

## 97th CML Annual Conference

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Colorado Open Meetings Law for Elected Officials

2:30-4:30PM  
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COLORADO  
MUNICIPAL  
LEAGUE

*Contents of this presentation reflects  
the view of the presenter, not of CML.*

## Colorado Open Meetings Law ("OML")

- "It is declared to be a matter of statewide concern and the policy of this state that the formation of public policy is public business and may not be conducted in secret." *Colorado Open Meetings Law*

## Basic Open Meeting Rules

- There are two critical rules regarding open meetings:
  - All meetings of a quorum or three or more members of a local public body (whichever is fewer) at which any public business is discussed or at which any formal action may be taken are public meetings open to public.
  - Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum of the body is in attendance, or is expended to be in attendance, shall be held only after full and timely notice to the public.

## Overview

- Part I: Who is covered?
- Part II: What constitutes a meeting?
- Part III: What notice is required?
- Part IV: Emergency meetings
- Part V: Executive sessions
- Part VI: What happens if OML is violated?
- Part VII: Email and social media
- Example scenarios

## Part I: Who is covered?

- "Local Public Body" includes any board, committee, commission or other policymaking, rulemaking, advisory or formally constituted body of a political subdivision of the state, such as municipalities.
- Also includes any public or private entity that has been delegated any "governmental decision-making function."
- However, "persons on the administrative staff" of a local public body are specifically excluded.

## Part II: What Constitutes a Meeting?

- Meetings of three or more members of any local public body, or a quorum if fewer than three, at which any public business is discussed or at which any formal action may be taken.
- Any gathering convened in person, by telephone, electronically, or by other means of communication.
  - emails and social media (discussed later)
- § 24-6-402, C.R.S.

### What is public business?

- “Public business” refers to the public body’s policy-making function
- Question: was the meeting convened for the purpose of discussing or furthering public policy, and therefore part of the policy-making process?
  - To prevail on a claim under the OML, a party must point to a pending action by the public body holding the meeting with regard to a rule, regulation, ordinance, or formal action by that public body that has a meaningful connection to the gathering in question

### What is not a meeting?

- Chance meetings or social gatherings at which discussion of public business is not the central purpose
- Electronic mail communication among elected officials that does not relate to pending legislation or other public business
  - Google doc/doodle scheduling

### Part III: What Notice is Required?

- What’s the Trigger?
  - The adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance
- What’s Required? “Full and Timely” notice:
  - Per state law, notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than **twenty-four** hours prior to the holding of the meeting
  - Check your local rules
- The public place or places for posting such notice shall be **designated annually** at the local public body’s first regular meeting of each calendar year.
  - Website posting?

### Drafting the Agenda

- “The posting shall include specific agenda information where available.” C.R.S. Sec. 24-6-402(2)(c).
- Notice is sufficient “so long as the items actually considered at the meeting are reasonably related to the subject matter indicated by the notice.” *Town of Marble v. Darien*, 181 P.3d 1148 (Colo. 2008).
- Agenda titles should not be overly general or vague.
- Avoid withholding known agenda items from agenda, and avoid adding agenda items on the night of the meeting.

### Curing Past OML Violations

- A state or local public body can cure a prior OML violation by holding a subsequent meeting that fully complies with the OML and does not involve the mere “rubber stamping” of earlier decisions made in violation of the OML. *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks and Outdoor Recreation*, 292 P.3d 1132 (Colo. App. 2012).

### Rubber stamping?

- Rubber stamping:
  - Open public hearing, then immediate vote
- Not rubber stamping:
  - Receive comments from interested parties and members of the public before publicly discussing and coming to a vote

## Direct Notice?

- The Open Meetings Law contains a provision requiring the clerk to maintain a list of persons who have requested, within the previous two years, direct notification of meetings.
- The person requesting direct notification can designate all meetings or can limit the request to meetings at which specified policies will be discussed.
- The clerk is required to provide these persons with “reasonable advance notice” of such meetings.
- The statutes specify neither what type of notice nor what time frame will be considered “reasonable;” however, it is provided that unintentional failure to give this direct notification will not invalidate actions taken at an otherwise properly noticed meeting.
- Best practice?

## Minutes Requirement

- Minutes shall be taken and recorded at meetings where public body adopts proposed policy, position, resolution, rule, regulation, or formal action.
- Requirements for minutes are only triggered if any type of formal action is or may be taken.
- Verbatim recitation is not required – summary or action minutes allowed.

## Minutes Requirement (Continued)

- If an executive session is called, the minutes must reveal the topic of discussion in the executive session.
- After the meeting, the minutes must be recorded promptly and are considered a public record open to inspection.
- Note: Many clerks utilize recording devices from which the actual “minutes” are transcribed at a later date. If an electronic recording serves as the actual minutes of the jurisdiction, the OML requires that the electronic recording practice must continue.

