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Electronic Communications and Open Meeting Laws

By

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Electronic Communications and Open Meeting Laws

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Many aspects of the revolution in electronic communications fall into the proverb: The more things change, the more they stay the same. Electronic communications may be faster and may make it easier for multiple individuals to communicate, but there are few circumstances in which electronic communications are fundamentally different or present wholly new issues for compliance and enforcement in open meetings.

Notice

Notice of meetings and providing the agendas can be done electronically with some more convenience but essentially little practical difference from using the mails or posting at the meeting location. Physical posting may be more convenient to the homeless and to those lacking computers, but public libraries typically offer some public access to computers. Physical posting requires everyone to visit the posting location unless the information is picked up in news media.

Notice of meetings has never been perfect for all citizens/residents, and it isn't perfect with electronic communications. One might say, with a crooked smile, it is "good enough for government work." The changeover from hand-delivered, mailed or posted notice to electronic notice through websites and e-mail for some kinds of meetings or meetings under some circumstances has occurred with relatively few glitches.

- some States retained prior forms of notice and added electronic notice on top as an additional form of notice,[1] achieving some duplication but overall much increased notice to residents. One advantage of this approach is that a technological failure does not necessarily mean that the meeting cannot proceed,[2] A disadvantage is that

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[1] *E.g.,* **Ky.**Op.Atty.Gen. 98-OMD-119 (July 27, 1998) (posting on public body's website alone is insufficient when statute requires posting at meeting place or other physical location); **Nev.**Rev.Stat. §241.020(4) (2013) (website notice is only supplemental and cannot substitute for minimum public notice required); **N.J.**Stat. §10:4-9.2 (2013) (permission to give electronic notice through Internet does not affect or supersede existing adequate notice requirements under prior law, and "no electronic notice issued pursuant to this act shall be deemed to substitute for, or be considered in lieu of, such adequate notice"); **N.Y.**Pub.Off.Law §104(5) (2013) ("When a public body has the ability to do so, notice of the time and place of a meeting given in accordance with [existing requirements], shall also be conspicuously posted on the public body's internet website."); **Tex.**Gov.Code §551.043(b) (2013) (Internet posting in addition to physical posting); **Utah**Code §52-4-202(3), (4) (2013) (amended in 1998 to encourage public bodies to develop and use electronic means to post notice in addition to other means required by the law).

[2] *E.g.,* **Ariz.**Rev.Stat. §38-431.02(A) (2013) ("A technological problem or failure that either prevents the posting of public notices on a website or that temporarily or permanently prevents the usage of all or part

no saving in expense or convenience is gained;

- members of public bodies may request notice of special meetings by electronic mail or facsimile instead of written notice, speeding transmission and making modest savings;[3]

- recognizing that many residents get notice primarily from the news media, some States provide for notice and agendas to be e-mailed to the news media;[4]

- as not all public bodies have their own websites, provisions for use of Internet notice of meetings may be (i) optional,[5] (ii) applied to state bodies but not mandatory for local bodies,[6] (iii) applied only to public bodies that have websites[7] or (iv) established to require posting on an alternative site;[8]

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of the website does not preclude the holding of the meeting for which the notice was posted if the public body complies with all other public notice requirements required by this section."); **Ill.**Comp.Stat. ch. 5, §120/2.02(b) (2013) ("The failure of a public body to post on its website notice of any meeting or the agenda of any meeting shall not invalidate any meeting or any actions taken at a meeting."); **Nev.**Rev.Stat. §241.020(4) (2013) (a public body that maintains a website on the Internet "shall post notice of each of its meetings on its website unless the public body is unable to do so because of technical problems relating to the operation or maintenance of its website." Inability to post notice as a result of technical website problems shall not be a violation); Argyle Independent School District v. Wolf, 234 S.W.3d 229, 248-49 (**Tex.**App. 2007) (perfection in use of Internet posting is not required, so unintended bad links or other posting errors will not alone invalidate the meeting); *see* Terrell v. Pampa Independent School District, 345 S.W.3d 641 (**Tex.**App. 2011).

[3] **Va.**Code §15.2-1418 (2013).

[4] *E.g.,* **Ind.**Code §5-14-1.5-5(b) (2013) (electronic mail delivery of notices of meetings to news media as an alternative to mail or facsimile); **Ky.**Rev.Stat. §61.823(4)(b) (2013) (notice of special and emergency meetings given by e-mail to members of public body and media that have requested notice of meetings).

[5] **Mass.**Gen.Laws ch. 30A, §20(c) (2013) (website posting is optional in addition to other forms of notice for local and regional bodies and required for statewide bodies).

[6] **Va.**Code §2.2-3707(C) (2013) (in addition to other notice, state public bodies must post notice of their meetings at least three working days prior to meetings on their websites and on Commonwealth Calendar, an electronic calendar maintained by the Virginia Information Technologies Agency. Other public bodies are encouraged but not required to publish meeting notices electronically).

[7] **Conn.**Gen.Stat. §1-225(b) (2013) (public agencies shall post their schedule of regular meetings on their websites, if available); **Ill.**Comp.Stat. ch. 5, §120/2.02(a) (2013) (a public body that has a website maintained by its full-time staff shall post the agenda of any regular meetings of the governing body on its website and keep it posted until regular meeting is concluded); **N.H.**Rev.Stat. §91-A:2(II) (2013) (meeting notices must be posted in two appropriate places, one of which may be public body's Internet website, if one exists); **Tex.**Gov.Code §551.056 (2013).

[8] *E.g.,* **Ariz.**Rev.Stat. §38-431.02(A)(4) (2013) (public bodies shall "[c]onspicuously post a statement on their website or on a website of an association of cities and towns stating where all public notices of their

- public bodies cannot switch back and forth from using website notice to another form of notice when that would leave the public uncertain where to find notice.[9]

- some States established how long the notice and agenda must remain posted on the website[10] while others were less precise leading to problems. For example, a 2009 lawsuit charged that a New York city's website was "updated regularly, but on an ad hoc basis, i.e. taking the time to advise of a 'tree lighting ceremony', or innocuous meeting, but neglecting to post meeting information on hot button issues like the budget."[11] The court found petitioner lacked standing but still rejected the city's view that it need only update its website as time permits:

> The intent and purpose of the statute does not indicate immediate compliance is necessary. However, the purpose of the statute is not served if, as respondents argued, the "[i]nstitutions and organizations charged with the responsibility of serving the general public" were permitted to pick and choose how and when websites were updated. As indicated by the Court on the record, such discretionary postings open a pandora's box of slippery slope possibilities where an institution or organization entrusted with serving the public could post notices that only served its agenda. Such discretionary postings would fly in the face of the transparency and openness that the Open Meetings Laws were designed to ensure.

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meetings will be posted, including the physical and electronic locations" and "[p]ost all public meeting notices on their website or on a website of an association of cities and towns and give additional public notice as is reasonable and practicable as to all meetings"); **Del.**Code tit. 29, §10004(e)(4) (2013) (all public bodies in state executive branch subject to open meeting law shall post meeting notices electronically to the Delaware website approved by Secretary of State. "In addition, for all noncounty and nonmunicipal public bodies, public notice required by this subsection shall include, but not be limited to, electronic posting on a designated State of Delaware website, approved by the Registrar of Regulations by May 1, 2013, which shall be accessible to the public."); **Ind.**Code §5-14-1.5-5(b) (2013) (state agencies must provide electronic access to notice through the computer gateway administered by office of technology); **Tex.**Gov.Code §§551.044(a), 551.048, 551.053(b) (2013) (secretary of state must post Internet notice of a meeting of a state board, commission, department, or officer having statewide jurisdiction and certain regional public bodies for at least seven days before meeting day).

[9] An issue arose in Maryland where the law provided that, if the public body had given public notice that website notice will be used, notice may be given "by posting the notice on an Internet website ordinarily used by the public body to provide information to the public." **Md.**Code State Gov. §10-506(c)(3) (2013). The Maryland Open Meetings Compliance Board recommended an amendment to require website posting if the public body has a website, noting that public bodies normally using website posting could post notice of a particular meeting on a bulletin board and still technically comply with the law. "Of course, notice in this manner would be meaningless to a member of the public accustomed to relying on the website." Maryland Open Government Eighteenth Annual Report (Oct. 2010), *at* http://www.oag.state.md.us/Opengov/Openmeetings/index.htm (visited July 22, 2013).

[10] **Ill.**Comp.Stat. ch. 5, §120/2.02(b) (2013) ("Any notice of an annual schedule of meetings shall remain on the website until a new public notice of the schedule of regular meetings is approved.").

[11] Matter of Rivers v. Young, 26 Misc.3d 946, 951, 892 **N.Y.**S.2d 747, 751 (2009).

> Black's Law Dictionary defines "ability" as "[t]he capacity to perform an act or service; esp., the power to carry out a legal act." Unquestionably, the respondents have the ability to update its website regularly. While to update same regularly may be inconvenient, inconvenience should not excuse failure to comply with statutory mandates. Accordingly, respondents should require its agencies to comply with internet posting mandates of the Open Meeting Laws in as timely a manner, and as consistently, as possible.[12]

- Preregistration resulting in automatic e-mail notice of meetings is a very effective mechanism of communicating with those who self-identify their interest in activities of the public body. Notice limited to those who preregister cannot be the only notice. Anyone who did not know to preregister, or who chose not to preregister, is effectively deprived of notice of meetings in violation of the law.[13]

- Troubling issues remain as to compliance with the Americans with Disabilities Act, the federal Rehabilitation Act of 1973 and state laws requiring accessibility to those with disabilities.[14] How many public bodies actually do comply with these laws as to all forms of disability and needs for accommodation. A website may comply fully for visually impaired who can increase font size but be insufficient for the blind.

- Another issue is individuals who are homeless or lack computer access for other reasons such as poverty. The Texas secretary of state, for example, must post Internet notices of meetings of state and regional public bodies and provide a convenient computer terminal in the secretary of state's office during regular office hours for public use to view notices.[15] This works for people in the immediate area, but not for those elsewhere in Texas. Some communities offer computers in their libraries. Others do not. What level of access is required and how convenient must it be?

Deliberations

The requirement for public meetings by public bodies varies significantly depending on the State's definition of terms like "deliberations" and "meeting." States vary widely.

Iowa defines a "meeting" as "a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or

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[12] Matter of Rivers v. Young, 26 Misc.3d 946, 952-53, 892 **N.Y.**S.2d 747, 752 (2009).

[13] Coastal & Watershed Resources Advisory Committee, 7 **Md.** Compliance Board Opinions 18 (Mar. 9, 2010).

[14] Massachusetts Attorney General, Open Meeting Law Guide 5 (Mar. 24, 2011), *at* http://www.**Mass.**gov/ago/government-resources/open-meeting-law/attorney-generals-open-meeting-law-guide.html (visited July 22, 2013) (warning public bodies of need for compliance)

[15] **Tex.**Gov.Code §§551.044(a), 551.048, 551.053(b) (2013).

action upon any matter within the scope of the governmental body's policy-making duties."[16]

Massachusetts defines "deliberation" as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction" but excludes "distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed."[17]

In Nevada, "deliberation includes the mere attendance at a meeting resulting in the receipt of information."[18]

Missouri defines a "public meeting" as "any meeting of a public governmental body subject to [the open meeting act] at which any public business is discussed, decided, or public policy formulated, whether such meeting is conducted in person or by means of communication equipment, including, but not limited to, conference call, video conference, Internet chat, or Internet message board."[19] A variety of other States have similar provisions.[20]

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[16] **Iowa**Code §21.2(2) (2013); Mason v. Vision Iowa Board, 700 N.W.2d 349, 354 (**Iowa** 2005) ("'policy-making' is more than recommending or advising what should be done. 'Policy-making' is deciding with authority a course of action."); Donahue v. State of **Iowa**, 474 N.W.2d 537, 539 (**Iowa** 1991).

[17] **Mass.**Gen.Laws ch. 30A, §18 (2013); *see* **Mass.**Gen.Laws former ch. 30A, §11A, ch. 34, §9F, ch. 39, §23A ("a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction"), *construed in* District Attorney v. School Committee of Wayland, 455 **Mass.** 561, 571-72 & n.7, 918 N.E.2d 796, 803-04 & n.7 (2009) (members of a public body cannot escape open meeting requirements by writing their exchange; violation occurred when members began "deliberations regarding this topic in private via e-mail, prior to the commencement of an open meeting"; "school committee is required to release each member's written comments and make them available to the public"); *accord*, **Idaho**Code §67-2341(2) (2013) ("'Deliberation' means the receipt or exchange of information or opinion relating to a decision, but shall not include informal or impromptu discussions of a general nature which do not specifically relate to a matter then pending before the public agency for decision."); **Ind.**Code §5-14-1.5-2(i) (2013) ("'Deliberate' means a discussion which may reasonably be expected to result in official action.").

[18] **Nev.**Op.Atty.Gen. 2001-05 (Mar. 14, 2001), *citing* State ex rel. Badke v. Village Board, 173 **Wis.**2d 553, 572, 494 N.W.2d 408, 415 (1993) ("Listening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking."), *and* McComas v. Board of Education, 197 **W.Va.** 188, 199, 475 S.E.2d 280, 291 (1996); *see* **Idaho** Attorney General, Idaho Open Meeting Law Manual 12 (Nov. 2011), *at* http://www.ag.idaho.gov/publications/legalManuals/OpenMeeting.pdf (visited July 22, 2013) ("Even the receipt of information relating to a 'decision'— i.e., a measure on which the governing body will have to vote — amounts to deliberation, and therefore triggers the definition and requirements of a 'meeting' under the Open Meeting Law.").

[19] **Mo.**Stat. §610.010(5) (2013).

[20] **Ill.**Comp.Stat. ch. 5, §§120/1, 120/1.02 (2013) (intent of law is that deliberations of public bodies be conducted openly; a meeting is a gathering of a majority of a quorum for the purpose of discussing public business); **Me.**Rev.Stat. tit. 1, §§401, 405(6) (2013) (public policy that deliberations of public bodies be conducted openly, and deliberations "on only the following matters may be conducted during an

New Hampshire defines a "meeting" as "the convening of a quorum of the membership of a public body," or a majority of its members if a quorum is more than a majority, "whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously," to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.[21]

Electronic Meetings

Telephonic participation in public meetings became possible and relatively popular enough in advance of electronic access and participation in meetings to allow enactment of provisions for telephonic or videoconference meetings that could largely resolve the issues with electronic meetings. There is little difference between telephonic participation in a meeting using a speaker and use of Skype or similar computer options by one or two members. Nevertheless, there was already substantial variation with respect to telephonic or videoconference meetings, and the variations only increased.

Public bodies have a collegial character that is inconsistent with any form of telephonic or electronic communication. Historical requirements that members attend meetings in person gave rise to prohibitions on some or all use of the telephone to conduct meetings, even if speakers or other devices would permit the public to hear the discussion in full. Following general availability of telephones, a number of States enacted express provisions permitting use of telephones in meetings of boards of directors of private corporations following court decisions that such meetings were prohibited as contrary to the collegial character of boards of directors. The same transition occurred for public bodies in many States, especially those with statewide jurisdiction. Authorization for telephonic, videoconference or electronic meetings is especially helpful for state public bodies that draw their membership from a number of communities within the State; attendance at such meetings is a particular burden for members who must travel a significant distance. Authorization may also be significant for public bodies that are subject to requirements for a vote of a majority of the total members, rather than members present, or for a super-majority vote on particular issues.

Today, only a few States completely prohibit telephonic meetings. States that mandate physical presence necessarily prohibit telephone and videoconference meetings. The 2005 Alabama law has been interpreted to preclude the holding of a meeting or a member's attendance at a meeting via telephone conference and to require members to be physically present to be

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executive session"); **N.C.**Gen.Stat. §143-318.10(d) (2013) (an official meeting is a gathering "for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body"); **S.C.**Code §30-4-20 (2013) (meeting is convening of quorum to discuss or act upon matter); **Tex.**Gov.Code §551.001(4) (2013) ("a deliberation . . . during which public business or public policy over which the governmental body has supervision or control is discussed or considered, or during which the governmental body takes formal action"), *construed in* **Tex.**Op.Atty.Gen. 95-055 (Aug. 30, 1995); **Tex.**Gov.Code §551.102 (2013) ("A final action, decision, or vote on any matter deliberated in a closed meeting under this chapter may only be made in an open meeting that is held in compliance with the notice provisions of this chapter.").

