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Commentary

The Public Affairs Research Council of Louisiana

Clean Bills of Health

The Legislature has a chance to create greater and safer public input during a pandemic

***Summary:** The Legislature's role is essential. It must fulfill its constitutional mandates and aid the economic and health recovery of the state. Legislators should take their role seriously while also taking the pandemic seriously. Lawmakers and staff at the Capitol should be tested for the disease. Lawmakers should set a good example by following the new, safer protocols. The agendas should be concise and relevant to the crisis at hand. Committee hearings should mitigate the risks and accommodate stakeholders, the public and state appointees by allowing testimony or confirmation hearings by phone or video appearances. Bills allowing legislative committee video-conferencing in an emergency should be given earnest attention.*

The Legislature performs an essential role for Louisiana. But not everything it normally does is essential under the circumstances of a pandemic.

That is the great challenge for the most social branch of state government as it re-enters the Capitol this week to fulfill its constitutionally mandated assignments and to aid the economic and health care recovery from the unanticipated ravages of COVID-19.

Legislators already are missing Rep. Reggie Bagala from their ranks due to his death from the disease. At least forty-four members are age 60 or older. It's no surprise that one of every four lawmakers didn't show up Monday.

But legislators are the only ones who can play their part. Only they can appropriate funds for state agencies and programs. In this risky environment, they must ensure a safe session not only for themselves, but for their staff, lobbyists, state and local officials, private stakeholder groups and interested citizens, who have a constitutional right to witness public hearings. Regular disease testing with quick results for lawmakers and staff would be a wise move.

The House and Senate have set reasonable protocols to create a paperless process and enforce cleanliness and social distancing. With that plan in place, there now are three key things they can do to make this session a safer and more productive experience: **follow the new rules; keep the legislative matters concise; and allow some testimony and confirmations remotely by phone or video.**

Unfortunately, the Legislature is off to a rough start on all three counts.

Safer environment

Some lawmakers take the rules seriously and some don't. On Day One back from the long recess, much time was given to inconsequential or non-urgent legislation unrelated to the impact of COVID-19, and many examples of postponable legislation are up for consideration. While the committees are accommodating in-person and written testimony – and hardworking lawmakers are fielding an abundance of calls and messages – the public hearings have yet to allow direct public testimony on screen or speaker.

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These are unnecessary shortcomings. When a lawmaker flouts the new rules, it sets a bad example for the non-legislators attending. Nothing is more contagious than a lack of discipline, except maybe the coronavirus. It's understandable. Masks and social distancing are a foreign concept in the state Capitol chambers and hallways, where the denizens are accustomed to huddles and handshakes.

On the positive side, the House Appropriations Committee invited economic experts and got directly to the business of evaluating the state's fiscal circumstances. But less encouraging, House committees also dove directly into legislation bearing no connection to the state budget or the recovery. Some bills left us shaking our heads over their irrelevance to our current grave situation.

This would seem to be a good time to get a bill passed because fewer legislators and potential critics are present. The time is short and the mood is in favor of moving bills in the name of progress.

Yet every bill creates more meeting time, more occupants at the Capitol and more human interactions. Committee chairs should ask: Is this bill worth the risk of making someone sick? Why can't it wait? The Legislature will be back in June and then almost surely again early in the next fiscal year.

Emergency measures

And then there is the complicated business of video or phone conferencing. The Governor signed an executive order in March allowing state and local public bodies to meet by videoconference if they are unable to achieve a quorum in person due to the pandemic. Many have done so. A quorum, even if virtual, is still required and votes still must be taken openly. Public comment must be allowed.

But the Governor and his orders oversee the executive branch, not the legislative one. In some other states, legislatures have taken up videoconferencing to keep the wheels turning, but not here.

Why is the Louisiana Legislature not using video or phone conferencing to conduct its business, at least for committee hearings? The reasons are technical, legal and cultural.

The committee rooms are not equipped for video conferencing. The hearings in normal times strive for a high standard of openness, offering online live and archived streaming for those who want to watch without participating. All participants in a hearing are seen and heard, and the number of online observers who can watch is not limited by the capacity of a common video-conferencing app.

But much of this can be, and in fact already has been, overcome. The State Bond Commission, which usually meets in the Capitol, has met multiple times remotely in recent weeks through GlobalMeet. The platform accommodates panel members situated remotely and those who tune in online to observe or participate. Public comment is made by email, live chat, video testimony and by phone. All is recorded. It would be hard to argue that these are not public hearings in the context of a pandemic. In fact, with these connections, the bond commission is able to involve a much broader public than it would without the pandemic-related tech solutions.

Using Senate committee rooms, the bond commission in the past also has invited bond advisors to brief the members in two-way conversations by telephone, allowing their voices through speakers to be heard easily by the whole room. Whereas not everyone has videoconferencing capability, just about everyone has a phone or can find access to one.