## Conduct at Meetings

- The public board has the right to establish rules regarding conduct at a public meeting.
- You can limit speaker’s times, and can establish procedures regarding conduct of the meetings.
- Make sure they are viewpoint-neutral.
- Three minute time limit is a reasonable time place and manner restriction. *Shero v. City of Grove*, 510 F.3d 1196, 1202 (10<sup>th</sup> Cir. 2007). Installation of a cut-off switch is not unreasonable, if it is used according to viewpoint-neutral criteria. *Zinna v. Bd. of Cty. Comm’rs of Cty. of Jefferson*, CIV.A.05-CV-01016-RP, 2008 WL 2185907, at \*2 (D. Colo. May 23, 2008).
- Arrest? **Only as a last resort!** You better have a record that a series of warnings have been issued to the disruptor, and that he or she continued to disrupt the orderly conduct of the meeting.

## Part IV: Emergency Meetings

- Are emergency meetings allowed?
- Situations in which public notice, and likewise, a public forum, would be either impractical or impossible. An “emergency” is “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”
- The action must be ratified at the next regularly scheduled meeting. *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1996).

## Emergency Meetings (Cont.)

- By show of hands: whose municipalities have an ordinance or charter provision permitting emergency meetings to be held under certain circumstances?
  - Do you recall an emergency meeting ever having been called?

### Part V: Executive Sessions

- Authorized Topics:
  - Property Transactions
  - Attorney Conferences
  - Confidential Matters
  - Security Arrangements or Investigations
  - Negotiations
  - Personnel matters
  - Documents Protected Under CORA

### When May Executive Session be Called?

- Only at a regular or special meeting
- The OML is silent on any particular notice of intent to hold an executive session as part of a regular or special meeting
  - But, posted notice of meeting must include specific agenda information where possible, so if an executive session is expected, it should be included on the posted agenda.

### How May Executive Session be Called?

- Announce the topic of discussion, including the specific citation to the OML which authorizes consideration of the announced topic in executive session
- Identify particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized
- The body must then vote on whether to hold the session for discussion of the topic(s) announced. Two-thirds of the quorum present must vote affirmatively before the governing body can close the meeting to the public

### Example Description #1

- An executive session pursuant to C.R.S. §§ 24-6-402(4)(b) and 24-6-402(4)(a), for a conference with the Town Attorney for the purpose of receiving legal advice on specific legal questions, and to discuss the purchase, acquisition, lease, transfer, or sale of real, personal, or other property interest – *Discussion of potential sale of Town-owned land*

### Whitsitt Case (Eagle County)

- “However, the Court does not find that there are specific market conditions or other matters that prohibited the Town from making a more detailed description of the property issues or negotiations to be discussed in the executive session. The Court does not find that there were specific market concerns or other matters that would reasonably prevent the Town from at least identifying what the property and negotiations were.”
- Town ordered to disclose transcripts and recordings regarding the property transaction

### Example Description #2

- An executive session pursuant to C.R.S. §§ 24-6-402(4)(b) and 24-6-402(4)(a), for a conference with the Town Attorney for the purpose of receiving legal advice on specific legal questions, and to discuss the purchase, acquisition, lease, transfer, or sale of real, personal, or other property interest – *Discussion of potential sale of Town-owned land at 123 Main Street to ABC Corporation*

### Executive Session Recording

- Must be electronically recorded
- Maintained for 90 days
- Executive session recording is not open for public inspection or subject to discovery, except upon the consent of the local public body or upon court order

### Emergency Executive Session?

- *Bjornsen v. Board of County Commissioners*, 2019COA59
- County Board general practice:
  - “In the rare and unavoidable event that an executive session is necessary prior to the ability of the Board to convene during a Public Meeting and the Board must hold an executive session without prior notice, the Board will then give full and proper notice of the executive session... at the next regular or special meeting.”
- Court took this to mean it was one of Board’s general practices to convene executive sessions outside a regular or special meeting without announcing topic or otherwise noticing the session beforehand if doing so were “unavoidable” and “necessary”
- **OML Violation – Executive Session improperly convened - Retroactive notice DOES NOT cure**
  - Local bodies “must strictly comply” with OML’s requirements for convening executive sessions.

### Part VI: What Happens if OML is Violated?

- Unlike ethics violations, no potential personal sanctions for noncompliance
- Resolution, rule, regulation, ordinance, or formal action may be declared void
- Courts may compel executive sessions to be opened if the discussion does not stay within scope or if OML not strictly complied with
- If court finds a violation of the OML, the court shall award the citizen prevailing in such action costs and reasonable attorney fees.
  - Court will not award costs/attorney fees if OML violation cured prior to filing of lawsuit. *Colorado Off-Highway Vehicle Coalition*, 292 P.3d 1132 (Colo. App. 2012)

### Part VII: Email and Social Media

- Recall: A meeting is “any kind of gathering, convened to discuss public business, in person, by telephone, electronically or by other means.”