[21] **N.H.**Rev.Stat. §91-A:2(I) (2013).

counted toward a quorum.[22] Ohio requires that a member of the public body must be present in person to be counted in determining whether a quorum is present and to be counted in voting.[23] Hawaii permits videoconference meetings but not telephonic meetings of state and county public bodies.[24] Oklahoma is similar.[25]

The Executive Director of the New York Committee on Open Government ruled that public bodies may not conduct open meetings by conference call because doing so limits the public's ability to observe deliberations.[26] New York's Attorney General noted that the collegial character of multi-person public bodies requires members to convene at a meeting with a quorum present and deliberate as a collective body but physical presence is not required if deliberations and decisions are done by the body as a whole; as a result, telephone conference calls may be used in lieu of in-person meetings when the open meeting requirements do not apply.[27]

A few States permit use of telephone or video equipment to link the public to the public meeting while requiring members of the public body to meet in person and members of the

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[22] Auburn University v. Advertiser Co., 867 So.2d 293, 301 (**Ala.** 2003) ("attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to consider or act in any way upon any matter"); **Ala.**Op.Atty.Gen. 2006-071 (Mar. 21, 2006); **Ala.**Op.Atty.Gen. 2004-072 (Feb. 13, 2004) (same for videoconferencing); **Ala.**Op.Atty.Gen. 236-50 (July 19, 1994) (prior law: "a member of a governing board or body cannot be counted present and his vote cannot be counted in order to constitute a quorum by use of a speakerphone or telephone"), *following* Penton v. Brown-Crummer Inv. Co., 222 **Ala.** 155, 131 So. 14, 16, 18 (1930). *But see* **Ala.**Op.Atty.Gen. 2006-130 (Aug. 16, 2006) (Alabama State Port Authority has specific statutory exception from general rule prohibiting telephonic attendance).

[23] **Ohio**Rev.Code §121.22(C) (2013); *see* **Ohio**Op.Atty.Gen. 2009-034 (Sept. 15, 2009); *accord,* **Tex.**Op.Atty.Gen. 94-031 (Mar. 24, 1994) ("the committee member who participated by telephone may not be considered to have been present at the meeting and his vote may not be counted").

[24] Hawaii Office of Information Practices, Guide to "The Sunshine Law" for State and County Boards 8-9 (June 2011), *at* http://www.state.hi.us/oip/sunshinelaw.html (visited July 22, 2013).

[25] **Okla.**Op.Atty.Gen. 82-7 (Jan. 20, 1982), *construing* **Okla.**Stat. tit. 25, former §304(2) (" 'Meeting' means the conducting of business of a public body by a majority of its members being personally together."). Section 304(2) was amended in 2010 to add concluding words "or, as authorized by Section 307.1 of this title, together pursuant to a videoconference." **Okla.**Stat. tit. 25, §304(2) (2013). Each member must be visible and audible to each other and to the public. **Okla.**Stat. tit. 25, §§306, 307.1(A) (2013). Executive sessions by teleconference are forbidden. **Okla.**Stat. tit. 25, §§306, 307.1(B) (2013).

[26] **N.Y.** Open Gov't Committee Advisory Opinion No. 687 (Oct. 6, 1981).

[27] **N.Y.**Op.Atty.Gen. 95-F6 (Aug. 14, 1995) ("a member of a public body can only cast a vote if the member is physically present at the meeting of the body"); **N.Y.**Op.Atty.Gen. 92-F6 (Aug. 4, 1992); *see* Thomas v. New York Temporary State Comm'n on Regulation of Lobbying, 83 App.Div.2d 723, 442 **N.Y.**S.2d 632, 634 (1981), *aff'd,* 56 **N.Y.**2d 656, 451 **N.Y.**S.2d 708, 436 N.E.2d 1310 (1982) (assuming, arguendo, that law applied to telephone votes; telephone vote not designed to circumvent law is valid).

public to appear in person before the body.[28] This approach maximizes public attendance and, if permitted, public participation while retaining the traditional meeting format for the public body.

Open meeting statutes may use the term "electronic communications," presenting opportunities for confusion as some States use the term to include telephonic and video or audio teleconferencing, and perhaps other and newer forms of electronic communications, while other States deem telephonic communications to be separate from electronic communications.[29]

Special details may be required. Missouri requires, in addition to other notice, "if the meeting will be conducted by telephone or other electronic means, the notice of the meeting shall identify the mode by which the meeting will be conducted and the designated location where the public may observe and attend the meeting. If a public body plans to meet by Internet chat, Internet message board, or other computer link, it shall post a notice of the meeting on its web site in addition to its principal office and shall notify the public how to access that meeting."[30]

Some States require minutes of electronic meetings to identify (i) members of the public body at each remote location specified in the notice who participated electronically, (ii) members who were physically assembled at the primary or central meeting location, and (iii) members

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[28] Hawaii Office of Information Practices, Guide to "The Sunshine Law" for State and County Boards 9 (June 2011), *at* http://www.state.hi.us/oip/sunshinelaw.html (visited July 22, 2013); **Okla.**Op.Atty.Gen. 81-142 (Nov. 30, 1981). Nebraska provides: "A public body may allow a member of the public or any other witness other than a member of the public body to appear before the public body by means of video or telecommunications equipment." **Neb.**Rev.Stat. §84-1411(6) (2013). Nevertheless, other parts of the open meeting law are clear that video- and tele-conferencing are permitted in stated circumstances. *E.g.*, **Neb.**Rev.Stat. §84-1411(2) (2013) (multiple state and some regional bodies may use videoconferencing; the Judicial Resources Commission may use telephone conferencing for up to half of its meetings under stated circumstances); **Neb.**Rev.Stat. §84-1411(3) (2013) (various other entities may use teleconferencing under stated circumstances); Wyoming Attorney General, The Open Meetings Act: A Summary (July 1, 2005), *at* http://attorneygeneral.state.wy.us/OpenMeetingsAct2005.pdf (visited July 22, 2013) ("the Act applies to telephonic and video conferences where a quorum of members of a governing board of an agency gather together by telephone communication or videoconference to participate in agency business covered by the Act").

[29] **R.I.**Op.Atty.Gen. ADV OM 04-08 (Dec. 3, 2004) ("for purposes of the OMA, we do not believe that telephonic communication is a means of 'electronic communication.' 'Electronic' is defined as 'of or relating to electrons; of, relating to, or utilizing devices constructed or working by the methods or principles of electronics; generating musical tones by electronic means; of, relating to, or being music that consists of sounds electronically generated or modified; or of, relating to, or being a medium (as television) transmitted electronically.' Merriam-Webster's Ninth New Collegiate Dictionary 401 (9th ed. 1988). More recently, 'electronic' has also been defined as 'implemented on or by means of a computer.' Merriam-Webster Online (2004). Further, a search of the Rhode Island General Laws reveals a pattern in which references to 'electronic,' or 'electronic communications' are separate from references to 'telephonic,' or 'telephonic communications.'").

[30] **Mo.**Stat. §610.020(1) (2013).

who monitored the meeting by electronic communications means from another location.[31]

Some statutes expressly permit telephonic or videoconference meetings when the discussion is broadcast so that the public may hear it and all other open meeting act requirements are satisfied. States that generally permit telephonic or videoconference meetings in their open meeting laws are Alaska,[32] California, Colorado,[33] Delaware, Hawaii,[34] Kansas,[35] Kentucky,[36] Minnesota,[37] Missouri,[38] Montana,[39] Nevada,[40] New Jersey,[41] North Carolina,[42] North Dakota,[43]

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[31] *E.g.,* **Va.**Code §2.2-3707(I) (2013).

[32] **Alas.**Stat. §44.62.310(a) (2011) ("Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. . . . The vote at a meeting held by teleconference shall be taken by roll call."); **Alas.**Stat. §44.62.312(a)(6) (2011) ("use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings"); **Alas.**Op.Atty.Gen. 1995-317 (Aug. 21, 1995); **Alas.**Op.Atty.Gen. 1994-367 (Nov. 30, 1994).

[33] **Colo.**Rev.Stat. §24-6-402(1)(b), (2)(d)(III) (2013) (" 'Meeting' means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." "If elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section. Electronic mail communication among elected officials that does not relate to pending legislation or other public business shall not be considered a 'meeting' within the meaning of this section."), *abrogating* **Colo.**Op.Atty.Gen. (Mar. 14, 1986) (approving use of telephone conference calls for adjudicatory administrative hearings but observing that use of telephone calls for meetings would violate purpose and spirit of open meeting law).

[34] **Haw.**Rev.Stat. §92-3.5 (2013) (meetings using interactive conference technology: notice must identify all locations at which board members will be physically present and public may attend at any location).

[35] **Kan.**Stat. §75-4317a (2013) (" 'meeting' means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency"), *abrogating* State v. Board of County Comm'rs, 254 **Kan.** 446, 449, 866 P.2d 1024, 1026 (1994) ("Inherent in the ordinary meaning of 'gathering' or 'assembly' is the requirement that persons at a gathering or assembly are in the physical presence of each other." At 1027: " 'meeting' requires the gathering or assembly of persons in the physical presence of each other"); *see* **Kan.**Op.Atty.Gen. 2005-3 (Jan. 27, 2005).

[36] **Ky.**Rev.Stat. §61.826 (2013) (videoconference permitted for any meeting other than executive session), *abrogating* **Ky.**Op.Atty.Gen. 92-151 (Nov. 2, 1992) (there is no statutory authority for use of a telephone conference call even if open to the public with speaker system).

[37] **Minn.**Stat. §13D.02 (2013) (at least one member present at regular meeting location); *see* Moberg v. Independent School District, 336 N.W.2d 510, 517-18 (**Minn.** 1983) (open meeting law does not apply to letters or telephone conversations between fewer than quorum).

[38] **Mo.**Stat. §610.010(5) (2013) (meeting may occur "whether such meeting is conducted in person or by means of communication equipment, including, but not limited to, conference call, video conference, Internet chat, or Internet message board.").

Oklahoma,[44] Oregon,[45] Rhode Island,[46] South Dakota,[47] Utah,[48] and Vermont.[49] In

[39] **Mont.**Code §2-3-202 (2013) (a meeting may be "corporeal or by means of electronic equipment").

[40] **Nev.**Rev.Stat. §241.030(6) (2013) ("electronic communication, must not be used to circumvent the spirit or letter of this chapter in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory powers"); Del Papa v. Board of Regents, 114 **Nev.** 388, 956 P.2d 770, 776-80 (1998); **Nev.**Op.Atty.Gen. 85-19 (Dec. 17, 1985) (lawful meeting may be conducted by telephone conference).

[41] **N.J.**Stat. §10:4-8(b) (2013) ("meeting" is "any gathering whether corporeal or by means of communication equipment").

[42] **N.C.**Gen.Stat. §143-318.13(a) (2013) (conference telephone meetings permitted if location and means for members of public to listen are provided; up to $25 may be charged per listener to defray costs).

[43] **N.D.**Cent.Code §§44-04-17.1(9)(a), 44-04-19(4) (2013) (permitting meetings "whether in person or through electronic means such as telephone or videoconference"); North Dakota Attorney General, North Dakota Open Meetings Manual (Jan. 2013), *at* http://www.ag.state.nd.us/Manuals/OROMManuals/2013OpenMeetingsManual.pdf (visited July 22, 2013).

[44] **Okla.**Stat. tit. 25, §§306, 307.1(A) (2013) (permitting videoconference meetings by public bodies when each member of the body is visible and audible to each other and to the public).

[45] Oregon requires that the governing body shall make available to the public at least one place where the public can listen to communications with the absent member. **Ore.**Rev.Stat. §192.670(2) (2013) ("The place provided may be a place where no member of the governing body of the public body is present.").

[46] **R.I.**Gen.Laws §42-46-5(b) (2013) ("No meeting of members of a public body or use of electronic communication, including telephonic communication and telephone conferencing, shall be used to circumvent the spirit or requirements of this chapter; provided, however, these meetings and discussions are not prohibited.").

[47] **S.D.**Codified Laws §§1-25-1, 1-25-1.2 (2013) ("Any official meeting may be conducted by teleconference [by audio or video medium]. A member is deemed present if the member answers present to the roll call conducted by teleconference for the purpose of determining a quorum. Each vote at an official meeting held by teleconference shall be taken by roll call."), *abrogating* **S.D.**Op.Atty.Gen. 88-35 (Sept. 1, 1988) (members appearing by teleconference are not present, leading to amendment of statute).

[48] **Utah**Code §§52-4-103(3), (5), 52-4-207 (2013) (a meeting is the convening of a public body "whether the meeting is held in person or by means of electronic communications"). The **Utah** Attorney General ruled that one or more members of a public body may lawfully use telephone conference calls or other electronic equipment to meet, deliberate and take action if notice requirements and other open meeting requirements are satisfied. **Utah**Op.Atty.Gen. 83-14 (Mar. 30, 1983); **Utah**Op.Atty.Gen. 79-210 (Aug. 1, 1979). In 1997, **Utah** enacted a detailed provision setting out the requirements for electronic meetings conducted by telephonic, telecommunications or computer conference. **Utah**Code §52-4-207 (2013).

[49] **Vt.**Stat. tit. 1, §312(a) (2013) ("A meeting may be conducted by audio conference or other electronic means, as long as the provisions of this subchapter are met."). Vermont amended its law to permit such meetings after a court decision finding telephone meetings improper. State v. Vermont Emergency

Massachusetts, the 2010 law authorizes the Attorney General to permit remote participation by regulation, and regulations have recently been adopted, requiring each specific public body to adopt the practice individually.[50]

These States may impose specific additional notice or agenda requirements or other requirements to ensure public access. These provisions make an accommodation between the preference for meetings in person and recognition that certain public bodies, especially those operating on a statewide basis, may have difficulty convening in person. An implication that can be drawn from specific limited grants of power that general use of electronic communications, even with notice and public ability to listen, is likely to be forbidden in these States. Thus, California permits public bodies to use video or audio teleconferencing for all purposes, with voting done by roll call, but the public body must post agendas at all teleconference locations, which must be open to public and identified in the notice and agenda; the agenda must provide an opportunity for members of public to address public body at each teleconference location; and local public bodies must adopt reasonable regulations to protect statutory and constitutional rights of parties and public appearing before public body.[51]

Delaware defines video-conferencing as "any system permitting interaction among all participants in 2 or more noticed public locations in compliance"[52] and provides for video-conferencing under specific circumstances:

> Unless otherwise prohibited by law, any public body subject to the provisions of this chapter, except for any public body in which members are elected by the public to serve on the public body, may conduct a meeting by means of video-conferencing, provided each attending member's participation occurs at a noticed public location where members of the public may also attend the meeting. The participation of a member of such public body by video-conferencing in compliance with this section

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Board, 136 **Vt.** 506, 394 A.2d 1360, 1361 (1978) ("We are directed to no authority, by either party, dealing with the subject of attendance at a 'meeting' through the medium of a telephone conference call. . . . Questions of identity of a claimed participant could easily arise. The personal contact that is so often an effective ingredient of a meeting is absent."), *legislatively abrogated by* **Vt.**Stat. tit. 1, §312(a) (2013).

[50] **Mass.**Gen.Laws ch. 30A, §18 (2013) (defining "deliberation" as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction"), *abrogating* **Mass.**Gen.Laws former ch. 30A, §11A, ch. 34, §9F, ch. 39, §23A (meeting is "any corporeal convening and deliberation"); *see* Massachusetts Attorney General, Regulations 940 CMR 29.10 (2013); Massachusetts Attorney General, Open Meeting Law Guide 10 (Mar. 24, 2011), *at* http://www.Mass.gov/ago/government-resources/open-meeting-law/attorney-generals-open-meeting-law-guide.html (visited July 22, 2013) ("The Attorney General is authorized under the Open Meeting Law to permit remote participation by members of a public body not present at the meeting location. This issue is under consideration by the AGO. While the issue is under consideration, remote participation by members of public bodies is not permitted under the Open Meeting Law.").

[51] **Cal.**Gov.Code §§11123(b), 54953(b) (2013).

[52] **Del.**Code tit. 29, §10002(i) (2013).

> shall be deemed attendance for all purposes, including purposes of establishing a quorum. When video conferencing is used, at least 1 of the noticed public locations shall be within the geographic jurisdiction of that public body. Meetings may otherwise be noticed for multiple public locations within the state where video-conferencing is available. During meetings where video-conferencing is used, each member must be identified, all participants shall be able to communicate with each other at the same time, and members of the public attending at the noticed public location or locations of the meeting must be able to hear and view the communication among all members of the public body participating by video-conference. Video-conferencing participation is not permitted when a verbatim transcript of the meeting may be required by law, except for public hearings on proposed rules and regulations, or where the chair or presiding officer determines that physical attendance is required at a single location.[53]

Oklahoma defines a "videoconference" as "a conference among members of a public body remote from one another who are linked by interactive telecommunication devices permitting both visual and auditory communication between and among members of the public body and members of the public."[54]

Still other States approved use of electronic communications by court or attorney general opinions. The Arizona Attorney General ruled that use of electronic communications that permit the public to see and hear the participation of the absent member was permitted under the open meeting law without express statutory authorization. The Arizona Attorney General stressed, however, that this method should be used only when no reasonable alternative was available and that all open meeting law requirements must be observed.[55] Florida permits members of a public body who are physically unable to attend but mentally capable to use interactive video and telephone systems to participate and vote, but physical presence at the meeting is otherwise required if action is to be taken.[56] Georgia permits meetings by conference or speaker telephone when the public can hear and record the comments and votes without imposing a requirement for emergency or special circumstances.[57] Before enacting statutory authority for telephonic meetings, Illinois permitted the State Board of Elections to use conference calls with speakers because of the short time periods within which that board must decide complaints.[58]

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[53] **Del.**Code tit. 29, §10006 (2013).

[54] **Okla.**Stat. tit. 25, §304(7) (2013) (both visual and auditory communication functions must be used).

[55] **Ariz.**Op.Atty.Gen. I91-033 (Oct. 17, 1991); **Ariz.**Op.Atty.Gen. I79-316 (Dec. 31, 1979) (conference call meeting permitted).

[56] **Fla.**Op.Atty.Gen. 2001-66 (Sept. 19, 2001); **Fla.**Op.Atty.Gen. 94-55 (June 15, 1994); **Fla.**Op.Atty.Gen. 92-44 (June 1, 1992).

[57] **Ga.**Op.Atty.Gen. 85-26 (May 9, 1985) (in support, Georgia Attorney General noted that Georgia law had been amended to permit corporate board meetings by conference call).

[58] **Ill.**Op.Atty.Gen. 82-041 (Nov. 10, 1982) (broadcast must be open to media and public and recorded by court reporter); *see* Scott v. Illinois State Police Merit Board, 222 **Ill.**App.3d 496, 584 N.E.2d 199, 204

A Michigan court found "no problem with the holding of hearings via teleconference calls . . . heard through speaker phones and . . . audible to all in the room,"[59] and the Michigan Attorney General ruled that interactive television could properly be used for a public meeting.[60] Mississippi permits the recording of final votes by telephone when the vote is reduced to public record and all deliberations were conducted in accordance with the open meeting law.[61] Moreover, the Mississippi Attorney General approved participation in lawfully called meetings at which a quorum is physically present by an incapacitated member of the public body so long as the public may hear all discussions.[62] The Ohio Attorney General approved the use of speaker telephone equipment by one member of a three-person quorum so long as the audience could hear the absent member.[63] The Pennsylvania Supreme Court approved use of speaker phone meetings, reversing two decisions that had disapproved their use.[64] Wisconsin Attorney General ruled: "A telephone conference meeting may be considered 'reasonably accessible' if the public and the news media may effectively monitor it."[65]

Use of telephones and videoconference facilities raises the likelihood that equipment

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(1991) (telephone conference of matters excepted from open meeting requirement conducted with notice does not violate law).

[59] Goode v. Department of Social Services, 143 **Mich.**App. 756, 373 N.W.2d 210, 212 (1985), *leave to appeal denied*, 424 Mich. 882 (1986), *followed in* Detroit Base Coalition for Human Rights of Handicapped v. Michigan Dep't of Social Services, 158 **Mich.**App. 613, 405 N.W.2d 136, 139 (1987), *rev'd on other grounds*, 431 **Mich.** 172, 428 N.W.2d 335 (1988) (both locations employing telephone conference facilities must be open for public).

[60] **Mich.**Op.Atty.Gen. 6835 (Feb. 13, 1995).

[61] Board of Trustees v. Mississippi Publishers Corp., 478 So.2d 269, 279 (**Miss.** 1985).

[62] **Miss.**Op.Atty.Gen. 210 (Feb. 21, 1991), *following* **Miss.**Op.Atty.Gen. 443 (Sept. 26, 1990).

[63] **Ohio**Op.Atty.Gen. 85-048 (Aug. 15, 1985); *see* **Ohio**Op.Atty.Gen. 2009-034 (Sept. 15, 2009). Members of the public body must be physically present in Ohio to vote or to be counted toward a quorum, **Ohio**Rev.Code §121.22(C) (2013), so the telephone may be used only for those members whose presence is not needed to create a quorum and who will not vote.

[64] Babac v. Pennsylvania Milk Marketing Board, 531 **Pa.** 391, 613 A.2d 551, 554 (1992), *rev'g* Finucane v. Pennsylvania Milk Marketing Board, 136 **Pa.**Commw. 681, 584 A.2d 1069 (1990) (statute does not include telephone communications in definition of "meeting," thereby forbidding meetings by speakerphone for lack of express authorization), *and* Babac v. Pennsylvania Milk Marketing Board, 136 **Pa.**Commw. 621, 584 A.2d 399, 402 (1990) ("The obvious intent of the Sunshine Act is to allow the public to see their representatives at work and observe their demeanor. Having Board members conduct a meeting by speakerphone, instead of attending in person, seriously vitiates the public's right to observe and assess the quality of the representation they are receiving.").

[65] **Wis.**Op.Atty.Gen. 39-80 (June 17, 1980); *accord*, Wisconsin Attorney General, Wisconsin Open Meetings Law, A Compliance Guide (Aug. 2010), *at* http://www.doj.state.wi.us/dls/OMPR/2010OMCG-PRO/2010_OML_Compliance_Guide.pdf (visited July 22, 2013) (telephone conference call "is very similar to an in-person conversation and thus qualifies as a convening of members").

failures and other difficulties may arise to prevent full communication among the locations. The Texas Attorney General has concluded that a governmental body must recess or adjourn its meeting if technical difficulties render portions of the meeting inaccessible to the public at a remote location and that the governmental body may not avoid having to recess or adjourn the meeting for technical difficulties by specifying in its meeting notice that, if technical difficulties occur, the quorum will continue to conduct business.[66] Hawaii similarly requires the meeting to be terminated if audio and visual communication cannot be maintained at all videoconference locations after the meeting convenes, even if a quorum is physically present in one location, but the meeting may continue with audio alone if everyone has already received any visual aids or participants are able to transmit visual aids readily to other locations within 15 minutes.[67] At a minimum, a public body may not notice a meeting by videoconference at specific locations and then fail to provide videoconference connections at the locations.[68]

Restricted Use of Telephone and Videoconference

Rather than grant broad permission for use of telephone and videoconference at public meetings, some States identify certain circumstances in which telephone and videoconference are appropriate and prohibit their use in other circumstances. Nebraska combines a number of these circumstances, authorizing state public bodies and certain multi-county bodies only to hold no more than half the meetings per year by videoconference,[69] permitting emergency meetings may be held by electronic or telecommunication equipment,[70] and authorizing any public body to permit members of public to appear by video or telecommunications equipment.[71]

Iowa authorizes a meeting by electronic means only if a meeting in person is impossible or impracticable and only if the public body provides public access to the conversation to the extent reasonably possible, complies with the notice requirements and keeps minutes of the meeting that include an explanation of the circumstances making a meeting in person impossible or impracticable.[72] Iowa also permits executive sessions by electronic means if the public body

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[66] **Tex.**Op.Atty.Gen. DM-480 (Aug. 5, 1998).

[67] **Haw.**Rev.Stat. §92-3.5 (2013).

[68] **Nev.**Op.Atty.Gen. 2006-05 (July 31, 2006) (violation to notice a meeting to be videoconferenced to different locations in Esmeralda County, and then fail to videoconference the meeting to those locations).

[69] **Neb.**Rev.Stat. §84-1411(2), (3) (2013).

[70] **Neb.**Rev.Stat. §84-1411(5) (2013); **Neb.**Op.Atty.Gen. 95063 (Aug. 10, 1995) (meetings by telephone conference call without video interaction are only allowed for emergencies).

[71] **Neb.**Rev.Stat. §84-1411(6) (2013).

[72] **Iowa**Code §21.8(1) (2013) ("only in circumstances where such a meeting in person is impossible or impractical"); **Iowa**Op.Atty.Gen. (May 15, 1980) (these requirements apply only when majority of members of body are separately participating by electronic means).

complies with the requirements for closed meetings.[73]

Some States permit individual members to attend by telephone or videoconference only if a quorum of the public body is meeting together in person. Thus, New Hampshire authorizes a public body to allow one or more members to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body if a quorum of the public body is physically present at the location specified in the meeting notice and the entire meeting and all members are audible or otherwise discernible to the public at that location, and all votes are taken by roll call.[74] The physical presence requirements do not apply in an emergency when "immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action."[75] The chair or presiding officer of the public body determines the presence of an emergency, and the facts on which the determination is based must be included in the minutes.

Enacted in 1995, a Texas provision permits governmental bodies to hold open or closed meetings by telephone conference call if the meeting is held by an advisory board or if an emergency or public necessity exists and convening a quorum at one location is difficult or impossible; notice requirements apply to such meetings, and meetings required to be open must be audible to the public at an announced location and tape recorded.[76] Texas added a provision in 1997 generally permitting public bodies to hold open or closed meetings by videoconference call if a quorum of the body is physically present at one location. In these circumstances, the regular notice requirements are expanded to provide the locations of all members attending the meeting, which must all be open for the public to attend, other specific requirements are satisfied, and the meeting is audio or videotaped with the recording made available to the public.[77] Texas permits the governing body of an institution of higher learning to hold open meetings by telephone conference call, available to be heard by the public at the regular meeting place, subject to regular notice requirements and tape recorded, when immediate action is

[73] **Iowa**Code §21.8(3) (2013).

[74] **N.H.**Rev.Stat. §91-A:2(III) (2013).

[75] **N.H.**Rev.Stat. §91-A:2(III)(b) (2013).

[76] **Tex.**Gov.Code §551.125 (2013), *construed in* **Tex.**Op.Atty.Gen. No. JC-352 (Mar. 5, 2001) ("Section 551.125, in permitting a meeting by telephone conference call only in case of an emergency or public necessity and only if it is 'difficult or impossible' to convene a quorum in one location, contemplates meetings by telephone conference call in extraordinary circumstances and not merely when attending a meeting at short notice would inconvenience members of the governmental body. *See id.* §551.125(b). When a quorum of the governmental body has convened for an emergency meeting at the meeting location, section 551.125 does not permit absent members to participate in the meeting by telephone conference call."); *see* **Tex.**Gov.Code §551.126 (2013) (Higher Education Coordinating Board may use telephone or video conference call if it complies with section 551.125 and minimum requirements for visibility and audibility). *But see* **Tex.**Gov.Code §§551.123, 551.124 (2013) (Board of Criminal Justice and Board of Pardons and Paroles may hold clemency hearings by telephone conference call, omitting requirements of notice and audibility).

[77] **Tex.**Gov.Code §551.127 (2013).

necessary and it is difficult or impossible to obtain a quorum in one location.[78]

Illinois has adopted a similar provision, providing that, if a quorum is physically present, a majority of the public body may allow a member to attend by video or audio conference if the member is prevented from physically attending by (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency.[79] Illinois also provides that, if an open meeting of a public body with large geographic jurisdiction is held simultaneously at one of its offices and other locations owned or leased by the body through an interactive video conference and if the body provides public notice and access for all locations, then members physically present in those locations can count towards a quorum.[80] The generally applicable requirement that a quorum be physically present at the location of an open meeting does not apply to these state bodies. For closed meetings of public bodies with less than statewide jurisdiction, Illinois requires a quorum to be physically present at the location of a closed meeting, but other members may participate in the meeting by means of a video or audio conference.[81]

A few States, like Illinois, permit statewide public bodies to use telephone and videoconference while prohibiting or restricting their use by local public bodies. Thus, Virginia authorizes state public bodies to hold all but one of their meetings annually through electronic communications under stated conditions, including a requirement that a quorum be physically

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[78] **Tex.**Gov.Code §§551.121, 551.122 (2013). *But see* **Tex.**Elec.Code §145.036 (2013) ("For the purpose of filling a vacancy, a majority of the committee's membership constitutes a quorum. To be nominated, a person must receive a favorable vote of a majority of the members present."), *construed in* State Democratic Executive Committee v. Secretary of State, 758 S.W.2d 227 (**Tex.** 1988) (Election Code violated by telephone poll selection of nominee by State Republican Executive Committee; statute requires favorable vote of majority of members present).

[79] **Ill.**Comp.Stat. ch. 5, §120/7(a) (2013); *see* Freedom Oil Co. v. Illinois Pollution Control Board, 275 **Ill.**App.3d 508, 515, 655 N.E.2d 1184, 1189 (1995) (affirming use of speakerphone for meeting: "There is nothing within the Open Meetings Act which specifically prohibits conducting a meeting by telephone conference or requires members of a public body to be in each other's physical presence to establish a quorum."). The public body must adopt rules to govern attendance by video or audio conference that may be more limited, and limitations do not apply to (i) closed meetings of public bodies with (A) statewide jurisdiction or (ii) meetings of state bodies that lack authority to make binding recommendations or determinations or to take substantive action. Such a state body may permit members to attend meetings by video or audio conference following specific procedural rules adopted by the body. **Ill.**Comp.Stat. ch. 5, §120/7(c), (d) (2013).

[80] **Ill.**Comp.Stat. ch. 5, §§120/2.01, 120/7 (2013). These bodies are those with statewide jurisdiction or "(B) Illinois library systems with jurisdiction over a specific geographic area of more than 4,500 square miles, or (C) municipal transit districts with jurisdiction over a specific geographic area of more than 4,500 square miles or (ii) open or closed meetings of State advisory boards or bodies that do not have authority to make binding recommendations or determinations or to take any other substantive action." **Ill.**Comp.Stat. ch. 5, §120/7(d) (2013).

[81] **Ill.**Comp.Stat. ch. 5, §120/2.01 (2013).

assembled in one location unless there is a declared state of emergency.[82] Virginia amended its statute to permit meetings by "any audio or combined audio and visual communication method" after a court found telephone conference calls did not qualify as meetings.[83] Local bodies may meet by electronic communication means without a quorum of the public body physically assembled at one location when the Governor declares a state of emergency if its catastrophic nature makes it impracticable or unsafe to assemble a quorum in one location and the meeting's purpose is to address the emergency.[84] An individual member of a local body in Virginia may participate by electronic communication if that member has a personal emergency, disability, medical condition, or personal matter, and other restrictions are satisfied.[85] An individual member of a regional public body may participate if that member's residence is over 60 miles from the meeting location and a majority of the members approve.[86] In the last two cases, a quorum must be physically assembled in the meeting location and the remote participant must be heard by all persons at that location.[87]

Georgia now permits public bodies with statewide jurisdiction to conduct meetings by telecommunications if the requirements of the open meeting law are satisfied.[88] Moreover,

> Under circumstances necessitated by emergency conditions involving public safety or the preservation of property or public services, agencies or committees thereof not otherwise permitted by subsection (f) of this Code section to conduct meetings by teleconference may meet by means of teleconference so long as the notice required by this chapter is provided and means are afforded for the public to have simultaneous access to the teleconference meeting. On any other occasion of the meeting of an agency or committee thereof, and so long as a quorum is present in person, a member may participate by teleconference if necessary due to reasons of health or absence from the jurisdiction so long as the other requirements of this

[82] **Va.**Code §2.2-3708(B) (2013).

[83] **Va.**Code §§2.2-3701, 2.2-3708(B) (2013), *adopted after* Roanoke City School Board v. Times-World Corp., 226 **Va.** 185, 307 S.E.2d 256, 259 (1983) ("*physical* presence of the participants is essential. A telephone conference call does not qualify. A participant in a telephone call can communicate with others, listen to them, speak and be heard, but none of this is done in the physical presence of individuals who have come together, met, assembled, and are 'sitting' as a body or entity."), *legislatively abrogated by* **Va.**Code §2.2-3708(B) (2013) (state bodies may use electronic communications for all but one of their meetings annually under stated conditions).

[84] **Va.**Code §2.2-3708(G) (2011). The local public body must give the best available public notice contemporaneously with notice provided its members, make arrangements for public access to the meeting, and state the nature of the emergency and the fact that the meeting was held by electronic communication means in the minutes.

[85] **Va.**Code §2.2-3708.1(A)(1), (2) (2013).

[86] **Va.**Code §2.2-3708.1(A)(3) (2013).

[87] **Va.**Code §2.2-3708.1(B) (2013).

[88] **Ga.**Code §50-14-1(f) (2013).

> chapter are met. Absent emergency conditions or the written opinion of a physician or other health professional that reasons of health prevent a member's physical presence, no member shall participate by teleconference pursuant to this subsection more than twice in one calendar year.[89]

Until the repeal in January 2013, Indiana permitted the board of the Indiana Bond Bank to use a speakerphone or similar equipment that permits all persons present to communicate simultaneously, if at least four members were present in person and the minutes reflected the identity of those who participated in person and those by electronic means.[90] The Indiana Public Access Counselor deemed silence as to all other public bodies to mean that telephonic participation by a member, even when a quorum was physically present, was a violation.[91]

Tennessee provides that participation in meeting by any means of communication, electronic or otherwise, is permitted upon declaration of necessity and only for members of state public bodies.[92]

Florida provides for the Administration Commission to adopt uniform rules of procedure for state agencies establishing procedures for conducting meetings by communications media technology, which means "electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available."[93] "If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state [and] shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available."[94] The Florida Attorney General has ruled "that a school board may use electronic media technology in order to allow a physically absent member to attend a public meeting if a quorum of the members of the board is physically present at the meeting site."[95] Given differing considerations for state and local bodies, however, the Attorney General stressed that participation of an absent member of a local body by telephone should be permitted only in an extraordinary circumstance and only when a quorum is

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[89] **Ga.**Code §50-14-1(g) (2013).

[90] **Ind.**Code former §5-1.5-2-2.5.

[91] Public Access Counselor Advisory Decision re Indiana Council on Independent Living (Oct. 18, 2006), *at* http://www.in.gov/pac/informal/files/ICOIL_Simers_inquiry_phone.pdf (visited July 22, 2013).

[92] **Tenn.**Code §8-44-108 (2013); **Tenn.**Op.Atty.Gen. 82-460 (Oct. 8, 1982) (special meeting may be held by telephone if broadcast so public may hear); **Tenn.**Op.Atty.Gen. 82-48 (Feb. 4, 1982).

[93] **Fla.**Stat. §120.54(5)(b)(2) (2013) (also providing that limitation of points of access to meetings, hearings and workshops subject to open meeting law to locations not normally open to public is presumed to violate open meeting law), *construed in* **Fla.**Op.Atty.Gen. 98-28 (Apr. 6, 1998); **Fla.**Op.Atty.Gen. 94-55 (June 15, 1994), *and in* **Fla.**Op.Atty.Gen. 92-44 (June 1, 1992).

[94] **Fla.**Stat. §120.54(5)(b)(2) (2013).

[95] **Fla.**Op.Atty.Gen. 98-28 (Apr. 6, 1998), *followed in* **Fla.**Op.Atty.Gen. 2002-82 (Dec. 11, 2002) (physically disabled members may participate electronically when a quorum is physically present).

physically present at the meeting.[96]

Various issues remain with respect to electronic meetings, including

- defining the term broadly enough to encompass all the various forms of electronic meetings that exist or foreseeably might exist so that the statute will cover everything it should cover without needing to be amended for each new device or technique;

- alternatively, defining the term with enough clarity to eliminate disputes as to what is and is not permitted for the various devices and techniques;

- identifying ways to achieve convenience and reduced expense without losing transparency to the public and the collegiality that may be essential to good functioning of the body;

- clearly reflecting whether different requirements apply for statewide or large regional bodies, for emergencies or designated special circumstances, addressing the distribution of written materials in multiple locations, and leaving no ambiguities to present later disputes and litigation;

- addressing the effect of technical problems with the communications on the validity of the meeting and the portion of the meeting before the problems began;

- for public bodies that have public participation, retaining the best aspects of public participation when members of the public body are attending electronically.

Serial Meetings

Serial meetings in person are forbidden by statute or case law in almost all States,[97] as are serial meetings in writing,[98] or by telephone,[99] or in some electronic format.[100] In most States,

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[96] **Fla.**Op.Atty.Gen. 2003-41 (Sept. 3, 2003).

[97] Stockton Newspapers, Inc. v. Members of Redevelopment Agency, 171 **Cal.**App.3d 95, 214 **Cal.**Rptr. 561 (3d Dist. 1985);

[98] City Council v. Cooper, 358 So.2d 440 (**Ala.** 1978) (prior law: enjoining use of letters signed by majority of city council to conduct business between bi-monthly meetings); Common Cause v. Stirling, 147 **Cal.**App.3d 518, 524, 195 **Cal.**Rptr. 163 (4th Dist. 1983) ("use of internally circulated letters among council members as a vehicle for governmental action violated the Brown Act"); San Diego Union (June 2, 1984) (letter on city letterhead signed by four councilmembers evidences apparent violation); **Fla.**Op.Atty.Gen. 97-23 (Apr. 15, 1997) ("If a memorandum reflecting the views of a board member on an issue pending before the board is circulated to other board members with each indicating approval or disapproval and completion of the signatures gives the memorandum the effect of becoming the official action of the board, there is a violation of the Sunshine Law."); **Fla.**Op.Atty.Gen. 96-35 (May 17, 1996); **Fla.**Op.Atty.Gen. 90-3 (Jan. 25, 1990) (board members' comments written on circulated draft contract on an issue that will come before board violate law); **Fla.**Op.Atty.Gen. 89-23 (Apr. 18, 1989) (transmittal of report to members is not violation when there is no response from or interaction among members in private and report is available for public inspection); **Fla.**Op.Atty.Gen. 077-143 (Dec. 30, 1977)

(members of public body may individually listen to tape recording); **Kan.**Op.Atty.Gen. 84-50 (June 7, 1984) (planning commission members may not sign off on written zoning decisions individually between meetings to expedite decisions); **La.**Op.Atty.Gen. 87-356 (May 19, 1987) (council may not conduct business by circulating letter for signature indicating that its members will support an action at council meeting); Armstrong v. Mayor & City Council, 409 **Md.** 648, 662, 976 A.2d 349, 358 (2009) (quoting Circuit Court: " 'The Committee conducted business with a quorum of its members when it circulated the Bill for signatures of members who were going to vote in favor of sending the Bill to the City Council with a favorable report. This was done in private and away from the public's view, in violation of the essence of the Open Meetings Act.' "), *following* Community & Labor United for Baltimore Charter Committee (CLUB) v. Baltimore City Board of Elections, 377 **Md.** 183, 186-87, 832 A.2d 804, 806-07 (2003); **Mich.**Op.Atty.Gen. 5222 (Sept. 1, 1977) (round-robining of bills whereby vote is obtained individually from members is violation); **Nev.**Op.Atty.Gen. 85-19 (Dec. 17, 1985) (members of public body may not render licensing decision by mail poll or ballot); **Okla.**Op.Atty.Gen. 82-7 (Jan. 20, 1982) (voting by mail violates law); **Okla.**Op.Atty.Gen. 80-144 (July 10, 1980) (voting by mail is prohibited); **S.C.**Op.Atty.Gen. (Sept. 6, 1984); **S.D.**Op.Atty.Gen. 88-35 (Sept. 1, 1988) (polling by mail is prohibited); **Tex.**Op.Atty.Gen. JC-0307 (Nov. 20, 2000) ("Circulation of a claim, invoice, or bill among members of a commissioners court for approval of payment in writing in lieu of consideration of the item at a meeting held pursuant to the Act would violate the Act."); **Tex.**Op.Atty.Gen. DM-95 (Mar. 4, 1992) (letter expressing opinion on matters relevant to city government signed by majority of city council that was not considered and approved in lawful meeting is violation); **Tex.**Op.Atty.Gen. JM-645 (Mar. 16, 1987); **Utah**Op.Atty.Gen. 79-210 (July 6, 1979) (approval of travel requests on "walk through" violates collegial character of board; "it can't seriously be contended that the Board of Examiners can take official action by acting individually and independently of any meeting called in the manner required by law").

[99] Stockton Newspapers, Inc. v. Members of Redevelopment Agency, 171 **Cal.**App.3d 95, 103, 214 **Cal.**Rptr. 561 (3d Dist. 1985); **Ky.**Op.Atty.Gen. 10-OMD-015 (Jan. 25, 2010) (phone voting, by which sufficient votes are gathered by multiple phone calls, is a violation); Board of Trustees v. Board of County Comm'rs, 186 **Mont.** 148, 606 P.2d 1069 (1980) (two of three commissioners discussed and approved a subdivision plat by telephone); Del Papa v. Board of Regents, 114 **Nev.** 388, 956 P.2d 770, 776-80 (1998); **N.M.**Op.Atty.Gen. 91-12 (Nov. 5, 1991) (resolution permitting telephonic authorization of county purchases violates open meeting law); Willmann v. City of San Antonio, 123 S.W.3d 469 (**Tex.**App. 2003) (telephone polling violates law); Hitt v. Mabry, 687 S.W.2d 791 (**Tex.**App. 1985) (secret deliberations by telephone violate law); Elizondo v. Williams, 643 S.W.2d 765 (**Tex.**App. 1982), *appeal from permanent injunction sub nom.* Hitt v. Mabry, 687 S.W.2d 791 (**Tex.**App. 1985) (injunction against telephone conferences); Wood v. Battleground School District, 107 **Wash.**App. 550, 27 P.3d 1208, 1216 n.4 (2001) (telephone tree in which members repeatedly phone each other to form a collective decision is a violation); **Wis.**Op.Atty.Gen. 39-80 (June 17, 1980) (any telephone conference call must comply with open meeting law). *But see* Gavin v. City of Cascade, 500 N.W.2d 729, 732 (**Iowa**App. 1993) (mayor's communications with each of three city council members individually was not a meeting).

[100] **Cal.**Gov.Code §§11122.5(b), 54952.2(b) (2013) ("use a series of communications of any kind, directly or through intermediaries"); **Fla.**Op.Atty.Gen. 89-39 (June 26, 1989); Del Papa v. Board of Regents, 114 **Nev.** 388, 400, 956 P.2d 770, 778 (1998) (serial electronic communications used to deliberate toward a decision violated open meetings law and "if a quorum is present, or is gathered by serial electronic communications, the body must deliberate and actually vote on the matter at a public meeting"); Johnston v. Metropolitan Gov't of Nashville & Davidson County, 320 S.W.3d 299, 312 (**Tenn.**App. 2009) (e-mail "exchanges, most copied to all Council members, mirror the type of debate and reciprocal attempts at persuasion that would be expected to take place at a Council meeting . . . are 'electronic communication . . . used to . . . deliberate public business in circumvention of the spirit or requirements'"), *quoting* **Tenn.**Code §8-44-102(c) (2013).

there is little or no distinction among various ways that a forbidden serial meeting can be conducted, and development of different forms of electronic communications did not alter the rules. There are some interesting wrinkles to consider:

- a few States define a valid "meeting" as requiring the physical presence of all participants[101] or a quorum of participants in some or all circumstances.[102] The fact that a meeting is not a valid meeting for purposes of the open meeting law does not mean that it cannot be a violation of that law.[103]

- the federal Sunshine Act, when an agency holds meetings, the meetings must be open to the public, but the Act does not require the agency to hold meetings. Instead, a federal agency may conduct business by "sequential or notational written voting."[104] State courts and statutes typically do not permit notational voting,[105] but a few do.[106]

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[101] Iowa, Missouri, Nebraska, Tennessee and Texas require physical presence absent an emergency. Minnesota requires at least one member of the body to be present at the meeting place.

[102] Alabama, Illinois, Massachusetts, New Hampshire, Ohio, Virginia so require for some or all meetings.

[103] E.g., Stockton Newspapers, Inc. v. Members of Redevelopment Agency, 171 **Cal.**App.3d 95, 102, 214 **Cal.**Rptr. 561 (3d Dist. 1985); Wood v. Battleground School District, 107 **Wash.**App. 550, 562, 27 P.3d 1208, 1216 (2001); McComas v. Board of Education, 197 **W. Va.** 188, 200, 475 S.E.2d 280, 292 (1996).

[104] AMREP Corp. v. F.T.C., 768 F.2d 1171, 1178 (**10th Cir.** 1985), *cert. denied*, 475 U.S. 1034 (1986), *following* Pacific Legal Foundation v. Council on Environmental Quality, 636 F.2d 1259, 1266 (**D.C.Cir.** 1980); State of Idaho v. Interstate Commerce Comm'n, 939 F.2d 784, 787 n.2 (**9th Cir.** 1991) ("Notational voting is a procedure which allows several members of a multi-member agency or commission to vote individually and separately, as opposed to voting at a meeting of the members of the agency."); Railroad Comm'n of Texas v. United States, 765 F.2d 221, 230 (**D.C.Cir.** 1985); Common Cause v. Nuclear Regulatory Comm'n, 674 F.2d 921, 934-35 & n.42 (D.C.Cir. 1982), *citing* S.Rep.No. 1178, 94th Cong., 1st Sess. 11 (1975); Communications Systems, Inc. v. FCC, 595 F.2d 797, 799-800 (**D.C.Cir.** 1978); Elkem Metals Co. v. United States, 126 F.Supp.2d 567, 575 & n.4 (**Ct.Int'l Trade** 2000) (further history omitted).

[105] State ex rel. Philipp Transit Lines, Inc. v. Public Service Comm'n, 552 S.W.2d 696 (**Mo.** 1977), *discussed in* State ex rel. Aquila, Inc. v. Public Service Comm'n, 326 S.W.3d 20 (**Mo.**App. 2010).

[106] **Alas.**Stat. §44.62.600 (2013) ("A member of an agency qualified to vote on a question may vote by mail or by teleconferencing."); **Alas.**Op.Atty.Gen. 1994-287 (July 5, 1994) (voting by mail is outside open meeting law); **Cal.**Gov.Code §11126(c)(3) (2013) (authorizing deliberations in executive session by state bodies conducting administrative adjudications under Government Code §§11500 *et seq.*); **Cal.**Gov.Code §11526 (2013) (permitting voting by mail or "another appropriate method"); 25 **Cal.**L.Rev.Comm'n Reports 55 (1995) (only members qualified to vote may use mail or other methods); Fleener v. City of Oskaloosa, 778 N.W.2d 66, 2009 **Iowa**App. LEXIS 1967 (2009) ("as the various members signed the January 3, 2008 letter, the later ones to sign were informed of any who had already signed, and were also able to see those signatures. We agree no meeting and no deliberation occurred"), *following* Gavin v. City of Cascade, 500 N.W.2d 729, 732 (**Iowa**App. 1993) (mayor's sequential communications with council members was not a meeting as defined by the statute or a violation); **Md.**Op.Atty.Gen. 96-016 (May 22, 1996) (approving notational voting by writings or by e-mail). A bill to

Arkansas, Colorado, Connecticut, Florida, Illinois, Tennessee, Virginia and Wisconsin forbid serial meetings by barring communications between fewer than a quorum of the public body concerning matters within its jurisdiction except in a properly convened public meeting or within a specific exception. No additional provision forbidding serial communications is necessary to prohibit serial communications in these States.

Some States are more complicated. Initial efforts to prohibit serial meetings of less than a quorum did not succeed in Indiana.[107] In 2007, Indiana enacted extensive regulation of serial meetings. The governing body of a public agency violates the open meeting law if six or more members of the governing body participate in a series of at least two gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

> (1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.
>
> (2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.
>
> (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.
>
> (4) The gatherings are held to take official action on public business.[108]

Under this subsection, a member of a governing body attends a gathering if the member is present in person or if the member participates by telephone or other electronic means, excluding electronic mail.[109] These provisions do not apply to various interactions that are excepted from the definition of a "meeting."[110] This provision is too complex, too open to interpretation (e.g., what is "the same subject matter"), and omits e-mail.

Intent to evade open meeting requirements is an express element of a prohibited serial meeting in a few other States. In Nevada, a meeting is defined to include

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amend the **Iowa** law to encompass serial meetings failed in the 2005 legislature. Dooley v. Johnson County Board of Supervisors, 760 N.W.2d 210, 2008 **Iowa**App. LEXIS 1718 (2008).

[107] Dillman v. Trustees of Indiana University, 848 N.E.2d 348, 351-52 (**Ind.**App.), *transfer denied*, 860 N.E.2d 594 (**Ind.** 2006) ("gatherings of less than a majority of the Trustees did not constitute a meeting subject to the Open Door Law"), *followed in* City of Gary v. McCrady, 851 N.E.2d 359, 367 (**Ind.**App. 2006).

[108] **Ind.**Code §5-14-1.5-3.1(a) (2013). A slightly different version of the four criteria applies "to the city-county council of a consolidated city or county having a consolidated city." **Ind.**Code §5-14-1.5-3.1(b) (2013).

[109] **Ind.**Code §5-14-1.5-3.1(a), (b) (2013). *See generally* Handbook on Indiana's Public Access Laws at 8, *at* http://www.in.gov/pac/informal/files/pac_handbook.pdf (visited July 22, 2013).

[110] **Ind.**Code §5-14-1.5-3.1(c) (2013).

> Any series of gatherings of members of a public body at which:
>
> (I) Less than a quorum is present 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.[111]

New Hampshire provides: "Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter . . . ."[112] Similarly, Texas makes it a misdemeanor for a member or members of a governmental body to conspire knowingly to circumvent the open meeting law by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of the law.[113] Provisions of this sort require a finding of scienter to trigger a violation, making enforcement more difficult.

Other States address the issue of serial meetings concurrently with other interactions between or among members of the public body. For example, Hawaii permits two members of a board to "discuss between themselves matters relating to official board business to enable them to perform their duties faithfully, as long as no commitment to vote is made or sought and the two members do not constitute a quorum of their board."[114] This provision permits two council members to discuss council business between themselves but prohibits either of them thereafter from discussing the same council business with any other council members outside of a properly noticed meeting.[115] Hawaii provides: "No chance meeting, permitted interaction, or electronic

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[111] **Nev.**Rev.Stat. §241.015(2) (2013); *compare* Dewey v. Redevelopment Agency, 119 **Nev.** 87, 64 P.3d 1070, 1078 (2003) (back-to-back briefings do not constitute a "constructive quorum"; when less than a quorum is present, private discussions and information gathering do not violate the Open Meeting Law), *with* Del Papa v. Board of Regents, 114 **Nev.** 388, 956 P.2d 770, 777 (1998) ("we believe that the legislature intended to prohibit public bodies from making decisions via serial electronic communications"), *both discussed in* **Nev.**Op.Atty.Gen. OMLO 2007-01 (June 11, 2007).

[112] **N.H.**Rev.Stat. §91-A:2-a(II) (2013).

[113] **Tex.**Gov.Code §551.143(a) (2013); *see* Esperanza Peace & Justice Center v. City of San Antonio, 316 F.Supp.2d 433 (W.D.**Tex.** 2001) (illegal "walking quorum" facilitated by mayor and city manager); Heath & Rogers, Did the Attorney General Shine Light on the Confusion in Texas' Sunshine Law? Interpreting Open Meetings Act Provision §551.143, 7 Tex.Tech.Admin.L.J. 97 (2006).

[114] **Haw.**Rev.Stat. §92-2.5(a) (2013).

[115] Right to Know Committee v. City Council, 117 **Haw.** 1, 175 P.3d 111 (App. 2007) ("Such serial communication is contrary to the letter, the intent and the spirit of the statute."); *see* Office of Information Practices Op. Ltr. 05-15 (Aug. 4, 2005); Office of Information Practices Op. Ltr. 04-04 (Feb. 20, 2004) ("HCRC staff cannot poll individual Commissioners outside of a properly noticed meeting for the purpose of determining and/or approving the HCRC's legislative testimony"); Office of Information Practices Op. Ltr. 04-01 (Jan. 13, 2004) (e-mail voting on matters under board's supervision violates law).

communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."[116] To the same effect, Tennessee provides that no "chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part."[117] A number of States have similar prohibitions.[118]

Oklahoma provides: "No informal gatherings or any electronic or telephonic communications, except teleconferences as authorized by Section [307.1] of this act, among a majority of the members of a public body shall be used to decide any action or take any vote on any matter."[119] Oklahoma's definition of "meeting" declares: "Meeting shall not include informal gatherings of a majority of the members of the public body when no business of the public body is discussed."[120]

In Kansas, when a board of county commissioners changed its quorum from three to four, the State objected that the change would permit two members to meet and then individually meet two other members and thereby circumvent the open meeting law. The court rejected this view, observing that the legislature "could have prevented this result by simply providing that the Open Meetings Act applies whenever two members of a governmental body or agency gather or assemble. Instead, it refused to adopt such an approach and defined a meeting simply as 'a majority of a quorum,' but did not define what constitutes a quorum."[121] A later case held that a gathering or assembly required physical presence in the same room or place, so that telephone calls and other interactive communications were outside the scope of the law.[122] The legislature then defined a "meeting" to mean, in 1994, "any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency" and, in 2008, "any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or

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[116] **Haw.**Rev.Stat. §92-5(b) (2013).

[117] **Tenn.**Code §8-44-102(c) (2013).

[118] Alabama, California, Colorado, Connecticut, Hawaii, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Tennessee, Texas, Utah, West Virginia and Wisconsin all have a similar provision.

[119] **Okla.**Stat. tit. 25, §306 (2013); **Okla.**Op.Atty.Gen. 81-69 (Apr. 2, 1981) ("The legislative intent is unmistakable. Section 306 is an absolute prohibition upon any attempt to circumvent the Open Meeting Act and obtain a consensus upon an item of business by informal meetings outside a public meeting.").

[120] **Okla.**Stat. tit. 25, §304(2) (2013).

[121] State ex rel. Stephan v. Board of County Comm'rs, 244 **Kan.** 536, 770 P.2d 455, 457 (1989).

[122] State ex rel. Stephan v. Board of County Comm'rs, 254 **Kan.** 446, 866 P.2d 1024, 1025-26 (1994); **Kan.**Op.Atty.Gen. 95-13 (Jan. 23, 1995).

agency."[123] The Kansas Attorney General concluded that "interactive communications" included serial communications by e-mail and intermediaries.[124] In 2009, Kansas law was amended to provide that "interactive communications," rather than "meetings," "in a series shall be open if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning the business or affairs of the body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency."[125] Communications must be among the members, so no interactive communication occurs if a nonmember communicates with a member who responds and copies other members with the response, when no further communications follow.[126]

E-Mail and Similar Communications

Relatively few States affirmatively address e-mail and similar computer communications specifically in their statutes, although the number of these States is increasing. E-mail is so available, so handy, and so readily concealed if the participants do not reveal it that it presents significant opportunities for violation of open meeting laws.[127] By "e-mail," I mean electronic communications among a few recipients.[128] Websites, open blogs and other communications that may be accessed freely by anyone with a computer and Internet access are addressed below.

Use of e-mail in the same manner as a letter, when a letter would not violate the law,

[123] **Kan.**Stat. §75-4317a (2013).

[124] **Kan.**Op.Atty.Gen. 98-49 (Sept. 16, 1998).

[125] **Kan.**Stat. §75-4318(f) (2013).

[126] **Kan.**Op.Atty.Gen. 2009-22 (Oct. 28, 2009).

[127] *But see* Benjamin, Evaluating E-Rulemaking: Public Participation and Political Institutions, 55 Duke L.J. 893 (2006); Coglianese, Citizen Participation in Rulemaking: Past, Present, and Future, 55 Duke L.J. 943 (2006); Johnson, The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet, 50 Admin.L.Rev. 277 (1998); Noveck, The Electronic Revolution in Rulemaking, 53 Emory L.J. 433 (2004).

[128] These include social media sites such as Facebook and MySpace, electronic discussion groups and listservs with limited membership, as well as microblogging services such as Twitter. The key component of this classification is that communications are intended and typically available to be accessed only by a selected portion of the public. *See* Bojorquez & Shores, Open Government and the Net: Bringing Social Media into the Light, 11 **Tex.**Tech.Admin.L.J. 45 (2009); Elefant, The "Power of Social Media: Legal Issues & Best Practices for Utilities Engaging in Social Media, 32 Energy L.J. 1 (2011); **Va.**FOI Advisory Council AO-01-01 (Jan. 3, 2001) ("Individual members of a public body could still utilize traditional e-mail to send correspondence to one or several members of a public body. When such e-mail and all subsequent responses are automatically viewed by all members of the public body, however, the nature of the electronic transmissions crosses the line between correspondence and discussion. Once a discussion ensues, it is governed by the meeting provisions of FOIA, which plainly prohibit any meetings where the members of a local public body are not physically assembled.").

presents no violation.[129] The same is true in reverse.[130]

Many more decisions and articles address e-mail under the public records laws[131] than under open meeting laws.[132] Applicability of public record laws may depend on

- on the identity of those who send or receive the e-mail,
- whether publicly owned computers were used for the creation, sending, receipt or reading and storage of the e-mail,[133]
- whether written during work hours or on personal time,[134]

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[129] **Ark.**Op.Atty.Gen. 99-018 (Mar. 22, 1999) (e-mail between two public officials is "analogous to written correspondence"); **Md.**Op.Atty.Gen. 96-016 (May 22, 1996) ("We see no reason to reach a different conclusion when the medium of sequential exchange is electronic mail, rather than conventional writings."); **Va.**FOI Advisory Council AO-19-04 (Aug. 31, 2004) ("Members of public bodies need not refrain from using e-mail in a manner that is the equivalent of sending a letter; however, members of public bodies should be cautioned against using e-mail in a manner that appears to entail simultaneity.").

[130] *E.g.*, **Cal.**Op.Atty.Gen. 00-906 (Feb. 20, 2001) ("We find no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums.").

[131] *E.g.*, Bryan & Reynolds, Agency E-Mail and the Public Records Laws—Is the Fox Now Guarding the Henhouse?, 33 Stetson L.Rev. 649 (2004); Fatino, Public Employers and E-mail: A Primer for the Practitioner and the Public Professional, 23 N.Ill.U.L.Rev. 131 (2003); Kozinets, Access to the E-Mail Records of Public Officials Safeguarding the Public's Right To Know, 25 Comm.Law. 17 (Sum. 2007); Annot., Disclosure of Electronic Data Under State Public Records and Freedom of Information Acts, 54 A.L.R.6th 653 (2008); Annot., State Freedom of Information Act Requests: Right to Receive Information in Particular Medium or Format, 86 A.L.R.4th 786 (1991).

[132] *E.g.*, O'Connor & Baratz, Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence, 12 Geo.MasonL.Rev. 719 (2004); Comment, Sunshine in Cyberspace - Electronic Deliberation and the Reach of Open Meeting Laws, 48 St. Louis U.L.J. 755 (2004).

[133] *See* Bradford v. Director, 83 **Ark.**App. 332, 345, 128 S.W.3d 20, 27-28 (2003) (irrelevant whether e-mails transmitted between a state employee and the Governor that involved public's business were transmitted to private e-mail addresses through private internet providers or sent to an official government e-mail address); **Del.**Op.Atty.Gen. 11-IIB02 (Mar. 16, 2011) (e-mails send and received on private computers are not in City's actual or constructive possession and are not public records); City of Dallas v. Dallas Morning News, LP, 281 S.W.3d 708, 714 (**Tex.**App. 2009) (unable to decide on summary judgment City's "claims the e-mails do not meet the statutory definition of public information, regardless of whether the e-mails relate to the transaction of official business, because they are not collected, assembled, or maintained by or for the City, and the City does not own or have the right of access to them").

[134] Personal e-mails are not necessarily public records simply because they were written by a public employee, even if during working hours or on a government-owned computer. *E.g.*, Associated Press v. Canterbury, 224 **W.Va.** 708, 688 S.E.2d 317 (2009) (collecting many cases); *accord*, Howell Education Ass'n MEA/NEA v. Howell Board of Education, 287 **Mich.**App. 228, 789 N.W.2d 495 (2010); Tiberino

- the content of employment policies and disclosures as to ownership of e-mails,
- the subject matter of the e-mail itself,[135] and
- a host of similar factors depending on variable state laws.[136]

As just one example, in 2008, the Arkansas Democrat Gazette requested that the Little Rock School District provide ongoing daily access to e-mail messages sent among school board members, messages sent by the superintendent to one or more school board members, including all daily and weekly updates, and messages sent by school board members to the superintendent or other school district administrators.[137] The newspaper proposed it be included in the list of recipients when each message is sent. The Attorney General concluded that ongoing, continuing or standing requests for records were not permitted but observed that e-mail exchanges could constitute a meeting requiring notice and compliance with other open meeting requirements. In 2009, the Attorney General concluded that e-mails directed from one school official to another (or others) that relate in some way to school matters so as to constitute a record of official functions are discoverable as public records unless a specific exemption prevents their disclosure.[138]

State laws that do address e-mail and similar electronic communications often do so in their definition of the term "meeting," including such communications in the kinds of meetings that can be governed by the law and thereby triggering notice, public access and similar requirements. For example, Arizona provides that a meeting is "the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action."[139] This definition was amended in 2000 "to prohibit a quorum of a public body from secretly communicating through technological devices, including, for example, facsimile

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v. Spokane County, 103 **Wash.**App. 680, 13 P.3d 1104, 1108 (2000); Schill v. Wisconsin Rapids School District, 327 **Wis.**2d 572, 786 N.W.2d 177 (2010).

[135] Associated Press v. Canterbury, 224 **W.Va.** 708, 711, 688 S.E.2d 317, 320 (2009) ("a personal e-mail communication by a public official or public employee, which does not relate to the conduct of the public's business, is not a public record subject to disclosure under FOIA").

[136] *E.g.*, Cowles Publishing Co. v. Kootenai County Board of County Comm'rs, 144 **Idaho** 259, 159 P.3d 896 (2007); **Kan.**Op.Atty.Gen. 2002-1 (Jan. 3, 2002); State ex rel. Glasgow v. Jones, 119 **Ohio**St.3d 391, 894 N.E.2d 686, 691 (2008), *following* State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't, 82 **Ohio**St.3d 37, 42 & n.1, 693 N.E.2d 789, 793 & n.1 (1998) (e-mail message from public office e-mail system can be a public record if it documents the organization, functions, policies, decisions, procedures, operations, or other activities of the public office); O'Neill v. City of Shoreline, 170 **Wash.**2d 138, 240 P.3d 1149 (2010) (request to see e-mail did not inherently include a request to see metadata).

[137] **Ark.**Op.Atty.Gen. 2008-055 (May 7, 2008).

[138] **Ark.**Op.Atty.Gen. 2009-124 (Aug. 31, 2009).

[139] **Ariz.**Rev.Stat. §38-431(1) (2013).

machines, telephones, texting, and e-mail."[140] The Arizona Attorney General detailed a variety of ways in which e-mail could be used in violation of the law:

> even though an e-mail may be exchanged from one Board member to another Board member—a communication that does not result in a quorum—the e-mail could be printed and copied and showed to a third Board member—a communication that does result in a quorum.
>
> An even greater risk is posed when e-mails are forwarded to other Board members, sometimes by non-Board members who are also recipients of the e-mail.
>
> The common practice of imbedding original e-mail messages and forwarding messages to multiple persons presents an unusually high risk that the Board could create a quorum without intending to do so.
>
> Similarly, there is the risk of hitting the "wrong button" as Mr. Harrington did when he inadvertently replied to all Board members in response to Mr. Bernstein's September 17, 2004 e-mail.
>
> Finally, there is the risk of exchanging e-mail on a system where others may have access. Dr. Harris testified that he believed that the college e-mail system was part of the public domain and that anyone who had access to the college system could access e-mail. If that is accurate, then a quorum of the Board could be established simply by one Board member accessing two other Board members' e-mail.[141]

The Arizona Attorney General provided another series of examples in a 2005 opinion, identifying situations that would or would not present a violation:

> a. E-mail discussions between less than a quorum of the members that are forwarded to a quorum by a board member or at the direction of a board member would violate the OML.
>
> b. If a staff member or a member of the public e-mails a quorum of members of the public body, and there are no further e-mails among board members, there is no OML violation.
>
> c. Board member A on a five-member board may not e-mail board members B and C on a particular subject within the scope of the board's responsibilities and include

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[140] Arizona Attorney General, Agency Handbook, 7.5.2 (2012), *at* http://www.azag.gov/Agency_Handbook/Ch7.pdf (visited July 22, 2013) ("Board members cannot use email to circumvent the Open Meeting Law requirements"); *see* **Ariz.**Op.Atty.Gen. I05-004 (July 25, 2005) ("when members of the public body are parties to an exchange of e-mail communications that involve discussions, deliberations, or taking legal action by a quorum of the public body concerning a matter that may foreseeably come before the public body for action, the communications constitute a meeting through technical devices under the Open Meeting Law").

[141] Arizona Attorney General, Yavapai Community College District Governing Board Open Meeting Law Investigation Report, Findings, Conclusions and Recommendation at 18 (Mar. 23, 2005), *at* https://www.azag.gov/press-release/yavapai-community-college-governing-board-violated-open-meeting-law-attorney-general%E2%80%99s (visited July 22, 2013).

what other board members D and E have previously communicated to board member A. This e-mail would be part of a chain of improper serial communications between a quorum on a subject for potential legal action.

d. A board member may e-mail staff and a quorum of the board proposing that a matter be placed on a future agenda. Proposing that the board have the opportunity to consider a subject at a future public meeting, without more, does not propose legal action, and, therefore, would not violate the OML.

e. An e-mail from the superintendent of the school district to a quorum of the board members would not violate the OML. However, if board members reply to the superintendent, they must not send copies to enough other members to constitute a quorum. Similarly, the superintendent must not forward replies to the other board members.

f. One board member on a three-member board may e-mail a unilateral communication to another board member concerning facts or opinions relating to board business, but board members may not respond to the e-mail because an exchange between two members would be a discussion by a quorum.

g. A board member may copy other board members on an e-mailed response to a constituent inquiry without violating the OML because this unilateral communication would not constitute discussions, deliberations or taking legal action by a quorum of the board members.

h. An e-mail request by a board member to staff for specific information does not violate the OML, even if the other board members are copied on the e-mail. The superintendent may reply to all without violating the OML as long as that response does not communicate opinions of other board members. However, if board members reply in a communication that includes a quorum, that would constitute a discussion or deliberation and therefore violate the OML.

i. A board member may use e-mail to send an article, report or other factual information to the other board members or to the superintendent or staff member with a request to include this type of document in the board's agenda packet. The agenda packet may be distributed to board members via e-mail. Board members may not discuss the factual information with a quorum of the board through e-mail.[142]

The Attorney General suggested language that might be included in e-mails to reduce the risk of violations: "To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members."[143]

Connecticut defines a meeting as

[142] **Ariz.**Op.Atty.Gen. I05-004 (July 25, 2005).

[143] **Ariz.**Op.Atty.Gen. I05-004 (July 25, 2005) (suggested language for e-mails from board members: "To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.").

> any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.[144]

E-mail constitutes a use of a technological device or electronic equipment for this definition.[145]

The Colorado open meeting law defines a meeting as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication."[146] The law then provides:

> If elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section. Electronic mail communication among elected officials that does not relate to pending legislation or other public business shall not be considered a "meeting" within the meaning of this section.[147]

The provision is limited to elected officials, so appointed or other non-elected members of public bodies are not covered. Colorado's public records law defines "e-mail" or "electronic mail" as

> an electronic message that is transmitted between two or more computers or electronic terminals, whether or not the message is converted to hard copy format after receipt and whether or not the message is viewed upon transmission or stored for later retrieval. "Electronic mail" includes electronic messages that are transmitted through a local, regional, or global computer network.[148]

Illinois defines a "meeting" as

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[144] **Conn.**Gen.Stat. §1-200(2) (2013); *see* Evans v. Freedom of Information Comm'n, 2005 **Conn.** Super. LEXIS 2116 (**Conn.**Super. Aug. 5, 2005) (no violation as to certain telephone and electronic communications).

[145] **Conn.** FOI Comm'n, Draft Declaratory Ruling #94, *at* http://www.state.ct.us/foi/TEMP/Temp_What's_New_Folder/Draft_E-mail_Dec_Rul.htm (visited July 22, 2013).

[146] **Colo.**Rev.Stat. §24-6-402(1)(b) (2013); *see* Colvin, E-mail, Open Meetings, and Public Records, 25 Colo.Law. 99 (Oct. 1996).

[147] **Colo.**Rev.Stat. §24-6-402(2)(d)(III) (2013).

[148] **Colo.**Rev.Stat. §24-72-202(1.2) (2013); *see* Denver Publishing Co. v. Board of County Comm'rs, 121 P.3d 190 (**Colo.** 2005) (e-mail as subject to public record act must be for use in performance of public functions or involve receipt of public funds; a public employee or public official's sending or receiving a message while compensated by public funds or using a publicly owned computer does not make the message a "public record"); State v. City of Clearwater, 863 So.2d 149 (**Fla.** 2003) (same); **Fla.**Op.Atty.Gen. (June 8, 2007) (same).

> any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business.[149]

The Kansas statute now provides: "As used in the open meetings act, 'meeting' means any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency."[150] In 1995, the Kansas Attorney General addressed the use of e-mail by members of a school board, concluding that "school board members may be in violation of the KOMA, if three or more board members simultaneously engage in discussion of the board business through computer terminals. However, simply sending a message to other board members would not constitute an "interactive communication," within the meaning of the KOMA."[151] The reasoning underlying this conclusion was that the original proposed 1994 amendment to the KOMA included "electronic and written communication," but the senate committee on local government struck "written communication" and inserted "any other means of interactive communication."[152] The 1995 Attorney General decision does not discuss whether use of computer communications would constitute a serial meeting, but earlier decisions indicate that serial communications are prohibited in Kansas.[153] In 1998, the Kansas Attorney General addressed the issue in depth:

> if e-mail between members becomes extensive enough that it amounts to a discussion between a majority of a quorum of the business or affairs of the body, the KOMA's procedural safeguards are triggered.
>
> For example, suppose members of a six member city council have all been connected to an e-mail system. On the next meeting's agenda there is an issue to reconsider widening the city's main street. Member A wants to see it pass. Member A e-mails member B and asks B's thoughts on the issue, and what it would take to get B to vote for the issue. B replies that he could support the issue, but he also wants another street widened at the same time. A forwards these items of e-mail to member C, asking C for C's opinions. C agrees to support widening the main street, but not the other street B suggested. Member A then e-mails C's response to B, and to all the other members, and the process goes on, until A has enough votes to pass the issue.

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[149] **Ill.**Comp.Stat. ch. 5, §120/1.02 (2013); *see* Gunnarsson, Is E-Mail Subject to the Open Meetings Act?, 90 **Ill.** B.J. 450 (2002).

[150] **Kan.**Stat. §75-4317a (2013).

[151] **Kan.**Op.Atty.Gen. 95-13 (Jan. 23, 1995).

[152] **Kan.**Stat. §75-4317a (2013).

[153] **Kan.**Op.Atty.Gen. 84-50 (June 7, 1984); **Kan.**Op.Atty.Gen. 82-266 (Dec. 22, 1982); **Kan.**Op.Atty.Gen. 81-268 (Dec. 8, 1981); **Kan.**Op.Atty.Gen. 80-173 (July 31, 1980); **Kan.**Op.Atty.Gen. 80-159 (July 22, 1980).

> All members are aware that their comments are being shared with the others, and that the other members' comments are being shared with them.
>
> The members have, by any standard, discussed the issue. All that remains is for them to walk into the next meeting and vote. The public will never know why the members voted the way they did, and the purpose of the KOMA is defeated. We believe this violates both the spirit and letter of the KOMA since the public was excluded.[154]

The statutory term "interactive" should not necessarily require simultaneous communication. The 1995 opinion reasoned: "If the sender of a message through the computer does not get a response immediately from a receiver, the communication is not 'interactive.' "[155] By 1998, the Kansas Attorney General implicitly discarded that 1995 interpretation because the scenario described in the quoted opinion plainly involved communications separated in time.

The Attorney General ruled that not all computer communications are prohibited as some do not constitute a meeting. Even indirect computer communications that are not a "meeting"

> are not necessarily prohibited. The question becomes whether KOMA's procedural safeguards–notice and public access–are complied with. It is technologically feasible and practical for a LISTSERV or bulletin board to be established on the Internet to which members of the public body have access to post and read messages and the public has access to at least read the messages. A terminal or cumulative print-out of messages could be made available in a public place for individuals who do not have access to a computer. When persons request notice of meetings, the first notice they should receive is that there is a perpetual, virtual meeting going on and how to access it. (We note that for specific types of municipalities there may be other statutory obstacles to virtual meetings.)

If, however, the indirect communication is such that KOMA's procedural safeguards cannot be met, the communications are prohibited. The KOMA does present some obstacles to discussions, but the KOMA represents the Legislature's determination that discussion of public business by public bodies must be done in public.[156] The Shawnee County District Attorney determined in 2011 that a member of the Kansas State Board of Education technically violated KOMA when responding "reply to all" to an e-mail sent from the board's attorney to members of the board.[157]

The Missouri statute was amended in 1998 to extend to meetings "whether corporeal or by means of communication equipment" and votes "by electronic communication or any other

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[154] **Kan.**Op.Atty.Gen. 98-49 (Sept. 16, 1998).

[155] **Kan.**Op.Atty.Gen. 95-13 (Jan. 23, 1995).

[156] **Kan.**Op.Atty.Gen. 98-49 (Sept. 16, 1998).

[157] Gardner News Editorial (June 15, 2011), *at* http://gardnernewsnow.com/editorial-da-opinion-strengthens-open-meetings-law/ (visited July 1, 2011).

means,"[158] and the statute provided: "At any public meeting conducted by telephone or other electronic means, the public shall be allowed to observe and attend the public meeting at a designated location identified in the notice of the meeting."[159] These provisions were both broadened and narrowed in 2004. Current law provides for meetings "by telephone or other electronic means" and "by Internet chat, Internet message board, or other computer link"[160] and defines the term "meeting" to include any meeting "conducted in person or by means of communication equipment, including, but not limited to, conference call, video conference, Internet chat, or Internet message board."[161] The law was narrowed as to voting; except for emergency situations: "All votes taken by roll call in meetings of a public governmental body consisting of members who are all elected, except for the Missouri general assembly and any committee established by a public governmental body, shall be cast by members of the public governmental body who are physically present and in attendance at the meeting."[162]

Montana defines a "meeting" as the "convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power."[163] This language may be interpreted in various ways, and the term "electronic equipment" is not defined in the Montana Code. A Legislative Branch Newsletter warns, however:

> Email. Members of agencies (as defined in Section 2-3-102, MCA) should be careful about making decisions or discussing substantive issues by email, as this violates the public's right to know. Similarly, 2-6-202(1)(b), MCA, provides that emails relating to the transaction of official business are public records. Even if an agency member is using a personal computer but has a government email address and is conducting public business with that email address, the emails are public record and subject to disclosure.[164]

A meeting in New Hampshire may be "in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to

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[158] **Mo.**Stat. former §610.010(5).
[159] **Mo.**Stat. former §610.020(2).

[160] **Mo.**Stat. §610.020(1) (2013); *see* Maneke & Curry, Public Scrutiny of Missouri E-Mail Under the Sunshine Law, 60 J.**Mo.**B. 14 (Jan.-Feb. 2004).

[161] **Mo.**Stat. §610.010(5) (2013).

[162] **Mo.**Stat. §610.015 (2013). The emergency must be documented in the minutes.

[163] **Mont.**Code §2-3-202 (2013).

[164] The Interim, A Monthly Newsletter of the Montana Legislative Branch, (May 2010), *at* http://leg.mt.gov/css/publications/Interim-Newsletter/2009-Interim-Newsletter/5-10-interim-newsletter.asp#oo (visited July 33, 2013).

communicate with each other contemporaneously."[165] New Hampshire further provides: "No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice."[166] The New Hampshire Attorney General interprets the law to encompass e-mails in a number of circumstances:

> E-mail use should be carefully limited to avoid an inadvertent meeting, albeit one where there is a failure to have a physical quorum at a noticed meeting place.
>
> Simultaneous e-mails sent to a quorum of a public body by a member discussing, proposing action on, or announcing how one will vote on a matter within the jurisdiction of the body would constitute an improper meeting.
>
> Sequential e-mail communications among members of a public body similarly should not be used to circumvent the public meeting requirement. For example, e-mail among a quorum of members of a public body in a manner that does not constitute contemporaneous discussion or deliberation and does not involve matters over which the body has supervision, control, jurisdiction, or advisory power does not technically constitute a meeting under the Right-to-Know law.
>
> E-mail discussions of a quorum concerning matters over which the public body has supervision, control, jurisdiction, or advisory power would run counter to its spirit and purpose.[167]

New Jersey's definition of a "meeting" includes any gathering "by means of communication equipment,"[168] a term that is not defined.

North Carolina defines an official meeting as "a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body."[169] South Carolina provides: "'Meeting' means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power."[170]

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[165] **N.H.**Rev.Stat. §91-A:2(I) (2013); *see* Johnston, Electronic Records and Communications Under New Hampshire's Right-to-Know Law, 48 N.H.B.J. 38 (Autumn 2007).
[166] **N.H.**Rev.Stat. §91-A:2(III)(c) (2013).

[167] Attorney General's Memorandum on New Hampshire's Right-to-Know Law 7 (July 15, 2009), *at* http://doj.nh.gov/civil/documents/right-to-know.pdf (visited July 22, 2013).

[168] **N.J.**Stat. §10:4-8(b) (2013).

[169] **N.C.**Gen.Stat. §143-318.10(d) (2013).

[170] **S.C.**Code §30-4-20(d) (2013); *see* **S.C.**Op.Atty.Gen. (Aug. 11, 2006) (strongly condemning pre-meeting meetings to discuss public business).

E-mail would presumably fall within the "communication equipment," "other electronic means" and "electronic equipment" portions of these statutes.[171]

Utah includes meetings conducted by means of "computer conference" within its definition of electronic meetings required to satisfy detailed notice and procedural requirements.[172] Utah defines "Electronic message" to mean "a communication transmitted electronically, including: (a) electronic mail; (b) instant messaging; (c) electronic chat; (d) text messaging as defined in Section 76-4-401; or (e) any other method that conveys a message or facilitates communication electronically."[173] Utah added a provision in 2011 to declare: "Nothing in this chapter shall be construed to restrict a member of a public body from transmitting an electronic message to other members of the public body at a time when the public body is not convened in an open meeting."[174] It remains to be seen how these provisions will be reconciled.

Vermont provides: "A meeting may be conducted by audio conference or other electronic means, as long as the provisions of this subchapter are met."[175]

West Virginia simply provides: "Meetings may be held by telephone conference or other electronic means."[176] The West Virginia Ethics Commission considered whether e-mail could be used during the course of an open meeting either to enable the members of the public body to communicate privately among themselves or to make an inquiry of a third party to obtain information relevant to a matter before the body. Not surprisingly, the former use was condemned and the latter was deemed acceptable if disclosed.[177] Similarly, e-mail may be used to transmit draft documents to members of the public body that will be discussed at a meeting, but the members must not comment among themselves by e-mail.[178]

In other States, e-mail has been addressed by addition of a prohibition to the statute. For example, the 2005 Alabama open meeting law provides: "Electronic communications shall not

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[171] No cases are directly on point, but other interpretation of the terms so indicates. *See* McGee v. Township of East Amwell, 416 **N.J.**Super. 602, 7 A.3d 785 (2010); Powell v. City of Newton, 684 S.E.2d 55 (**N.C.**App. 2009), *aff'd in part*, 703 S.E.2d 723 (**N.C.** 2010); Jennings v. Jennings, 389 **S.C.** 190, 697 S.E.2d 671 (App. 2010).

[172] **Utah**Code §52-4-207 (2013).

[173] **Utah**Code §52-4-103(4) (2013).

[174] **Utah**Code §52-4-210 (2013).

[175] **Vt.**Stat. tit. 1, §312(a) (2013).

[176] **W.Va.**Code §6-9A-2(4) (2013); *see* Associated Press v. Canterbury, 224 **W.Va.** 708, 688 S.E.2d 317 (2009) (e-mail as public record).

[177] **W.Va.** Ethics Comm'n, Open Meetings Advisory Opinion 2009-08 (Dec. 3, 2009).

[178] **W.Va.** Ethics Comm'n, Open Meetings Advisory Opinion 2006-09 (Sept. 7, 2006).

be utilized to circumvent any of the provisions of this chapter."[179] The only other mention of electronic communications appears in an exclusion from the definition of "meeting": "Occasions when a quorum of a governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the governmental body."[180]

Hawaii provides: "No chance meeting, permitted interaction, or electronic communication shall be used to circumvent the spirit or requirements of this part to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power."[181] As a result, the Office of Information Practices warns: "Board members cannot discuss board business outside of a properly noticed meeting through the telephone or by memoranda, fax, or e-mail. As a general rule, if the statute prohibits board members from discussing board business face-to-face, board members cannot have that same discussion through another type of media."[182]

Nebraska provides: "Videoconferencing, telephone conferencing, or conferencing by other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act" and "Telephone conference calls, emails, faxes, or other electronic communication shall not be used to circumvent any of the public government purposes established in the Open Meetings Act."[183] The Nebraska Attorney General explains that, generally, "a minimal exchange of correspondence or minimal electronic communication among members of a public body does not trigger the existing circumvention prohibitions" and that "members of a public body can communicate with other members of that body by electronic means, even if that communication is directed to a quorum of the body, so long as there is no course of communication which becomes sufficiently involved so as to evidence an intent or purpose to circumvent the Public Meetings Statutes."[184]

Nevada provides that "electronic communication, must not be used to circumvent the spirit or letter of this chapter in order to discuss or act upon a matter over which the public body

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[179] **Ala.**Code §36-25A-1(a) (2013).
[180] **Ala.**Code §36-25A-2(6)(b)(2) (2013).

[181] **Haw.**Rev.Stat. §92-5(b) (2013).

[182] Hawaii Office of Information Practices, Guide to "The Sunshine Law" for State and County Boards 13 (June 2011), *at* http://www.state.hi.us/oip/sunshinelaw.html (visited July 33, 2013).

[183] **Neb.**Rev.Stat. §84-1411(2)(e), 3(h) (2013).

[184] **Neb.**Op.Atty.Gen. 04007 (Mar. 8, 2004); *see* **Neb.**Op.Atty.Gen. 04007 (Mar. 8, 2004) ("e-mails, faxes or records of other electronic communications between elected officials and between elected officials and governmental staff are public records which are subject to disclosure to the general public, unless there is a specific statute in each instance which allows particular electronic materials to be kept confidential"); Nebraska Attorney General, Open Meetings Act, *at* http://www.ago.ne.gov/public_records/open_meetings_act (visited July 22, 2013).

has supervision, control, jurisdiction or advisory powers."[185] Oklahoma provides: "No informal gatherings or any electronic or telephonic communications, except teleconferences as authorized by . . . this act, among a majority of the members of a public body shall be used to decide any action or take any vote on any matter."[186]

Oregon requires any meeting, including an executive session, of a governing body of a public body held through the use of electronic communication to be conducted in accordance with the open meeting law requirements.[187] Moreover, Oregon provides:

> When telephone or other electronic means of communication is used and the meeting is not an executive session, the governing body of the public body shall make available to the public at least one place where the public can listen to the communication at the time it occurs by means of speakers or other devices. The place provided may be a place where no member of the governing body of the public body is present.[188]

Rhode Island has adopted a detailed provision:

> (b) No meeting of members of a public body or use of electronic communication, including telephonic communication and telephone conferencing, shall be used to circumvent the spirit or requirements of this chapter; provided, however, these meetings and discussions are not prohibited.
>
> (1) Provided, further however, that discussions of a public body via electronic communication, including telephonic communication and telephone conferencing, shall be permitted only to schedule a meeting.
>
> (2) Provided, further however, that a member of a public body may participate by use of electronic communication or telephone communication while on active duty in the armed services of the United States.
>
> (3) Provided, further however, that a member of that public body, who has a disability as defined in chapter 87 of title 42 and:
>
> (i) Cannot attend meetings of that public body solely by reason of his or her disability; and

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[185]. **Nev.**Rev.Stat. §241.030(6) (2013).

[186]. **Okla.**Stat. tit. 25, §306 (2013); *see* **Okla.**Op.Atty.Gen. 81-69 (Apr. 2, 1981) ("The legislative intent is unmistakable. Section 306 is an absolute prohibition upon any attempt to circumvent the Open Meeting Act and obtain a consensus upon an item of business by informal meetings outside a public meeting.").

[187]. **Ore.**Rev.Stat. §192.670(1) (2013); *see* Oregon Attorney General's Public Records and Meetings Manual (2010), *at* http://www.doj.state.or.us/public_records/manual/public_meetings.shtml (visited July 22, 2013) ("communications between and among a quorum of members of a governing body convening on electronically linked personal computers are subject to the Public Meetings Law if the communications constitute a decision or deliberation toward a decision for which a quorum is required, or the gathering of information on which to deliberate").

[188]. **Ore.**Rev.Stat. §192.670(2) (2013).

(ii) Cannot otherwise participate in the meeting without the use of electronic communication or telephone communication as reasonable accommodation, may participate by use of electronic communication or telephone communication in accordance with the process below.

(4) The governor's commission on disabilities is authorized and directed to:

(i) Establish rules and regulations for determining whether a member of a public body is not otherwise able to participate in meetings of that public body without the use of electronic communication or telephone communication as a reasonable accommodation due to that member's disability;

(ii) Grant a waiver that allows a member to participate by electronic communication or telephone communication only if the member's disability would prevent him/her from being physically present at the meeting location, and the use of such communication is the only reasonable accommodation; and

(iii) Any waiver decisions shall be a matter of public record.[189]

Tennessee provides that no "chance meetings, informal assemblages, or electronic communication shall be used to decide or deliberate public business in circumvention of the spirit or requirements of this part."[190] A governing body may but is not required to allow electronic or other means of communication in connection with meetings authorized by law so long as a physical quorum is present at the noticed meeting location or a finding of necessity is made and included in the minutes.[191] Electronic communication between members of the governing body is also permitted over an Internet forum, but only with public access and notice and satisfaction of other requirements.[192] The specificity of limitations and requirements for use of these permitted electronic communications surely indicates that private e-mail

[189] **R.I.**Gen.Laws §42-46-5(b) (2013); *see* **R.I.**Op.Atty.Gen. OM 06-49 (June 6, 2006) ("A quorum of the Exeter/West Greenwich Regional School Committee did not collectively discuss or participate in an e-mail exchange when three (3) School Committee members out of seven (7) total School Committee members directly participated in the e-mail correspondence. Therefore, the OMA was inapplicable"); **R.I.**Op.Atty.Gen. OM 06-47 (May 19, 2006) ("town council violated the OMA when four of the five council members engaged in a series of email exchanges in which they discussed a matter over which the council has supervision, control, jurisdiction or advisory power. The exchanges were not limited to the purpose of scheduling a meeting as governed by R.I.Gen.Laws §42-46-5(b). A meeting convened by a 'rolling quorum' even though the discussions were not held in a traditional forum and the exchanges were not simultaneous, but held over a two day period"); **R.I.**Op.Atty.Gen. ADV OM 04-01 (Mar. 5, 2004) ("a series of email communications among a quorum of the Committee would satisfy the quorum requirement of the OMA, and that the OMA would apply"; "an inadvertently or unexpectedly forwarded email could bring the entire series of communications under the auspices of the OMA").

[190]. **Tenn.**Code §8-44-102(c) (2013).

[191]. **Tenn.**Code §8-44-108(b) (2013).

[192]. **Tenn.**Code §8-44-109 (2013).

communications among members of the public body are forbidden, as one court held.[193]

Texas authorizes a public body to "use a telephone conference call, video conference call, or communications over the Internet to conduct a public consultation with its attorney in an open meeting of the governmental body or a private consultation with its attorney in a closed meeting of the governmental body."[194] This section cannot be used for other meetings and does not apply if the attorney is an employee of the public body.[195] Texas also authorizes the broadcast of meetings of governmental bodies over the Internet, subject to the same notice requirements for other meetings.[196]

Virginia defines "electronic communication" as "any audio or combined audio and visual communication method,"[197] a definition that appears not to encompass e-mail and similar communications. The Virginia open meeting law then provides more broadly: "No meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business, except as provided" expressly in specific provisions.[198] E-mail and similar communications surely fall under the language "or other communication means." The express authorization for meetings without physical assembly of the members is limited to audio and audio/visual communications that can be heard or heard and seen by all in attendance.[199]

The open meeting laws many States are silent as to electronic communications such as e-mail. Absence of express mention of electronic communications in an open meeting law will not necessarily prevent application of the law to these communications in appropriate circumstances. Some States use definitions and other provisions that are sufficiently broad to encompass e-mail

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[193]. Johnston v. Metropolitan Gov't of Nashville & Davidson County, 320 S.W.3d 299, 309-10 (**Tenn.**App. 2009).

[194] **Tex.**Gov.Code §551.129(a) (2013); *see* Tuma, Municipalities and the Internet: A Few Legal Issues, 27 T.Marshall L.Rev. 49 (2001). The section does not apply to governing boards of institutions of high education or to the Texas Higher Education Coordinating Board. **Tex.**Gov.Code §551.129(f) (2013).

[195] **Tex.**Gov.Code §551.129(c), (d) (2013).

[196] **Tex.**Gov.Code §551.128 (2013).

[197] **Va.**Code §2.2-3701 (2013).

[198] **Va.**Code §2.2-3707(B) (2013). *But see* **Va.**Op.Atty.Gen. 1999-12 (Jan. 6, 1999) ("Transmitting messages through an electronic mail system is essentially a form of written communication and, in my opinion, does not constitute 'conducting a meeting . . . through . . . electronic . . . means' as contemplated by [the open meeting law]. Accordingly, it is my opinion that [the law] does not bar members of a local governing body from sending electronic mail communications to other members of the governing body.") (quoting former statute)).

[199] **Va.**Code §§2.2-3708, 2.2-3708.1 (2013).

and similar communications without expressly referring to them. These include California,[200] Delaware,[201] and Wisconsin.[202] Wisconsin law defines a "meeting" to require a "convening" of the members of the public body. The Wisconsin Attorney General explained:

> Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.
>
> Inadvertent violations of the open meetings law through the use of electronic communications can be reduced if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies. Nevertheless, because of the absence of judicial guidance on the subject, and because electronic mail creates the risk that it will be used to carry on private debate and discussion on matters that belong at public meetings subject to public scrutiny, the Attorney General's Office strongly discourages the members of every

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[200] **Cal.**Gov.Code §54952.2(b) (2013) ("A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body."); **Cal.**Op.Atty.Gen. 00-906 (Feb. 20, 2001) ("A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.").

[201] **Del.**Op.Atty.Gen. 03-IB11 (May 19, 2003) (finding a violation when the "three members of the Nominating Committee were involved in the exchange of e-mails, and their exchange of views resulted in a consensus on who to nominate for the design, special events, and merchants committees"; "Serial e-mails allow each member of a public body to receive and comment on other member's opinions and thoughts, and reach a consensus on action to take.").

[202] *E.g.*, Wisconsin Attorney General, Wisconsin Open Meetings Law, A Compliance Guide (Aug. 2010), *at* http://www.doj.state.wi.us/dls/OMPR/2010OMCG-PRO/2010_OML_Compliance_Guide.pdf (visited July 22, 2013) ("Written communications transmitted by electronic means, such as email or instant messaging, also may constitute a 'convening of members,' depending on how the communication medium is used. . . . [C]ourts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications").

> governmental body from using electronic mail to communicate about issues within the body's realm of authority.[203]

Various court and attorney general opinions hold that e-mail and electronic communications are encompassed within the requirements and prohibitions of the open meeting laws. The Florida Attorney General ruled that use of electronic communications through linked computers is likely to be subject to the open meeting law.[204] Similarly, use of an anonymous newsletter written by one city councilmember and sent to other members as a means to communicate privately is a violation.[205] In Washington, following authorities involving telephonic and serial meetings, the court held that electronic mail communications can constitute a "meeting," although "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'"[206] The court found:

> Wood has established a prima facie case of "meeting" by e-mails. The post-oath e-mail discussions involved a quorum of the five-member Board. For instance, on November 30, Sharp sent an e-mail to all Board members and another e-mail to three of the members; on December 1, Sharp again e-mailed all the Board members, attaching a response he had received from Striker about a matter they had discussed; next, on December 3, Kim e-mailed Sharp and copied three other Board members in response to Sharp's earlier e-mail; and on December 5, Sharp again e-mailed all Board members.
>
> Further, these discussions related to Board business, including the possibility of instituting a declaratory judgment in regard to Beck's contract with the District and otherwise evaluating Beck's performance, and the structuring of the Board's liaison duties. And the active exchange of information and opinions in these e-mails, as opposed to the mere passive receipt of information, suggests a collective intent to deliberate and/or to discuss Board business.[207]

Use of e-mail is addressed in many open meeting guides published by attorneys general or other public officials in various States. The Maine website answers the question "Can members of a body communicate with one another by email outside of a public proceeding?":

> There is no legal prohibition against email communication between members of a public body outside of a public proceeding. However, email communication among a quorum of the members of a body used as a substitute for deliberations or decisions which should properly take place at a public meeting may likely be considered a

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[203] Wisconsin Attorney General, Wisconsin Open Meetings Law, A Compliance Guide (Aug. 2010), *at* http://www.doj.state.wi.us/dls/OMPR/2010OMCG-PRO/2010_OML_Compliance_Guide.pdf (visited July 22, 2012).

[204] **Fla.**Op.Atty.Gen. 89-39 (June 26, 1989).

[205] **Fla.**Op.Atty.Gen. (Oct. 31, 2002).

[206] Wood v. Battleground School District, 107 **Wash.**App. 550, 564, 27 P.3d 1208, 1217 (2001).

[207] Wood v. Battleground School District, 107 **Wash.**App. 550, 565-66, 27 P.3d 1208, 1217-18 (2001).

> "meeting" in violation of the statutory requirements for open meetings and public notice. . . .
>
> Members of a body should refrain from the use of email as a substitute for deliberating or deciding substantive matters properly confined to public proceedings. Email is permissible to communicate with other members about non-substantive matters such as scheduling meetings, developing agendas and disseminating information and reports.[208]

In Massachusetts, "E-mail exchanges between or among a quorum of members of a public body discussing matters within the body's jurisdiction may constitute deliberation, even where the sender of the e-mail does not ask for a response from the recipients."[209] Even before adoption of the 2010 open meeting law revision, the Massachusetts Attorney General explained:

> Like private conversations held in person or over the telephone, email conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as the public is deprived of the opportunity to attend and monitor the email "meeting." Thus it is a violation to email to a quorum messages that can be considered invitations to reply in any medium, and would amount to deliberation on business that must occur only at proper meetings. It is not a violation to use email to distribute materials, correspondence, agendas or reports so that committee members can prepare individually for upcoming meetings.[210]

The Michigan Attorney General reached a similar conclusion:

> Use of e-mail or other electronic communications among board members during an open meeting – e-mail, texting, or other forms of electronic communications among members of a board or commission during the course of an open meeting that constitutes deliberations toward decision-making or actual decisions violates the OMA, since it is in effect a "closed" session. While the OMA does not require that

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[208] Frequently Asked Questions, *at* http://www.maine.gov/foaa/faq/index.shtml (visited July 22, 2013) ("Email is a public record (likely even when sent using a member's personal computer) if it contains information relating to the transaction of public or governmental business unless the information is designated as confidential or excepted from the definition of a public record. 1 MRSA §402, sub-§3. As a result, members of a body should be aware that all emails and email attachments relating to the member's participation are likely public records subject to public inspection under the Freedom of Access laws.").

[209] Massachusetts Attorney General, Open Meeting Law Guide 3 (Mar. 24, 2011), *at* http://www.Mass.gov/ago/government-resources/open-meeting-law/attorney-generals-open-meeting-law-guide.html (visited July 22, 2013); *e.g.*, **Mass.**Atty.Gen. OML Complaint (May 25, 2011); **Mass.**Atty.Gen. OML Complaint (Apr. 26, 2011); *see* District Attorney v. School Committee, 455 **Mass.** 561, 572 n.9, 918 N.E.2d 796, 804 n.9 (2009) ("release of the written e-mail correspondence is the only way to 'cure' the improper deliberations held by the school committee and the improper executive sessions held by the school committee").

[210] Massachusetts Open Meeting Law Guidelines 13 (Apr. 2009), *at* http://www.Mass.gov/Cago/docs/Government/oml_guidelines_final.pdf (visited July 8, 2009). This version of the guidelines is no longer available on the Internet.

> all votes by a public body must be by roll call, voting requirements under the act are met when a vote is taken by roll call, show of hands, or other method that informs the public of the public official's decision rendered by his or her vote. Thus, the OMA bars the use of e-mail or other electronic communications to conduct a secret ballot at a public meeting, since it would prevent citizens from knowing how members of the public body have voted.
>
> Moreover, the use of electronic communications for discussions or deliberations, which are not, at a minimum, able to be heard by the public in attendance at an open meeting are contrary to the OMA's core purpose – the promotion of openness in government.
>
> Using e-mail to distribute handouts, agenda items, statistical information, or other such material during an open meeting should be permissible under the OMA, particularly when copies of that information are also made available to the public before or during the meeting.[211]

The New Mexico Attorney General treats e-mail communications in the same manner as telephone calls, both capable of constituting a rolling quorum in violation of the law.[212] The North Dakota Attorney General observed in 2009: "Due to technology, there are many new ways members of a governing body may communicate. Simultaneous communication between a quorum of a governing body, through instant messaging, e-mail, or other technology, may be considered a meeting subject to the open meeting law."[213] Thus, "analysis of whether a meeting took place by e-mail is no different than that of other meetings," requiring four elements: a public entity, a governing body, public business and a gathering, which can be "an exchange of e-mails among a quorum of the governing body."[214]

The Indiana Public Access Counselor concluded in 2009: "Where there is no majority gathered together in one location and because those participating by telephone or electronic mail cannot be counted present, the activity is not a gathering and as such does not constitute a meeting for the purposes of the ODL."[215] Although Indiana has express prohibitions against serial meetings, the provisions exclude electronic mail:

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[211] Michigan Attorney General, Open Meetings Act Handbook 9, *at* http://www.michigan.gov/documents/ag/OMA_handbook_287134_7.pdf (visited July 22, 2013) (footnotes omitted).

[212] New Mexico Attorney General, Open Meetings Act Compliance Guide 8-9 (7th ed. 2010), *at* http://www.nmag.gov/consumer/publications/openmeetingsactcomplianceguide (visited July 22, 2013).

[213] North Dakota Attorney General, North Dakota Open Meetings Manual 7 (Jan. 2013), *at* http://www.ag.state.nd.us/Manuals/OROMManuals/2013OpenMeetingsManual.pdf (visited July 22, 2013).

[214] **N.D.**Op.Atty.Gen. 2010-O-09 (July 1, 2010).

[215] Opinion of the Indiana Public Access Counselor 09-INF-22 (July 28, 2009), *at* http://www.in.gov/pac/files/Informal_Inquiry_09-INF-22_regarding_electronic_mail_as_a_meeting.pdf (visited July 22, 2013), *following* City of Gary v. McCrady, 851 N.E.2d 359, 367 (**Ind.**App. 2006) (no meeting unless a majority is present).

> the governing body of a public agency [or city-county council] violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:
>
> (1) One (1) of the gatherings is attended by at least three (3) members [of the public agency] but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body. [or]
>
> (1) One (1) of the gatherings is attended by at least five (5) members of the city-county council and the other gatherings include at least three (3) members of the city-county council.
>
> (2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.
>
> (3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.
>
> (4) The gatherings are held to take official action on public business.
>
> For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.[216]

The Public Access Counselor ended: "Even in the serial meeting provisions, though, electronic mail is specifically set apart as a type of communication that does not constitute a gathering."[217]

One consideration in the analysis, depending on the language of the open meeting law, is whether there is simply a single outgoing e-mail from one person to one or more other persons or an exchange of e-mails amounting to some level of dialogue or exchange of views between or among the individuals. Some jurisdictions take the position that one person's mere passive receipt of information does not constitute a "meeting" triggering the open meeting law.[218]

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[216] **Ind.**Code §5-14-1.5-3.1(a), (b) (2013) (combining the two sections given their multiple parallel provisions).

[217] Opinion of the Indiana Public Access Counselor 09-INF-22 (July 28, 2009), *at* http://www.in.gov/pac/files/Informal_Inquiry_09-INF-22_regarding_electronic_mail_as_a_meeting.pdf (visited July 22, 2013).

[218] *E.g.*, **Ariz.**Op.Atty.Gen. I05-004 (July 25, 2005) ("a one-way communication by one board member to other members . . . , with no further exchanges between members, is not a per se violation of the OML" but "[a]n exchange of facts, as well as opinion, may constitute deliberations"); **Fla.**Op.Atty.Gen. 2001-20 (Mar. 20, 2001); **R.I.**Op.Atty.Gen. OM 11-08 (Mar. 25, 2011); Wood v. Battleground School District, 107 **Wash.**App. 550, 564, 27 P.3d 1208, 1217 (2001); *see* **Ark.**Op.Atty.Gen. 2005-166 (Nov. 8, 2005) (Arkansas might adopt view that "an e-mail message sent from either the city attorney or the mayor to members of the council ordinarily would not constitute a meeting because it would not evidence a gathering" but "the potential for circumventing the FOIA open meeting requirement through sequential or

Some States impose what has been described as a "simultaneity" element in the prohibited e-mails that distinguishes them from permitted or unregulated e-mails.[219] These States may independently prohibit serial meetings and may thus address serial e-mails through that prohibition. Illinois defines "any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication, of a majority of a quorum of the members of a public body held for the purpose of discussing public business or, for a 5-member public body, a quorum of the members of a public body held for the purpose of discussing public business" as a meeting under the Open Meetings Act.[220] The Maryland Attorney General concluded that the Open Meetings Act does not apply to e-mail communications among members of a public body, unless a quorum of a public body is engaged in a simultaneous exchange of e-mail on a matter of public business. Adopting the reasoning of the federal approval of notational voting, the Attorney General ruled:

> We see no reason to reach a different conclusion when the medium of sequential exchange is electronic mail, rather than conventional writings. On the facts as we understand them, each member of the Carroll County Planning Commission opened the electronic folder containing his or her e-mail at a convenient time, much as the member would open an envelope containing writings. The member would then reply in writing, treating the previously received message no differently than if the communication had arrived in the mail. In this respect, the e-mail exchanges were substantively "indistinguishable from letters or memoranda." The difference, of course, is that e-mail dramatically shortens the transmission time for the messages and permits easier distribution to a group of recipients, e-mail thus encourages the sharing of ideas. But in terms of the Open Meetings Act, there is still no "convening of a quorum of a public body."[221]

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circular series of communications also exists with e-mail"), *citing* **Ark.**Op.Atty.Gen. 2003-048 (Apr. 4, 2003), *and* Watkins & Peltz, The Arkansas Freedom of Information Act 290 (4th ed. 2004). *See also* **Ark.**Op.Atty.Gen. 2008-055 (May 7, 2008) (remedy for improper e-mail exchanges is to pursue applicable remedies to force public officials to provide notice and opportunity to monitor the proceedings that is required for public meetings); **Fla.**Op.Atty.Gen. 2001-20 (Mar. 20, 2001) (no meeting when e-mail does not result in exchange of member's comments or responses).

[219] Beck v. Shelton, 267 **Va.** 482, 490-91, 593 S.E.2d 195, 199 (2004) ("the key difference between permitted use of electronic communication, such as email, outside the notice and open meeting requirements of FOIA, and those that constitute a 'meeting' under FOIA, is the feature of simultaneity inherent in the term 'assemblage' " in the definition of a "meeting"; although "simultaneity may be present when e-mail technology is used in a 'chat room' or as 'instant messaging,' it is not present when e-mail is used as the functional equivalent of letter communication by ordinary mail, courier, or facsimile transmission") (footnote omitted), *following* **Va.**Op.Atty.Gen. (Jan. 6, 1999) ("Transmitting messages through an electronic mail system is essentially a form of written communication"); **Va.**FOI Advisory Council AO-19-04 (Aug. 31, 2004); Connor & Baratz, Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence, 12 Geo.MasonL.Rev. 719 (2004).

[220] **Ill.**Comp.Stat. ch. 5, §120/1.02 (2013).

[221] **Md.**Op.Atty.Gen. 96-016 (May 22, 1996), *quoting* Armstrong v. Executive Office of President, 1 F.3d 1274, 1279 (D.C.Cir. 1993), *appeals after remand*, 90 F.3d 553, 97 F.3d 575 (D.C.Cir. 1996), *cert.*

Simultaneous communication by a form of instant messaging does violate the Maryland law.[222] New Hampshire requires that "all participating members are able to communicate with each other contemporaneously."[223] The North Dakota Attorney General warns: "Simultaneous communication between a quorum of a governing body, through instant messaging, e-mail, or other technology, may be considered a meeting subject to the open meeting law."[224] Other States do not require simultaneity as an element of a meeting. In Arizona, for example, the definition of a meeting includes four types of activities by a quorum of the members of the public body: discussing legal action, proposing legal action, taking legal action, and deliberating "with respect to such action."[225] Although three of these involve some exchange or interaction, proposing legal action does not, with the result that "an e-mail from a board member to enough other members to constitute a quorum that proposes legal action would be a meeting within the OML, even if there is only a one-way communication, and no other board members reply to the e-mail."[226]

E-mail presents a variety of unresolved issues, many of which vary widely from State to State depending on the definitions and other terms in the existing law. Among other issues,

- are the provisions of the open meeting and public records acts consistent or conflicting? Do the definitions mesh or fight? Where is e-mail regulated and is there a different result depending on which law is applied?

- are the laws written for real people living real lives? If the violations that arise are the kind of normal behavior that ordinary people would engage in without thinking, is there a way to change the laws to avoid these violations?

- Is "simultaneity" an element of the prohibition on emails? Does that make sense in a practical world? What was the rule for an exchange of letters leading to consensus,

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denied, 520 U.S. 1239 (1997); *accord*, Maryland Compliance Board Opinion (May 23, 2011); Maryland Attorney General, Open Meetings Act Manual ch. 2 & n.25 (7th ed. 2010), *at* http://www.oag.state.md.us/Opengov/Openmeetings/support.htm (visited July 22, 2013) ("the Act does not apply to conventional e-mail messages" but the "result might be different if a quorum were participating in a simultaneous medium like a pre-arranged 'chat room.' "). In contrast, this form of communication and action would violate the law in many other States. *E.g.*, New Mexico Attorney General, Open Meetings Act Compliance Guide 8-9 (7th ed. 2010), *at* http://www.nmag.gov/pdf/AGO%20OMA%20Guide%207th%20Ed.pdf (visited June 16, 2011).

[222] **Md.**Op.Atty.Gen. 96-016 (May 22, 1996).

[223] **N.H.**Rev.Stat. §91-A:2(I) (2013).

[224] North Dakota Attorney General, North Dakota Open Meetings Manual 7 (Jan. 2013), *at* http://www.ag.state.nd.us/Manuals/OROMManuals/2013OpenMeetingsManual.pdf (visited July 22, 2013), *citing* **N.D.**Op.Atty.Gen. 2007-O-14 (Dec. 5, 2007).

[225] **Ariz.**Rev.Stat. §38-431(4) (2013).

[226] **Ariz.**Op.Atty.Gen. I05-004 (July 25, 2005).

and should that apply instead?

- Is texting different from e-mail or should the same rules apply? What about other instant messaging formats that are more like e-mail and texting than like Twitter and blogs that may broadcast more widely.

- Is the state statute written to encompass new forms of email and instant messaging formats or must it be amended as they develop?

Websites, Blogs, Bulletin Boards and the Like

Websites, blogs, electronic bulletin or message boards and the variety of other means for electronic posting of generally available information present different issues than e-mail. These means of communication are commonly available to a larger group or to the public generally, and some are interactive for some or all who have access.

Websites and blogs that are not interactive present fewer troublesome issues. Members of public bodies retain their First Amendment rights to communicate and, frankly, their free individual communication with their constituents is an essential component of democracy. Purely outgoing websites and blogs are essentially electronic versions of newsletters and columns or advertisements in newspapers, setting out the individual member's views.[227] Standing alone, a website or blog maintained by an individual member of a public body without interactive features is not an open meeting violation. If the website or blog is used to solicit a response from other members of the public body, then the website or blog may be as a means to evade the law and a violation in some States.[228]

Interactive sites pose significant unresolved and largely unconsidered issues.[229] If

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[227] *E.g.*, Brody, Catch the Tiger by the Tail: Counseling the Burgeoning Government Use of Internet Media, 83 Fla.B.J. 52 (2009); Natale, Exploring Virtual Legal Presence: The Present and The Promise, 1 J.HighTech.L. 157 (2002); Salkin, Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations, 31 PaceL.Rev. 54 (2011); Sherman, Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square, 31 PaceL.Rev. 95 (2011).

[228] **Fla.**Op.Atty.Gen. (Jan. 22, 2009) ("any subsequent postings by other commission members on the subject of the initial posting could be construed as a response which would be subject to the statute"), *following* **Fla.**Op.Atty.Gen. 2008-07 (Feb. 26, 2008).

[229] *See generally* Bojorquez & Shores, Open Government and the Net: Bringing Social Media into the Light, 11 **Tex.**Tech.Admin.L.J. 45 (2009); Chance & Locke, Struggling with Sunshine: Analyzing the Impact of Technology on Compliance with Open Government Laws Using Florida as a Case Study, 21 Fordham Intell.Prop.Media & Ent.L.J. 1 (2010); Chance & Locke, The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government, 35 Fla.St.U.L.Rev. 245 (2008); Larsen & Rainie, Digital Town Hall: How Local Officials Use the Internet and the Civic Benefits They Cite from Dealing with Constituents Online, *at* http://www.pewinternet.org/~/media//Files/Reports/2002/PIP_Digital_Town_Hall.pdf.pdf (2002) (visited July 22, 2013); Sherman, Your Mayor, Your "Friend": Public Officials, Social Networking, and

everyone had ready access to computers and the Internet and unlimited time and if notice requirements could be satisfied, use of interactive Internet sites could enable a democratic revolution in which constituents could communicate freely with their representatives and observe their representatives in action. Practical reality intervenes, however, because computer access and time are not unlimited. Not everyone has ready access to computers and the Internet. A citizen has multiple representatives at multiple levels of government—local, regional, state and national—and cannot observe them all simultaneously even if job, family and other obligations did not intervene. Various States have begun to address use of the Internet, but the steps into this new arena are not yet clearly defined.

A few States affirmatively address electronic meetings but treat them much like videoconferences without focusing on the more difficult issues of interactivity and length of meeting or other issues. Thus, Iowa expressly authorizes public electronic meetings if a meeting in person is "impossible or impractical" and the meeting satisfies minimum requirements:

> a. The governmental body provides public access to the conversation of the meeting to the extent reasonably possible.
>
> b. The governmental body complies with section 21.4. For the purpose of this paragraph, the place of the meeting is the place from which the communication originates or where public access is provided to the conversation.
>
> c. Minutes are kept of the meeting. The minutes shall include a statement explaining why a meeting in person was impossible or impractical.[230]

Executive sessions may be conducted by electronic means without complying with these requirements if all requirements for a closed session are satisfied.[231]

Missouri provides that, in addition to other notice, "[i]f a public body plans to meet by Internet chat, Internet message board, or other computer link, it shall post a notice of the meeting on its web site in addition to its principal office and shall notify the public how to access that meeting."[232] Tennessee authorizes electronic communication between members of the governing body over an Internet forum, but only with public access and notice and satisfaction of other requirements.[233]

Utah also expressly authorizes electronic meetings but only if the public body has

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the Unmapped New Public Square, 31 PaceL.Rev. 95 (2011); Note, Sending The Wrong Message: Technology, Sunshine Law, and the Public Record in Florida, 39 StetsonL.Rev. 411 (2010).

[230] **Iowa**Code §21.8(1) (2013); *see* **Iowa** Association of School Boards, Special Report: E-Mails and the Open Meetings and Public Records Law (Nov. 26, 2003), *at* http://www.ia-sb.org/assets/EAC6EE28-EABE-45F7-BE21-1A5C39E7296E.pdf (visited July 22, 2013) (e-mails in which a majority of members discuss a policy issue fall under open meeting law).

[231] **Iowa**Code §21.8(3) (2013).

[232] **Mo.**Stat. §610.020(1) (2013).

[233] **Tenn.**Code §8-44-109 (2013).

adopted a resolution, rule, or ordinance governing the use of electronic meeting. The resolution, rule, or ordinance "may":

> (i) prohibit or limit electronic meetings based on budget, public policy, or logistical considerations;
>
> (ii) require a quorum of the public body to:
>
> (A) be present at a single anchor location for the meeting; and
>
> (B) vote to approve establishment of an electronic meeting in order to include other members of the public body through an electronic connection;
>
> (iii) require a request for an electronic meeting to be made by a member of a public body up to three days prior to the meeting to allow for arrangements to be made for the electronic meeting;
>
> (iv) restrict the number of separate connections for members of the public body that are allowed for an electronic meeting based on available equipment capability; or
>
> (v) establish other procedures, limitations, or conditions governing electronic meetings not in conflict with this section.[234]

A public body that convenes or conducts an electronic meeting must give public notice of the meeting as required by law for all meetings and provide

> (i) notice of the electronic meeting to the members of the public body at least 24 hours before the meeting so that they may participate in and be counted as present for all purposes, including the determination that a quorum is present; and
>
> (ii) a description of how the members will be connected to the electronic meeting.[235]

The public body must also establish one or more anchor locations for the public meeting, at least one of which is in the building and political subdivision where the public body would normally meet, post written notice at these location(s) and provide space and facilities so that interested persons and the public may attend and monitor open portions of the meeting and participate if participation is to be permitted.[236]

Interactive Internet sites present especially difficult issues including the following:

- interactive sites can be set to limit or control access. If the public is denied access or public access is monitored or controlled in some manner, most or all States would prohibit use of a bulletin board or discussion board by members of the public body because it would amount to a non-public meeting.

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[234] **Utah**Code §52-4-207(2)(a) (2013).

[235] **Utah**Code §52-4-207(3) (2013).

[236] **Utah**Code §52-4-207(3) (2013).

- participation may be chilled among "interested persons within the community who may not be comfortable with or familiar with the operation of a computer or who may have difficulty using a computer keyboard or are handicapped and need adaptive technology."[237] On the other hand, handicapped individuals may be able to participate by computer who could not leave their residence to attend a meeting in person.

- notice of interactive meetings needs to be given broadly enough and in a timely manner to enable meaningful participation. Once established, the form and timing of notice cannot be changed to be less effective without significant effort.

- procedures need to exist to govern post-meeting communications with the members of the public body as the desire to communicate will not terminate with the meeting.

If the public is invited to observe the communications or even to participate in the communications on the board, then the electronic board can be seen as simply an open meeting conducted in a different manner. If there is no interactivity and the meeting is held for a defined time similar to an in-person meeting, then the bulletin board is very similar to a televised open meeting and logically should be subject to similar rules. A larger number of the members of the public may be able to observe the meeting on television than on the Internet through a bulletin board. Both options can be made available simultaneously. Either option may result in greater public observation than through physical attendance, especially for meetings of public entities with statewide or large regional jurisdiction. If use of websites or bulletin boards is permitted, then the public entity must ensure that all members of the public can access the communications, including those who lack computers with Internet access.[238] Notice of the meeting typically will have to include notice of locations where computer access is available,[239] and any specialized programs needed to have meaningful access must be provided.[240]

Additional issues arise if the meeting is extended over significant time periods by serial communications, instead of conducted much as a live meeting would be held. Those who might be interested may not be able to access the site or board repeatedly over multiple hours or days, and their participation may be mooted if they are not watching the events unfold in real time. These issues have only begun to be addressed.

The Arizona Attorney General concluded in 2008 that a board can lawfully hold a virtual meeting, including one comprised of serial communications through an online medium, after providing notice and agenda and implementing procedures to facilitate and safeguard public access. The proposed virtual meeting would have board members access a document to

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[237] **Fla.**Op.Atty.Gen. 2008-65 (Dec. 10, 2008).

[238] **Fla.**Op.Atty.Gen. 2008-65 (Dec. 10, 2008) (workshop meetings using an on-line bulletin board open to the public); **Fla.**Op.Atty.Gen. 2001-66 (Sept. 19, 2001).

[239] **Fla.**Op.Atty.Gen. 2008-65 (Dec. 10, 2008) ("Computers will be made available to the public at the city's public library. These computers will be made available on a first-come, first-served basis and there are fifty computers in the library."); **Fla.**Op.Atty.Gen. 2001-66 (Sept. 19, 2001).

[240] **Ariz.**Op.Atty.Gen. I08-008 (Sept. 29, 2008).

comment and propose changes, with edits identified to the particular member, over a defined time period, followed by an in-person meeting to discuss and adopt the final version of the document.

> Continuing developments in telecommunications technology offer the promise of widening the public's access to meetings held by public bodies, whether by web-casting meetings or allowing other forms of virtual meetings. This promise, however, is counterbalanced by the potential for abuse or technological obstacles for some citizens to access the meeting. Thus, any public body choosing to use technological means to conduct its meetings must scrupulously comply with the notice and minute-keeping requirements imposed by the open meeting law and must further make all reasonable efforts to facilitate public access to the meeting, whether through explicit instructions on using technology or by providing access to the meeting at the public body's own facilities.[241]

In contrast, the Florida Attorney General holds that, although state agencies in Florida may use communications media technology for meetings by statute,[242] the burden on the public of constantly monitoring the board to participate in the electronic proceedings precludes use of such electronic communications in lieu of in person meetings.[243] The requirement of physical presence to meet a quorum for all except statewide public bodies in Florida precludes any decision making at meetings using interactive communications media.[244]

[241] **Ariz.**Op.Atty.Gen. I08-008 (Sept. 28, 2008).

[242] **Fla.**Stat. §120.54(5)(b) (2013).

[243] **Fla.**Op.Atty.Gen. (Mar. 19, 2007), *following* **Fla.**Op.Atty.Gen. (Mar. 23, 2006) (disapproving a proposal to have an interactive online bulletin board discussion open for a month on a given topic, followed by public meeting and decision); **Fla.**Op.Atty.Gen. 2002-32 (Apr. 22, 2002) (disapproving an online bulletin board that would permit public to observe communications among members of the public body and then write letters or e-mails to comment), *and distinguishing* **Fla.**Op.Atty.Gen. 2001-66 (Sept. 19, 2001).

[244] **Fla.**Op.Atty.Gen. 2006-20 (June 15, 2006).