

NAHAC Board of Directors Training



What is a Meeting?

Requirements:

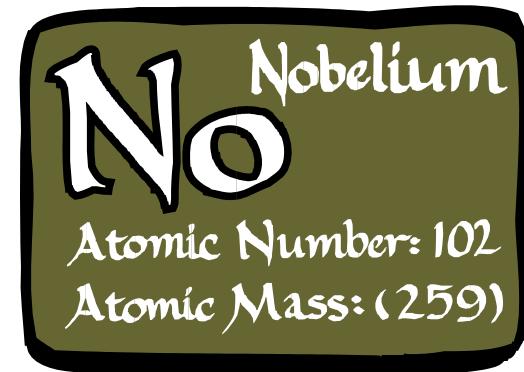
- Quorum of members of a public body must be present either collectively or serially together with **deliberation and/or action:**
- Deliberation toward a decision on a matter within the public body's jurisdiction, control, supervision or advisory power, and/or:
- Action: which means making a decision, commitment or promise; (NRS 241.015(1)) over a matter within the public body's supervision, jurisdiction, control or advisory power.

Is this a meeting?



- At a meeting of a standing subcommittee a quorum of the parent public body attends;
- The members of the parent body arrived separately; did not sit together and did not speak to each other before or after the meeting.
- None spoke during the meeting, they only observed.

No, AG's office
opined there was
no meeting.



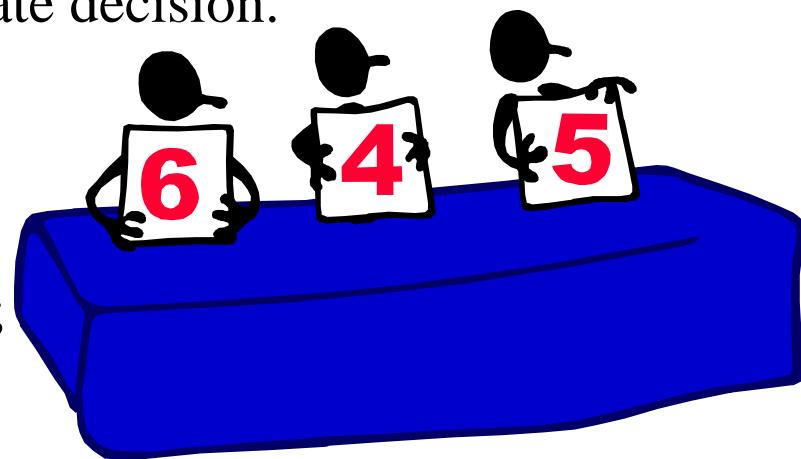
- The OML does not specifically prohibit members of a public body from attending a meeting of its own standing committee.
- Supreme Court opinion: explicitly states that the OML only applies when a quorum of a public body acts **in its official capacity as a body**, nullifying any argument that mere attendance by a quorum is at the same time deliberating as a public body.
- Example: polling or collective discussion, would indicate a meeting. OMLO 2010-06 (Sept. 10, 2010)

More Examples:

- Two or more public bodies meet together to discuss common issues. Meeting? Op. Nev. Att'y Gen. 2001-05 (March 14, 2001) Which body notices the meeting?
- A quorum meets in front of the dais following adjournment of the noticed public meeting. Discussion was of matters not appearing on the agenda. Is this okay?
- What if less than a quorum of members meet to discuss public business? What about pending matters within the public body's jurisdiction and control? Is this a violation?
- What if there is no physical meeting, only faxes among quorum, in which the members are asked for feedback (meaning approval) on a draft press release. *Del Papa v. Board of Regents*, 114 Nev. 388 (1998).

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, and it
 - includes a promise or commitment;
 - secret ballots or secret promises have always been in violation of the OML.
 - 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's finer points

- Is deliberation necessary? Before voting? On any matter? Whether on the agenda or not?
- Is deliberation necessary during discussion items? On the consent agenda?
- What constitutes an “action” item? Approval of the minutes and/or agenda?
Adjournment?

“Deliberation” / “Discussion” 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: it is the collective **discussion** or exchange of facts, prior to ultimate decision that constitutes “**deliberation**.”
- “**Gathering of facts**” no longer in definition!!

Action

- How many ways can a quorum of a public body take “action”?

A decision is a commitment or promise whether it is by a show of hands or otherwise signified so that a reasonable person would understand that a decision had been made.
- Questions about whether a public body took action is seldom encountered.
- Usually the issue is no notice that action would be taken.