### Email Example: *Guy v. Whitsitt*

- An email sent from one councilmember to three others discussing a proposed resolution and the instructions that would be given to staff members about expansion of zone districts where marijuana could be sold
  - Public meeting
- An email regarding public business sent by one member of the council to another (not quorum)
  - Not public meeting
- Text messages regarding public business from the mayor to the city manager?
  - Not public meeting
- The Case is on appeal. 2019 CA 125

### E-mail Tips:

| Okay  | Not Okay   |
|---|--|
| <ul style="list-style-type: none"> <li>• Have a one-on-one discussion</li> <li>• Respond to constituent e-mails</li> <li>• Correspond with Town staff (consistent with municipal policy)</li> <li>• Copy other Council members or staff on “fyi” only e-mails</li> <li>• If you have it, use Town/City-assigned e-mail address and device</li> <li>• <b>But in all situations, do not use e-mail to discuss quasi-judicial matters such as land use and liquor licensing decisions</b></li> </ul> | <ul style="list-style-type: none"> <li>• <b>Don’t</b> use e-mail to discuss policy with more than 1 other member</li> <li>• <b>Don’t</b> use as substitute for open public meeting discussion</li> <li>• <b>Don’t</b> use to discuss or disseminate information on quasi-judicial matters</li> <li>• <b>Don’t</b> use as substitute for taking action</li> <li>• <b>Don’t</b> “reply all” on e-mails sent to more than 2 Council members, excepting only non-policy e-mails</li> <li>• <b>Don’t</b> send e-mails with mixed public/private communications</li> <li>• <b>Don’t</b> say in an e-mail what you wouldn’t say in a public meeting (or what you would not like to read in the paper, or have read to you in a deposition, etc.)</li> </ul> |

## Social Media Tips

- All of the tips applicable to email
- Private messages
- Commenting on interactive spaces

## Social Media

- Similar to conducting a meeting
- First amendment concerns – limited public forum. *Davison v. Plowman*, 247 F.Supp.3d 767 (E.D. Va. 2017); *Davison v. Randall*, 912 F.3d 666, 672 (4th Cir. 2019)
- Removal of comments/blocking users – viewpoint discrimination?
  - Ask your attorney!
- Policing content
- Lafayette and Thornton settlements: \$20,000 and \$30,000 respectively

## Policing Social Media Pages

### Can't you police the content?

- Many Colorado municipalities have created rules for use of their official social media sites.
- Denver has created a policy for its City Council's social media sites. So has Superior.
- Denver's policy asserts that its social media sites are "limited public fora,"
- Based upon this, Denver establishes a number of types of content that is not allowed and "may be removed."
- This has not been tested by judicial review

## Policing Social Media Pages

### Can't you police the content?

- Comments that are clearly off-subject or are not topically related to the scope or context of the original post;
- Obscene, profane, racist, or explicit language or content;
- Content that is threatening, harassing, or discriminatory;
- Potentially libelous or defamatory content;
- Content in violation of any federal, state, or local law;
- Content that promotes, fosters, or perpetuates discrimination based on race, creed, color, age, religion, gender, marital status, status regarding public assistance, national origin, physical or mental disability, sexual orientation, or political party;
- Sexual content or links to sexual content;
- Solicitations of commerce, including content that advertises or promotes a commercial product or service, or any entity or individual;
- Content that incites or promotes violence or illegal activity;
- Plagiarized material, or material that violates intellectual property rights or copyright;
- Content that could compromise an ongoing criminal investigation;
- Information that may tend to compromise the safety or security of the public or public systems;
- Content that contains personal identifying information or sensitive personal information; and,
- Content that violates a legal ownership interest of any other party.

## Communications Takeaways

- E-mail or social media discussion can be subject to OML; don't use e-mail or social media as a substitute for a meeting.
- Be circumspect in all forms of communications as public officials, whether meetings, e-mails, social media, texts or otherwise.
- Remember, the OML says the formation of public policy is public business – the intent is to allow is for openness in the policy-making process.
- Don't conduct your business so as to leave a sense that, in your meetings, people are walking into the middle of a conversation.

## Example Scenario #1

**Longtime Public Works Director is retiring and the City is having a reception for him. Fellow employees and the City Council are invited. Required to post notice? Invite the public? Take minutes?**

### Example Scenario #2

Planning Commission has a hearing on a controversial new development. A very large crowd turns out for the meeting such that not all attendees can fit in the meeting room at Town Hall. A Planning Commissioner suggests moving the meeting to his church's function room which will accommodate all attendees. The Planning Commission decides to reconvene at the church in one hour and posts signs on the front doors to Town Hall advising of the venue change. At the new venue no microphones are available and the public has difficulty hearing the Planning Commission members over all the audience talking. Was this an appropriate course of action? Does it comply with the Open Meetings Law?

### Example Scenario #3

Three trustees are invited by a mining company to a restaurant for a presentation by the mining company about how it plans to mitigate contamination it caused to a river running through the Town. The three trustees attend the meeting to listen to the presentation. Was there an open meetings law violation?

### Example Scenario #4

A CML employee emailed Councilmember Jones for input on a piece of legislation proposed by the General Assembly. Councilmember Jones then forwarded the email to her fellow Councilmembers for their input on the Bill.

Shortly thereafter, an email exchange ensued among the Councilmembers about the proposed legislation, consisting of 20 emails containing proposed edits to the draft, a detailed discussion regarding various topics, and the impact of the Bill on the City. Councilmember Jones then distilled the comments and edits into a memo and emailed it to the CML employee. Was there an open meetings violation?

Thank you for your public service!

Questions?