Training Seminar:
Open Meeting Law

Mead, Talerman & Costa, LLC
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Open Meeting Law

G.L. c. 30A, §§ 18 – 25
940 CMR 29.00
Open Meeting Law
Administration

- The Office of the Attorney General ("AG"), Division of Open Government ("DOG") is responsible for the administration and enforcement of the Open Meeting Law.

- The DOG has issued Open Meeting Regulations at 940 CMR 29.00.
Open Meeting Law
Important Definitions

- “Public Body” includes all multi member boards, committees, etc. established to serve a public purpose in the town, this includes subcommittees created to advise or report to the full Public Body.

- “Deliberations” include any written and oral communication, including communication via e-mail and/or other electronic medium, between or among members of a public body on any public business within its jurisdiction; this does not include the distribution of meeting materials, scheduling information or reports/documents to be discussed at a meeting.
“Intentional Violation” means an act or omission by a public body or a member thereof, in knowing violation of M.G.L. c. 30A, sec. 18-25. Evidence of an intentional violation of M.G.L. c. 30A, sec. 18-25 shall include, but not be limited to, that the public body or public body member (a) acted with specific intent to violate the law; (b) acted with deliberate ignorance of the law’s requirements; or (c) was previously informed by receipt of a decision from a court of competent jurisdiction or advised by the Attorney General, pursuant to 940 CMR 29.07 or 940 CMR 29.08, that the conduct violates M.G.L. c. 30A, sec. 18-25. Where a public body or public body member has made a good faith attempt at compliance with the law, but was reasonably mistaken about its requirements or, after full disclosure, acted in good faith compliance with the advice of the public body’s legal counsel, such conduct will not be considered an intentional violation of M.G.L. c. 30A, sec. 18-25.
“Meeting” includes all deliberations of a Public Body but it does not include the following provided no deliberation occurs:

- (a) an on-site inspection of a project or program;
- (b) attendance by a quorum of a Public Body at a public or private gathering, including a conference or training program or a media, social or other event;
- (c) attendance by a quorum of a Public Body at a meeting of another Public Body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion;
- (d) a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it; or
- (e) a session of a town meeting convened under section 10 of chapter 39 which would include the attendance by a quorum of a public body at any such session.
Meeting Notice must be posted at least 48 hours prior to the meeting **excluding** Saturdays, Sundays and Legal Holidays;

Notice must include the purpose of the meeting, the agenda and any other matters the Chair reasonably believes will be discussed;

Notice must be posted in or on the building that houses the Clerk’s Office and must be visible to the public “at all times” (24 hours a day, 7 days a week);
A decision by the AG emphasizes the importance that all meeting notices include sufficient information regarding the topics to be discussed at the meeting such that it reasonably informs the public of what will be discussed – including topics to be discussed in executive session.

- A meeting notice stating the name of the applicant and noting it was a request for an extension of an Order of Conditions was found to be insufficient.

- The AG noted that all other items on the agenda were listed as “public hearing”, while the notice for the extension was not identified as a public hearing.

- The AG determined that the failure to note that the hearing on the extension was a public hearing constituted a violation of the OML.
Another recent decision by the AG provides additional clarity regarding the sufficiency of notice.

The AG’s office noted that notice for an executive session must state “All subjects that may be revealed without compromising the purpose for which the executive session was called.”

- Litigation not yet commenced but contemplated by BOS need not include specifics
- Litigation actually filed must include name of case

In this case, the AG’s office found no violation, because contingencies to a purchase and sale agreement that was the subject of the executive session had not yet been completed, thus the notice could properly exclude those details to avoid compromising the purpose of the executive session.

- If contemplating the purchase of real estate — need not identify it.
Open Meeting Law
Alternative Notice Posting

- The DOG has approved the following alternative posting methods at 940 CMR 29.03(2) in the event the posting in or on the municipal building cannot be seen at all times:
  - Posting on municipal website;
  - Post on cable television AND post in an alternate municipal building open at all times;
  - Post in newspaper of general circulation AND post in an alternative municipal building;
  - Place computer monitor or bulletin board displaying notice in the municipal building such that it can be viewed from outside the building;
  - Provide an audio recording of meeting notices available to the public by telephone at all times.
In the event the Town adopts one of the alternative posting methods, the Town Clerk must notify the AG in writing as to the method, including any applicable website address.

If at any time the Town adopts a different posting method than the one on file with the AG, the Town Clerk must update the AG with a new written notice.
Open Meeting Law
Alternative Notice Posting

- In an emergency situation, the 48 hour posting requirement may be waived but an effort must be made to comply whenever possible.

- An emergency is any sudden, generally unexpected occurrence or set of circumstances demanding immediate action.
The Open Meeting Law provides for remote participation at meetings by members of the Public Body. Must be adopted by the BOS.

The Chair of the public body must announce at the start of a meeting whether video/audio recordings are being made, including those by private individuals.

To address a meeting of a public body, permission of the chair is required. The chair is not required to allow the public to participate in a public meeting as opposed to a public hearing held under another statutory scheme.
Open Meeting Law
REMOTE PARTICIPATION

- Regulations allow remote participation by members of a body only after authorization by the Board of Selectmen.

