

Open Meeting Law Training

David Gardner, Senior Deputy Attorney General,
2020 Training

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)

- ▶ 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)).

“Walking Quorums”

- ▶ 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.

Not a Meeting

- ▶ A gathering of a members (including a quorum):
 - ▶ 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, or
 - ▶ 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.
 - ▶ to receive training regarding the legal obligations of the public body, including, without limitation, training conducted by an attorney employed or retained by the public body, the Office of the Attorney General or the Commission on Ethics, if at the gathering the members do not deliberate toward a decision or action on any matter over which the public body has supervision, control, jurisdiction or advisory power. NRS 241.015(3)(b)

Closed Sessions

- ▶ 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).

Agenda items must be “Clear and Complete?”

- ▶ Agenda items must be clear and complete. NRS 241.020(2)(d)(1).
- ▶ Members are only allowed to discuss items on the agenda for the meeting.
- ▶ Members are not allowed to respond to public comments unless it is about an agenda item and during the time that agenda item is being heard.

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).

Corrective Action Allowed

- ▶ 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).
- ▶ If a member of public body relies on legal advice, no criminal penalty or administrative fine may be imposed.

OAG Authority

- ▶ 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

Using Technology for a Meeting

- ▶ 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).

NRS & NAC

▶ Nevada Revised Statutes

- ▶ Is the law of the State of Nevada.
- ▶ Must be passed by the legislature and signed by the Governor before it becomes law.
- ▶ It trumps all other Nevada State law except for the Nevada Constitution.

▶ Nevada Administrative Code

- ▶ Is the of the State of Nevada.
- ▶ Issued by State agencies and must be approved by the Legislative Commission before it becomes law.
- ▶ It trumps all Nevada State law except the Nevada Constitution and the Nevada Revised Statutes.