

## What are the notice and procedural requirements of the Sunshine Law?

### 1. What kind of notice of the meeting must be given?

#### a. Reasonable notice required

A vital element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See, s. 286.011(1), F.S. Although s. 286.011, F.S., did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. *Hough v. Stemberge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973). *Accord, Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985).

Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. AGOs 90-56 and 71-346. *And see, Baynard v. City of Chiefland, Florida*, No. 38-2002-CA-000789 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309, 310 (Fla. 1st DCA 1991). "Governmental bodies who hold unnoticed meetings do so at their peril." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 869 (Fla. 3d DCA 1994).

The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved. In some instances, posting of the notice in an area set aside for that purpose may be sufficient; in others, publication in a local newspaper may be necessary. In each case, however, an agency must give notice at such time and in such a manner as will enable the media and the general public to attend the meeting. AGOs 04-44, 80-78 and 73-170. *And see, Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991), citing to AGO 73-170, and stating that the purpose of the notice requirement is to apprise the public of the pendency of matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wish. *Cf., Lyon v. Lake County*, 765 So. 2d 785, 790 (Fla. 5th DCA 2000) (where county attorney provided citizen with "personal due notice" of a committee meeting and its function, it would be "unjust to reward" the citizen by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee). *And see, Suncam, Inc. v. Worrall*, No. C197-3385 (Fla. 9th Cir. Ct. May 9, 1997) (Sunshine Law requires notice to the general public; agency not required to provide "individual notice" to company that wished to be informed when certain meetings were going to occur).

While the Attorney General's Office cannot specify the type of notice which must be given in all cases, it has suggested the following notice guidelines:

1. The notice should contain the time and place of the meeting and, if available, an agenda (or if no agenda is available, subject matter summations might be used);
2. the notice should be prominently displayed in the area in the agency's offices set aside for that purpose, e.g., for cities, in city hall;
3. emergency sessions should be afforded the most appropriate and effective notice under the circumstances and special meetings should have at least 24 hours reasonable notice to the public; and
4. the use of press releases and/or phone calls to the wire services and other media is highly effective. On matters of critical public concern such as rezoning, budgeting, taxation, appointment of public officers, etc., advertising in the local newspapers of general circulation would be appropriate.

The notice procedures set forth above should be considered as suggestions which will vary depending upon the circumstances of each particular situation. See, AGO 73-170 ("If the purpose for notice is kept in mind, together with the character of the event about which notice is to be given and the nature of the rights to be affected, the essential requirements for notice in that situation will suggest themselves.").

Thus, in *Rhea v. City of Gainesville*, 574 So. 2d 221 (Fla. 1st DCA 1991), the court held that a complaint alleging that members of the local news media were contacted about a special meeting of the city commission one and one-half hours before the meeting stated a sufficient cause of action that the Sunshine Law had been violated. *Compare, Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (three days' notice of special meeting deemed adequate); and *News and Sun-Sentinel Company v. Cox*, 702 F. Supp. 891 (S.D. Fla. 1988)

(no Sunshine Law violation occurred when on March 31, a "general notice" of a city commission meeting scheduled for April 5 was posted on the bulletin board outside city hall). *And see, Yarbrough v. Young, supra*, at 517n.1 (Sunshine Law does not require city council to give notice "by paid advertisements" of its intent to take action regarding utilities system improvements, although the Legislature "has required such notice for certain subjects," *see e.g., 166.041[3][c], F.S.*).

The determination as to who will actually prepare the notice or agenda is essentially "an integral part of the actual mechanics and procedures for conducting that meeting and, therefore, aptly relegated to local practice and procedure as prescribed by . . . charters and ordinances." *Hough*, 278 So. 2d at 291.

b. Notice requirements when meeting adjourned to a later date

If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. AGO 90-56.

