2015
OPEN MEETING LAW
Training
Local Government

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THE DEFINITION OF PUBLIC BODY

- All public bodies must be created as provided in NRS 241.015(4)
- P.B. must be an administrative, executive, legislative, or advisory body supported by tax revenue;
- Blue Ribbon Commissions appointed by Governor.

What is a Meeting?

Three requirements:

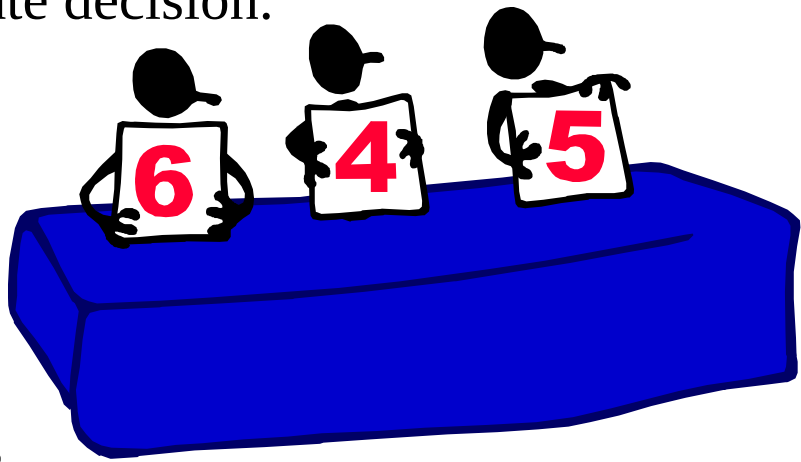
- 1. Quorum of members of a public body;

…and either, or both:

- 2. Deliberation amongst the quorum toward a decision, or:
- 3. 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” 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.”**

Fundamental Agenda Rule; all items must be "clear and complete"

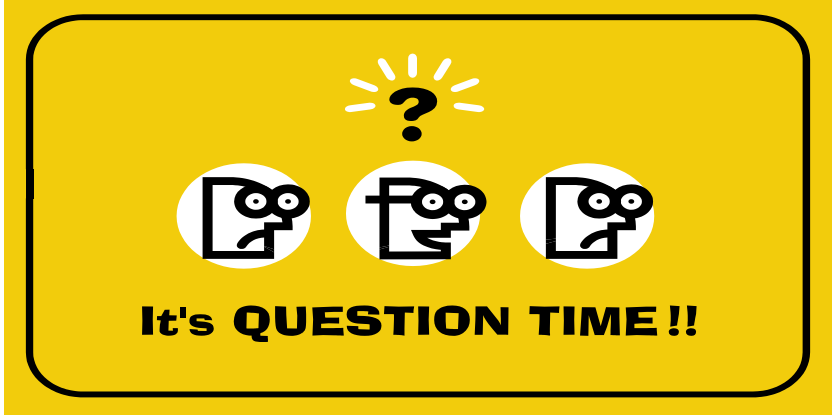
NRS 241.020(2)(c)(1)

- 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.*

How to comply with “clear and complete” rule.

- Make sure the agenda provides complete list of topics to be considered.
- Items must give the public clear notice of the topics to be discussed;
- Related matters to an agenda topic may not be discussed or the public body 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?"

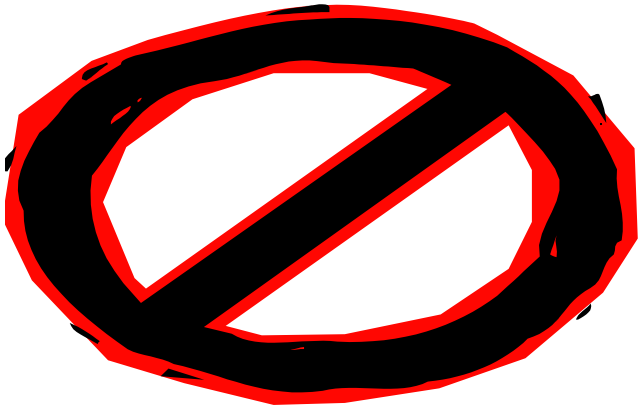


- Many public bodies have used the following phrase on their agenda:

  "…. 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 agenda fundamental rule

Stick to the Agenda: Members and/or counsel must prevent public body discussion from wandering off topic to related matters not specifically listed;

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!