- The Board of Selectmen have the authority to place restrictions on the use of remote participation including amount and source of funding, and which bodies pay participate, if any.

- The chair must determine that physical attendance will be unreasonably difficult.

- Acceptable methods of remote participation include any technology that enable the remote participant and all persons present at the meeting location to be clearly audible to one another.
Open Meeting Law
remote participation, Cont’d

Minimum Requirements
- Quorum must be physically present at meeting location
- Members participating remotely and all those present at the location must be clearly audible to each other
- All votes taken must be by roll call vote

Procedure:
- Chair must announce at start of meeting the name of remote participant and for which reason.
- Remote participants may vote and are not deemed absent
- Remote participants may participate in executive session but must state at the start that no one else is present or able to hear the discussion at the remote location, unless the public body has approved the presence of that individual
- Any time technological difficulties make the use of remote participation ineffective, the chair may decide how to address the issue.
Open Meeting Law

Email

- As noted in the definition of Deliberation, discussions via email of topics within a board’s jurisdiction are Deliberations and violate the Open meeting Law.

- Email communications must therefore be limited to the distribution of meeting materials and similar information.

- It is suggested that all emails contain the following statement: “This email is for the distribution of materials only, not for discussion purposes.”
A recent decision by the AG’s office found that communication via email constitute deliberation in violation of the OML.

- In this case, a study committee created a voting grid addressing a number of potential issues, which was circulated via email to the members of the committee.
- The AG found that every email exchanged containing completed voting grids constituted an OML violation as improper deliberation.
- The circulation of the blank voting grid was not found to constitute a violation, the violation occurred when completed grids were circulated.
Executive Session is any part of any meeting of a public body that is not open to the public. The following may be discussed provided the chair announces in open session that discussion in open session would have a detrimental effect:

- To discuss the reputation, character, physical condition or mental health, rather than professional competence, of an individual, or to discuss the discipline or dismissal of, or complaints or charges brought against, a public officer, employee, staff member or individual;

- To conduct strategy sessions in preparation for negotiations with nonunion personnel or to conduct collective bargaining sessions or contract negotiations with nonunion personnel;

- To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares;
To discuss the deployment of security personnel or devices, or strategies with respect thereto;

To investigate charges of criminal misconduct or to consider the filing of criminal complaints;

To consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body; (may not have the other party in the ES)

To comply with, or act under the authority of, any general or special law or federal grant-in-aid requirements;
Open Meeting Law
Executive Session Cont’d

- To consider or interview applicants for employment or appointment by a preliminary screening committee if the chair declares that an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee, to consider and interview applicants who have passed a prior preliminary screening;

- To meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity;

- To discuss trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities
Open Meeting Law

Minutes

- **Must include a summary of discussions on each subject, list of exhibits used at the meeting and decisions made, including a record of all votes.**

- **All exhibits shall become part of the official record and a list of the exhibits must be included in the minutes.**

- **Minutes of executive sessions must be disclosed “when the purpose for which [the] . . . Executive session was held has been served.”**

- **At regular intervals, a public body shall review the minutes of executive sessions to determine if continued non-disclosure is warranted.**
Minutes of all open sessions must be approved in a timely manner.

In a recent case, the AG’s Office found that a board meeting on a regular basis a delay or more than two to three months in preparing and approving minutes constitutes a violation.

In another recent case, the AG’s Office found not only that minutes were not approved in a timely manner, but also that the minutes did not contain sufficient detail and accuracy.

The minutes were deficient because they did not identify the subject matter of comments from a member of the public, and the minutes were not sufficiently detailed to allow a person who did not attend the meeting to deduce the nature of the concerns raised by the speaker.
All complaints of Open Meeting Law violations must be filed with the Public Body and the Town Clerk, within 30 days of the alleged violation.

Within 14 business days of receipt of the complaint, the Public Body must take any necessary remedial action and send a copy of the complaint and description of remedial action to the DOG.

If the Public Body does not take the necessary remedial action within 30 days of receipt of the complaint, the complainant may file a copy of the complaint with the DOG.

The DOG will determine if the complaint warrants an investigation into the alleged Open Meeting Law violations.
Open Meeting Law
Enforcement Cont’d

- The DOG may resolve Open Meeting Law violations through informal communications with the public body or a formal order which may require the following:
  - Immediate and future compliance with the Open Meeting Law;
  - Attendance at a training session authorized by the AG;
  - That minutes, records or other materials be made public;
  - Nullification of action taken by the public body;
  - Imposition of a fine upon the Public Body for not more than $1,000.00 per intentional violation;
  - Other appropriate action.
All municipal employees will be deemed to have knowledge of the Open Meeting Law as they are required to receive a copy.

Accordingly, any violation of the Open Meeting Law could be considered willful because of the employee’s knowledge of the Law.
AG may issue advisory opinions on request or by his or her own initiative. (Example: Request of Town manager about a Town Manager appointed Committee)

Action taken by a Public Body in good faith reliance on an advisory opinion will not constitute an intentional violation of the Open Meeting Law provided the circumstances are not materially different from those in the advisory opinion.
The End