However, in *State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992), the county court held that s. 286.011, F.S., was not violated by a brief discussion as to whether commission members could make an inspection trip to an industrial facility without violating s. 286.011, F.S., when the discussion took place immediately after the adjournment of a duly noticed commission meeting. The court found that the room remained open during the discussion, no member of the public relied to their detriment on the adjournment by leaving the proceedings, and there was no allegation that the alleged adjournment was utilized as a tool to avoid the public scrutiny of governmental meetings. *And see, Greenburg v. Metropolitan Dade County Board of County Commissioners*, 618 So. 2d 760 (Fla. 3d DCA 1993) (no impropriety in county commission continuing its meeting until the early morning hours).

c. Notice requirements when board acting as quasi-judicial body or taking action affecting individual rights

Section 286.0105, F.S., requires:

Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of s. 286.0105, F.S. AGO 81-06.

d. Effect of notice requirements imposed by other statutes, codes or ordinances

The Sunshine Law requires only that *reasonable* public notice be given. As stated above, the type of notice required is variable and will depend upon the circumstances. A public agency, however, may be subject to additional notice requirements imposed by other statutes, charters or codes. *See, e.g., s. 189.417(1), F.S.*, providing notice requirements for meetings of the governing bodies of special districts. In such cases, the requirements of that statute, charter, or code must be strictly observed. *Inf. Op. to Mattimore*, February 6, 1996. *And see, Yarbrough v. Young*, 462 So. 2d 515, 517, n.1 (Fla. 1st DCA 1985) (Sunshine Law does not require city council to give notice "by paid advertisements" of its intent to take action regarding utilities system improvements, although the Legislature "has required such notice for certain subjects," *see e.g., 166.041[3][c], F.S.*).

Thus, a board or commission subject to Ch. 120, F.S., the Administrative Procedure Act, must comply with the notice requirements of that act. *See, e.g., s. 120.525, F.S.* Those requirements, however, are imposed by Ch. 120, F.S., not s. 286.011, F.S., although the notice of a board or commission published in the Florida Administrative Weekly [FAW] pursuant to Ch. 120, F.S., also satisfies the notice requirements of s. 286.011, F.S. *Florida Parole and Probation Commission v. Baranko*, 407 So. 2d 1086 (Fla. 1st DCA 1982).

2. Does the Sunshine Law require that an agenda be made available prior to board meetings or restrict the

board from taking action on matters not on the agenda?

The Attorney General's Office recommends publication of an agenda, if available, in the notice of the meeting; if an agenda is not available, subject matter summations might be used. However, the courts have held that the Sunshine Law does not *mandate* that an agency provide notice of each item to be discussed via a published agenda. Such a specific requirement has been rejected because it could effectively preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body. See, *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). And see, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary; public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts). Thus, the Sunshine Law has been interpreted to require notice of *meetings*, not of the individual *items* which may be considered at that meeting. However, other statutes, codes or ordinances may impose such a requirement and agencies subject to those provisions must follow them.

Accordingly, the Sunshine Law does not require boards to consider only those matters on a published agenda. "[W]hether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature." *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996).

For example, s. 120.525(2), F.S., requires that agencies subject to the Administrative Procedure Act must prepare an agenda in time to ensure that a copy may be received at least seven days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. After the agenda has been made available, changes may be made only for good cause. *Id.*

Therefore, agencies subject to the Administrative Procedure Act must follow the requirements in that statute. See, Inf. Op. to Mattimore, February 6, 1996 (notice of each item to be discussed at public meeting is not required under s. 286.011, F.S., although other statutes, codes, or rules, such as Ch. 120, F.S., may impose such a requirement).

Moreover, even though the Sunshine Law does not prohibit a board from adding topics to the agenda of a regularly noticed meeting, the Attorney General's Office has advised boards to postpone formal action on any added items that are controversial. AGO 03-53. "In the spirit of the Sunshine Law, the city commission should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before the commission." *Id.*

3. Does the Sunshine Law limit where meetings of a public board or commission may be held?

a. Inspection trips

Members of a public board or commission are not prohibited under the Sunshine Law from conducting inspection trips provided that they do not discuss matters which may come before the board or commission for official action. See, *Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974). In *Bigelow*, the court said that where two of five commissioners, as members of a fact-finding committee, went on an inspection trip to Tennessee, they should not have discussed what recommendations the committee would make while they were still on their trip, but should have waited until such discussion could occur at a meeting held in compliance with the Sunshine Law.

