

**STATE OF NEVADA
OPEN MEETING LAW TASK FORCE**

Minutes of Meeting

Thursday, March 18, 2010 at 3:30 p.m.

**Office of the Attorney General
100 North Carson Street
Carson City, NV 89701**

Committee Members Present in Carson City

Barry Smith
Judy Caron
Scott Doyle

Committee Members Present by Phone

Mark Hinueber, LVRV
Thomas Mitchell, LVRV
Senator Terry Care

Committee Members Absent

Assemblywoman Debbie Smith
Mark Lundahl
Trevor Hayes

Public Present

None.

Attorney General's Office staff present

Attorney General Catherine Cortez Masto, Chair
George Taylor, Senior Deputy Attorney General
Keith Munro, Assistant Attorney General
Keith Marcher, Senior Deputy Attorney General
Jim Spencer, Chief of Staff
Edie Cartwright, Public Information Officer

1. Call to order, roll call of members, and introduction.

Attorney General Catherine Cortez Masto called the Open Meeting Law Task Force meeting to order at 3:30 p.m. and roll call was taken.

2. Power Point Presentation.

General Masto explained that the Power Point presentation is just a starting point for the task force to set the stage for discussion and questions. Since she has been in office no one has examined the OML to determine if it needs refinement, revisions, or whether it is fine as it is. The Task Force will assist the AG to address any concerns and changes that we might want to present to the next Legislature. This is an opportunity for everyone to speak and express their concerns, to determine what works and what doesn't, and whether changes in the law are necessary.

General Masto asked if everyone had copies of the handouts for the meeting which include: the Power Point presentation, Nevada OML Manual, and a compilation of OML enforcement provisions in other States provided by Barry Smith. Individuals attending by telephone should have received these documents electronically. There is a two page untitled document listing a total of 99 public bodies including town boards and general improvement districts that have filed complaints for the last three years, 2007–2009.

General Masto explained that NRS Chapter 241 defines the OML, but we also rely on Supreme Court decisions, Attorney General Opinions and the OML Manual. She explained that the first 14 statutes define the OML which is outlined in the first three pages of the power point.

George Taylor explained the procedure when a complaint is received and the 60 and 120 day statute of limitation deadlines to complete the investigation. He explained that the Attorney General has the power to determine whether or not to prosecute a violation. He also discussed the AG's policy expressed in the OML Manual at Section 11:07.

General Masto gave an overview of a power point slide showing a graph delineating the number of complaints filed each year with this office from 2000-2009: 2000/59, 2001/58, 2002/56, 2003/50, 2004/69, 2005/68, 2006/61, 2007/59, 2008/40, and 2009/49. General Masto then explained a large chart that lists 148

complaints received between 2007–2009. It gives the disposition of each complaint; if they were resolved within the 60 day or 120 day deadline and if not, why.

General Masto also reviewed a Nevada map showing 23 geographic representations of public bodies in the State of Nevada where the 23 complaints had been filed. Most came from rural communities or local community boards. None of those depicted came from state agencies.

General Masto introduced the next body of slides beginning with Legislative Declaration of Intent.

George Taylor explained that we get a lot of questions regarding the definition of “public body.” That this really is a gray area and one that needs to be looked at. It is not clearly defined in statute. What does the statutory definition mean when it says— it must be a body of the state or local government? Does it require formation by ordinance or statute? What does “governmental function” mean? This phrase is not in statute, but we have referred to and incorporated it into our opinions.

Mr. Taylor explained that Nevada is a quorum state but not all states follow this rule. This issue came before the Nevada Supreme Court in the *Dewey v. Redevelopment Agency of Reno* case. The court stresses the fact that there has to be a quorum before there can be an OML violation.

Deliberation and Action are important OML issues. This is really the heart of what a public body does. The definition of Deliberation is not in the statute. Action is defined in statute. There is always room for discussion on these two components.

Mr. Taylor explained that the difference between Exception and Exemption is really misunderstood. It is difficult to draw a distinction or contrast between the two. This is a poorly misunderstood area of law. The only OML Exception is found in NRS Chapter 241. Exemptions are found in various places in statute including NRS Chapter 288. Mr. Taylor explained that he receives many questions in this area.

Quasi–Judicial proceedings. The 2007 Supreme Court determined that under the judicial exception in the OML there is also a quasi–judicial exception, which has ramifications for boards and commissions which may hold contested hearings. Mr. Taylor

reviewed the basic elements. The Supreme Court made plain not to confuse “hearing” and “proceedings.”

