

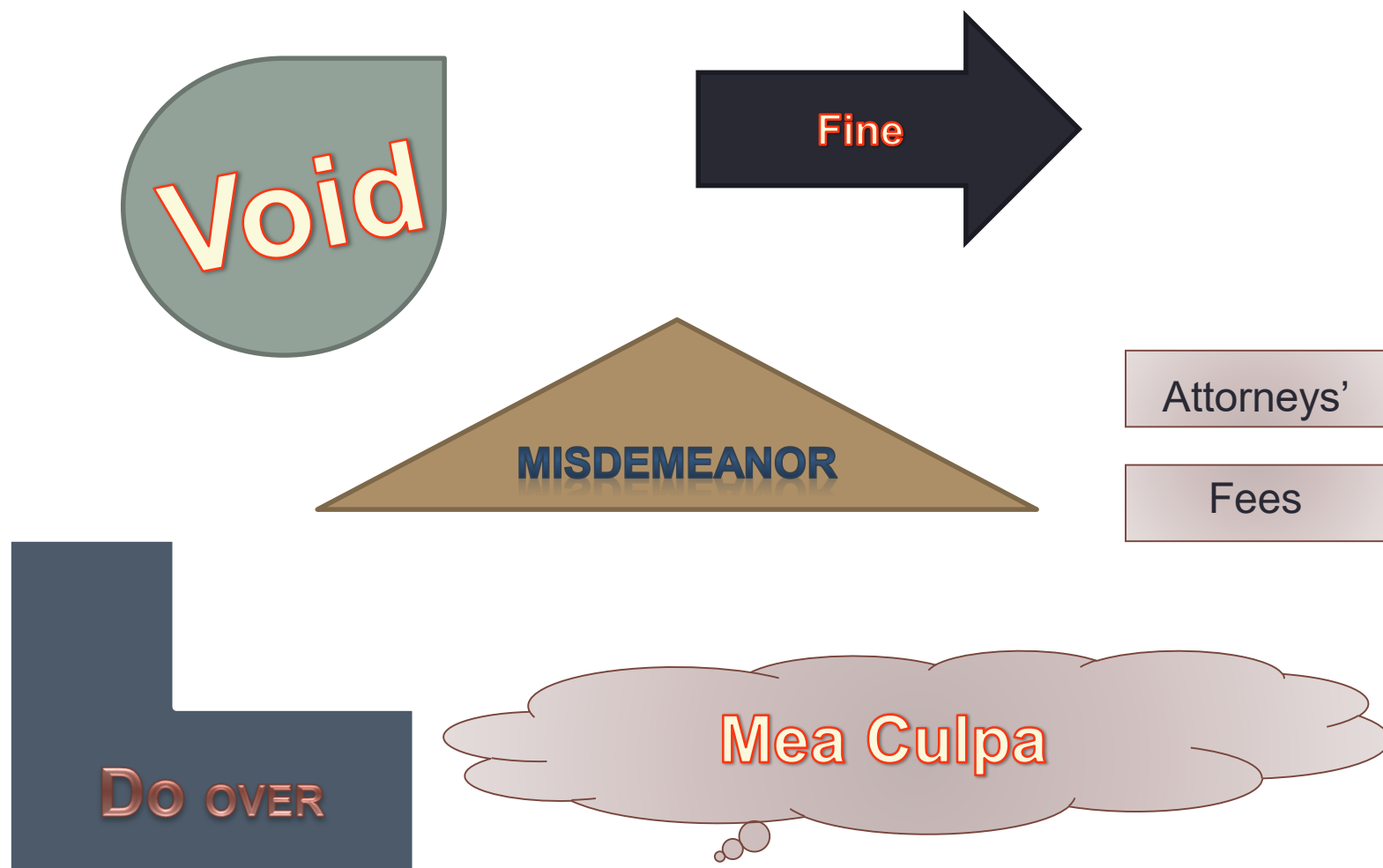
OPEN MEETING LAW

Presentation to the Board of Agriculture

June 6, 2018

By Deputy Attorney General Dennis L.
Belcourt

Penalties and Remedies for OML violations



Penalties and Remedies

Actions taken in violation of 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 2141.040.

When a violation of the OML occurs or is alleged, the OAG recommends that the public body make every effort to promptly correct the apparent violation. NRS 241.0365.

