



This article is based on a presentation by Nicole M. Schuster, Deputy Attorney General, Office of the Indiana Attorney General, at the 2017 FSBPT Annual Meeting.

Due Process and the Digital Age: Using Technology in Board Work

Technology allows for virtual board meetings and hearings, but there is a dark side that can land board members in hot water if they do not proceed with caution. Some states spell out either in statute, regulations, or enabling acts for their licensing boards how technology should or shouldn't be used. Others are virtually silent on the virtual world. In all cases, when in doubt, consult your counsel.

Some of the issues that should be considered when using technology are providing public notice for a remote meeting, roll call votes vs. voice votes, quorums, connectivity, closed or executive sessions, public participation and access, recording the meetings, meetings vs. hearings, and serial meetings.

It's All about Transparency

There was a huge push for more transparency in government from the 1950s through the 1970s, resulting in the Federal Freedom of Information Act, or FOIA. Nearly every state and jurisdiction has their own FOIA-like laws now too. Most states and jurisdictions also have open door or public access laws, which gives the public the right to attend public meetings of governmental boards. Together, these laws allow the public to attend meetings of government bodies and obtain documents generated by the government.

Technology is a tool that can enhance these goals — by allowing board members to attend meetings remotely, for example. But if used improperly, it can lead to several pitfalls. Case law on remote attendance began in 1992, when teleconferencing was in its infancy, with a case involving the Pennsylvania Milk Board. Some cases in Illinois also occurred in the 1990s and a Maryland case in 2011 cited both the 1992 Pennsylvania case and a 1996 Illinois case, providing a direct line of case law crossing jurisdictions adopting the same reasoning.

Some states have a qualifier or some special quirk that occurs if a board member connects remotely. For example, some states require a remote board member to be equally audible to the participants.

Some states also may require that a meeting notice indicate if any members are participating from a remote location. Some even require the remote location to be publicly

accessible, such as a meeting room in a public library. Georgia's notification rules are especially elaborate, probably due to problems that had occurred in that jurisdiction.

Indiana doesn't have a notification provision, which led to one board allowing a member to connect from Cancun. The line was as clear as a bell. Board members — and the audience — could hear the wind rustling in the palms. They could hear the birds squawking and the waves on the beach. And they could hear the ice cubes clinking in his glass. He was drinking iced tea, but the jokes started anyway. The attorney quickly shut down the jokes. It was not a legal problem, but it was a decorum problem. There was an appearance of impropriety.

How Meetings are Run is Affected by Technology

Roll call voting is often a requirement when a member participates remotely. Even if the regulations do not expressly require a roll call vote, it can be a good idea. On a voice vote with everyone in the room voting “aye,” sometimes the remote participant is lost in the cacophony of those in the meeting room. For that reason, some states have incorporated a requirement of roll call votes if any of the members of the board participates electronically.

Boards also can't take any action unless they have a quorum. States differ on the definition of a quorum if some members participate electronically. Indiana is interesting because the body itself votes and decides whether or not the person participating remotely counts as a member of a quorum. It also notes that some members must be present physically. If some members are participating remotely, there must be some members in a noticed physical space participating in person.

On connectivity, some jurisdictions state in their statutes that if connectivity fails, the meeting has been held improperly. Some states also have explicit provisions allowing or disallowing participation by electronic means in a closed or executive session. The reason for disallowing electronic participation is the states have deemed the topics too delicate. Because of that, if there's no express permission in a board's code, they need to be very cautious and talk to counsel beforehand.

Generally, states with a code allowing for electronic meetings have a provision that require accommodation for public participation. There's often a requirement there must be a physical site so members of the public can go to it. Sometimes, a member or two are required at that physical site.

Who Can Record Your Meetings?

States regulate the public's ability to record meetings as well. Many states have passed regulations or statutes that allow for the board to pass some reasonable rules to keep this recording in line, and many states have a provision that closed or executive sessions are still off limits.

Boards need to keep in mind that laws change. In Montana, until October 1, it was only accredited press representatives that could record. After October 1, the law allowed anyone to record. You don't have to be a member of the press, which is a significant change.