General Masto – Before going forward, any questions.

Senator Care – I was wondering if anyone has an explanation as to why the dramatic drop-off in complaints since the legislative revisions in 2005 and 2007. Is it because the law is working better? George Taylor explained that the statistics had jumped out at him as well. He stated he thinks maybe the OML has been amended to make it easier to understand. The AG has also implemented an outreach program of presentations to boards and commissions and he feels that has helped.

Judy Caron stated that she filed a complaint with this office, but the general feeling of the public is – don’t bother. That nothing ever comes out of the complaints and it is a waste of time. That the public feels that the outcome is always based on previous opinions. She stated she received an informal opinion. She asked what determines an informal vs. a formal opinion. Mr. Taylor explained that on the AG’s website there is a preface-introduction which states we publish opinions that are new or matters of first impression. There are four or five criteria. Mr. Taylor makes a decision whether to file a formal or informal opinion. General Masto stated that there is a lot of discretion with the DAG overseeing the OML at that time. Ms. Caron stated that the website OML checklist is very helpful.

General Masto stated that the next slides have been put together for discussion in an effort to come up with concrete ideas and suggestions.

Mr. Taylor discussed corrective action under Section 11 of the OML Manual. He stated Section 11 encourages public bodies to take corrective action to “cure” a violation. The question posed by the slide is whether fines or other penalties should be assessed for infractions? This is an issue for discussion. Mr. Taylor referred to the document provided by Barry Smith which compiled other State’s OML enforcement provisions.

Barry Smith commented that the public body should be forced to recognize they are in violation of the law. Perhaps there should be a requirement for the board to obtain training. Maybe the public body should have to submit an annual report regarding OML complaints filed against it and resolutions thereof. Public bodies need to be kept honest.

Judy Caron stated she was told only formal opinions are mailed certified mail. If the opinions are not mailed certified, what proof is there that the violators received the opinion. This occurred at a board meeting where the board members indicated they did not receive the opinion. Are all board members sent the opinion or just the chair? Carole Gourley, OML Coordinator, stated that all opinions, formal or informal, are mailed regular mail. None are sent certified mail. She explained that the opinion is sent to the complainant, chair of the public body, and counsel for the public body. Ms. Caron emphasized the integrity of the AG's office needs to be restored. She seconded Mr. Smith's view that public bodies should be forced to acknowledge a violation in a public meeting.

George Taylor put the subject of having Subpoena Authority out for discussion. The AG's investigative procedure starts with a request for a statement from the committee, board, commission members and counsel, but the Attorney General does not have subpoena authority to require cooperation. Just putting it out on the table as a possibility? General Masto noted that the time clock is ticking to meet the 60 day and 120 day statutory limitations period while waiting for public bodies to comply. Mr. Smith asked if the AG's requests have been ignored. Mr. Taylor answered, yes, for some period of time.

Senator Care stated the Legislature discussed this in 2005 and 2007. He talked about sanctions for violators and subpoena power. Are there other jurisdictions where the enforcer has subpoena powers? General Masto stated that we will follow up on this issue. There was a discussion of Mr. Smith's document, OML Enforcement Provisions, June 2009.

George Taylor asked about the subject of penalties. Should the public bodies pay the costs of investigation? There would have to be some kind of criteria to follow regarding enforcement. This would not be possible with every public body without criteria.

The subject of civil fines was discussed. These are found in other State's OML provisions. Mr. Taylor stated he has not looked into other jurisdiction's fine schedules because this office follows Nevada law and there are no fines or penalties. Other jurisdictions do have civil fines. General Masto referred to the handout from Mr. Smith regarding enforcement in other States.

Tom Mitchell, LVRJ – Asked about and referred to repeat offender provisions for removal from public office. General Masto asked whether they have "removal from office provisions" in other state

statutes. Mr. Hinueber then stated that Arizona, Hawaii, Minnesota, Iowa and Michigan have those provisions. Barry Smith said Iowa is “two prior violations” before its removal from office provision is available.

Discussion of the Clear and Complete Rule. There was explanation of the rule using combination of various phrases from AG opinions. Important area of law. Agenda items must be clear and complete. There is a great deal of confusion in this area and this is a complaint that recurs frequently.

