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LEGAL OPINION

TO: Speaker KC Becker and Majority Leader Alec Garnett

FROM: Office of Legislative Legal Services

DATE: March 31, 2020

SUBJECT: Conducting Legislative Business Remotely During a Declared Disaster Emergency¹

Legal Questions

Because of safety concerns arising from the COVID-19 pandemic, the general assembly may be unable to reconvene the regular legislative session by physically appearing at the State Capitol and may instead be forced to use electronic or other means to reconvene the legislative session and allow legislators to participate remotely (remote legislative session).

1. Are there any constitutional provisions that prevent the general assembly from convening and conducting a remote legislative session?
2. Are there any legislative rules or statutory provisions that the general assembly would need to address to be able to convene and conduct a remote legislative session?

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly. OLLS legal memoranda do not represent an official legal position of the general assembly or the State of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

Short Answers

1. There are no constitutional provisions that prevent the general assembly from convening and conducting a remote legislative session. But there are constitutional provisions that need to be acknowledged to ensure compliance.
2. Yes, there are several legislative rules and at least one statutory provision that the general assembly would need to address in order to convene and conduct a remote legislative session.

Discussion

- 1. There are no constitutional provisions that prevent the general assembly from convening and conducting a remote legislative session. But there are constitutional provisions that need to be acknowledged to ensure compliance.**

There are no constitutional provisions that expressly or specifically prohibit the general assembly from holding floor sessions and committee hearings remotely. There are, however, several constitutional requirements that the general assembly would need to satisfy during a remote legislative session, some of which may require the adoption of practices and procedures unique to remote legislative sessions to ensure the requirements are met.

1.1. Quorum.

Article V, section 11 of the Colorado Constitution (section 11) specifies that a majority of each house of the general assembly constitutes a quorum, which is necessary for a house to conduct legislative business, "but a smaller number may adjourn from day to day, and compel the attendance of absent members." Since section 11 does not specify the manner by which a quorum is determined, and does not specifically require physical presence in the capitol, it is within the constitutional authority of the general assembly to determine how a quorum would be ascertained for purposes of floor proceedings during a remote legislative session. Section 11 does not apply to committee hearings.

1.2. Each house makes and enforces rules.

Article V, section 12 of the Colorado Constitution grants the Senate and the House of Representatives the "power to determine the rules of its proceedings and adopt rules providing punishment of its members or other persons for contempt or disorderly behavior in its presence; to enforce obedience to its process; to protect its members

against violence...." The general assembly may want to make it clear that this constitutional provision applies even when the legislators are acting in the "virtual" presence of each other through a remote legislative session.

1.3. Journals.

Article V, section 13 of the Colorado Constitution requires each house to keep and publish a journal of its proceedings. The secretary of the Senate and the chief clerk of the House of Representatives will need to ensure that the journals can still be kept and published for a remote legislative session. This requirement can likely be accomplished by application of Joint Rule 44 (h).²

1.4. Constitutional requirement for open sessions of the houses.

Article V, section 14 of the Colorado Constitution requires the sessions of each house, and of the committees of the whole, to be open, unless the business is such that it should be kept secret. This constitutional provision does not specify the manner in which these sessions are open, and it is within the constitutional authority of the general assembly to determine its rules of procedure to ensure compliance with this constitutional requirement.³ Since "open" is not specifically defined, and given the declared disaster emergency, the term "open" would appear to allow for a remote legislative session so long as members of the public could at least hear the committee hearings and floor sessions.⁴

1.5. Reading and passage of bills.

Article V, section 22 of the Colorado Constitution specifies that "[e]very bill shall be read by title when introduced, and at length on two different days in each house; provided, however, any reading at length may be dispensed with upon unanimous consent of the members present." Since this section does not define "present," and does not specifically require physical presence in the capitol, it is within the

² Joint Rule 44 (h) of the Joint Rules of the Senate and House of Representatives gives additional powers and authority to the secretary of the Senate and the chief clerk of the House of Representatives to implement new or streamlined methods of operations to preserve the resources of the respective houses and to function effectively during a disaster emergency.

³ Colo. Const. art. V, § 12 provides, "Each house shall have power to determine the rules of its proceedings...."

⁴ Compliance with this constitutional requirement would also satisfy the requirements of the Colorado open meetings law, part 4 of article 6 of title 24, C.R.S.

constitutional authority of the general assembly to determine in its rules of procedure that, in order to dispense with the requirement to read a bill at length, the unanimous consent of those "virtually" present will suffice during a remote legislative session.⁵

1.6. Seat of state government.

Article VIII, section 2 of the Colorado Constitution specifies that the seat of government of the state of Colorado is located in the city and county of Denver. The general assembly may want to clarify that all actions taken during a remote legislative session have the same legal effect as if legislators were physically present at the seat of government.

2. There are several legislative rules that the general assembly would need to address in order to convene and conduct a remote legislative session.

