



Linda Lyshol &lt;lysholl@branchdistrictlibrary.org&gt;

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## Virtual attendance at board meetings?

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**Membiela, Clare (MDE)** <MembielaC@michigan.gov>

Thu, Feb 1, 2018 at 9:45 AM

To: Linda Lyshol &lt;lysholl@branchdistrictlibrary.org&gt;, "michlib-l@mail.mcls.org" &lt;michlib-l@mail.mcls.org&gt;

Hello Linda:

Currently it is legal to have a board member remotely participate via telephone, Skype, etc. However, there have been, in the last few legislative sessions, bills introduced that would prohibit remote attendees from voting. The current bill on this issue is [HB 4184](#). The bills tend to get stalled in the process and not pass, however, it is likely that at some point this idea may become law.

The Open Meetings Act currently permits attendance and voting remotely, but is clear on the following caveats:

- Members attending remotely must be able to be CLEARLY seen and/or heard (depending on the method of attendance) by ALL participants – particularly members of the public.
- Members attending remotely should repeat their names or employ some other method when speaking in order to ensure that participants in the meeting (especially members of the public) fully understand who is speaking.
- All voting must be roll call votes in order to ensure that the public knows how each member votes.

Additionally, although there are no express prohibitions on this, it is generally thought that a **quorum should not be attained via remote participation**, and this practice is strongly discouraged.

If your board anticipates frequent remote participation, your board may wish to codify policies within the bylaws and stipulate a limit to the number of members that can attend remotely at any one time. Some library boards require prior notice to the board President of members willing to remote in. However, this is in the discretion of the board.

Here is a link to an article by the Clark Hill Law Firm on this topic that explains this well.

<http://www.clarkhill.com/alerts/open-meetings-act-update-informal-meetings-remote-participation>

Please don't hesitate to contact me if I can be of any assistance! I have also compiled an assortment of different Board policies on this issue and would be happy to send it to you if it would be helpful.

Thanks!

Clare

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**From:** [michlib-l-bounces@mcls.org](mailto:michlib-l-bounces@mcls.org) [mailto:[michlib-l-bounces@mcls.org](mailto:michlib-l-bounces@mcls.org)] **On Behalf Of** Linda Lyshol via Michlib-l  
**Sent:** Wednesday, January 31, 2018 4:23 PM  
**To:** [michlib-l@mail.mcls.org](mailto:michlib-l@mail.mcls.org)  
**Subject:** [Michlib-l] Virtual attendance at board meetings?

Hi, recently a trustee asked if it is legal to have board members attend virtually instead of physically. Obviously, this would not excuse physical presence at board meetings all the time, but simply for the times that the board member might be ill but not ill enough to have read the packet and be able to vote; it would be nice for them to leave their germs at home. There would, of course, be other reasons they might not be able to attend physically but, if possible, to attend virtually. Does anyone have an legal opinion on this or have a policy that I can look at? Thanks!

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# Legislative Analysis

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## **OPEN MEETINGS: PHYSICAL PRESENCE REQUIRED FOR VOTE BY MEMBERS OF ELECTED PUBLIC BODY**

Phone: (517) 373-8080  
<http://www.house.mi.gov/hfa>

**House Bill 4184 (reported from committee as H-1)**

**Sponsor: Rep. Lana Theis**

**Committee: Oversight**

**Complete to 5-22-17**

Analysis available at  
<http://www.legislature.mi.gov>

### **BACKGROUND:**

Generally speaking, it is understood that members of a public body currently can participate in meetings of public bodies by teleconferencing, interactive television, and similar means. An Attorney General opinion and a state Court of Appeals decision have allowed this in certain cases.]

### **SUMMARY:**

The bill would amend the Open Meetings Act. The act currently says, "All decisions of a public body shall be made at a meeting open to the public."

House Bill 4184 would specify that for a decision of a public body to be considered made at a meeting "open to the public," each member who votes must be physically present when casting a vote. This would only apply to a public body that consists entirely of elected members.

However, the following exceptions would apply:

- The provision would not apply to an emergency session under the statute or to a meeting to address critical personnel or infrastructure issues, if a delay could result in unnecessary or increased costs or liability to a local unit of government.
- The requirement to be physically present to vote does not apply to an elected member called for military duty.
- The requirement to be physically present to vote could be waived by the elective body for one meeting each year for each member if all of the following conditions are met: (1) the vote is cast through a video conferencing system; and (2) the absence is for good cause, including, but not limited, to a serious illness of the member or in the member's family or a death in the family.

The bill would take effect 90 days after being enacted.

MCL 15.263

**FISCAL IMPACT:**

The bill does not appear to have a significant fiscal impact.

**POSITIONS:**

According to committee minutes:

The Michigan Municipal League supports the bill. (3-16-17)

The Michigan Townships Association is neutral on the bill. (3-32-17)

The Michigan Association of School Boards is opposed to the bill. (4-27-17)

Legislative Analyst: Chris Couch  
Fiscal Analyst: Ben Gielczyk

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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# Open Meetings Act Update: "Informal Meetings;" Remote Participation

By Mark W. McInerney / May 02, 2016

A recent Court of Appeals decision regarding Open Meetings Act requirements for "informal meetings" of the University of Michigan Board of Regents, and continued questions about whether members of public bodies can participate in a public meeting "remotely," occasion this update.

## ***Detroit Free Press v University of Michigan Regents***

On April 26, the Michigan Court of Appeals issued a published opinion confirming that the Board of Regents of the University of Michigan is permitted to conduct "informal" meetings in private, without complying with provisions of the Open Meetings Act. The Court of Appeals affirmed a decision of the Michigan Court of Claims, which itself was based on a 1999 Michigan Supreme Court decision arising from a presidential search at Michigan State University. The *Free Press* has indicated it plans to appeal, and suggests that its plan all along was to ask the Supreme Court to revisit its 1999 decision in the *Michigan State* case in view of what it believes are new concerns about openness of public decision-making processes.