Judy Caron inquired if you can file an OML complaint against a draft agenda. This is when all the information has not been received and the support materials have not been received. She runs into this with the Wildlife Commission and Board. General Masto stated we would need more information, then we could explore further. Mr. Taylor commented that this is a recurring problem with the Board of Wildlife Commission.

Discussion of Supreme Court Case law – *Schmidt v. Washoe County*. This case is important because the Supreme Court held that a public body may hold pre-meeting discussions on whether to remove or place an item on agenda. This practice does not violate the OML. Scott Doyle suggested caution in this area if we are thinking to amend this case law. He noted that the *Schmidt* case distinguished the “clear and complete” standard as articulated in the *Sandoval* case especially with regard to specifically listing specific bills late in legislative session, which may represent a narrow exception to *Sandoval’s* holding. Also stated the *Sandoval* case is good case law.

There was further discussion of the scope of the presentation of topics either as talking points or as subjects for amendment in the next Legislature.

First Amendment. Public comment is a frequent complaint subject. A Public body may restrict public comment, but the public body must tolerate viewpoint neutral comments. OML opinion 2001-22 addressed this issue. Topics presented to the task force were: (1) “meaningful” public comment; (2) limitations on public comment; (3) chairperson’s discretion regarding public comment. Disagreements arise when one individual is given more time past the amount allotted on the agenda, maybe to finish their statement, but the next person isn’t given the same consideration. Time limitations should be clearly articulated on the agenda. Judy Caron asked if a member of the public could ask the Chairman a question or their

point of view. Mr. Taylor indicated yes, but the board can choose to participate or not participate but they must remain viewpoint neutral at all times.

Discussion of slide entitled “Committee or no committee.” What is a committee? There is no firm definition. Mr. Taylor explained how the OML Manual determines what a committee is. There are also many inquiries on this issue. Do we need a better definition? Discussion of “fact finding” by committee contrasted with committees that vote and deliberate. What does “other subsidiary thereof” mean? Barry Smith stated he has a problem with this too. Should we have purpose as a definition or use the AG’s bright line rule in Section 3.04 of the OML Manual.

Discussion of the OML and nonprofit corporations. In the last Legislature a certain type of homeowner’s association was defined to be a public body. These are called RARCIC’s and there are between 10–15 in Nevada. Some are very large and do perform some governmental functions. They are equivalent to a GID, but they are nonprofit corporations.

Senator Care stated that this has come up in the Legislature—a private corporation performing a public purpose. For instance, in the prisons where you have a privatization, but when can the press sit in. For instance the Tax Commission made the determination that the monorail is a nonprofit corp., and it gets all the benefits pursuant to Nevada law but there is an argument to be made that it serves a public purpose. Not sure how many other entities are out there. He was not sure if this topic of the OML was entitled to cover the monorail. No one gets to sit in on those meetings (monorail corp.). I believe they have an annual disclosure. Any ideas? General Masto stated this is a good point, but we have to be careful of how we define it and the consequences. This would apply to other regulated companies such as taxicabs, etc. They are all private industries. Need to be careful of unintended consequences. If we pursue, we throw it all out there, then we need to be wary of the consequences.

Discussion of Serial Briefings and the *Dewey* case. The *Dewey* court allows for a City Manager to take less than a quorum of a public body and brief them on public business and do that as many times as necessary without violating the law. Mr. Taylor uses *Dewey* frequently. Definition of “deliberations” came from the *Dewey* case. Scott Doyle stated that parts of the *Dewey* are helpful, but also worrisome. Part of it has to do with Nevada being

a quorum state. Serial briefings do not instill confidence with our interpretation of the OML. He stated it should be part of the AG's education and our outreach program to avoid misunderstanding.

Discussion of the slide entitled "Appointed Public Officers." This subject engenders a lot of inquiries. In a 1989 case out of Douglas County, the Supreme Court said the entire procedure to select or appoint a person to public office must be done in public, but generally public bodies do not want to evaluate and interview in public. There are many inquiries from the public and public body's counsel regarding this issue.

Discussion of the subject of "Fair hearing – Abstention from voting." There is a problem if several appointed public body members abstain, and then less than a quorum makes a decision for the public body. Appointed members can abstain but not elected public body members without an opinion from counsel. Appointed members can abstain and then there is less than a quorum making a decision for the public body. Mr. Taylor asked if there is an appetite to try to change the law to also apply to appointed bodies. Senator Care stated this bill in reality is simply political. You have rural Nevada where everyone grew up together, went to college together, etc., so everyone claims they have to abstain from voting on everything. There is no appetite by the Legislature to expand this to appointed boards.

