



Attending and/or Conducting Meetings Electronically

By David W. Broadwell, CML General Counsel, March 16, 2020 (updated April 2, 2020)

Governments at all levels are struggling with the question of how to adjust public meeting procedures to cope with the COVID-19 public health crisis. On March 14, the Colorado General Assembly adjourned entirely for at least two weeks and posed an interrogatory to the Colorado Supreme Court to help the body cope with the unique challenges caused by the current crisis. On April 2, the Supreme Court ruled that the General Assembly may continue in recess until circumstances allow the body to safely meet again, without losing any of the 120 days allowed for the regular session.

Adjournment and cancellation are a short-term strategies, but the business of government must go on, and that inevitably requires meetings at some point.

When Governor Polis and the Colorado Department of Public Health and Environment issued statewide “Stay at Home” orders on March 25, the orders contained exceptions for essential local government functions, including the legislative functions of local governing bodies. With appropriate precautions in place, some municipalities (particularly smaller towns) are continuing to conduct in-person meetings. But the overall trend is toward remote participation in meetings as long as the public health crisis continues.

The Basic Legality of Electronic Meetings Under the Colorado Open Meetings Law (OML)

The consensus of opinion is that the Colorado Open Meetings Law allows for participation in public meetings to occur electronically, given the definition of “meeting” at 24-6-402(1)(b), C.R.S. However, local laws and policies typically provide only for live, in-person meetings in fixed locations, and thus require some modification before electronic attendance is permitted.

The trick is to ensure that the electronic access to the meeting is sufficient to practically and legally emulate the degree of public access and participation that would be true under normal circumstances in a live meeting conducted in person.

In early March, CML was contacted by Jeff Roberts of the Colorado Freedom of Information Council, asking what Colorado municipalities had in store for “virtual meeting” in the wake of

the COVID-19 emergency. Rest assured that any new and different procedures for convening meetings will be closely watched by open government watchdogs, both in terms of ensuring the public's ability to see and hear the meeting, as well as the public's ability to meaningfully participate in the meeting (e.g. for any matter requiring a public hearing.)

In recent weeks, municipalities throughout Colorado have been adopting electronic meeting policies to enhance public health and safety in the spirit of "social distancing." CML continues to collect examples of these policies on its COVID-19 resource page: www.cml.org/covid19.

FAQ on Open Meetings Laws Issued by the Colorado Attorney General

On March 27, the Office of the Colorado Attorney General issued written guidance for the state and local governments on OML compliance issues associated with electronic meetings. The FAQ is posted here: <https://coag.gov/app/uploads/2020/03/FAQs-on-Open-Meetings-Law-and-Virtual-meetings-3.27.20.pdf>

Most of the advice in the FAQ is similar to what municipal attorneys have been advising their clients both before and during the current public health crisis. But we would offer the following additional observations on the piece.

- **Emergency electronic meetings?** The A.G. cites the key case of *Lewis v. Town of Nederland* for the principle that public bodies have implicit authority to convene emergency meetings without prior notice in some limited circumstances. As municipalities were scrambling to convene special meetings in order to adopt emergency ordinances as the COVID-19 crisis began to break, it appeared to us that everyone was still able to give 24-hour advance notice as required by the OML. The best advice remains honor the 24-hour requirement unless it is absolutely impossible to do so due to the nature of the emergency.
- **Obligation to allow public participation in electronic meetings?** The A.G. correctly observes that nothing in the OML itself requires that the public must be allowed to speak at meetings. The purpose of the OML is to allow the public to observe the transaction of public business. The extent to which a public body allows the public to speak is largely governed by local charter provisions, ordinances, rules of procedure, and customs and practices. But the FAQ issued by the A.G. does not go on to mention that, in some cases, the requirement to conduct a public hearing and therefore allow public participation is driven by state statute, nor does the FAQ touch upon the larger subject of quasi-judicial hearings, in which Due Process requires that interested parties be given a fair opportunity to participate. More on that subject below.
- **Executive Sessions associated with Electronic Meetings?** The advice given by the A.G. in the FAQ tracks what we are hearing around the state, particularly the advice about implementing some sort of "two-mode" method to ensure that the executive session is private. Bear in mind that all the usual OML strictures for executive sessions still apply. For example, the purpose of the executive session must be announced in the public portion of the electronic meeting. And the executive session itself must be conducted via a mode of communication that allows for recording of the session to the extent required by the OML.

Conducting Quasi-Judicial Hearings Electronically

Based upon inquiry traffic we are receiving here at CML, we believe several municipalities are moving toward including agenda items that require quasi-judicial hearings in their electronic meetings. These are hearings where the body is acting on a specific application, like a land use approval or a liquor license. In general, municipal officials know a quasi-judicial decision requires a higher degree of formality, and a quasi-judicial decision is appealable immediately to district court by any aggrieved party. Extra care must be taken to ensure: (1) All parties with a legal interest are allowed to speak; (2) a record of the hearing is adequately preserved; and (3) overall the hearing can be conducted in an orderly manner and in a manner that closely parallels the way you would conduct the hearing, receive evidence, debate and vote on the decision, and preserve a record under normal circumstances.

On March 30, CIRSA Executive Director Tami Tanoue posted detailed guidance to her members on the subject of conducting quasi-judicial hearings, guidance which is available at this link: <https://www.cirsa.org/blog/conducting-a-quasi-judicial-hearing-electronically/>

Some municipalities have simply delayed quasi-judicial decisions for the time being. But as the public health crisis continues through April (and potentially beyond), we expect more municipalities may feel the need to take action on land use and licensing decisions in the pipeline.

CML is looking to bolster the advice on its COVID-19 resources page with good examples of policies and procedures specifically related to quasi-judicial hearings. Please share if your municipality has adopted new policies on this topic!

Four Different Ways to Think About Electronic Participation in Meetings

- **Remote participation by a member of the governing body?** This option has been around for years, and many municipalities already have local policies describing whether and under what circumstances officials may patch-in to a meeting and cast votes. This option may now become more important as vulnerable or self-isolating members of a public body may ask to participate in meetings from afar.
- **Remote participation by members of the public?** What if the municipality continues to conduct meetings as usual, but wants to provide extra options for sick or vulnerable people to “attend” remotely? This option is less commonly addressed in municipal meeting procedures, but the Colorado General Assembly blazed a trail with their remote testimony policy, details of which are linked here: <https://leg.colorado.gov/remote-testimony>.
- **Still conduct live meetings, but exclude the public from being physically present?** Theoretically, a public body and staff could meet in a highly controlled and safe environment, and restrict all public “attendance” to electronic means of telecommunication. In the current COVID-19 environment, some capitol staffers considered this option for the General Assembly, calling it legal but highly impractical. The General Assembly’s aversion to continuing to meet at the Capitol while physically excluding the public was reflected in HJR 20-1006 posing an interrogatory to the

Supreme Court concerning interpretation of the 120-day limit on the regular session.
See the fourth recital on p. 2 of the HJR:

https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_hjr1006_enr.pdf

- ***Conduct the entire meeting electronically—the truest form of virtual meeting.***
Modern technologies promoted by the likes of Zoom and GoToMeeting make the ability to do large mass-participation meetings at least possible in ways they never were until recently. Again, a carefully crafted approach to using this technology can legally comply with the OML. While many municipalities are still in the experimentation phase and are “working out the bugs” early reports from around the state are positive. It is indeed possible to conduct an orderly meeting electronically and ensure public access and participation that complies with the letter and the spirit of the OML.

Please remember to share with CML any new meeting policies or procedures adopted by your municipalities and we will post them on our COVID-19 webpage at www.cml.org/covid19.