

**GOVERNMENT
IN-SUNSHINE-LAW
UPDATE 10-8-13 ©
Manasota League of Cities**

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The opinions and ideas expressed in this presentation are solely those of Robert D. Pritt, & do not reflect opinions or positions of Roetzel & Andress, A Legal Professional Association.

SUNSHINE

- **SUNSHINE IS SERIOUS BUSINESS**
- **IS IN THE FLORIDA CONSTITUTION**
- **IS IN STATE STATUTES**

Florida Constitution
Statement of Law:
Article I Sec. 24 (b) (2002)

**All meetings of any collegial body of...[a]
municipality...at which official acts are to be
taken**

OR

**At which official business is to be transacted or
discussed,**

Shall be open and noticed to the public...

Florida Statutes

s. 286.011

Statement of Law:



All meetings of any Board or commission of any...municipal corporation... at which official acts are to be taken are declared to be public meetings open to the public at all times...

Florida Statutes

s.286.011

Statement of Law:

- **The board or commission shall provide reasonable notice of all meetings.**
- **No Resolution, Rule, or Formal Action shall be considered binding except as taken or made at such meeting.**

Florida Statutes

s.286.011

Statement of Law:

- **Minutes...of a meeting...shall be promptly recorded...**
- **Such records shall be open to public inspection.**
- **Circuit courts...have jurisdiction to enforce.**

Interpretations:



Members of the **SAME PUBLIC BODY** may **NOT COMMUNICATE** with each other concerning **MATTERS** which may **FORESEEABLY** come before the body, except in an **OPEN MEETING**

“Same Public Body”

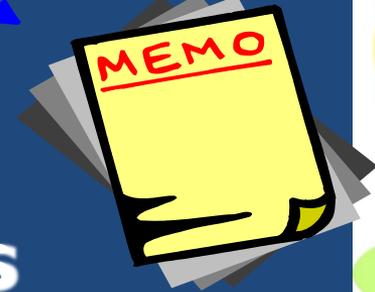
- DELEGATION OF DUTIES
- If power & authority is **delegated** to a committee or individual, that entity or person must act in sunshine also.
 - Ad hoc advisory committees
 - Executive Director or staff
 - Search firm
 - Bid/Proposal Review Committee

Communicate means:

- Any "gathering" whether formal or informal between any two or more members



- Memoranda/Letters



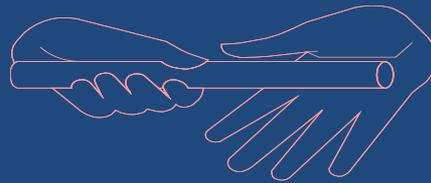
- Telephone conversations



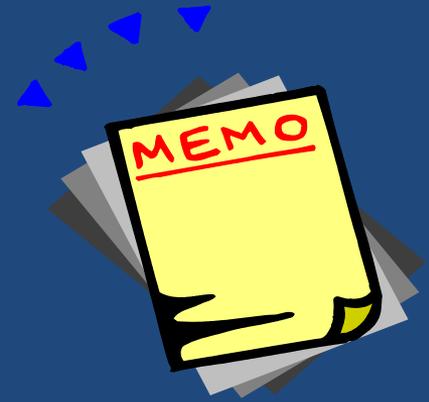
- Electronic media

You've Got Mail

- Intermediaries



“Communicate”



- **Rules for Use of Memoranda:**

Member may:

- Send memo to other members outside of meeting.

Member may not:

- Request Response outside of meeting
- Respond to a memo from another member outside of meeting.

“Communicate”

- Telephone
- E Mail
- Social Media
 - Texting
 - Facebook
 - Linked In
 - Twitter & Many Others



“Communicate”

Most prevalent source of sunshine violations:

Face to Face Conversations

Second most prevalent:

E-Mail

“Communicate”

Intermediaries or Liaisons

- Daisy-Chaining
- Attorney-Senior staff
 - Never ask what another member said
 - Polling—Is violation
- Members of Public?
- News Reporters?
- News Letters?