Although the Supreme Court's handling of this matter may be useful in revealing the Court's current thinking about the Open Meetings Act in general, the *University of Michigan Regents* case does not affect school boards or other non-university public bodies. The primary basis of the 1999 decision was the constitutional status and protection given to the governing boards of public universities in Michigan. Article VIII, Section 4 of the Michigan Constitution provides that "formal sessions" of university governing boards are to be "open to the public," thus implicitly suggesting that "informal" sessions need not be open to the public. Sections 5 and 6 of Article VIII provide that the university governing boards are to have general supervisory authority over the day-to-day operations of the universities. The Supreme Court in 1999 held that the determination of whether a meeting was "formal" or "informal" was up to the governing boards, and that any directive that "informal" meetings be open to the public would interfere with the boards' constitutional right to supervise their own operations. The Court of Appeals reaffirmed those conclusions in the current case. The discretion accorded public universities is unique. Other public bodies, including local school boards, do not have the ability to meet behind closed doors except under the specific conditions for a closed session permitted by the Open Meetings Act. This decision should thus have no effect on meetings of public school boards.

## ***Remote Participation at Board Meetings***

Passed in 1976, the Open Meetings Act did not fully anticipate the advances in communication that have occurred in the last 40 years. The Act is silent as to whether members of public bodies may participate in a meeting remotely, using electronic means. In a 1987 decision involving remote participation at a hearing (as opposed to a Board meeting), the Michigan Court of Appeals concluded that participation via teleconference was permissible where the public was able to hear comments by absent members, and particularly votes, using speaker phones. In his Open Meetings Act Handbook, Attorney General Schuette assumes that remote participation by Board members at meetings is permissible, recommending that when members are remotely participating any votes should be taken by roll call so there is no question how all members vote.

Since the Act is silent on this issue, and since some remote participation is generally regarded as acceptable, may all members of a Board participate in a meeting by teleconference? May a meeting take place with members of the public who attend looking at a telephone to which all seven Board members have called in from remote locations? In our view, proceeding in this manner would be unwise, would defeat the purposes of the Open Meetings Act, and would invite a court to step in to invalidate a meeting held under such circumstances. Commentators have generally recommended that at least a quorum of members be physically present, with additional members participating by teleconference. We agree with these views. We also recommend that board by-laws establish rules governing remote participation, requiring, in addition to the physical presence of a quorum, that a sound system be used that allows persons participating in the meeting to communicate with each other and persons attending the meeting to clearly hear the comments of members attending remotely, and that roll call votes be used exclusively when members are participating remotely.

During the last three sessions of the Legislature, consideration has been given to bills that would prohibit remote participation. Bills have come close to passage during the 2011-2012 and 2013-2014 sessions of the Legislature. During the current session, both houses of the Legislature in 2015 have passed by large margins similar but not identical bills that would largely forbid the practice. No effort has yet been made to reconcile the bills, so at the moment remote participation remains permissible.

If you have questions about this or other Open Meetings Act issues, please contact Mark McInerney at (313) 965-8383, [mmcinerney@clarkhill.com](mailto:mmcinerney@clarkhill.com), or another member of Clark Hill's Education Law group.

## Sample Skype/Electronic attendance Policies

**NOTE:** There is nothing in the Open Meetings Act or Michigan law to indicate that members attending electronically can not vote. However, if your library determines that remote attending members CAN vote, then the Open Meetings Act would require that any votes be conducted via ROLL CALL so that it is very clear to members of the public attending which members voted which way on each issue.

It is also a good idea to refrain from completing a quorum via remote access. However, in the event of an emergency or other unexpected circumstance, if a quorum cannot be formed except by remote access, then it may be permitted (all steps to ensure access and interaction by the public must be taken – see below). A library should confer with their attorney as to the appropriate circumstances when a quorum could be completed via remote access.

It is also important that members attending remotely (either via phone or video) are visible and/or audible to members of the public attending the meeting. Remote attending members should be clearly heard and/or seen. It is also important to make sure that the remote attending members introduce themselves each time they speak so there is no confusion as to who is speaking.

### SAMPLE POLICIES

#### Library 1

*“7.4 A Board member, after notifying the Library Director or Board Chairperson of a planned absence, may request in advance to attend the meeting electronically. Board members who participate in a meeting electronically will be marked present on the Board’s attendance chart.*

*8.1 quorum for the transaction of (Library Name) business shall consist of five members of the Library Board. A Board member attending a meeting electronically shall not be counted for the quorum.*

*8.2 Adoption of all resolutions and business shall require a simple majority vote of a quorum of five or more members of the Library Board in attendance. A Board member attending a meeting electronically may participate in discussions regarding all items on the agenda, but shall be unable to vote”*

#### Library 2

*“a. In the case of emergency, as provided by law, Board action may be taken by at least a quorum of the Board upon at least eighteen (18) hours (or longer if practicable) notice to the public. A board member may participate in such meetings by means of conference telephone or other means of remote communication by which all persons participating in the meeting can*

*communicate with each other. Any action taken pursuant to such emergency meeting shall be subject to ratification or rejection at the next public meeting of the Board."*

### Library 3

*"Section 4. A Board member may participate virtually or via telephone as long as full participation in the meeting is possible and a quorum of the Board is physically present."*

### Library 4

*" 1. A Board member, after notifying the Library Director or Board President of a planned absence, may request in advance to attend the meeting electronically. Board members who participate in a meeting electronically (via skype or telephone) will be marked present in attendance with participation limited to discussion but not counted as part of a quorum."*