- Regents 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)

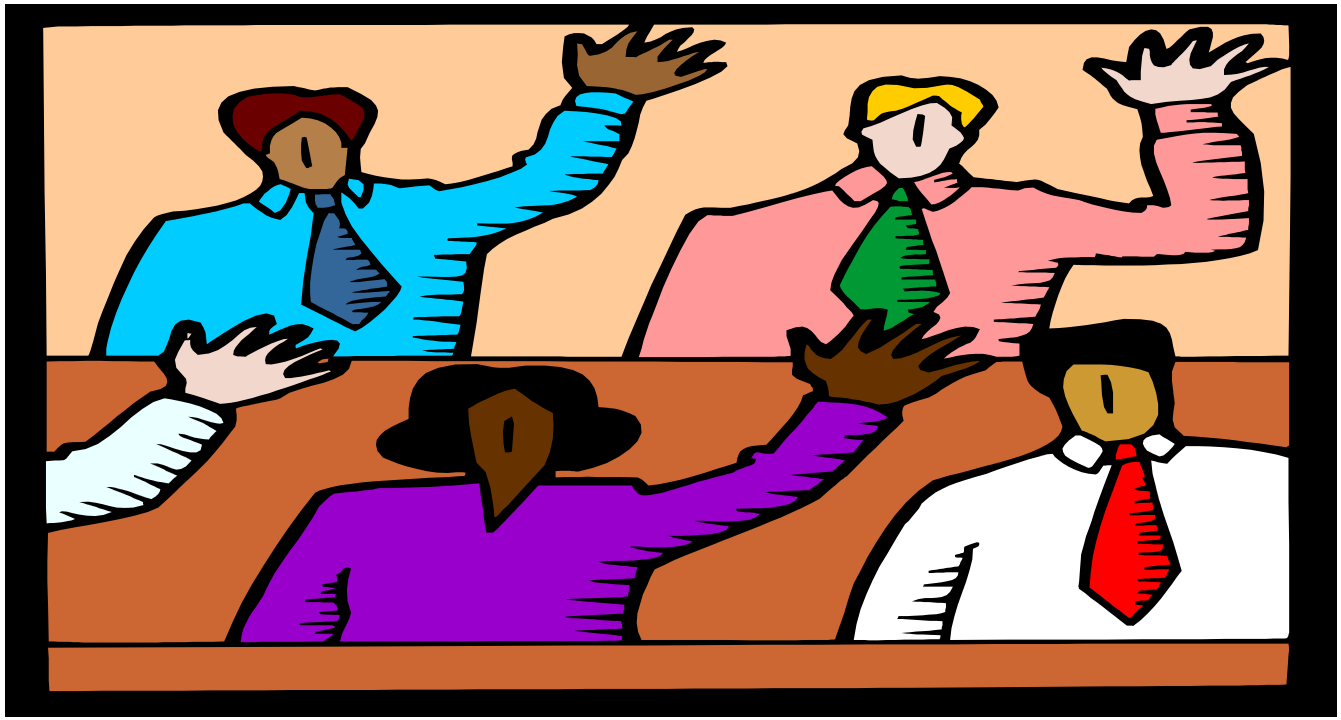
…But, the *Dewey Court also said:*

- 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/subcomittees/… or any subsidiary thereof.”

- If a sub-committee **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 First Amendment right of access in the public or the press to judicial or other 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.
- 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);

1st **Amendment**: public comment Issues; Currently the OML authorizes a public body 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)(comment on any matter)**

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 regardless of the topic.

What is an “actual disturbance”?

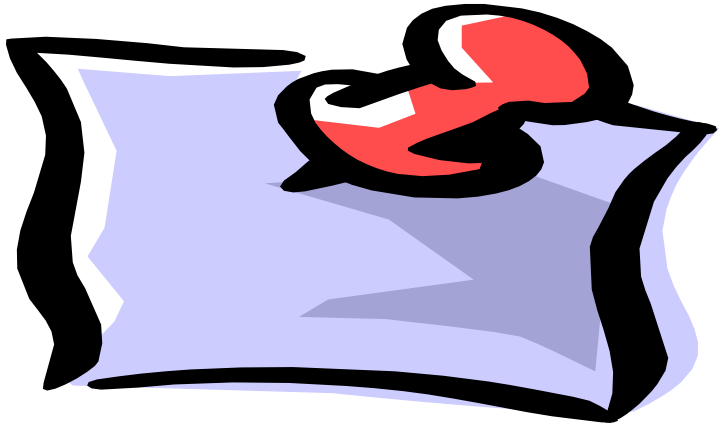
- A person or persons who “willfully disrupts a meeting to the extent its orderly conduct has been made impractical.”
- “removing an individual from a public meeting does not violate the Constitution *provided that* the individual is sufficiently disruptive and is not removed because of his or her [expressed]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

