:

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

Id. 119 Nev. at 151, 67 P.3d at 903–904. At this meeting, the Committee discussed a controversial NDI report regarding a dormitory raid by UNLV police. Regent Hill discussed the details of the raid, criticized the UNLV police department, and recommended the police department be disarmed. This discussion occurred against the advice of legal counsel. The office of the Attorney General sued the Regents for exceeding the scope of the agenda item. The district court granted summary judgment for the Committee after applying a “germane standard” to the discussion, concluding the discussion was germane to the agenda item. The Office of the Attorney General appealed.

The Supreme Court stated that the agenda statement was “clear and complete” under NRS 241.020(2)(c)(1), and, in the abstract, the Committee could have discussed the NDI report. However, the Court held, “[t]he plain language of NRS 241.020(2)(c)(1) requires that discussion at a public meeting cannot exceed the scope of a clearly and completely stated agenda topic.” *Id.*, 119 Nev. at 154, 67 P.3d at 905. Here, the Committee violated the Open Meeting Law by exceeding the scope of the agenda statement “when it discussed the details of the report, criticized the UNLV police department, and commented on the impact of drug use on the campus.” The Court said the Committee’s agenda statement did not inform the public that these matters would be a topic of discussion. *Id.* 119 Nev. at 155, 67 P.3d at 906.

Many other complaints received by the Office of the Attorney General have to do with public bodies wandering off their agendas. Discussions may start on an agenda item but then drift off into other matters. (*See* AG File No. 10-014 (February 25, 2010) for an example of a deliberate discussion of a person’s character without notice and beyond the scope of the agenda item.) The chair for a public meeting or its counsel should be vigilant to stop the discussion from drifting in order to prevent Open Meeting Law violations. *See* OMLO 98-03 (July 7, 1998) for an example of how a public body can

violate the Open Meeting Law by wandering off its meeting agenda. *See also* OMLO 99-09 (July 28, 1999) for an example of how a budget workshop designated for discussion and review of a proposed budget resulted in several violations of the Open Meeting Law when members of the public body made decisions on various items within the proposed budget.

Deviating from the agenda by commencing a meeting prior to its noticed meeting time violates the spirit and intent of the Open Meeting Law and nullifies the purpose of the notice requirements set forth in NRS 241.020(2). *See* OMLO 99-13 (December 13, 1999).

In this Open Meeting law opinion, the public body's Chairman brought up new subjects unrelated to agenda item. A Commissioner interjected a call for a parliamentary point-of-order. Even though the Chair's remarks strayed beyond the agenda item, which was "review and discussion of written items sent or received by the Commission since the last regular meeting and to send correspondence copies for the exhibit file," the Chair ignored the point of order. His refusal to acknowledge the point-of-order and return to the subject matter of the agenda was a violation of the OML. A public body may not raise an unagendized issue at any time as long as no action is taken. The OML clearly states that each agenda item must be "clearly and completely" set forth. It is not conditional on whether it is an informational item or an action item. AG File No. 09-031 (October 22, 2009)

§ 7.04 Matters brought up during public comment; meeting continued to another date

The Open Meeting law now requires multiple periods of public comment on each public body agenda. No action may be taken upon a matter raised in public comment or anywhere else on the agenda, until the matter itself has been specifically included on a future agenda as an item upon which action may be taken.

Restrictions on public comment must be reasonable and must be noticed on the agenda, i.e. time limitations. NRS 241.020(2)(c)(3) *see* § 8.04 *infra*. Restrictions must be viewpoint neutral. At least one of the multiple periods of public comment must allow the public to speak about any matter within the public body's jurisdiction, control, or advisory power. *See* § 8.04 for the requirements for conducting the public comment period. The Open Meeting Law does not limit a public body's discretion to refuse to place on the agenda an item requested by a member of the public. Any limits are a matter of general administrative law. *See* AG File No. 00-047 (April 27, 2001).

Where a meeting is continued to a future date, the reconvened meeting must have the same agenda or portion thereof at the later date. The new date is a second, separate meeting for purposes of notice and public comment, and a member of the public is entitled to make public comment on the same subject at both meetings. [For explanation of the public comment requirement, *See* AG File No. 01-012 (May 21, 2001).]

§ 7.05 Meeting that must be continued to a future date.