Although it may not completely eliminate a 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).

Background

- Nevada's Open Meeting Law is statutory, found in Nevada Revised Statutes chapter 241
- Open Meeting Law interpretation
 - Judicial (Written Opinions)
 - Office of Attorney General Guidance
 - Open Meeting Law Manual and Open Meeting Law Opinions (http://ag.nv.gov/About/Governmental_Affairs/OML/)
 - DAG advice

Legislative Declaration of Intent

- NRS 241.010.

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.

Open Meeting Law Teams

Meeting Gathering or Series Of Gatherings

Quorum a majority of the total membership

Deliberate toward a decision

Take Action DECIDE, COMMIT

Public Body **PUBLICLY FUNDED,
GOVERNOR APPOINTED,
CREATED BY LAW**

Subcommittees and Advisory Committees

- A Board Creates a subcommittee when the board votes to assign a matter within its jurisdictions to two or more individuals
 - Subcommittee meetings governed by the open meeting law
 - Board assignment of a matter to an individual is not creating a subcommittee
 - Individual given assignment may not engage a quorum of the Board.

Key Definitions

- ***“ ‘Deliberate’ means to examine, weigh and reflect upon the reasons for or against the action. The term includes, without limitation, collective discussion and the collective acquisition or exchange of facts preliminary to the ultimate decision.”***
- ***NRS 241.015(2) (2013) See Dewey v. Redevelopment Agency of City of Reno, 119 Nev. 87 (2003)***



Key Definitions

- “Meeting”:
- (a) Except as otherwise provided in paragraph (b), means:
- (1) The gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, 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, whether in person or by means of electronic communication, 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.

Serial Meetings/Walking Quorums

- Any series of gatherings the totality of attendance at which constitutes a quorum should be avoided unless gathering is excepted from the definition of “meeting”.



Can Texting Violate OML?

- Scenario: During Public Meeting, board members text each other and board staff on subjects under discussion
- “. . . **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).

Texting could violate the OML

- Recommendation: Board Members should refrain from texting each other about Board business
 - Open Meeting Law—Serial Communications
 - Note also Public Records Act Issue

The Board of Agriculture Must Conduct Meetings in Public

- Exceptions
 - “Non-meetings”
 - “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”

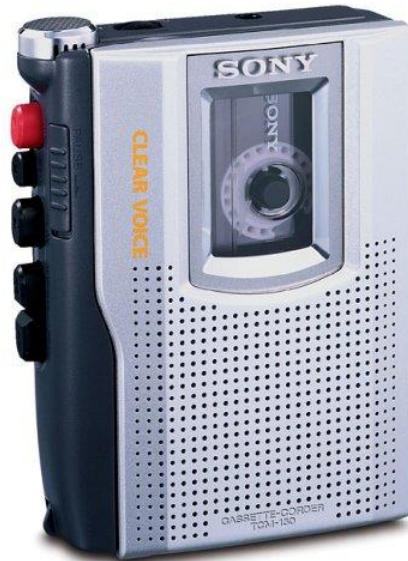
The Board of Agriculture Must Conduct Meetings in Public

- Exceptions, cont'd
 - Nonmeetings, cont'd
 - Attorney nonmeeting: A gathering . . . 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.
 - May deliberate (NRS 241.015(2): “to examine, weigh and reflect upon the reasons for or against a choice [before the public body] i.e. ‘collective discussion, acquisition and exchange of facts preliminary to decision.’”)
Must not take action (“decision, commitment, promise, or affirmative vote”) in nonmeeting with attorney.



The Board of Agriculture Must Conduct Meetings in Public

- Exceptions, cont'd
 - Nonmeetings, cont'd
 - Nonmeetings, in their limited scope, need not comply with NRS chapter 241 at all.



Open Meeting Exceptions—how they are interpreted

NRS 241.016(4) The exceptions provided to 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.



Closed Meetings, Cont'd

- ▣ Closure pursuant to NRS 241.030
 - Except as otherwise provided in this section and [NRS 241.031](#) and [241.033](#), a public body may hold a closed meeting to . . . Consider the character, alleged misconduct, professional competence, or physical or mental health of a person.

MUST PUBLISH AND FOLLOW CLEAR AND COMPLETE AGENDAS . . .