Public comment …

… is all about choice

Choice for public bodies between alternatives: NRS 241.020(2)(d)(3

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 <u>discussed</u> the matter. And the public body must allow one more period of p.c. before adjournment.
   - But, public bodies may augment <u>either, or both</u> alternatives with additional opportunity to comment. Statutory alternatives are minimum requirements – a "floor," not a "ceiling".



Important agenda notice requirements NRS 241.020(2)(d)(6)

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 or removed at any time.
- Most importantly: public comment restrictions must appear on each agenda.

Serial Briefings are not Meetings?

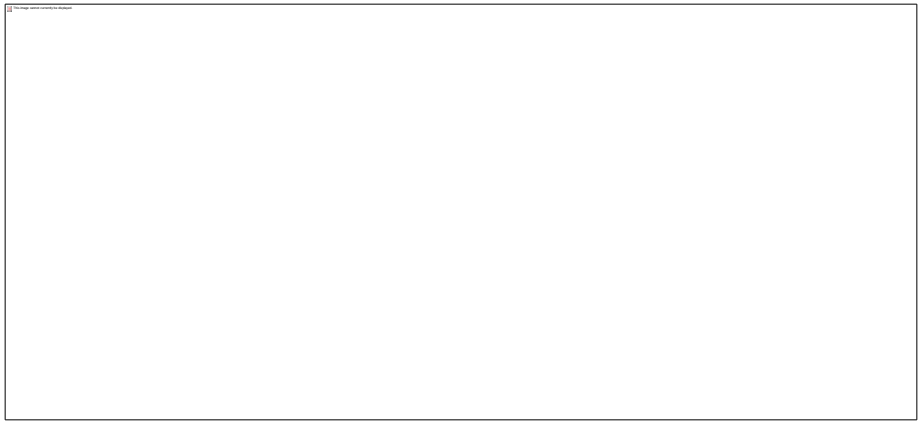
- In *Dewey* 119 Nev. At 94, 64 P. 3d at 1075, the Nevada Supreme Court stated that private briefings among staff of a public body and a non-quorum of members of a public body is not a meeting for purposes of the Open Meeting Law, and such a meeting is not prohibited by law. See §5.08 supra for a further discussion of Dewey.
- **But** stay away from "serial quorum" or "walking quorum" or "constructive quorum. All terms are synonymous.

Remedies if Violation occurs

- AG may seek to void action; and/or seek injunctive relief;
- Corrective Action: NRS 241.0365;
- 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).

Subpoena

NRS 241.039



- AG may issue administrative subpoena for the production of “relevant documents, records or materials” in any OML investigation…
- Willful failure to comply may result in prosecution for misdemeanor.
- NRCP and FRCP require the production of “documents, electronically stored information, or tangible things …”. NRS 53.160

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 a civil penalty!

- For a civil penalty to apply to a person "Action" is required!!
- NRS 241.015(1) defines action 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
(11th ed., June 2012; to be revised in 2015)

- 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.nv.gov/ Open Meeting law (link)

OML:
A short public records primer;
How safe are your private emails?

Are you a public officer serving on a public body whether appointed or elected?

U.S. Constitution, Source of our "right to privacy".

- Right to privacy has constitutional source. (Also speech, religion, press, assembly and petition among others.)
- The substantive component of the XIV Amendment; and Article I, section 8(5)(due process clause of the Nevada Constitution), protects an asserted right to privacy that is recognized as being "deeply rooted" in tradition and history and so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [it] were sacrificed," **the asserted right is a fundamental one.**
- *Eighth Judicial District Court v. Logan D.*--- P.3d ----, 2013 WL 3864448 (Nev.), 129 Nev. Adv. Op. 52

Privacy vs. public records

(FOIA: Freedom of Information Act)

- FOIA; 42 USCA 552 requires federal agencies to make certain records publicly available.
- Exemptions are narrowly construed by courts;
- Agency must make an “adequate” search for public records request; “reasonableness” test;
- Agency declarations are presumed to be in good faith.