Rules regarding the official recordings of board meetings via technology vary from jurisdiction to jurisdiction. In Washington, DC, for example, a teleconference must be recorded. The way boards record the meeting also can affect how long the recording must be kept. If boards in Nevada make an audio recording of a meeting, or cause it to be

transcribed, the audio recording or transcript must be retained by the body for one year after the adjournment. But if only minutes are taken, they must be held for five years and then they go to the state archives.

How the recording was made and its purpose defines how long the body has to hold on to it and whether or not it goes to state archives. New York requires, if at all possible, for public bodies to live broadcast. It is then posted on their websites.

Let the Sun Shine in

Board members using technology at meetings is a big deal. There is no question technology is now essential to appropriate board work. But the use of electronic devices can have profound legal consequences. The time, place, and manner of the devices board members use can be factors in whether the use is proper or improper, or subject to preservation and disclosure under the state's Sunshine laws. DC law states: "Email exchanges between members of public body shall not constitute an electronic meeting." But that's not true everywhere.

An Illinois court ruled that Illinois city council members' communications on their personal electronic devices during a public meeting on the subject of the public meeting are subject to disclosure under Illinois' FOIA. The law arose because members of a council apparently were chatting away on their cellphones during their meeting. They clearly were communicating to each other, because eye contact was made. The suspicion of impropriety arose, that they were discussing how they were going to vote and were establishing a voting block. That is definitely pertinent to the matter under discussion and that most definitely should be disclosed.

California's supreme court recently ruled that public employees' exchanges on their personal devices relating to work can be a public record.

When board members use their technology at meetings, they need to consider efficiency, obviously, but consider not only actual impropriety, but the appearance of impropriety. They need to be reminded that the material they're generating may be subject to disclosure under the Sunshine laws.

President Trump has been scrutinized and criticized for commenting on jurisprudence issues on Twitter. Board members need to be careful on social media that they do not do the same. A licensing board member who posts on Facebook, "Oh, that person should definitely have their license revoked. It's just horrible. I can't believe a physical therapist would act like that," is raising the specter of impropriety.

Be Extra Careful When Conducting a Hearing

Special consideration must be made when the board is conducting a hearing, as opposed to a meeting. Alabama, Nevada, and South Carolina are among the states that have put considerable thought into regulating hearings. Due process protections apply once boards go into a hearing format, and those are: notice, a meaningful opportunity to be heard and a meaningful manner of being heard, as well as a fair and impartial decision-maker. All three can be impacted once technology has started to change the format of the meeting.

The manner of how you work with someone in conducting an electronic teleconference hearing can affect due process concerns. In an employment case out of DC, whoever was

calling in to set up the teleconference hearing couldn't get past the receptionist. The receptionist didn't know what was going on, and apparently, the board member just hung up on the receptionist. They defaulted the fellow. On appeal, the court said, "That's not fair. You have to be more open and disclosing, you have to fight your way past a receptionist who has no clue what's going on."

On the issue of opportunity to be heard, technology can make holding hearings in a meaningful time so much easier. But it can make the evaluation of evidence difficult. If a licensee walks in with a pile of documents, is the board going to have a scanner ready to go? Will the remote participating board member in Cancun be able to access these documents? In at least one case, a board just couldn't get the documents through and they had to be read into the record. And the licensee was fine with it and said it was adequate, but it was not an ideal situation.

Three-dimensional evidence raises its own concerns. If someone walks in with an architectural model, a text to the remote participating member's cellphone may not be adequate.

Demeanor evidence has also been addressed by at least one court. In a 2015 Nebraska case, Melanie M objected to the fact that she was only allowed a teleconference hearing on her SNAP benefits. She didn't have a face-to-face confrontation. And the court said that the risk of erroneous deprivation was not so great, that a face-to-face hearing at a local office was not constitutionally required. But that's for SNAP benefits. What if a licensee is looking at revocation of the way they've earned their livelihood for 25 years? There is a spectrum of due process and boards must guess before they are in a situation that doesn't have rules that directly apply to it. Again, in such cases, boards should consult counsel before proceeding.