SOCIAL MEDIA

- NEW
- AGO 2009-19
- Communications on government Facebook page may be subject to Government in Sunshine Law.
- Board members may not use government's Facebook page in discussion of matters that foreseeably will come before the Board.

“Communicate”

- Social Media and Sunshine Law
- See Attorney General: Update Florida Rules on Retention of Electronic Communication
- AG Website 3-17-10 myfloridalegal.com
- AG Social Networking Video myflsunshine.com

“Matters before the public body”:

- **INCLUDES:** Matters which may come before the body in foreseeable future
- Matters which may come back in foreseeable future

Agenda Items...



Exceptions:



- **FACT FINDING** committee or mission
- **EDUCATIONAL** or training session
- **REAL PROPERTY** negotiations*
- **LITIGATION** discussions
- **LABOR**
- **SECURITY**

FACT FINDING COMMITTEE

- ONLY APPLIES TO ADVISORY COMMITTEES, NOT TO ULTIMATE DECISION-MAKERS
- AGO 6-10-10 INFORMAL OPINION
- FINCH v. SEMINOLE COUNTY SCHOOL BOARD (5th DCA 2008)
- Held: Board members could not take fact-finding tour of district even if they sit in different bus seats and do not discuss business.

FACT FINDING

Committee

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FACT FINDING

- FACT-FINDING ONLY--INFORMATION GATHERING AND REPORTING ONLY
- IF COMMITTEE CAN ALSO MAKE RECOMMENDATIONS, IT IS SUBJECT TO SUNSHINE LAW

EDUCATIONAL or TRAINING SESSIONS

- MUST STILL TAKE CARE TO AVOID DISCUSSION OF ANY MATTER THAT MAY COME BEFORE THE BODY IN THE FORESEEABLE FUTURE

REAL PROPERTY NEGOTIATIONS *

- OPTIONAL PROCEDURE FOR PURCHASE OF REAL PROPERTY AND HAVING OPTION EXEMPT FROM PUBLIC RECORDS LAW
- DOES NOT PROVIDE EXEMPTION TO SUNSHINE LAW
- SEE 166.045

LITIGATION DISCUSSIONS

- 286.011 (8) F.S.
- STRICT LIMITS
- PENDING LITIGATION
- ENTITY A PARTY
- SETTLEMENT NEGOTIATIONS OR STRATEGY RELATED TO LITIGATION EXPENDITURES
- ONLY ENTITY ATTORNEY & MANAGER MAY ATTEND WITH PUBLIC BODY

LITIGATION DISCUSSIONS

- RISK MANAGEMENT PROGRAM
- 768.28 F.S.
- CLAIMS & COMPROMISES EXEMPT FROM SUNSHINE AND PUBLIC RECORDS UNTIL END OF LITIGATION
- MAY BE OTHER EXCEPTIONS SUCH AS HIPAA

LABOR NEGOTIATIONS

- COLLECTIVE BARGAINING BETWEEN CITY MANAGER AND UNION ARE IN SUNSHINE
- DISCUSSIONS BETWEEN CITY MANAGER AND COMMISSION OR COUNCIL ARE EXEMPT
- See 447.605 F.S.

SECURITY

- DISCUSSIONS AND RECORDS CONCERNING SECURITY SYSTEMS AND PUBLIC PROPERTY ARE EXEMPT FROM SUNSHINE
- RECORDS ARE CONFIDENTIAL
- INCLUDES FEDERAL HOMELAND SECURITY

Special Problem Areas—Speaking Engagements & Forums

- TWO OR MORE BOARD MEMBERS MAY BE IN ATTENDANCE
- ONE OR MORE MAY BE A SPEAKER
- MORE THAN ONE MAY GIVE OPINION
- BUT CANNOT ENGAGE IN DISCOURSE **BETWEEN** EACH OTHER



Court Interpretations:

- Statute construed to **“FRUSTRATE ALL EVASIVE DEVICES”**
- Statute construed **“LIBERALLY IN FAVOR OF THE PUBLIC”**
- **EACH STEP** in decision-making process is an **OFFICIAL ACT**



Violations:

- Action taken is VOID
- Attorney's fees recoverable
- Unknowing violation--non-criminal infraction--\$500 FINE
- Knowing violation--\$500 FINE AND/OR 60 DAYS IN JAIL
- REMOVAL FROM OFFICE by Governor--extraordinary malfeasance



Alleged Violations

- Practical Consequences
- Negative Publicity
- Heightened Distrust
- Presumption of Violation in minds of constituents.

Recent Cases

- **SARASOTA CITIZENS FOR RESPONSIBLE GOVERNMENT v. CITY OF SARASOTA**
- **48 So. 3d 755 (Fla. 2010)**

Recent Cases (cont.)

Facts

- Bond Validation-Baltimore Orioles contract
- At least one e-mail correspondence, a comment was directly addressed from one Board member to another
- Sunshine lawsuit
- Public hearing for the reconsideration and ratification of the Interlocal Agreement

Recent Case (cont.)

- Asst. Manager consultations were not required to be in the sunshine
- (b) the one-on-one staff briefings of County Board members prior to the July 22, 2009 public meeting were not a violation of the Sunshine Law, and
- (c) any e-mail violations were cured by the Board's public meetings.

Recent Cases (cont.)

- Delegation

- Where the committee has been delegated decision-making authority, the committee's meetings must be open to public
- Advisory committees functioning as fact-finders or information gatherers are not subject to section 286.011.

Recent Cases (cont.)

Polling

Bullock, individually and assisted by other County staff, held one-on-one meetings in the two- or three-day period immediately preceding the Board's public meeting on July 22, 2009. These meetings were informational briefings regarding the contents of the MOU, where Bullock would also ask if the individual members had any questions about the MOU. There is no evidence that Bullock or other County staff communicated what any commissioner said to any other commissioner.

Recent Cases (cont.)

- E-mails

- From constituents to members of the Board were copied to other members and sometimes led to comments between Board members regarding the topic of bringing the Orioles to Sarasota for spring training. The last such e-mail exchange, which possibly violated the Sunshine Law, occurred on April 12, 2009.

Recent Cases (cont.)

Cure

- The Board conducted multiple public meetings subsequent to that April 12 exchange where the topic of Orioles spring training was discussed and considered. For example, on April 14, 2009, the Board publicly held meeting...
- On May 13, 2009, the Board publicly discussed stadium costs and financing and directed the County Administrator to proceed with negotiations.

Other hearings held.

Recent Enforcement

Governor Scott vs. Wauchula 2-5-11

EOG#11-28

Governor removed Commissioners from office for sunshine violations allegedly occurring months earlier even after criminal prosecution over and penalties (fines) paid and Commissioners re-elected to new term.

STATE ATTORNEY ENFORCEMENT

- UNLIKE OTHER ETHICS VIOLATIONS, SUNSHINE VIOLATIONS ARE NORMALLY INVESTIGATED BY LAW ENFORCEMENT &
- PROSECUTED BY STATE ATTORNEYS
- IF ONE THINKS ETHICS COMMISSION OR GOVERNOR IS SCARY, THINK ABOUT CRIMINAL PROSECUTION

RECENT ATTORNEY GENERAL OPINIONS

- AGO-2009-56
- USE OF **INTERNET** FOR DISCUSSIONS
- OK IF INFORMAL & OPEN TO ALL
- MUST BE AT A **MEETING** IF BETWEEN MEMBERS
- MUST BE **QUORUM IN ROOM** IN ORDER TO ALLOW ABSENT MEMBER TO PARTICIPATE BY PHONE

“Private” Non-Profits

- A **private** non-profit organization could be considered as a “**public agency**” for sunshine purposes and for public records purposes.
- News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser , 596 So.2d 1029 (Fla.,1992)
- **Totality of Factors Test**