Privacy vs. public records

example of a newspaper reporter's request under FOIA

- Requester asked for any and all U.S. Environmental Protection Agency records (limited to senior officials) including private emails; Private emails among senior staff showing that E.P.A. may have deliberately slowed or "delayed" issuance of a controversial regulation until after the 2012 presidential election.
- Court found that further discovery was necessary regarding "possible exclusion of relevant personal emails" of certain high level E.P.A. officials.
- Court noted the existence of a congressional investigation into whether the E.P.A. regularly used private communications (emails) to conduct agency business to avoid FOIA obligations. Cont'd next slide

Privacy vs. public records

- U.S. District Court stated that the "record left open the possibility that … "the agency engaged in bad faith conduct by excluding the top politically appointed leaders of the E.P.A. from its initial response to the FOIA request."
- Court ordered discovery be conducted into whether and to what extent high E.P.A. Officials utilized personal email accounts to conduct official business.

Landmark Legal Foundation, --- F. Supp.2d ---, 2013 WL 4083285 (D.D.C.) (August 14, 2013);

(Currently Hillary Clinton's use of private email server during her service as Secretary of State is a political hot topic)

Privacy vs. public records

Here's another example of a state FOIA request for personal texts, email and twitter records:

A reporter for newspaper filed a state FOIA request with City of Champaign, Illinois seeking "All electronic communications, including cellphone text messages, sent and received by members of the city council and the mayor during city council meetings. Request specifically applied to both city issued and personal cellphones, and city issued or personal email addresses and Twitter accounts.

City of Champaign v. Madigan, 992 N.E. 2d 629, 2013 IL App. (4th) (July 16, 2013)

City of Champaign v. Madigan

- Ill. appellate court held that city council member communication from personally owned electronic devices made during council meeting and study session were subject to disclosure under FOIA.
- Illinois public record defined as: communication pertaining to public business, and prepared by, or for, or used by , received by , possessed by or controlled by the "public body."
- Public record is not defined in Nevada in statute. Instead, NRS 239 states: "unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person"

Privacy vs. public records

another example: Pennsylvania

- Personal email records between school board members that did not document a transaction or activity of the district were found not to be public records although similar records on agency computers were disclosed.
- Location of emails on agency computer did not automatically imply it was a public record even if use of the computer violated agency policy that explicity stated user had no expectation of privacy.
- But, an individual school board member acting in his or her official capacity constitutes agency activity when discussing agency business, implying that it is subject to records request regardless of where the email is found – on a personal computer or an agency computer.
- *Easton Area School District v. Baxter,* 35 A.2d 1259 (January 24, 2012)(on judicial review of order by Office of Open Records to provide reuester with all records responsive to his request.)

D.R. Partners v. Board of County Commissioners (Clark county)

- LVRJ sought to compel Clark county to disclose billing statements that documented county officials use of publicly owned cell phones.
- Redacted records were released.
- R.J. filed petition for mandamus to compel release of unredacted records.
- S.Ct. found that Clark county failed to provide court with a particularized evidentiary showing that would have allowed a balancing of interests test. Court reversed trial court and ordered release of unredacted billing records. *D.R. Partners v. Board of County Commissioners,* 116 Nev. 616(2000).

Reno Newspapers v. Sheriff

- Nev. Supreme Court determined that the identity of the holder of a concealed firearms permit is a public record, and it also included records of any post permit investigation, suspension, or revocation. This issue obviously raised the issue of personal privacy.
- Court noted governmental interests under balancing test is more narrowly interpreted by virtue of 2007 legislative amendments. Conversely open and accessible government must be more liberally interpreted. State's burden is heavier now. It must prove that its interest in non-disclosure "clearly outweighs the public's right of access."
- *Reno Newspapers v. Sheriff, 126 Nev. __, (2010)*

Reno Newspapers v. Jim Gibbons

- Newspaper filed petition for writ of mandamus for access to Gov. Gibbon's emails while he was in office.
- Court began its opinion from presumption that all government generated records are open to disclosure.
- Disclosure is subject to statutory provision of confidentiality;
- Absent provision of confidentiality then balancing of interests applies.

Reno Newspapers v. Jim Gibbons

- 104 emails were identified.
- Court reversed and remanded to trial court with instructions to review a specially prepared log that described each email. Trial court Judge was instructed to apply the balancing test to each requested email. *Reno Newspapers Inc. v. Jim Gibbons,* --- P.3d ---, 2011 WL 6268856 (Nev.); 127 Nev. Adv. Op. 79

QUESTIONS OR COMMENTS?

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