Similarly, two or more members of an advisory group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the notice and minutes requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make to city officials. AGO 02-24. See also, Inf. Op. to Kreidler, February 20, 1996 (the mere presence of two members of a human rights advocacy committee during an investigation of a group home does not make the Sunshine Law applicable, provided that the members avoid discussion between themselves of issues that may come before the committee for official action).

b. Luncheon meetings

Public access to meetings of public boards or commissions is the key element of the Sunshine Law and public agencies are advised to avoid holding meetings in places not easily accessible to the public. The Attorney General's Office, therefore, has suggested that public boards or commissions avoid the use of luncheon meetings to conduct board or commission business. These meetings may have a "chilling" effect upon the public's willingness or desire to attend. People who would otherwise attend such a meeting may be unwilling or reluctant to enter a public dining room without purchasing a meal and may be financially or personally unwilling to do so. Inf. Op. to Campbell, February 8, 1999; and Inf. Op. to Nelson, May 19, 1980.

In addition, discussions at such meetings by members of the board or commission which are audible only to those seated at the table may violate the "openness" requirement of the law. AGO 71-159. Public boards or commissions are, therefore, advised to avoid holding meetings at places where the public and the press are effectively excluded. AGO 71-295. *Cf.*, *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971), in which the Florida Supreme Court observed: "A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public."

#### c. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011(6), F.S., prohibits boards or commissions subject to the Sunshine Law from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility. *And see*, s. 286.26, F.S., relating to accessibility of public meetings to the physically handicapped.

Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave such identification while attending the meeting and to request permission before entering the room where the meeting is held. AGO 96-55. *And see*, AGO 05-13, concluding that a city may not require persons wishing to attend public meetings to provide identification as a condition of attendance. This is not to say, however, that an agency may not impose certain security measures on members of the public entering a public building, such as requiring the public to go through metal detectors. *Id.*

#### d. Out-of-town meetings

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. *Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. *Id.*

Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994). The court refused to adopt a rule prohibiting any board workshops from being held at a site more than 100 miles from its headquarters; instead, the court held that a balancing of interests test is the most appropriate method to determine which interest predominates in a given case. As stated by the court, "[t]he interests of the public in having a reasonable opportunity to attend a Board workshop must be balanced against the Board's need to conduct a workshop at a site beyond the county boundaries." *Id.* at 1385.

In addition, there may be other statutes which limit where board meetings may be held. *See*, e.g., s. 125.001, F.S. (meetings of the board of county commissioners may be held at any appropriate public place in the county); s. 1001.372, F.S. (school board meetings may be held at any appropriate public place in the county). *And see*, AGOs 03-03 and 75-139 (municipality may not hold commission meetings at facilities outside its boundaries).

Conduct which occurs outside the state which would constitute a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3), F.S. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, F.S.

#### 4. Can restrictions be placed on the public's attendance at, or participation in, a public meeting?

## a. Public's right to attend or record meeting

### (1) Size of meeting facilities

The Sunshine Law requires that meetings of a public board or commission be "open to the public." For meetings where a large turnout of the public is expected, public boards and commissions should take reasonable steps to ensure that the facilities where the meeting will be held will accommodate the anticipated turnout. Meetings held at a facility which can accommodate only a small number of the public attending, when a large public turnout can reasonably be expected, may violate the public access requirement of s. 286.011, F.S., by unreasonably restricting access to the meeting. If a huge public turnout is anticipated for a particular issue and the largest available public meeting room cannot accommodate all of those who are expected to attend, the use of video technology (e.g., a television screen outside the meeting room) may be appropriate. In such cases, as with other open meetings, reasonable steps to provide an opportunity for public participation in the proceedings should also be considered.

### (2) Inaudible discussions

A violation of the Sunshine Law may occur if, during a recess of a public meeting, board members discuss issues before the board in a manner not generally audible to the public attending the meeting. Although such a meeting is not clandestine, it nonetheless violates the letter and spirit of the law. *Rackleff v. Bishop*, No. 89-235 (Fla. 2d Cir. Ct. March 5, 1990). *And see*, AGO 71-159, stating that discussions of public business which are audible only to "a select few" who are at the table with the board members may violate the "openness" requirement of the law.

### (3) Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to *all* persons who choose to attend. AGO 99-53. In *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995), the court ruled that a board violated the Sunshine Law by requesting that bidders voluntarily excuse themselves from each others' presentations. The court found that the board's actions "amounted to a *de facto* exclusion of the competitors, especially since the 'request' was made by an official directly involved with the procurement process."

Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. AGO 79-01. Section 286.011, F.S., however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such policies do not frustrate or subvert the purpose of the Sunshine Law. *Id.*

Although not directly addressing the open meeting laws, courts of other states have ruled that in the absence of a compelling governmental interest, agencies may not single out and exclude a particular news organization or reporter from press conferences. *See, e.g., Times-Picayune Publishing Corporation v. Lee*, 15 Media L. Rep. 1713 (E.D. La. 1988); *Borrea v. Fasi*, 369 F. Supp. 906 (D. Hawaii 1974); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971); and *Southwestern Newspapers Corporation v. Curtis*, 584 S.W.2d 362 (Tex. Ct. App. 1979).

### (4) Cameras and tape recorders

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting may be adopted by the board or commission. A rule or policy which prohibits the use of nondisruptive or silent tape recording devices, however, is unreasonable and arbitrary and is, therefore, invalid. AGO 77-122.

Moreover, the Legislature in Ch. 934, F.S., appears to implicitly recognize the public's right to silently record public meetings. AGO 91-28. Chapter 934, F.S., the Security of Communications Act, regulates the interception of oral communications. Section 934.02(2), F.S., however, defines "[o]ral communication" to specifically exclude "any public oral communication uttered at a public meeting." *See also*, Inf. Op. to Gerstein, July 16, 1976, stating that public officials may not complain that they are secretly being recorded during public meetings in violation of s. 934.03, F.S.

Similarly, a school board's refusal to allow unobtrusive videotaping of a public meeting violated the Sunshine Law. *Pinellas County School Board v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002). *Accord*, AGO 91-28.

b. Public's right to participate in a meeting

(1) Importance of public participation

The Attorney General has noted that "the courts of this state and this office have recognized the importance of public participation in open meetings." See, AGO 04-53 and cases cited at footnote 6. In *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So. 2d 526 (Fla. 2d DCA 2002), the court held that a county development review committee was subject to the Sunshine Law, and should have allowed public comment before making its decision on a project. *Cf.*, s. 286.0115(2)(b), F.S., providing that "[i]n a quasi-judicial proceeding on local government land use matters, a person who appears before the decisionmaking body who is not a party or a party-intervenor shall be allowed to testify before the decisionmaking body, subject to control by the decisionmaking body, . . . ."

However, the Supreme Court has indicated that with regard to certain types of executive meetings, there may not be a right under s. 286.011, F.S., for a member of the public to participate. In *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983), the Court examined the applicability of the Sunshine Law to a staff committee delegated the authority by the university president to recommend candidates for a university position. Reviewing the activities of a committee carrying out executive functions traditionally conducted without public input, the Court stated:

This Court recognizes the necessity for the free exchange of ideas in academic forums, without fear of governmental reprisal, to foster deep thought and intellectual growth. . . . We hasten to reassure respondents that nothing in this decision gives the public the right to be more than spectators.

Until the matter is clarified, the Attorney General's Office has recognized that when committees are carrying out certain executive functions which traditionally have been conducted without public input (as described in the *Marston* decision), the public has the right to attend but may not have the authority to participate. See, *Law and Information Services v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996), citing *Marston* for the principle that the public does not have a right to speak on all issues prior to resolution of the issue by the board; *Homestead-Miami Speedway, LLC. v. City of Miami*, 828 So. 2d 411 (Fla. 3d DCA 2002) (city did not violate Sunshine Law where there was public participation and debate in some but not all of the meetings concerning a proposed contract).

On the other hand, if a committee or board is carrying out legislative responsibilities, the Attorney General's Office has advised that the public should be afforded a meaningful opportunity to participate at each stage of the decision-making process, including workshops. See, Inf. Op. to Thrasher, January 27, 1994; and Inf. Op. to Conn, May 19, 1987.

(2) Authority to adopt reasonable rules

In providing an opportunity for public participation, the Attorney General's Office has advised that reasonable rules and policies, which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending, may be adopted by a public board. For example, a rule which limits the amount of time an individual may address the board could be adopted provided that the time limit does not unreasonably restrict the public's right of access.