NRS 241.020(2) Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting. The notice must include:

- (a) The time, place and location of the meeting.
- (b) A list of the locations where the notice has been posted.
- (c) The name and contact information for the person designated by the public body from whom a member of the public may request the supporting material for the meeting described in subsection 5 and a list of the locations where the supporting material is available to the public. (2013)
- (d) An agenda consisting of
 - (1) A clear and complete statement of the topics scheduled to be considered during the meeting.
 - (2) A list describing the items on which action may be taken and clearly denoting that action may be taken on those items by placing the term “for possible action” next to the appropriate item, , if the item is placed on the agenda pursuant to NRS 241.0365, by placing the term “for possible corrective action” next to the appropriate item.
 - (3) Periods devoted to comments by the general public, if any, and discussion of those comments. Comments by the general public must be taken:
 - (I) At the beginning of the meeting before any items on which action may be taken are heard by the public body and again before the adjournment of the meeting; or
 - (II) After each item on the agenda on which action may be taken is discussed by the public body, but before the public body takes action on the item.

MUST PUBLISH AND FOLLOW CLEAR AND COMPLETE AGENDAS . . .



MUST PUBLISH AND FOLLOW CLEAR AND COMPLETE AGENDAS . . .

- What is clear and complete?
 - “Nevada's Open Meeting Law seeks to give the public clear notice of the topics to be discussed at public meetings so that the public can attend a meeting when an issue of interest will be discussed.”

Sandoval v. Board of Regents of University, 119 Nev. 148, 155 (2003)

MUST PUBLISH AND FOLLOW CLEAR AND COMPLETE AGENDAS . . .

Further guidance from *Sandoval*: do not “exceed the scope of a clearly and completely stated agenda topic.”

- *Sandoval* involved an information item
 - Review UCCSN, state and federal statutes, regulations, case law, and policies that govern the release of materials, documents, and reports to the public.
- After presentation of the information item, the Board of Regents went beyond the foregoing information item:
 - Regent Douglas Hill proceeded to discuss a controversial report, prepared by the Nevada Division of Investigation (NDI), regarding a dormitory raid that occurred on the University of Nevada, Las Vegas (UNLV) campus. Regent Hill discussed details of the dormitory raid, criticized the UNLV police department's actions, and recommended that the UNLV police department be disarmed. Regent David Phillips then commented on the danger of drugs on the UNLV campus.

Is Action Item Correctly Disclosed?

The agenda should have a higher degree of specificity when addressing a subject of special or significant interest to the public. Sandoval at pp. 154-5

- Reno City Counsel Agenda, November 14, 2012:
- “Discussion, direction to staff and possible approval of Limited Guaranty pertaining to Settlement and Restructuring Agreement.”



“Clear and Complete” and agendaizing bill draft discussions

- The Nevada Supreme Court has held that when a public body was reviewing legislation during session for possible recommendations, it did not violate the clear and complete requirement although the specific legislation was not listed on the noticing agenda, as the agenda referred to a website where list of legislation could be found prior to the hearing date, which the Court found to be “reasonable notice.”

Schmidt v. Washoe County, 123 Nev. 128, 138 (2007)

Clear and Complete Agenda: Administrative Action Regarding a Person

- Agenda must include name of person **regarding** whom action may be taken. NRS 241.020(5). For example: appointees, contract awards.
- If a person is to be named in a motion, that person's name should be on the agenda

“For Possible Action”

- Agenda must contain: A list describing the items on which action may be taken and clearly denoting what action may be taken on those items by placing the term “for possible action” next to the appropriate item.
- The Board cannot take action on item not designated as an action item.

Boards MAY BE REQUIRED TO GIVE INDIVIDUAL NOTICE IN CERTAIN CIRCUMSTANCES

- NRS 241.033: Except for employment applicants, “a public body shall not hold a meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of any person or to consider an appeal by a person of the results of an examination conducted by or on behalf of the public body unless it has (a) Given written notice to that person of the time and place of the meeting; and (b) Received proof of service of the notice”

BOARDS MAY BE REQUIRED TO GIVE INDIVIDUAL NOTICE IN CERTAIN CIRCUMSTANCES

- In other words, public bodies should avoid discussions of character, alleged misconduct, professional competence, or physical or mental health of specifically identifiable persons unless (1) that subject is within the scope of the clear and complete agenda item and (2) the person has been given individual notice.
- Notice required: 5 working days personal delivery or 21 working days by certified mail

Other Individual Notice Requirement

- Same notice required before holding meeting to consider administrative action against a person
- “Administrative action against a person”
 - “Person” includes corporate entities
- Per Open Meeting Law Manual: Administrative Action against a person “does not occur unless the matter being acted on is uniquely personal to the individual or entity. ‘Administrative action against a person’ does not occur when the legal basis of the action is consideration of the inanimate characteristics of a facility or property and no consideration of the characteristics or qualifications of the individual or entity (the person) that has sought the governmental approval.”