Current laws and rules

Louisiana's Constitution and statutes contain special provisions for Legislative meetings, as do House and Senate rules. The Constitution requires that bills receive a "public hearing." There is no specific constitutional prohibition against video or phone conferencing. Lawmakers must meet somewhere in the state capital city.

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Statutes require legislative meetings with a quorum and the members present. The law allows video-conferencing in limited circumstances between sessions. Statutes and House and Senate rules grant broad privileges for legislators to meet privately for social or informational gatherings, so long as votes aren't taken.

The Legislature should look foremost at its Constitutional mandates, especially those during a regular session. There are duties it must perform, such as forming a state budget, without which no public funds may be spent by state agencies. It must figure out how to fulfill those mandates even under the duress of a pandemic.

Article XII, Section 11, of the state Constitution contains a Continuity of Government provision, which directs the Legislature to provide "for orderly and temporary continuity of state government, in periods of emergency...." Delegates to the constitutional convention in 1973 debated somewhat inconclusively about the powers assumed by this provision. The Legislature since then has not fully fleshed out a set of continuity laws, but this provision appears to encourage lawmakers to better prepare for emergencies. Article IV addresses successions for public officials and Article III allows the Legislature to suspend laws temporarily.

The Senate Secretary has acknowledged that this Continuity of Government section is one of several tools in the emergency toolbox. But any new special process must be handled properly to avoid successful court challenges to legislative decisions made in unusual ways.

Culturally, the Legislature is the “people’s house.” Most lawmakers value the in-person meetings and live public involvement. It is the ultimate public body of the state. Public transparency and participation should be a high priority.

PAR recommendations

Taking all these matters into consideration, PAR suggests that the Legislature could adopt House and Senate rules, joint rules or concurrent resolutions to exercise all available constitutional authority and allow video committee meetings while respecting the constitutional mandate for openness during an emergency.

If legislators themselves need to be present in person – and there is a legal argument for that – then video or phone conferencing could be utilized only for those non-legislators who wish to offer committee testimony without the risks of entering the Capitol. During a pandemic, this move would make a hearing more public, not less.

The Senate President and Secretary have been studying this possibility and are still considering ways to move in this direction. Sen. Sharon Hewitt, chairman of the Senate & Governmental Affairs Committee, has taken a lead in searching for solutions. House members, including a special effort by Rep. Barry Ivey, have been seeking answers, also.

Currently, those who wish to offer real-time testimony must walk the halls and rooms of the Capitol, use its facilities and sit at the same table and microphone as many others offering testimony in a hearing room. They may offer written testimony, which must be submitted well ahead of a hearing and does not offer the flexibility of commenting on new amendments brought in committee. (A House committee this week is requiring written submissions 24 hours in advance.)

The House and Senate are figuring ways to read aloud or summarize the written testimonies, which are all entered into the record but not necessarily heard during the debates. The

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perspective of some stakeholders is that their written testimony for all practical purposes is simply being tossed into a drawer. One educational stakeholder group this week sent out an announcement that, “We’ll don a mask and get in there” to look out for their interests. They must have thought that was their only effective choice, and no one could blame them for reaching that conclusion.

A safer and public-friendly approach

In this emergency, the Legislature should provide those seeking public testimony the alternative of appearing by screen or speaker. Technically, the obstacles can be overcome. Legally, in a pandemic, this would offer a better “public hearing” as required by the Constitution. And culturally, you’ve got to adjust in a crisis to get the work done.

Bills on the House and Senate sides will be under consideration this session to create statutory support for legislative committee video-conferencing in an emergency. These instruments deserve earnest attention.

Maybe the Legislature with its new protocols and strict adherence will be able to get through its current and special sessions in the next two months without endangering people. While it's possible additional measures may be unnecessary, further mitigation of risks could be beneficial, and perhaps even life-saving. If legislators take their role seriously while also taking the pandemic seriously, they might see fit to give the public a safer alternative to participate.

Endnote: Senate confirmations

While much of the Legislature's attention has focused on its essential task of passing a budget, Senate confirmations are also a significant mandated job. Hundreds of executive branch appointments are up for confirmation and by law those people must be confirmed during a regular session or else their hold on the post will be voided and their authority will be removed without the possibility for reappointment during the interim before the next regular session.

The law does not allow confirmations to slip into a special session. Lawmakers could consider a suspension of the confirmation statutes, but this is probably unnecessary.

Traditionally, not all appointees who are confirmed get a hearing in the Senate & Governmental Affairs Committee. Committee recommendations to the full Senate are typically a single omnibus vote and may include those appointees who appeared in committee and those who didn't during the session. So, the committee and Senate leaders have a lot of leeway even in normal circumstances to move along the process as rapidly as they choose. Ultimately, the full Senate makes the confirmations, usually in a sweeping single vote.

Surely, some appointees due for confirmation hearings can conduct these by video or phone, sparing human traffic and lowering the health risks in the Capitol.

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