Totality of Factors Test

- 1) level of **public funding**
- 2) **commingling** of funds
- 3) whether activity was conducted on **publicly-owned property**
- 4) whether services contracted for were **integral part** of authority's chosen decision-making process

Totality of Factors Test

- 5) whether corporation was performing governmental function or function which authority otherwise would perform
- 6) extent of authority's involvement with, regulation of, or control over corporation
- 7) whether corporation was created by authority
- 8) whether authority had substantial financial interest in corporation, and
- 9) for whose benefit corporation functioned

Totality of Factors Test

- 8) whether authority had **substantial financial interest** in corporation, and
- 9) for **whose benefit** corporation functioned

West Volusia I

Dominion & Control Test

- MEMORIAL HOSPITAL-WEST VOLUSIA, INC. v.
- NEWS-JOURNAL CORPORATION: 729 So. 2d 373 (Fla. 1999).
- For Sunshine purposes, must determine whether government had dominion & control over private non-profit

Delegation Test

- Is in West Volusia I & II.
- MEMORIAL HOSPITAL-WEST VOLUSIA, INC. v. NEWS-JOURNAL CORPORATION 927 So. 2d 961(5th DCA 2006)
- Delegation Test: Delegation of performance of public purpose to a non-profit could be similar to delegation of official acts.

RECENT ATTORNEY GENERAL OPINIONS (AGOs)

- Number: AGO 2011-01
Date: February 7, 2011
Subject: Sunshine/Public Records Law, nonprofit foundation
- 1. The Biscayne Park Foundation, Inc., is an "agency" for purposes of Chapter 119, Florida Statutes, and subject to the inspection and copying requirements thereof.**
 - 2. The Biscayne Park Foundation, Inc., is subject to and must comply with the requirements of section 286.011, Florida Statutes.**

s. 286.0114 (New 10-1-13)

- Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission
- The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition...

286.0114

...if the opportunity occurs at a meeting that is during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

286.0114

- Does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting.
- The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

286.0114

- Does not apply to:
- (a) An official act that must be taken to deal with an **emergency** situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act

286.0114

- (b) An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;
- (c) A meeting that is exempt from s. 286.011;
or

286.0114

- (d) A meeting during which the board or commission is acting in a quasi-judicial capacity.
- This paragraph does not affect the right of a person to be heard as otherwise provided by law.

286.0114 Safe Harbor

- (4) Rules or policies of a board or commission which govern the opportunity to be heard are limited to those that:
 - (a) Provide guidelines regarding the amount of time an individual has to address the board or commission;

Safe Harbor

(b) Prescribe procedures for allowing representatives of groups or factions on a proposition to address the board or commission, rather than all members of such groups or factions, at meetings in which a large number of individuals wish to be heard;

Safe Harbor

(c) Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or

Safe Harbor

(d) Designate a specified period of time for public comment.

(5) If a board or commission adopts rules or policies in compliance with this section and follows such rules or policies when providing an opportunity for members of the public to be heard, the board or commission is deemed to be acting in compliance with this section.

286.0114

- Remedies & Penalties
- Injunction I Circuit Court
- Attorney's Fees
- Action Voided

s. 286.0115

Access to Local Officials

- 1995
- After Jennings v. Dade County
- Jennings said ex parte (one-sided) communications (not in the public meeting) with a public official are presumed to be prejudicial
- Many land use hearings are “quasi-judicial, i.e., “like a judicial” proceeding

s. 286.0115

- Elements of Quasi-judicial hearing
- 1. Procedural Due Process Required=Notice and Opportunity to be heard
- 2. Law must be correctly applied
- 3. Decision must be supported by substantial, competent evidence IN THE RECORD at the hearing

s. 286.0115

- 4. The tribunal must be FAIR & IMPARTIAL (i.e., free of prejudice)
- Thus, lobbying of a quasi-“judge” is presumed prejudicial
- However, it has been customary for local officials to allow constituents to have full access to them or to “lobby” them

s. 286.0115

- Access to Local Officials Act is a compromise
- (1) Safe Harbor Provision
- A county or municipality may adopt an ordinance or resolution removing the presumption of prejudice from ex parte communications with local public officials by establishing a process to disclose ex parte communications...

