

Open Meeting Law Training

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Applicability of the Open Meeting Law

- The OML applies to meetings of public bodies. NRS 241.016(1).
- “Public Body” is defined as “Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons which expends or disburses or is supported in whole or in part by tax revenue” NRS 241.015(4).
- Includes subcommittees created by public bodies. NRS 241.015(4).

Open Meeting Law (NRS Chapter 241)

- “In enacting this chapter, the Legislature finds and declares that all public bodies exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” NRS 241.010(1).
- “The exceptions provided in this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.” NRS 241.016(4).
- The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

Open Meeting Law (NRS Chapter 241)

- Public bodies working on behalf of Nevada citizens must conform to statutory requirements in open meetings under an agenda that provides full notice and disclosure of discussion topics and any possible action. *Sandoval v. Board of Regents*, 119 Nev. 148, 67 P.3d 902 (2003).
- Deliberation and action must be properly noticed and taken openly. NRS 241.010.
- Action is only taken by the body as a whole; members have no individual decision-making powers and may only speak on behalf of the body if authorized to do so during an open meeting. NRS 241.015(1).
- To the extent a multimember group is appointed by a public body and given the task of making recommendations to that public body, that group is also a “public body” subject to the OML. NRS 241.015(4).

What is a Meeting?

- NRS 241.015 says:
 - **Quorum** of members of a public body *gathering* together with:
 - **Deliberation** toward a decision; and/or
 - **Action**: which means making a decision, commitment or promise over a matter within the public body's supervision, jurisdiction, control or advisory power.
- A quorum is a simple majority of the total body (NRS 241.015(5)); action requires majority vote of members present (NRS 241.015(1)).
- A gathering of a quorum at a social function is **not** a meeting **as long as** there is no deliberation or action.
- An attorney-client conference on potential and existing litigation is **not** a meeting **as long as** there is no action.

What is a Meeting?

- Serial communications or “walking quorums” can constitute a constructive meeting.
- A constructive quorum can exist with less than a quorum speaking together at any given time if opinions are relayed between members.
- Email pitfalls – “Reply all” email chains can constitute a meeting.
- Example of a constructive quorum: Two members of a five member public body discuss how they intend to vote on an issue and why. One of those members then has that same discussion with a third member, including how both the first two members intend to vote and why. A quorum (three members) has deliberated on an issue outside of a meeting.

Meeting Notice and Agenda: NRS 241.020

- Time, place and location of meeting
- List of locations posted
- Agenda consisting of a **clear and complete** statement of the topics scheduled to be considered
- Action items clearly denoted as “for possible action”
- Public comment at beginning/end or before any action item
- Posted at office of the public body **or** location of meeting **and** 3 other separate, prominent places within Nevada
- Posted at public body website **and** at www.notice.nv.gov
- Posted no later than 9 AM of the third working day before the meeting

What is “Clear and Complete?”

- Agenda items must be **clear and complete**. NRS 241.020(2)(d)(1).
- A **higher degree of specificity** is necessary for topics of **substantial public interest**. *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906. Factors to consider include:
 - Does the topic generate public comment?
 - Does the topic generate debate among the members of the body?
 - Does the topic generate media interest/coverage?
- Agenda items such as “member comments” and “reports” are problematic in that these invite discussion and possible deliberation on topics that are not set forth on the agenda. Any topic that is raised should be included on a future agenda before any discussion can ensue.

Meeting Notice and Agenda (continued)

- Name and contact information for person the public may request supporting materials from and locations where the supporting material is available
- If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person
- If the public body will consider whether to take administrative action regarding a person, the name of the person
- Notification that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time
- Any restrictions on comments by the general public

Additional Requirements

- Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).
- Notice to persons who have requested notice of meetings pursuant to NRS 241.020(3)(c).
- Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033. This would not apply to passing remarks.
- An emergency meeting may only be called where the need to act upon a matter is truly unforeseen and circumstances dictate that immediate action is required. NRS 241.020(9).

Additional Requirements

- One copy of the agenda, any supporting materials, and the recording of a public meeting must be provided at no cost to a member of the public requesting them and **at least** one copy made available at the meeting. NRS 241.020(6); NRS 241.035(2).
- Supporting materials must be available to the public when provided to public body members. NRS 241.020(7).
- Meeting must be recorded or transcribed. NRS 241.035(4).
- Minutes must be kept in conformance with NRS 241.035 and include:
 - Date, time and place of meeting;
 - Members in attendance;
 - Substance of all matters proposed, discussed or decided; and
 - Substance of remarks made by any member of public or their written remarks if requested.