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

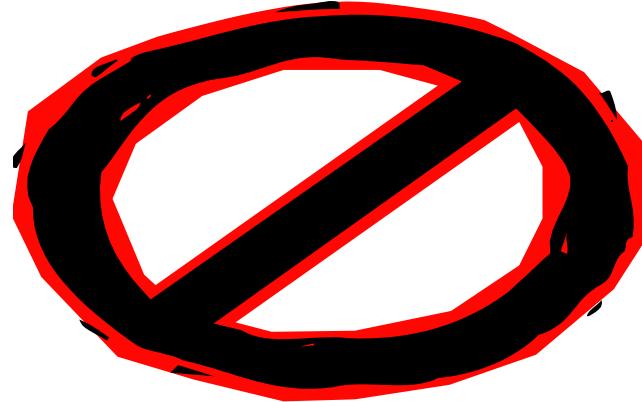
Are these items “clear and complete?”



It's QUESTION TIME !!

- 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.”*

Stick to the Agenda:

Members and/or counsel must prevent public body discussion from wandering to related topics.

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

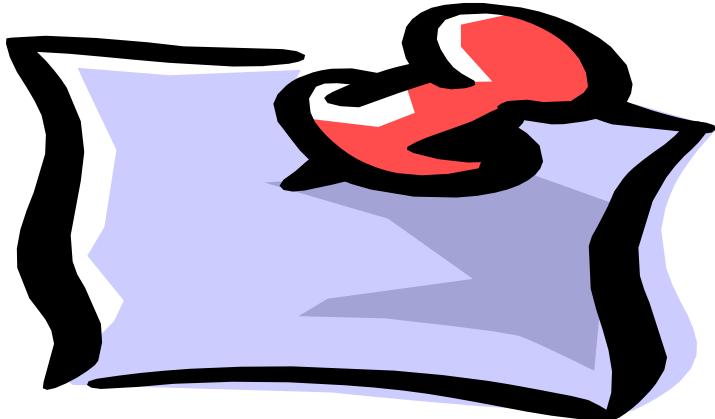


Are Serial Briefings a Meeting?

- No! In *Dewey* 119 Nev. At 94, 64 P. 3d at 1075, the Nevada Supreme Court stated that private briefings among staff of a public body and a non-quorum of members of a public body is not a meeting for purposes of the Open Meeting Law, and such a meeting is not prohibited by law.
- **But** stay away from “serial quorum” or “walking quorum” or “constructive quorum. All terms are synonymous.

What if members contact each other outside a public meeting?

- Social functions;
- Conventions even if out of state;
- Non-meetings with counsel to discuss potential or pending litigation;
- If less than a quorum members may discuss public business, but your counsel may frown on this activity.
- Supreme Court in *Dewey v. Redevelopment Agency of City of Reno*, 119 Nev. 87, 94 (2003) has taken a dim view of action in the “shadows”



NRS 241.020: Public body must state on agenda that:

- Action items must be labeled “for possible action,”
- items may be taken out of order and/or
- Items may be combined removed at any time.
- Most importantly: public comment restrictions must appear on the agenda.
- Posting on Dept. of Administration website
- Supporting documents must be made available
- Certification of posting of agenda (name, title, signature of person posting along with address and time of posting)

Public comment violation may be a Constitutional violation

- Citizens may sue public body, individual members, and the State or political subdivision based on allegation of violation of first amendment right to free speech. *Norse v. City of Santa Cruz*, 629 F. 3d 966 (9th Cir. 2010). (USCA 42 section 1983)
- Entire public meeting (beginning to end) is a limited public forum; first amendment rights extend throughout the meeting subject to reasonable time place and manner restrictions, even content restriction if viewpoint neutral.
- Facts: provocative silent Nazi salute from rear of audience caused ejection from meeting.
- En banc court reversed lower court ruling in favor of city. Court said “salute was momentary and casual, causing no disruption at all.”
- Court: “Speech must actually disrupt, disturb or impede the orderly conduct of a meeting before speaker may be ejected.”