A meeting which is continued to a future date where the continuation date does not appear on the original agenda must be re-noticed as a new meeting. The agenda must be posted according to NRS 241.020(2)(three working days before the noticed meeting) whether the new agenda carries over items from the prior agenda or whether it adds new items. The new date is a second, separate meeting for purposes of notice and public comment, and a member of the public is entitled to make public comment on the same subject at both meetings.

Meetings may be recessed and reconvened on the same date it was noticed without violation of the notice provisions of the OML.

§ 8.07 Excluding witnesses from testimony of other witnesses

Under NRS 241.030(5)(c), a witness may be removed from a public or private meeting during the testimony of other witnesses. This applies even if the witness is an employee of the state agency that is prosecuting the case. Unless otherwise stipulated, the witness may continue to be excluded after he testifies. *See* Op. Nev. Att’y Gen. No. 93 (November 21, 1963). The witness should be allowed entrance after all other witnesses have testified. Aside from these witness exclusion rules remember that, NRS 241.033(4) prohibits the public body from excluding the person being considered under NRS 241.030 at any time during the closed meeting, as well as his/her representative or attorney.

§ 8.08 Votes by secret ballot forbidden; voting requirements for elected public bodies; voting requirements for appointed public bodies (NRS 241.0355)

Since a secret ballot defeats the accountability of public servants, vote by secret ballot is not permitted under the Open Meeting Law. *Cf. News & Observer Publ’g Co. v. Interim Bd. of Educ.*, 223 S.E.2d 580 (N.C. Ct. App. 1976); *Olathe Hosp. Found., Inc. v. Extencicare, Inc.*, 539 P.2d 1 (Kan. 1975); *State ex rel. Wineholt v. Laporte Super. Ct No 2*, 230 N.E.2d 92 (Ind. 1967).

But that does not mean all votes must be by roll call. The Open Meeting Law is satisfied if a vote is by roll call, show of hands, or any other method so that the vote of a public official is made known to the public at the time the vote is cast. *Esperance v. Chesterfield Twp. of Macomb County*, 280 N.W.2d 559 (Mich. Ct. App. 1979).

A public body that is required to be composed only of elected officials may not take action by vote unless at least a majority of all members of the public body vote in favor of the action. A public body may not count an abstention as a vote in favor of an action. NRS 241.0355(1).

In a letter opinion construing public body voting requirements set out in NRS 241.0355, this office determined that the Regional Transportation Commission of Southern Nevada was composed of elected officials from statutorily designated public bodies in Clark County; therefore it is an elected public body subject to the voting requirements of NRS 241.0355. Before action can be taken by RTC, NRS 241.0355 requires a majority of the RTC members to vote affirmatively. There can be no reduction in quorum due to absence of one or more commissioners where the public body is required to be composed of elected officials, even if they are appointed to the RTC by the membership of another elected public body. Letter opinion to Chairman Larry Brown, Regional Transportation Commission of Southern Nevada, July 8, 2011.

“Action” means:

- (a) If a public body has a member who is not an elected official, an affirmative vote taken by a majority of the members present during a meeting of the public body, but;

(b) If all the members of a public body must be elected officials, an affirmative vote taken by a majority of all the members of the public body. *See* NRS 241.015.

For example, if only three members of a five person county commission (elected body) are present at a meeting, the three cannot take action by a 2 to 1 vote; the vote must be 3 to 0, since a majority (3) must be in favor of the action.

The Open Meeting Law can never force a public body to take action on any agenda topic. *See* AG File No. 00-018 (June 8, 2000). NRS 241.020(2)(c)(6)(III)(public body may remove an item from the agenda at any time or delay its discussion at any time.)

The Legislature encourages appointed or elected members of public bodies to vote – not abstain. NRS 281A.420(4)(b) states: “Because abstention by a public officer disrupts the normal course of representative government and **deprives the public and the public officer’s constituents of a voice in governmental affairs** the provisions of NRS 281A.420 are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer’s situation would be materially affected by the public officer’s acceptance of a gift or loan, the public officer’s pecuniary interest, or the public officer’s commitment in a private capacity to the interests of others.”

§ 8.09 Audio and/or video recordings of public meetings by members of the public

Under NRS 241.035(3), members of the public may be allowed to record on audio tape or any other means of sound or video reproduction if it is a public meeting and the recording in no way interferes with the conduct of the meeting.

§ 8.10 Telephone conferences

See § 5.05 for a discussion of the proper way to conduct telephone conferences.