Although not directly considering the Sunshine Law, the court in *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), recognized that "to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting--would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." Thus, the court concluded that a mayor's actions in attempting to confine the speaker to the agenda item in the city commission meeting and having the speaker removed when the speaker appeared to become disruptive constituted a reasonable time, place and manner regulation and did not violate the speaker's First Amendment rights. *And see, Rowe v. City of Cocoa*, 358 F. 3d 800 (11th Cir. 2004) (city council's regulation limiting speech of nonresidents during its meetings is viewpoint-neutral and does not violate the First or Fourteenth Amendment rights of nonresidents). *Compare*, AGO 04-53 (statute

requiring special district board to hold "a public hearing at which time qualified electors of the district may appear and be heard" does not prohibit nonqualified electors from participating).

5. May the members of a public board use codes or preassigned numbers in order to avoid identifying individuals?

Section 286.011, F.S., requires that meetings of public boards or commissions be "open to the public at all times." If at any time during the meeting the proceedings become covert, secret or not wholly exposed to the view and hearing of the public, then that portion of the meeting violates the portion of s. 286.011, F.S., requiring that meetings be "open to the public at all times." Thus, in *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985), the Court disapproved of a procedure by which representatives of the media would be permitted to attend a city council meeting provided that they agreed to "respect the confidentiality" of certain matters. "Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories." *Id.* at 823.

Accordingly, the use of preassigned numbers or codes at public meetings to avoid identifying the names of applicants violates s. 286.011, F.S., because "to permit discussions of applicants for the position of a municipal department head by a preassigned number or other coded identification in order to keep the public from knowing the identities of such applicants and to exclude the public from the appointive or selection process would clearly frustrate or defeat the purpose of the Sunshine Law." AGO 77-48. *Accord*, AGO 76-240 (Sunshine Law prohibits the use of coded symbols at a public meeting in order to avoid revealing the names of applicants for the position of city manager). *And see*, *News-Press Publishing Company v. Wisher*, 345 So. 2d 646 (Fla. 1977), in which the Supreme Court held that the procedure used by a county commission to reprimand a department head contravened the Sunshine Law. "The public policy of this state as expressed in the public records law and the open meetings statute eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references." *Id.* at 648.

6. May members of a public board vote by written or secret ballot?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act. *See*, AGO 73-344. *Cf.*, AGO 78-117 (in the absence of statutory authority, proxy voting by board members is not allowed).

By contrast, a secret ballot violates the Sunshine Law. *See*, AGO 73-264 (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). *Accord*, AGOs 72-326 and 71-32 (board may not use secret ballots to elect the chairman and other officers of the board).

7. Are board members authorized to abstain from voting?

Section 286.012, F.S., provides:

No member of any *state, county or municipal* governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting . . . a vote *shall be* recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under . . . s. 112.311, s. 112.313, or s. 112.3143, F.S. (e.s.)

Section 286.012, F.S., thus, prohibits a member of a state, county or municipal board who is present at a meeting from abstaining from voting unless there is, or appears to be, a possible conflict of interest under ss. 112.311, 112.313 or 112.3143, F.S., of the Code of Ethics for Public Officers and Employees. *And see*, AGO 02-40 (s. 286.012 applies to advisory board appointed by a county commission).

Failure of a member to vote, however, does not invalidate the entire proceedings. *City of Hallandale v. Rayel Corporation*, 313 So. 2d 113 (Fla. 4th DCA 1975), *cause dismissed sua sponte*, 322 So. 2d 915 (Fla. 1975) (to rule otherwise would permit any member to frustrate official action merely by refusing to participate).

Section 286.012, F.S., applies *only* to state, county and municipal boards. AGO 04-21. Special district boards are not subject to its provisions and may adopt their own rules regarding abstention, subject to s. 112.3143,

F.S. AGOs 04-21, 85-78 and 78-11.

Section 112.3143(3)(a), F.S., prohibits a county, municipal, or other local public officer from voting on any measure which inures to his or her special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal or parent organization or subsidiary of a corporate principal, other than a public agency, by whom he or she is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. An exception exists for a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356, F.S., or s. 163.357, F.S., or an officer of an independent special tax district elected on a one-acre, one-vote basis. Section 112.3143(3)(b), F.S.