While existing House Rules, Senate Rules, and Joint Rules already appear to provide latitude for convening a remote legislative session, the Senate and the House of Representatives should clarify by rule or statute, or authorize the Executive Committee of the Legislative Council to adopt policies to clarify, issues such as those described below⁶ for purposes of convening a remote legislative session:

- **Verification of the identities of and authentication of actions taken by participating legislators:** To ensure the validity of legislative actions taken during a remote legislative session, it is essential that the remote legislative proceedings and committee meetings are conducted in a manner that includes verifying the identity of each participating legislator and authenticating the actions taken by each participating legislator. The existing legislative rules do not contemplate remote participation, so there is no rule that specifically requires that each person participating in a vote or proceeding is verified as being a legislator. However, there are rules that imply that only the elected legislator may participate in voting.⁷ A rule, statute, or policy allowing for

⁵ The issues of legislators being "present" and ascertaining a quorum are also discussed in section 2 of this memorandum.

⁶ This list is not intended to be all inclusive, rather it includes important issues that were initially identified.

⁷ See House Rule 20 (f), prohibiting a member or any other person from casting the vote of another member. See also House Rule 25 (j)(2) and Senate Rule 22 (c), prohibiting the use of written or oral proxies in committee for any purpose.

remote legislative proceedings and committee meetings should specify that the identity of each participating legislator must be verified and that legislator's actions must be authenticated. The manner of verification and authentication may be dictated by the type of technology used in convening the remote legislative session.

- **Being present – quorum:** Clarification of what constitutes a legislator being "present" and how a quorum of either house of the general assembly is ascertained during a remote legislative session or committee meeting could provide clarity to ensure that the requirements of all rules of proceeding that presume the physical presence of members in the houses' chambers or in committee meetings are applied to remote legislative proceedings in a manner that will accomplish the same purposes for which the rules were established. *House Rule 5, Senate Rule 2, & numerous other House and Senate rules that refer to legislators being "present."*
- **Call of the respective houses:** Since it would be impossible and also counterproductive for legislators to be sent for and taken into custody for failing to appear in the chamber when the general assembly is conducting legislative business via a remote legislative session, the general assembly may want to consider amending these rules or establishing a new process to deal with how calls of a house are handled and enforced during remote legislative floor sessions. *House Rule 19, Senate Rule 20.*
- **Public testimony in committees of reference:** Article V, section 20 of the Colorado Constitution (GAVEL) requires that every measure referred to a committee of reference of either house be considered by the committee upon its merits "and no rule of either house shall deny the opportunity for consideration and vote by a committee of reference upon such a measure within appropriate deadlines." Under *Grossman v. Dean*,⁸ "considering on the merits" contemplates "at a minimum, some interactive consideration by members of a committee...before being voted on...." This requirement does not necessarily require public testimony, but many legislators view public testimony during a committee hearing as an important source of information when they are considering legislation. The rules, statutes, or policies may need to specify how members of the public who want the opportunity to participate in a committee meeting being conducted remotely may submit their questions and their

⁸ *Grossman v. Dean*, 80 P.3d 952 (Colo. App. 2003).

testimony or comments to the committee. What may be feasible is highly dependent on what technology may allow.

- **Express prohibitions against electronic participation in committee of reference meetings:** Because the nature of a remote legislative session would require participation through the telephone or other electronic connection, legislative rules that prohibit electronic participation in meetings of committees of reference would need to be addressed. The general assembly may want to consider amending these rules or, alternatively, adopting new rules or policies on remote legislative sessions that waive or override these prohibitions in certain circumstances. *House Rule 25A, Senate Rule 22B.*
- **Standing division during the committee of the whole:** While a call for ayes and noes may not be made during the committee of the whole, a legislator may demand a standing division of the ayes and noes on any question. It may be advisable to specify by rule or policy how the ayes and noes are to be determined for a division vote in the committee of the whole. *House Rule 32 (b), Senate custom & practice.*
- **Limiting use of electronic devices:** The limits on the use of electronic devices on the chamber floors or in committee hearings were written to avoid disruption and interruption of important deliberations. If strictly construed, however, the rules limiting the use of electronic devices could be interpreted to prevent the convening and conducting of a remote legislative session. The general assembly may want to consider clarifying by amendment or policy that these rules do not apply to floor sessions and committee hearings being conducted remotely. *House Rule 25C (b), House Rule 33 (e), Senate Rule 22A (b), and Senate Rule 22B.*
- **Recording of legislative proceedings:** Joint Rule 28 requires "[a]ny meeting held in the Capitol building or Legislative Services Building by the General Assembly, or either house thereof, and authorized by statute, by resolution, or by rule of either house..." must be recorded. Joint Rule 28 also specifies how such recordings must be stored. This rule does not contemplate meetings held remotely, but if the general assembly wishes to convene and conduct a remote legislative session, it is advisable that the general assembly amend this rule or otherwise specify that this rule also applies to remote legislative proceedings. *Joint Rule 28.*

One approach that the general assembly and each house, when applicable, could take to address these issues is to generally amend legislative rules as necessary to allow

remote legislative proceedings under the existing framework of legislative rules. Another approach would be for the general assembly, by statute or rule, to authorize the Executive Committee of the Legislative Council to adopt policies to enable remote legislative sessions while clarifying and, in some instances, overriding or eliminating issues with existing rules.