Make Meeting Materials Available

NRS 241.020

5. Upon any request, a public body shall provide, at no charge, at least one copy of:

(a) An agenda for a public meeting;

(b) A proposed ordinance or regulation which will be discussed at the public meeting; and

(c) Subject to the provisions of subsection 6, any other supporting material provided to the members of the public body for an item on the agenda, except materials:

(1) Submitted to the public body pursuant to a nondisclosure or confidentiality agreement which relates to proprietary information;

(2) Pertaining to the closed portion of such a meeting of the public body; or

(3) Declared confidential by law, unless otherwise agreed to by each person whose interest is being protected under the order of confidentiality.

↪ The public body shall make at least one copy of the documents described in paragraphs (a), (b) and (c) available to the public at the meeting to which the documents pertain. As used in this subsection, “proprietary information” has the meaning ascribed to it in [NRS 332.025](#).

Make Meeting Materials Available to Those who Request them

From the news (*Reno Gazette Journal*, 12/10/12):

Decision on banning dogs in Nevada bear hunts delayed

- The Nevada Wildlife Commission has postponed any decision on a proposal to ban the use of dogs during black bear hunts after it was made aware of a potential problem with Nevada's open meeting law.
- After several hours of discussion Saturday, commissioners learned that the entirety of a petition proposing the ban had not been posted on the Nevada Department of Wildlife's website in advance of the meeting.
- Commissioners were then advised by the Nevada Attorney General's Office not to make any decision on the petition because it could be vulnerable to a challenge under the open meeting law, Department of Wildlife spokesman Chris Healy said.
- The matter could be taken up again by the commission in February or March. The petition is supported by opponents of Nevada's bear hunt, now in its second season.

Make Meeting Materials Available

- NRS 241.020 (cont'd)
 7. ...a copy of supporting material required to be provided upon request pursuant to paragraph (c) of subsection 6 must be:
 - (a) If the supporting material is provided to the members of the public body before the meeting, made available to the requester at the time the material is provided to the members of the public body; or
 - (b) If the supporting material is provided to the members of the public body at the meeting, made available at the meeting to the requester at the same time the material is provided to the members of the public body.
 - ↳ If the requester has agreed to receive the information and material set forth in subsection 5 by electronic mail, the public body shall, if feasible, provide the information and material by electronic mail.
- OMLO 98-01 “Made available” not equal “mailed.” In other words, a requester who wants a paper copy of supporting materials before the meeting may be required to come to the agency to get it.

Recording Meeting--Minutes

- NRS 241.035 requires that written minutes be kept of:
 - (a) The date, time and place of the meeting.
 - (b) Those members of the public body who were present and those who were absent.
 - (c) The substance of all matters proposed, discussed or decided and, at the request of any member, a record of each member's vote on any matter decided by vote.
 - (d) The substance of remarks made by any member of the general public who addresses the public body if the member of the general public requests that the minutes reflect those remarks or, if the member of the general public has prepared written remarks, a copy of the prepared remarks if the member of the general public submits a copy for inclusion.
 - (e) Any other information which any member of the public body requests to be included or reflected in the minutes.

Recording Meeting, cont'd

- An audio recording or transcription by court reporter of meeting must be made as well. NRS 241.035

Public Comment

- Must be on agenda at least (1) once before first action item and again before end of meeting OR (2) on all action items (before action taken) if additional opportunity is given to provide comment on other items, as well
- The Board may not take action based on public comment except as it relates to an action agenda item
- Court may discuss public comment it receives
- The Board may not discriminate based on viewpoint
- Comment may be limited to areas relevant to Board jurisdiction
- Repetition and caustic personal attacks may be limited
- Any time limit or other permissible restriction on public comment should be spelled out on agenda

Questions?