s. 286.0115

...with such officials pursuant to this subsection or by adopting an alternative process for such disclosure. However, this subsection does not require a county or municipality to adopt any ordinance or resolution establishing a disclosure process.

s. 286.0115

(c) Any person not otherwise prohibited by statute, charter provision, or ordinance may discuss with any local public official the merits of any matter on which action may be taken by any board or commission on which the local public official is a member...

s.286.0115

If adopted by county or municipal ordinance or resolution, adherence to the following procedures shall remove the presumption of prejudice arising from ex parte communications with local public officials

s. 286.0115

1. The substance of any ex parte communication with a local public official which relates to quasi-judicial action pending before the official is not presumed prejudicial to the action if the subject of the communication and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter.

S. 286.0115

2. A local public official may read a written communication from any person. However, a written communication that relates to quasi-judicial action pending before a local public official shall not be presumed prejudicial to the action, and such written communication shall be made a part of the record before final action on the matter.

s. 286.0115

3. Local public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them. Such activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.

s. 286.0115

4. Disclosure made pursuant to subparagraphs 1., 2., and 3. must be made before or during the public meeting at which a vote is taken on such matters, so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to refute or respond to the communication. This subsection does not subject local public officials to part III of chapter 112 for not complying with this paragraph.

s. 286.0115

(2)(a) Notwithstanding the provisions of subsection (1), a county or municipality **may adopt an ordinance or resolution establishing the procedures and provisions of this subsection for quasi-judicial proceedings on local government land use matters.** The ordinance or resolution shall provide procedures and provisions identical to this subsection. However, this subsection **does not require** a county or municipality to adopt such an ordinance or resolution.

s. 286.0115

- The ordinance or resolution shall provide procedures and provisions identical to this subsection. However, this subsection does not require a county or municipality to adopt such an ordinance or resolution.

s. 286.0115

(b) In a quasi-judicial proceeding on local government land use matters, a person who appears before the decisionmaking body who is **not a party or party-intervenor** shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, and **may be requested to respond to questions from the decisionmaking body...**

s. 286.0115

- but need not be sworn as a witness, is not required to be subject to cross-examination, and is not required to be qualified as an expert witness.
- The decisionmaking body shall assign weight and credibility to such testimony as it deems appropriate.

s. 286.0115

A party or party-intervenor in a quasi-judicial proceeding on local government land use matters, upon request by another party or party-intervenor, shall be sworn as a witness, shall be subject to cross-examination by other parties or party-intervenors, and shall be required to be qualified as an expert witness, as appropriate.

s.286.0115

(c) In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decisionmaking body by application of ex parte communication prohibitions.

s. 286.0115

...Disclosure of such communications by a member of the decisionmaking body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decisionmaking body.

s. 286.0115

All **decisions** of the decisionmaking body in a quasi-judicial proceeding on local government land use matters must be supported by **substantial, competent evidence in the record** pertinent to the proceeding, irrespective of such communications.

s.286.0115

(3) This section does not restrict the authority of any board or commission to establish rules or procedures governing public hearings or contacts with local public officials.

Current & Future Trends

- “I think that is going to be the challenge for the next 50 years—how do we adapt old, established rules to **new technology**”—John Roberts, **Chief Justice of the United States**, address to Rice University in 2012.

Current & Future Trends

- McLuhan-The medium is the Message-1964
- Proof:
 - Twitter-2013
- Expect for Sunshine:
 - More attempts at evasive devices
 - Easier detection of evasive devices
 - No change in Florida Law
 - More prosecutions of Sunshine violations