



# Maryland Municipal Attorneys Association

## Quarterly Newsletter – Fall 2019

Lynn Board, President; Frank Johnson, Secretary; Jason DeLoach, Treasurer

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### Maryland Municipal Attorney Association News and Updates

In this quarterly newsletter, we give brief updates on a broad array of state and federal legal issues affecting Maryland municipalities. Our webpage is on the Maryland Municipal League (MML) website (under “Departments”), and provides more information on MMAA, meetings and newsletters. Send any changes or suggestions to Frank Johnson via email at [frank.johnson@gaitthersburgmd.gov](mailto:frank.johnson@gaitthersburgmd.gov).

### Deliberations by Email Subject to Open Meetings Act

The Open Meetings Act seeks to ensure that public business be handled in an “open and public manner.” Md. General Provisions Code Ann., §3-102. The goal, as the Open Meetings Compliance Board (Board) has explained, is to ensure that the public can observe the deliberations of public bodies on public issues. The focus is on communications, especially among a quorum, which become deliberations, including debate and discussion.

In the past, the Board focused on communications among a quorum which is simultaneous, including conference calls or text messaging. While not holding email communications to be Open Meetings Act violations, the Board has recently warned that email deliberations on public issues should be avoided and handled instead in open public meetings. Of special concern has been the “reply-all” emails, in which multiple members of a public body can receive the same communication. Indeed many of us advising town and city councils have advised caution in use of those “reply-all” email chains, as they can turn into extensive deliberations, even while the body withholds any final decision.

On July 1, 2019, the Board finally decided that such reply-all email communications can be subject to the Open Meetings Act, in a complaint against the

Talbot County Council (13 OMCB Opinions 39). With a focus on deliberations among a quorum, the Board reduced emphasis on requiring immediately simultaneous communications, instead finding that reply-all email communications over a broad period of time, such as two days or more, can constitute true deliberation over a public issue.

While reply-all emails can include deliberations, many public bodies have used emails to handle relatively minor issues such as finalizing testimony to the General Assembly on state legislation. Yet such testimony was the key issue at hand in the Talbot County case, and the Board held that such testimony is considered a matter of public business. In the context of presenting testimony before a General Assembly committee, often on short notice, this can produce a practical hardship, as it’s simply not feasible to hold an open meeting to discuss a town or city’s testimony on every bill.

Communication is certainly permitted, as well as discussion basic matters such as setting the agenda. Deliberations among a quorum is the key issue, but it is possible to finalize some decisions outside of an open meeting. Town or city councils can, for example, defer certain final decisions, such as the specific draft of a letter, to municipal staff. Individual communications in separate emails which don’t use the “reply-all” option are not deliberation, at least as long as there is not back and forth involving a quorum. Bear in mind that the Board in the Talbot County decision warned that sharing communications and deliberating can violate the Open Meetings Act even if a quorum isn’t connected at the same time. Thus, staff or one member can individually communicate with the others without committing a violation, as long as that does not devolve into ongoing deliberation. As the Board has now held, such deliberations, even by email, can be considered an Open Meetings violation if not handled at a public meeting.



## MML President Ryan Spiegel updates MMAA on Amicus Process

At the summer convention, MMAA welcomed MML President Elect (now President) Ryan Spiegel, who serves on the Gaithersburg City Council. He updated MMAA members on MML's revisions to the Litigation Participation Policy, which MML applies to requests to join (or draft) an Amicus brief in appellate litigation. Ryan took the lead role in updating the policy after municipalities had raised concerns that the existing policy included a long procedure to appoint a review committee and require a Board vote; even when MML is only being asked to sign onto or add our name to existing briefs. In that case the Board of Directors felt it was unnecessary to go through the entire process, which could also make it difficult to meet deadlines if, for example, a request for our support for an existing brief was made a short time before the filing deadline.

Ryan explained that for requests requiring a brief, as MMAA addressed last year, the old process remains in place, requiring Board review and a Review Panel. But for requests to sign on to existing briefs, the new process allows the Executive Committee to decide. The Executive Committee is empowered to seek counsel, but they can also make a relatively quick decision. Considerations are the same, with the same focus on a broad impact on members rather than a specialized impact or no impact at all. Ryan noted a few smaller changes on process as well, such as to ensure that procedurally the panel appointed to review a request for an Amicus Brief would have the power to establish its rules of procedure to allow expeditious review.

The new rules also specify the naming of a review panel chair and provided some rules clarifying when and how a municipality can request direct discussion and argument with the Board and the Panel as they consider the Amicus request. Ryan also noted that the Board of Directors can hire outside counsel within the line item in the MML Budget. The policy also allows the imposition of a reasonable fee on the requesting municipality to

share the costs incurred in drafting a brief, when that is necessary.

Overall, Ryan concluded that MML will probably have more opportunities to sign on to existing briefs rather than draft its own, saving funds and allowing MML to be more responsive. Ryan explained that the Board of Directors is empowered to have MMAA attorneys serve as part of the review panel, and usually does so, but isn't required to involve MMAA, or at least can seek outside assistance if MMAA has no one available to serve on a Panel. He did note that the rule calls for a list of attorneys willing to serve on such panels, and suggested that MMAA should keep a list of interested attorneys.

## MMAA Added to Open Meetings Compliance Board Updates

The Open Meetings Compliance Board has a list of emails which it uses for regular updates, such as issuing new decisions. After learning that counties are included in that list, the Attorney General's office agreed to add the MMAA Secretary as well. We will therefore forward any Board updates we receive, which should ensure that our members and municipalities are up to date on the most recent Open Meetings decisions.

## Save the Date: Fall Meeting with County Attorneys

County and municipal attorneys support an annual joint meeting. Our first was last year, which focused on emerging trends in police liability and personnel claims. This year, we're planning to meet on Thursday, October 17 in Baltimore at Chiapparelli's, a Little Italy restaurant, and will focus on the Opioid crisis. Jonathon Novak, from the Dallas firm of Fears, Nachawati will speak. As a former DEA attorney who has focused on certain legal changes inciting parts of the crisis, he has handled a good deal of litigation and is working with local governments in that regard. John Kane, a Maryland attorney working with Jonathon Novak on Opioid litigation will join him. Save the date and RSVP request will be coming out in the next few weeks.