3. The general assembly needs to eliminate or override a statutory limitation affecting its ability to conduct legislative remote sessions.

There is only one statutory section that currently limits the general assembly's ability to convene and conduct remote legislative sessions. Section 2-3-303 (2)(h)(I), C.R.S., grants the Executive Committee of the Legislative Council the authority to allow legislators to electronically participate in legislative committees and to adopt policies regarding legislators' electronic participation. However, the statute restricts the Executive Committee's authority to only allow legislators to electronically participate in committee meetings held during the legislative interim. This section reads:

2-3-303. Functions - report - definitions. (2) In addition to any other powers and duties set forth in law, the executive committee of the legislative council has the following powers and duties:

(h) (I) The power to allow members of the general assembly to participate electronically in committee meetings and to recommend and develop policies regarding electronic participation if so allowed; except that, **if allowed, electronic participation must only be allowed for committee meetings occurring during the legislative interim.** (Emphasis added)

The general assembly could amend this statutory section to remove the interim committee limitation. It is also possible that the Senate and the House of Representatives could adopt a joint rule superseding this statutory restriction or authorize the Executive Committee of the Legislative Council to adopt policies governing the conduct of remote legislative proceedings, which policies could expressly supersede the interim committee limitation in section 2-3-303 (h)(1), C.R.S., in certain circumstances.

The ability of the general assembly to establish a formal rule of procedure that supersedes a statutory rule of procedure is based upon the constitutional authority of each house to determine its rules of procedure.⁹ This grant of authority is plenary and,

⁹ Colo. Const. art. V, § 12.

except as otherwise limited by the state constitution, is exclusive.¹⁰ Mason's recognizes that rules of legislative procedure are derived from various sources that take precedence in the following order:

- 1) Constitutional provisions and judicial decisions thereon.
- 2) Adopted rules.
- 3) Custom, usage, and procedures.
- 4) Statutory provisions.
- 5) Adopted parliamentary authority.
- 6) Parliamentary law.¹¹

Whenever there is conflict between rules from these sources, the rule from the source listed earlier prevails over the rule from the source listed later.¹²

If the general assembly decides to amend section 2-3-303 (2)(h)(I), C.R.S., to remove the interim committee restriction, it could also provide statutory clarification concerning whether a member participating in a remote floor session or committee meeting is entitled to compensation such as per diem and expenses under section 2-2-307 and 2-2-317, C.R.S.

The general assembly may wish to include other provisions in the bill such as:

- A legislative declaration that describes the reasons why the general assembly is unable to convene physically at the State Capitol for specified reasons and declares that legislative business must be conducted in a different manner;
- A statement regarding how long the general assembly expects to need to conduct legislative business by means of a remote legislative session (e.g. for the duration of a public health emergency disaster declared by the governor);
- A definition of a "remote legislative session";

¹⁰ *In re Speakership of House of Representatives*, 15 Colo. 520, 25 P. 707 (1890); see also, *State ex.rel. Johnson v. Hagemeister*, 161 Neb. 475, 73 N.W.2d 625 (1955); *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963 (1912).

¹¹ *Mason's Manual of Legislative Procedures* (2010 ed.), Sec. 4, Par. 2.

¹² *Id.*, Sec. 4, Par. 4; see also, *Malone v. Meekins*, 650 P.2d 351 (Alaska 1982) (under separation of powers, court refused to adjudicate whether removal and then selection of new speaker in accordance with legislative rules violated statute); *Des Moines Register & Tribunal Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996) (court upheld senate withholding telephone documents consistent with senate rule despite claim that action violated open records law); *Abood v. League of Women Voters*, 743 P.2d 333 (Alaska 1987) (claim that legislators violated open meetings law dismissed as nonjusticiable since legislative rules governed open meetings).

- Provisions regarding the delivery of bills to the governor while the legislature conducts business through a remote legislative session;¹³
- Provisions specifying how the two houses and legislative committees will conduct their proceedings and meetings and transact business during a remote legislative session;
- Notice that, except for sessions conducted in secret pursuant to article V, section 14 of the Colorado Constitution, a meeting conducted remotely will be preceded by the same or substantially the same public notice as would be required if the members were physically present at the seat of government; and
- A provision specifying whether the remote legislative session is available only for this particular declared disaster emergency or other declared disaster emergencies in the future.

¹³ Colo. Const. art. V § 11.