For those local officials subject to s. 112.3143(3)(a), F.S., however, no exception exists even though the abstention has the effect of preventing the local legislative body from taking action on the matter. AGO 86-61. Prior to the vote being taken, the local officer must publicly state the nature of his or her interest in the matter from which he is abstaining. Within 15 days of the vote, the officer must disclose the nature of his or her interest in a memorandum filed with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. Section 112.3143(3)(a), F.S.

State public officers, however, are not required to abstain from voting because of a conflict of interest. Section 112.3143(2), F.S. *But see*, s. 120.665(1), F.S., applicable to agencies subject to Ch. 120, F.S., the Administrative Procedure Act, stating that "[n]otwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding."

If the state officer votes, however, on a matter which would inure to his or her special private gain or loss, or to the special gain or loss of any principal or parent organization or subsidiary of a corporate principal by which the officer is retained, or to the special private gain or loss of a relative or business associate, the officer is required to disclose the nature of his or her interest in a memorandum. The memorandum must be filed within 15 days after the vote with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. *See*, s. 112.3143(2), F.S.

Although a member of a *state* board or commission is authorized to abstain from voting on a question in which he or she is personally interested, the member is not disqualified from voting; the member may, therefore, be counted for purposes of computing a quorum for a vote on that question. Once a quorum is present, a majority of those members actually voting is sufficient to decide the question. AGO 75-244.

When a member of a *local* board is *required* to abstain pursuant to s. 112.3143(3), F.S., the local board member is disqualified from voting and may not be counted for purposes of determining a quorum. AGOs 86-61 and 85-40.

Questions as to what constitutes a conflict of interest under the above statutes should be referred to the Florida Commission on Ethics.

8. Is a roll call vote required?

While s. 286.012, F.S., requires that each member present cast a vote either for or against the proposal under consideration by the public board or commission, it is not necessary that a roll call vote of the members present and voting be taken so that each member's specific vote on each subject is recorded. The intent of the statute is that all members present cast a vote and that the minutes so reflect that by either recording a vote *or* counting a vote for each member. *Ruff v. School Board of Collier County*, 426 So. 2d 1015 (Fla. 2d DCA 1983) (roll call vote so as to *record* the individual vote of each such member is not necessary). *Cf.*, s. 20.052(5)(c), F.S., requiring that minutes, including a record of all votes cast, be maintained for all meetings of an advisory body, commission, board of trustees, or other collegial body adjunct to an executive agency.

9. Must written minutes be kept of all sunshine meetings?

Section 286.011, F.S., specifically requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. While tape recorders may also be used to record the

proceedings before a public body, written minutes of the meeting must be taken and promptly recorded. AGO 75-45. The minutes required to be kept for "workshop" meetings are not different than those required for any other meeting of a public board or commission. AGO 74-62.

Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. AGOs 02-51 and 74-294. The minutes are public records when the person responsible for preparing the minutes has performed his or her duty even though they have not yet been sent to the board members or officially approved by the board. AGO 91-26.

Section 286.011, F.S., does not specify who is responsible for taking the minutes of public meetings. This appears to be a procedural matter which the individual boards or commissions must resolve. Inf. Op. to Baldwin, December 5, 1990.

10. In addition to minutes, does the Sunshine Law also require that meetings be transcribed or tape recorded?

The Attorney General's Office has concluded that the minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting. AGO 82-47. *And see, State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992) (no violation of Sunshine Law where minutes failed to reflect brief discussion concerning a proposed inspection trip). However, an agency is not prohibited from using a written transcript of the meeting as the minutes, if it chooses to do so. Inf. Op. to Fulwider, June 14, 1993.

The Sunshine Law does not require that public boards and commissions tape record their meetings. AGO 86-21. However, once made, such recordings are public records and their retention is governed by schedules established by the Division of Library and Information Services of the Department of State in accordance with s. 257.36(6), F.S. *Id. Accord*, AGO 86-93 (tape recordings of school board meetings subject to Public Records Act even though written minutes are required to be prepared and made available to the public). *And see*, AGO 04-15 (tape recordings of staff meetings made at the request of the executive director by a secretary for use in preparing minutes of the meeting are public records).