

PUBLIC MEETINGS DURING EMERGENCIES ACT
MEMORANDUM

TO: UNIFORM LAW COMMISSIONERS

FROM: Mark Glaser
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RE: Issues Memorandum for Proposed Model Law on Public Meetings During Emergencies

INTRODUCTION

The COVID-19 pandemic highlighted the need for public bodies to have the meet remotely when emergencies make in-person meetings impossible or inadvisable, as well as the need for rules that assure that virtual meetings of public bodies comply with applicable laws that provide for public observation and participation. The Public Meetings During Emergencies Act is intended to provide a statutory framework that will enable public bodies to meet when emergencies occur. The Act builds on existing state laws authorizing the declaration of emergencies and subjecting public meetings to procedural and public access requirements. It is intended to work in harmony with those laws, particularly open meetings and other laws providing for public comment on or participation in the deliberations of public bodies.

During the COVID-19 pandemic, many governors included within their declarations of emergency measures suspending laws concerning the meetings of public bodies, such as those governing the location of meetings and public access and participation, and authorized virtual meetings. Some of the executive orders included provisions intended to create public access and participation rights in virtual meetings comparable to those applicable to traditional in-person meetings. A handful of states also enacted legislative authorizations for virtual meetings, although some of these are temporary measures set to expire at the end of this pandemic. The result, however, has been a patchwork of varying rules concerning the procedure for such meetings and uneven protections of public access and participation.

The overarching purposes of this Act are to provide the states with a uniform approach, consistent with each state's needs and practices, which will enable public bodies to continue to function during emergencies that prevent in-person meetings, and to protect the interests of the public in observing or participating in those meetings to the

maximum extent practicable. Drawing in part from the executive orders issued and legislation adopted in response to the pandemic, this Act provides a statutory basis for virtual meetings during an emergency conditioned on compliance with requirements intended to assure the effective functioning of the meetings and the public access and participation comparable to that required for in-person meetings.

STRUCTURE OF THE ACT

Section 2, the Definitions section, ties this Act to other state laws. “Emergency declaration” is defined in terms of other statutory authority – federal, state, or local – for the declaration of an emergency. “Meeting” and “public body” are defined with respect to the state’s open meetings law. As we discussed at the 2021 Annual Meeting, in the absence of a consistent and generally accepted definition of “public body” across the states, this seemed the best way to reach the variety of public bodies that hold public meetings. The definition also excludes the legislature, legislative agencies, and the courts unless the state chooses to include them.

The definition of “virtual meeting” provides for the coverage of hybrid meetings – that is, those where some members of the public body are physically present at the meeting site and some are participating remotely – as well as meetings in which all the members of the body are participating by electronic means. The question of whether to cover hybrid meetings was discussed at some length by the committee. We determined that in some emergencies it might be possible for some members of the public body to y meet safely in the normal physical location of the body’s meetings even if others cannot, and it would be desirable to cover those meetings.

Section 3 was added after the 2021 Annual Meeting and replaces the Savings provision (section 12 in the 2021). It addresses the scope of the Act. It confirms that the Act only applies while an emergency declaration is in effect, and that it does not limit or supersede any other law authorizing a member of a public body to participate remotely, whether or not an emergency is in effect.

Section 4 provides the authorization for public bodies to meet virtually during an emergency and provides that an action taken at a virtual meeting that complies with the Act have the same effect as an action taken at an in-person meeting. This section creates a two-part test for authorizing a virtual meeting: there must be (i) an “emergency declaration” in effect and (ii) *either* (a) the declaration prohibits or limits or has the effect of prohibiting or limiting the public body from meeting in person, or (b) the presiding officer or similar authorized person of the public body determines that it is not “practical or prudent” for the public body to meet in person because of the emergency. The emergency declaration is an essential condition for a virtual meeting. If it precludes an in-person meeting then the public body has authority to conduct a virtual meeting. If the emergency declaration does not clearly preclude an in-person meeting, then the presiding officer of the public body – or someone with similar authority – must take the extra step of determining that due to the emergency that public body should not meet in person, and

must communicate that determination to the members of the public body.

Sections 5 through 8 establish the conditions a virtual meeting must satisfy for the actions of a public body taken at such a meeting to be valid. Section 5 addresses the conduct of the meeting from the perspective of the members of the public body. Sections 6 and 7 address public observation and participation. Section 8 addresses notice requirements.

- Section 5 expresses a preference for holding virtual meetings in such a manner that members of the body who attend may contemporaneously see and hear their fellow members. The Act recognizes, however, that it may not always be possible for all members of the committee to have visual access to the meeting and therefore provides that audio communications between the members of the body may be sufficient under the circumstances set forth in this Act.
- Section 5 also addresses access to a virtual meeting by people with disabilities. It directs that the public body shall to the extent practicable select technology for the virtual meeting that is compatible with assistive technology commonly used by people with disabilities and facilitates the accommodation needs of people with disabilities. This provision, section 5(a), was added after the 2021 Annual Meeting and it reflects the input of observers from the disability community.
- Section 6 provides that public bodies subject to the open meetings (or similar) law of the jurisdiction must enable the public to observe the public meeting if that would be required by the open meetings law. The section requires the public body to enable the public to see and hear the meeting as it proceeds, but recognizes that if the public body is using audio-only access to conduct the meeting, public observation may be limited to hearing the meeting.
- Section 7 addresses public participation in the virtual meeting of a public body if that would have been required for an in-person meeting of the public body. In the draft submitted to the 2021 Annual Meeting, public participation was addressed in two sections: the first dealt with compliance with laws permitting members of the public to submit written or oral comments; the second with quasi-adjudicative situations, such as a zoning board meeting or a licensing proceeding, where some members of the public have a due process right to participate, including the right to present evidence or examine witnesses. This section combines both of those sections, although the different forms of participation are recognized in different subsections – subsections (a) and (b) address public comment, and subsections (c) and (d) address participation that includes presentation of evidence and examination of witnesses. The issue of whether due process requirements can be fully

satisfied at a virtual meeting is a difficult one. The committee determined, and provided in the Act, that a public body, upon a finding entered into the record, has the power to take action in such a matter over the objection of the person whose interest is being considered.

- Section 8 addresses those notice requirements specific to a virtual meeting, including notice that the meeting will be virtual, the technology that will be used, and the means for public observation under section 6 or public participation under section 7. Section 8 functions in conjunction with existing state or local requirements for notice of public meetings and hearings.

Section 9 provides public bodies with rule-making authority to adopt rules for the conduct of a virtual meeting. Section 9 authorizes rules to address such issues as how the public body in emergency circumstances will inform members of the public that a meeting will be held virtually; how the public body will make materials presented at meetings available to the public; how technological issues that arise during meetings will be addressed; and how the public body will ensure that disabled citizens have a means to access the meetings. Rules are also authorized to establish procedures for objections to proceedings based on a denial of due process rights. Although it is likely that most public bodies would have the authority without this provision to adopt these and similar rules under their general authority to govern their own meetings, the committee thought that a statutory grant of rule-making authority that refers to these issues would signal the desirability of adopting such rules without mandating them.