George Taylor asked Keith Marcher if there is a constitutional cause of action based on "fair hearing?" Mr. Marcher said yes, however the issue has not been raised, but it came up recently in a pharmacy board case. The issue is that where less than a quorum makes a decision in a contested case; for example, a party may argue that they did not receive a fair hearing.

Discussion of the subject of Electronic public meeting. This is a new issue. The Governor's Task Force for Broadband asked about it. Question: Can you participate in a bulletin board meeting that could go on for several days? Would that fit within the OML? We put the subject here for discussion. Scott Doyle stated that trying to put these electronic media definitions in the OML law when the media is so transitory would be difficult. You can define it but in two years as technology changes, the law would have to change. Barry Smith asked if Mr. Doyle's preference would be to deal with the issue through an opinion rather than statute. Mr. Doyle replied in the affirmative and asked whether the electronic gathering is truly a public body? He asked does the bulletin board provide a quorum? Definitional issues under this subject would be difficult.

Mr. Taylor stated that the next slides are just additional topics for discussion only.

General Masto asked if anyone had any other issues for discussion.

Barry Smith brought up his view of the confusion that exists between defining “exceptions” and “exemptions.” He cautioned the group about opening up topics in the Legislature. He also urged the group to address the OML exemption in NRS Chapter 288.

Judy Caron asked that when there is an OML opinion that involves a public body appointed by the Governor that the Governor’s office also receive a copy of the letter or opinion issued by this office.

Senator Care cited to “Violations and sanctions.” The task force may want to explore “sanctions” when the public body has knowingly committed a violation as opposed to a simple violation. He asked what if the body relied on the opinion of counsel and the body conducts business behind closed doors, and then later it is determined to be a violation. Often fines, unless paid by the office holder, are only tax money forked over to pay the fine of the public body. He said a statute to remove an office holder would need a legal proceeding before a finder of fact. Then an appellate procedure for judicial review must be considered. Not sure what other states do. Should explore that. General Masto stated we will definitely research what other states are doing to poll “best practices.”

Tom Mitchell stated he feels the attorney general’s office should be involved in assisting the boards on the interpretation of public records. There is a lot of confusion over what is expected of them, especially in rural counties. He suggested bringing administration of public record law into the AG’s office.

Barry Smith asked how this office handles an OML complaint against a state board or commission when the AG’s office also represents the board or commission. General Masto stated we sort of build a conflict wall around George. Sometimes separate deputy attorney generals represent a board and the agency at the same meeting. If there is an OML issue, we tell them to file a complaint with George. George then handles it and works with the DAG assigned to assist that board.

Keith Marcher explained the process of handling an OML complaint against a state board in further detail.

General Masto and Scott Doyle discussed the previous administration's handling of OML complaints, division of function, the conflict wall, and the unique nature of the AG office's representation of numerous and diverse clients. Outside counsel is not always required. Protection of the integrity of the process is paramount. Judy Caron asked what recourse the public has if a DAG allows a meeting to get out of hand. Is the deputy also in violation? She related her experience with a particular board and multiple representation by two DAG's. Keith Marcher explained the current division of function where DAG's represent a board or commission and the other DAG represents the agency. General Masto stated that should a DAG give inappropriate OML advice to the agency or board, she would want to know because that is an administrative matter.

Judy Caron asked if the task force could review the form found on the AG's website, the complaint form, for possible revision to reflect the possibility of naming individuals as violators.

3. Next Meeting.

General Masto asked if everyone would be able to meet once a month for approximately two hours. Everyone agreed. She stated that the next meeting would be in April. She indicated that Linda Fitzgerald will send out draft minutes to everyone along with the agenda.

4. Discussion/suggestions for future meetings.

General Masto discussed the following items: 1) Data compilation. She asked the task force to help identify any other types of information members would want to see. She illustrated with explanation of the data compilation chart (148 complaints) from 2007-2009 already compiled.

For the next meeting, she asked the members to Identify priorities the task force should pursue. She asked whether anyone had suggestions for moving forward. Should anyone else be added to the task force? Barry Smith and General Masto discussed the OML task force process and agreed that work must fit within time constraints given legislative deadlines.

General Masto and Keith Munro discussed moving forward with an OML Bill at least by May 2010.

5. Public Comment.

No public comment.

6. Adjournment.

Meeting adjourned at 5:20 p.m.