Most statutes are silent about remote participation by other parties, including witnesses. Due process and evidentiary concerns can drive whether or not this should be allowed and the individual case may determine whether it's allowed. A case out of Pennsylvania is an interesting example. This was a case of a podiatrist who had killed his wife. He was released from jail and went to the podiatry board and said, "I want my license back. I've been rehabilitated. The code says I had my period of rehabilitation, I've been rehabilitated. I should be a podiatrist again." The board was nervous about that. When he appeared at his hearing, he said he wanted six people from Western Pennsylvania to dial into the hearing in Harrisburg and give character evidence. And the hearing officer said, "No. There's no statutory scheme to allow this."

The Board on Judicial Review upheld the hearing officer's decision based on a lack of any statutory scheme, the dangers of witnesses not being who they say they are, referring to documents that aren't in evidence, and no demeanor evidence. Therefore, the hearing officer did not abuse her discretion in denying petitioner's motion. This is a case where it seems self-evident to a turnip. He's not going to get his license, this is not a big deal. What if it had been a scope of practice case and the licensee was a lot more sympathetic? Perhaps the witness with a requested dial-in is in a nursing home. Good judgement is difficult but necessary.

There is also a danger of board members looking up externally sourced material when they are supposed to be evaluating the evidence from the parties. There was a case where a

board decided to fine a licensee \$1,000. The licensee indicated he can't afford the fine. Suddenly, one of the board members says, "You know, I'm looking at pictures of your shop and I think a \$1,000 fine is just going to roll off you like water off a duck's back." He had looked at the website of the licensee's shop, determined there was very pricey equipment in there, that clearly this fellow was doing just fine financially, and made a judgment on evidence that wasn't presented.

Sources of guidance about how board members should use electronics and the concerns that might arise from it can be found in your state's Ethics Code, often your Code of Judicial Conduct. Even if it doesn't directly apply to a board member when they're acting as an administrative law judge or a hearing officer, it can still provide very valuable guidance. Boards should also use common sense and common courtesy.

Be Serious about Serial Meetings

Many states are passing laws about serial meetings and how and when electronic communications can be considered serial meetings. To put it in historical context, as soon as the Sunshine laws started, people started trying to find ways to do an end run around them, because business had always been conducted in a smoky back room. The attitude was, just because we're trying to put some sunshine into that smoky back room, we're not giving up our smoky back room. The concept of serial meetings started to become popular. Serial meetings are defined as, "applying to the efforts to intentionally avoid a public meeting with a quorum by discussing public meetings in multiple sub-groups." And that can be small meetings with perhaps less than a quorum. It can be telephone calls, or it can be email exchanges.

In one Florida case, a school board was considering redistricting. Board members knew it was going to be contentious. They therefore decided to have small, non-quorum meetings. The district superintendent attended each one to ensure they were all on the same page before voting at the board meeting to avoid discussion and fireworks from the public. The board was sued and the Florida Court of Appeals ruled it was an intentional effort to circumvent the Sunshine law.

Another case involved the University of Michigan Board of Regents. The university needed a new president, which entails a lot of effort and public meetings. Instead, they appointed a member of the Board of Regents to go out and just do some fact-finding among the various stakeholders. And he's quoted in the paper saying that he's talking to a bunch of people, calling, doing a bunch of visits, to find out what everybody's thinking. Booth Newspapers called them on it, saying the deliberations must be conducted in public. It's an incredibly inefficient process, to be sure, but it allows for transparency and participation in government by the governed.

Alabama has taken a different route, stating in statute that small, non-quorum meetings "involving a search to fill a position that directs the institution or a department or a major division thereof, including the position of President, Vice President, Provost, Dean, Department Head, or Athletic Coach, is not a serial meeting."

On the other side of the spectrum is Tennessee. Most states require intent to circumvent the law. In 2009, however, a Tennessee court held, "We do not believe that an intention to circumvent the act is necessary to find a violation." In other words, if you did it and it comes out, you violated it.

The Bottom Line

The takeaway is that if you're engaged in meetings or hearings, look at what your statutes say. Is it a closed or executive session? Look at your statutes again. Be guided by common politeness, common sense. And when you're in doubt about if what you're doing is legal, talk to your counsel before you do it.



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