

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

Minutes of Meeting

Thursday, April 29, 2010 at 2:00 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

Committee Members Present by Phone

Attorney General Catherine Cortez Masto, Chair
Mark Hinueber, LVRV
Thomas Mitchell, LVRV
Assemblywoman Debbie Smith
Trevor Hayes
Maggie McLetchie

Committee Members Absent

Senator Terry Care
Mark Lundahl
Scott Doyle

Public Present

Karen Gray
Cynthia Gregory, Douglas County DA

Attorney General's Office staff present

George Taylor, Senior Deputy Attorney General
Keith Marcher, Senior Deputy Attorney General
Jim Spencer, Chief of Staff

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

Attorney General Catherine Cortez Masto called the meeting to order at 2:10 p.m. Roll call was taken and it was determined that a quorum was present.

She stated that Scott Doyle could not be here but he provided a letter that has been passed out to everyone just before this meeting. She indicated that it will be electronically provided to the rest of the participants who are calling in on the phone.

2. Review and Approval of Minutes from March 28, 2010 meeting.

General Masto asked if anyone had any changes or corrections to the minutes. No changes were requested. She asked for a motion to approve. Barry Smith made a motion to approve the minutes, Judy Caron seconded. All ayes, no nays - motion was approved.

3. Discussion/review of Exhibits from 3/8/10 meeting.

General Masto explained that the Nevada map presented gives a sense of what locations we are talking about geographically and the breakdown across the State of Nevada. She asked if anyone had any thoughts or comments on this map. She asked George Taylor if he had any further comments on the map presented.

Mr. Taylor stated that the map represents each public body that this office investigated for a three year period. They are not directly geographically over each location, but as you can see if you look at the left side of the Nevada map they are kind of stacked on top of each other, but by and large, my review is not scientific, but we have a lot of rural public bodies that are noted on this map.

General Masto asked if there were any state agencies or state bodies.

Mr. Taylor replied yes. If you look at the left side of the map there are two boxes that list state agencies and down in southern Nevada there were some local government agencies that we simply could not fit over the Carson City area or Las Vegas. It was asked if the public body name and location could be listed to correlate with the file.

Judy Caron asked if it could be indicated whether it is an appointed board or an elected board. Have it correlate with the number on the map.

Mr. Taylor asked if they wanted two more things added. It was decided to just add the public body name. He indicated that he will look into incorporating the additional information.

General Masto indicated that any comments should be emailed to her assistant, Linda Fitzgerald.

4. Legislative Agenda

General Masto gave an explanation as to what the task force is trying to accomplish. During our last meeting there were a lot of comments. Everything must be put on the table and then we can determine as a group what issues we really want to present to the Legislature. We will try to catch everything. We need to decide as a group what we want to tackle, and what to prioritize. All issues raised are for discussion and review.

Next, there was a brief discussion of the OML and whether monetary penalties would assist enforcement.

4 (a) Penalties. General Masto asked everyone to review Scott Doyle's letter regarding this issue. She asked George Taylor how many states assess penalties?

Mr. Taylor indicated he did not recall, but after a quick review indicated he counted 24 from Barry Smith's handout at the last meeting. State's offer different fee schedules.

Next Las Vegas task force members were asked if it would be appropriate to have civil penalties. Responses from Las Vegas members indicated willful and knowing violations should be penalized, and this should be a legislative priority. Another comment was that a penalty should be for a knowing violation.

Mr. Taylor stated that Nevada's statute regarding criminal misdemeanors (241.040) requires a finding that the member of the public body acted with knowledge of the fact that the meeting was in violation. It is a "knowing" standard for a criminal misdemeanor.

General Masto asked if there is anything already in the existing statute that addresses a civil penalty?

Mr. Taylor indicated he was not aware of anything in the Nevada OML. We could perhaps look at other states. There are 24 examples in the Open Meetings Enforcement Handout from the 3/18/10 meeting, which we could review for standards and then bring it back to the body at our next meeting.

Suggestions from Las Vegas members for penalties were: \$100/first offense; \$250/second offense; \$500/third offense and removal from office – three strikes law. Perhaps the costs of investigation should be paid back by the agency in violation.

General Masto asked George Taylor to pull together the penalties from other states for the next meeting.

Barry Smith said the handout being discussed (with information about penalties) is actually put together by the Massachusetts Newspaper Publisher's Association (MNPA). He stated he has the Reporter's Committee Open Government Guide which he can provide a copy of to George. Except for a couple of states it should still be accurate. He stated he is in agreement with the general concept as it has been outlined so far, that there are degrees of penalties for repeated offenses and that it goes up to perhaps a higher standard that does include removal from office as well.

General Masto stated let's move on to Agenda item #4(a)(2), the "repeat offender" removal from office provision.

She stated, let me clarify, does everyone agree that there should be a legislative agenda component for "removal from office"? She asked Mr. Taylor how many states have that penalty?

Mr. Taylor stated that at the meeting held March 18, Mr. Hinueber said there were at least four states that had removal from office provisions.

Barry Smith stated that is what he sees on the MNPA chart too, four or five states with removal from office penalties.

General Masto asked George Taylor to pull those removal penalties from other states, as well, so we can take a look at their structure.

Comments from Las Vegas regarding Scott Doyle's letter, and other issues were discussed. Regarding "repeat offender," we need a knowing standard for civil penalty, but if we can prove a willful disregard the first time, then removal might be proper on the first strike.

Comment from Las Vegas - this means if they acted with reckless disregard, right?

Mr. Taylor responded, I think that is a different standard, what I propose to do when I review and compile the summary of the state's fee schedules, is to take a look at their burden of proof, what kind of language they use, and bring it back to you.

Trevor Hayes stated that one statutory standard should be failure by the public body member to engage in due diligence as it applies to any removal from office provision.

General Masto noted that a "removal from office" provision – a civil penalty – might need a higher standard for enforcement, but the task force will have to figure that out. Removal is not a criminal penalty.

There was further discussion of enforcement of the OML using voluntary compliance and enforcement through penalties. Should the district attorney's be involved in enforcement; how about bad advice from the public body's attorney?

Trevor Hayes stated that in that case we should not seek criminal sanctions, we just want to bring them into compliance. Maybe the district attorney's should train the public bodies.

General Masto mentioned reliance on district attorney's and advice to public bodies—should their advice be required to be consistent with the law?

Barry Smith stated a public body should be knowledgeable about the OML. They should understand what their requirements are and what needs to be done. If they do have a question and there is any doubt, we want them to say, "Yeah, we better get some good advice because there is a penalty here if we don't."

General Masto asked what happens if the district attorney or their attorney gives them bad advice?

Mr. Taylor stated that right now this office has a policy, not only in the OML but in other agencies and other areas of law, that reliance on an attorney's advice avoids member liability.

General Masto asked if their attorney is not advising them correctly, should there be some sort of ability to say, well okay you did rely on

them, however, it was the wrong advice. Does this require enforcement or just more training from this office?

Mr. Taylor stated that over the last few years there have been several public bodies that we have been investigated several times. However, the subject matter of the investigations has been different. It is not the same violation each time. Right now, despite the fact that I have several public bodies that have had three or four violations in the last two or three years, I continue to give them advice, discuss issues/complaints with their attorney, and then I follow up and offer outreach and training. That is how we handle it. