

HOW TO RUN AN EFFECTIVE MEETING (AND COMPLY WITH THE RIGHT-TO-KNOW LAW)

Academy for Good Governance – Course III

Class of 2024

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THE RIGHT-TO-KNOW LAW: PUBLIC MEETINGS & NONPUBLIC SESSIONS

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Overview of How RTK Governs Meetings Content

- I. What is a “meeting”?
- II. What is not a meeting, i.e., a “nonmeeting”?
- III. Nonmeeting v. Non-Public Session
- IV. What are the requirements for holding a proper “meeting”?
- V. How to hold meetings virtually.

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What is a Public Meeting? RSA 91-A:2



Quorum



Public body



Convenes so that they can communicate contemporaneously



To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

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Quorum



Majority of membership



Can't define as more than majority to circumvent law



Another statute may apply

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Meeting v. Hearing



Meeting

To conduct body's business
RSA 91-A
Open to public
No right to speak



Hearing

To hear public/certain people on issue
91-A "plus"
Open to public
Right to speak

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Public Body

RSA 91-A:1-a, VI:

- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee created by and serving at the pleasure of the City Manager of city employees providing advice to planning board applicants and the planning board is not a public body *Martin v. Rochester*

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When Public Meetings – Purpose of Public Meetings



Convenes such that all participating members are able to communicate with each other contemporaneously

In-person
Email?
Phone?



To discuss or act upon matters which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

Any
“business”
the body
deals with
Construe
broadly

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Meetings Among Public Body Members Outside of Public Meetings

Meetings of public body members that are less than a quorum to discuss public business should not be undertaken – all public business should only be discussed at properly convened public meetings

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III

II. 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 as expressed in RSA 91-A:1

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What is Not a “Meeting”? (*i.e.*, “Non-meeting”)



Social or other encounter, no decisions



Collective bargaining



Consultation with legal counsel



Circulation of draft documents



Different than nonpublic session!

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What are the Requirements of a Public Meeting?



Public notice



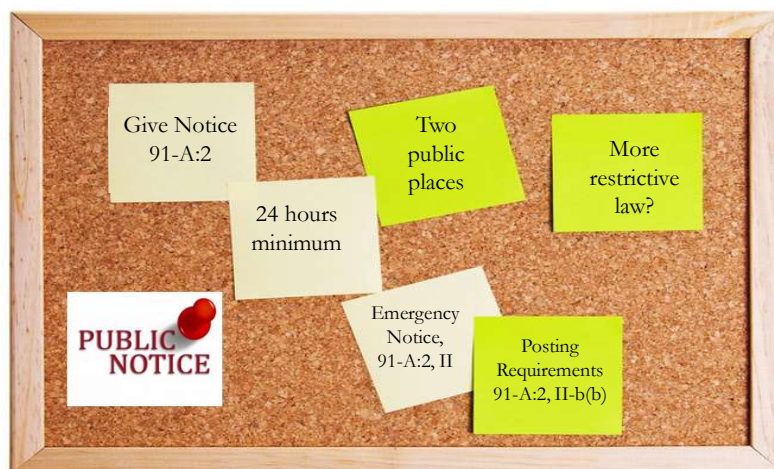
Open to the public



Meeting minutes

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Posting Requirements



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Switching Back to In-Person Meetings

- Emergency Order #12, allowed virtual meetings during the State of Emergency
- Since State of Emergency expired on June 11, 2021, boards can still have partially remote meetings
 - There must be a physical location for the public to attend, and, in most cases,
 - A quorum of the board must be present at that location.
- Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.

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Option 1: Remote Board Member Participation RSA 91-A:2, III(a)



- Public body *may* allow
- Personal attendance “not practical” (in minutes)
- Quorum *present at physical location*
- All board members can hear and be heard
- Identify board members in remote location
- All votes by roll call

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Option 2: “Emergency” RSA 91-A:2, III(b)

- Chair must declare that “emergency” exists sufficient to satisfy requirements of RSA 91-A:2, III.
- Still requires physical location.
- However, a quorum of the board need not be present at the physical location.
- Everyone can hear and be heard.
- Identify persons in remote location.
- All votes by roll call.



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Tips for Electronic Communications that Comply with 91-A

- ✓ Use an administrative person to send an email.
- ✓ Put the recipients' email addresses in the BCC line of the email to prevent the possibility of “Reply All.”
- ✓ Sending an email to a quorum of a public body could be deemed a violation of RSA 91-A where a recipient public body member could hit reply all and create an improper electronic conversation
- ✓ Use official city/town email addresses.
- ✓ Leave discussion and deliberation of official matters for a public meeting, a properly-held nonpublic session, or proper “non-meeting.”

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Meetings “Open to the Public”

- “All meetings . . . shall be open to the public.” RSA 91-A:2, II.
- “Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting.”
- Public has right to record, etc.
- No secret ballot voting.
- Public Comment?

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Public Meeting Minutes RSA 91-A:2

- Minimum required contents:
 - (1) the names of members, (2) persons appearing before the public bodies, (3) a brief description of the subject matter discussed, (4) state final decisions made, and, (5) state the names of the members who made or seconded each motion shall be recorded in the minutes.
- Made available within 5 business days.
- Posting requirements–
 - RSA 91-A:2, II-b(a)
- If the software used to conduct a remote meeting allows for recording, use it to aid the minute taker, but remember that recordings are not a substitute for written minutes.

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Nonpublic Sessions - RSA 91-A:3

It's a nonpublic session,
not a nonpublic meeting

A nonpublic session is
different from a "non-
meeting"

Nonpublic session is the
exception, not the rule

Nonpublic sessions are
permitted, not required
– **except when the
meeting is a "hearing"**
**and a person has right
to NP**

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When May a Public Body Enter Nonpublic Session?*

RSA 91-A:3, II

- Public employee (specific employee)
- Hiring (specific employee)
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

*Most common, but not complete list

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How To Enter Nonpublic Session - RSA 91-A:3, I



Motion to enter nonpublic session must be made and seconded.



Motion must state on its face the specific exemption relied upon.



Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

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RSA 91-A:3, II (a) Dismissal, Promotion, Compensation, Discipline, Investigation of Charges Concerning a Public Employee

- Must concern a particular municipal employee – not a grouping of employees or a department
- This provision states that the meeting must be held in public if the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
 - Thus, the “right to a meeting” refers to some written rule entitling the employee to a public airing of the matter under investigation.
 - By way of example, under RSA 41:48, an appointed police officer cannot be removed from office unless she is provided notice and a public hearing before the governing body.
 - Similarly, under RSA 202-A:17, no public employee of a public library can be removed from employment unless they are provided written notice and a public hearing on their removal if requested.

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RSA 91-A:3, II (c) Matters Which, if Discussed in Public, Would Likely Affect Adversely the Reputation of Any Person, Other than a Member of the Public Body Itself

- The harm to reputation must be severe and not trivial
- The claim of reputational harm cannot be asserted by a member of the public body that is convening the nonpublic session
- Person who might suffer the reputational harm can nevertheless request an open meeting
- This exemption extends to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant
- Notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected. *Sivalingam v. Newton*, 174 N.H. 489 (2021)

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Minutes of Nonpublic Sessions



Minutes must be kept—same as for public session.



Must “record all actions in such a manner that the vote of each member is ascertained and recorded.”

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Conducting the Nonpublic Session

May make decisions in nonpublic session

Member objecting to violations—note objection. If board persists, objecting member may continue to participate without being subject to penalties

RSA 91-A:2, II-a

Returning to public session

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Other Considerations

Include nonpublic session on posted agenda

Timing—beginning or end of meeting?

Attendance by non-members

- Legally, there is no limit on who may be permitted to attend a nonpublic session. However, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

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Disclose or Seal?

Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:

- Disclosure would have adverse effect on reputation;
- Disclosure would “render the proposed action ineffective”; or
- Discussion in nonpublic session pertained to terrorism.

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New Law: HB 108 Maintain List of Nonpublic Meeting Minutes

Effective January 1, 2022

List of sealed nonpublic meeting minutes must:

- Identify the public body
- State the date & time of the nonpublic session
- State the exemption for the nonpublic session
- State the date of the decision to seal the minutes
- State the date of any subsequent decision to unseal minutes

➤ Minutes sealed under RSA 91-A:3, II (d) (sale or acquisition of real or personal property) “shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction.”

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Review of Previously Sealed Minutes

- RSA 91-A:3, IV - Effective October 3, 2023 (HB321)
 - New section imposes a statutory obligation to review all previously sealed nonpublic session minutes every 10 years to determine whether basis for sealing still present (*i.e., divulgence would still cause harm to reputation, or render the proposed action discussed ineffective, or pertain to thwarting a terrorist attack*).
 - For “archived” or minutes sealed prior to 10/3/23, statutory obligation to review the previously sealed nonpublic meeting minutes or unseal.
 - Failure to review “archived” minutes by October 3, 2023, or all minutes every 10 years, requires automatic disclosure regardless of reason of original sealing

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EFFECTIVE MEETINGS, FREEDOM OF SPEECH & CIVILITY

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Tips for Effective Meetings



- Preparation = more effective meetings
- Do you have rules of procedure?
- Agenda
- Circulate materials in advance
- Read packet, think about comments and questions in advance
- No discussions prior to/outside meeting!

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Rules of Procedure: Basic Content

Regular Meeting Day, Time & Location

Annual Election of Officers

Authority of Presiding Officer/Chair

Duties & Privileges of Board Members

Quorum & Voting

Agenda for Board Meetings

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Rules of Procedure: Basic Content (cont.)

Order of Business at Board Meetings

Meeting Procedure and Decorum

Procedures for Public Hearing, Public Comment

Right-to-Know Law

Committees/Liaisons/Appointments

Enactment of Ordinances, Resolutions & Motions

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Setting the Agenda

- Not mandatory, but effective tool for organization and keeping things on track
- Not required to be posted with notice
- Have procedures in place to allow for all members to have a say in agenda setting
- You are not strictly bound to the agenda, but it can be helpful in controlling what the public is allowed to bring up at the meeting
- The agenda is not to be used to silence certain topics or opinions!

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Conducting the Meeting

Timing

- Be and start on time

Chair

- Chair's responsibilities

Rules

- Set ground rules

Focus

- Stay on topic

Be mindful

- Don't forget the minute-taker

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Meeting Decorum



ALL EYES ARE ON YOU



PAY ATTENTION!



ELECTRONIC MEDIA
USE DURING MEETINGS

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Riggins' "Don'ts"



Don't mingle with friends, acquaintances, unknown applicants or objectors in the audience before the meeting & during a recess period.



Don't indicate by word or action how you intend to vote during the portion of the hearing devoted to presentations.



Don't interrupt a presentation until the question period, except for very short and *necessary* clarifying remarks or queries.



Don't use first names in addressing *anyone at all* during the course of the hearing.



Don't try to make the applicant or any other person appearing before you look like a fool by the nature of your questions or remarks.

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Riggins' "Do's"



Do rotate the seating in some regular manner each successive meeting to prevent a "strong" member from gradually dominating a "weak" member.



Do sit down and have a long soul-searching session with yourself if you find you are consistently "out in left field," that no one seems inclined to second your profound motions, and that you are quite often a minority of one.

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Dealing with (Sometimes Difficult) People



Listen actively



Stay calm



What you say & *how* you say it



Apply rules of decorum/procedure
evenly

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Public Comment

- No right to speak in meeting, unless you give it to them (remember hearings are different)
 - *Under RSA 189:74, **school boards** are required to provide opportunity for a minimum of 30 minutes of public comment at all meetings **except** those involving only non-public issues, and emergency meetings under 91-A:2, II*
- Establish & explain rules, apply consistently
- First Amendment: Many restrictions are not acceptable!
- Maintain control & order
 - Removal?



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1st Amendment Cases

- ***Dayton v. Estari (Ohio)***- Regulation of “expressive conduct” not permissible unless it is accompanied by other impermissible conduct.
- ***Norse v. City of Santa Cruz***- Government officials in America must occasionally tolerate offensive and irritating speech.
- ***Cohen v. California***- Citizens have the right to express their opinions and criticisms, even if the speech is foolish and without moderation.

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Civility v. Protected v. Disruptive

- **Civility:** *formal politeness and courtesy in behavior or speech.*
- **Civil discourse:** *“the free and respectful exchange of different ideas. It entails questioning and disputing, but doing so in a way that respects and affirms all persons, even while critiquing their arguments.”*
- **Incivility not to be confused with Unprotected Speech or Disruptive Speech**
- Protected speech can be disruptive, uncivil speech can be protected, civil speech can be disruptive
- *Barron v. Kolenda*, 491 Mass. 408 (2023)
 - “Although civility can and should be encouraged in political discourse, it cannot be required.”
 - Held unconstitutional Southborough, Mass select board meeting rules that:
 - required speakers to “act in a professional and courteous manner”
 - required “[a]ll remarks and dialogue ... be respectful and courteous, free of rude, personal or slanderous remarks”
 - declared that “[i]nappropriate language and/or shouting will not be tolerated”

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Civil v. Uncivil

CIVIL	UNCIVIL
Treating opponents with the respect with which you wish yourself (or your mother) to be treated	Insulting, berating or otherwise being disrespectful to those who don't hold your position
Assuming that - and treating - a person holding an position different than yours as simply having different opinions as to the best course of action	Treating a person with a different opinion than yours as having improper motives
Addressing and challenging the opposing argument	Attacking the person making the opposing argument
Providing valid counterarguments and supporting your own with reason and objectively true information	Dismissing opposing viewpoints out of hand, spreading disinformation or merely trolling (provocative comments to incite emotional fracas rather than discussion of ideas)
Adhering to the meeting rules	Disrupting the meeting by interrupting, disrupting or otherwise ignoring the meeting rules

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Out of Order Speakers & Disruptive Attendees

- State v. Dominic, 117 N.H. 573 (1977). Selectboard member can be criminally prosecuted for disorderly conduct after ignoring chair's rulings and continually interrupting meeting.
- In State v. Comeh, 130 N.H. 688 (1988), upheld disorderly conduct conviction of protester who caused 90 second delay of opening of NH gubernatorial inauguration.
- State v. Jeffrey Clay, Case No. 2018-0184 (2019, N.H. S.Ct.) unpublished order), affirmed convictions for disorderly conduct and resisting detention after repeated refusal to comply with select board's public comment rules.
- Baer v. Leach, (2015, U.S. Dist. Ct., Dist. N.H.). Police officer did not violate rights of individual arrested and charged with disorderly conduct after being warned three times to cease interrupting meeting. (Note the state court had dismissed the disorderly conduct charge.)

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Out of Order Speakers & Disruptive Attendees

PROCEED CAREFULLY

- Removal is on the surface antithetical to right of free speech, and the attend open meetings,
- Decision to remove a person from a meeting should be taken and carried out with due care.
- Disruptions must be actual, not constructive, technical or anticipatory (i.e., a perception comments could cause a disruption after the fact).
- Meet with officer or Chief before the meeting;
 - Discuss meeting rules;
 - Discuss cues and steps before invoking removal power.

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