Exceptions

- Closed sessions may be held by any public body to consider character, alleged misconduct, professional competence, or the physical or mental health of a person, with some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body, or to consider an appeal by a person of the results of an examination appeal by a person of the results of an examination administered on behalf of the public body. NRS 241.030.
- Closed sessions may not be held:
 - To discuss the appointment of any person to public office or as a member of a public body. NRS 241.030(4)(d); *see also City Council of City of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 784 P.2d 974 (1989).
 - To consider the character, alleged misconduct, or professional competence of an elected member of a public body, or a person who is an appointed public officer or who serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position. NRS 241.031(1).

Public Comment Pitfalls

- Restrictions must be reasonable “time, place, and manner” restrictions. NRS 241.020(d)(7). This means NO:
 - Halting comment based on viewpoint of speaker;
 - Halting comment upon belief defamation is occurring; or
 - Halting comment critical of a public official.
- But, presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specified agenda topic for which comment is offered, or halt conduct that is willfully disruptive. *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).
- The OML does not “[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.” NRS 241.030(4)(a).

Violations

- Actions taken in violation of the law are void. NRS 241.036.
- The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040.
- When a violation of the OML occurs or is alleged, the OAG recommends that the public body made every effort to promptly correct the apparent violation. NRS 241.0365.
- Although it may not completely eliminate the violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.
- Corrective action is prospective only. NRS 241.0365(4).

Violations

- Corrective action requires that the public body engage in an *independent deliberative action* in full compliance with the OML. *See, e.g., Page v. MiraCosta Community College Dist.*, 102 Cal. Rptr. 3rd 902, 930 (Cal. Ct. App. 2009).
- A public body must clearly denote that corrective action may be taken at a meeting by placing the term “for possible corrective action” next to the appropriate agenda item. NRS 241.020(2)(d)(2).

Using Technology for a Meeting

- Quorum of a public body using serial electronic communication to deliberate toward or make a decision violates law. NRS 241.016(4); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).
- If technology is used to convene a quorum for a public meeting:
 - There must always be a physical location for members of the public to attend the meeting. NRS 241.020(1); AB 70.
 - All the members of the public body and the members of the public who are present at the meeting must be able to hear or observe and participate in the meeting. NRS 241.010(2); AB 70.
 - That technology must not be used to circumvent the spirit or letter of the OML. NRS 241.016(4).

Legislative Update – AB 70

- Ability to delegate litigation decisions
- Language regarding use of teleconferencing or videoconferencing technology for a meeting
- Ability of a public body to receive certain training outside of a public meeting, so long as there is no deliberation or action on any matter within the public body's jurisdiction and control
- Better defines “subcommittee or working group” as having a majority of members that are members or staff members of the public body and that is authorized to make a recommendation to or take action on behalf of the public body

Legislative Update – AB 70

- Defines “supporting material”
 - Provided to a quorum of the public body, public body reasonably relies on it to deliberate or take action on a matter contained in a published agenda
- Public officers and employees responsible for a public meeting must “make reasonable efforts to ensure the facilities for the meeting are large enough to accommodate the anticipated number of attendees.”
 - If reasonable efforts are taken, no violation if a person is not allowed to attend the meeting because the facility has reached maximum capacity.
 - Public body not required to incur costs to secure a facility outside the control or jurisdiction of the public body or to upgrade, improve or otherwise modify an existing facility to accommodate the anticipated number of attendees.
- Meeting held to recognize or award positive achievements of a person is not subject to the notice requirements of NRS 241.033.

Legislative Update – AB 70

- The OAG will not investigate complaints about alleged violations that occurred more than 120 days before the complaint was filed, unless:
 - Violation was not discoverable at the time the violation occurred, *and*
 - The alleged violation did not occur more than 1 year prior to the complaint
- Authorizes the OAG to decline to investigate if it determines that the interests of the complainant are not significantly affected by the alleged violation, unless:
 - Complainant would have standing in a court of law
 - Complainant is (1) a natural person who resides in the jurisdiction of the public body; or (2) a non-governmental entity with a mission to foster or promote transparency in government

Legislative Update – AB 70

- Increased administrative fines for violation. Now \$500 for first, \$1000 for second, \$2500 for third subsequent
- If a member of public body relies on legal advice, no criminal penalty or administrative fine may be imposed.

Additional Points

- Parliamentary procedure is not addressed in the OML – Duties of the presiding officer, recognizing speakers, motions and voting, making a clear record. *See Robert's Rules of Order* (11th ed. 2011).
- Disclosure and abstention **prior to consideration of a topic** in conformance with Ethics in Government Law (NRS Chapter 281A). Abstain only in a clear case where the independence of judgement of a reasonable person in your situation would be materially affected by the conflict of interest disclosed. *See* NRS 281A.420; *see also Carrigan v. Commission on Ethics*, __ Nev. __, 313 P.3d 880 (2013).