Basis for suit in Federal Court

- 42 U.S.C.A. § 1983:
- Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

1st Amendment: public comment Issues; the OML authorizes a public body (limited public forum) to:

- restrict public speakers to the subjects within its supervision, control, jurisdiction or advisory power;
- limit public comment if the “speech becomes irrelevant or repetitious.”
- apply reasonable time limitations,
- limit caustic personal attacks.
- **But it forbids a public body from limiting public comment based disagreement with “viewpoint” of the speaker.**
- **NRS 241.020(2)(c)(3)(II)(public may comment on any matter not on the agenda as an action item)**

Rules of Decorum

Recommended for some public bodies

- Provide guidelines before discipline or ejection;
- “Persons addressing public body shall not make personal, impertinent, slanderous or profane remarks ... loud, threatening, abusive language, or other disorderly conduct that actually disrupts, disturbs or impedes the orderly conduct of meeting.”
- Warning;
- Resisting removal;
- Penalty.

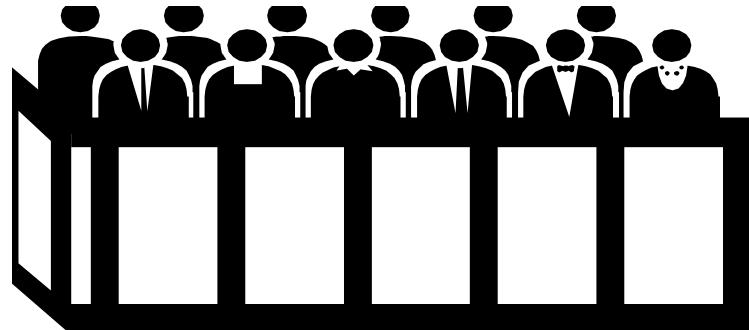


Legislative Immunity from Suit. Criteria for determining if immunity is appropriate

- 1. Policy decision or ad hoc decision making?
- 2. Does act apply to few people or to many?
- 3. Is the act formally legislative in character?
- 4. Is it in traditional legislative form?
- *Norse v. City of Santa Cruz, 629 F.3d 966 (2010)*

Qualified immunity

- Qualified immunity: government official is entitled to qualified immunity, an affirmative defense to suit, unless he knew or should have known the act in question violated a clearly established statutory or constitutional right.



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.

There must be an actual disruption or disturbance before a person may be ejected ?

- A person or persons who “willfully disrupts a meeting to the extent its orderly conduct has been made impractical.”
- “removing an individual from a public meeting does not violate the Constitution *provided that* the individual is sufficiently disruptive and is not removed because of his or her [expressed] views” *Dehne v. City of Reno*, 222 Fed. Appx. 560, 562 (9th Cir. 2007)





Public comment ... It's all about Choice

Choice for public bodies between alternatives:

1. **1st alternative:** two p.c. periods on each agenda; One before any action item has been considered, and another period of p.c. before adjournment.
2. **Or. Second alternative:** P.c. must be heard before a public body takes action on any action item but after it has discussed the matter. And the public body must allow one more period of p.c. before adjournment.
 - **And,** public bodies may augment either, or both alternatives with additional opportunity to comment. Statutory alternatives are minimum requirements – a “floor” not a “ceiling”.

Remedies if Violation occurs

- Void action; and/or seek injunctive relief;
- Corrective Action: within 30 days after violation, “for corrective action”
- Private Lawsuits: NRS 241.037(2)
- Criminal Misdemeanor: NRS 241.040
- Civil monetary fines (NRS 241.0395)
- All of these remedies are now supported by subpoena authority!! (NRS 241.039).



PENALTY For OML Violation

**Violator must have knowledge of
the OML violation**

He/she must have
participated in action which
violated the OML.

Fine: up to \$500.00

1 year limitations period for
bringing an action.

This cause of action
belongs solely to the
Attorney General.

(see next slide)



How to avoid Violation

- Enforcement against a member of a public body based on “participation” may only occur when the member makes a commitment, promise, or casts an affirmative vote to take action on a matter under the public body’s jurisdiction or control when the member knew his/her commitment, promise, or vote was taken in violation of the OML.

More about how to avoid violation

- The civil penalty amendment requires that a public body take action in order for the civil penalty to be potentially applicable. “Action” is defined in NRS 241.015(1) as an affirmative act; mere silence or inaction by members is not sufficient to rise to the level requiring enforcement.
- This office would not seek to punish individual members who attempt to comply with the OML, only those that actually violate it.

AG's Open Meeting Law Manual

- Statutory provisions
- Explanation of requirements
- Examples
- Compliance checklists
- Sample Forms: agenda, minutes and notice of meeting to consider a person's character, etc.
- Available on the Attorney General's website at:www.ag.state.nv.us/Open Meeting law (link)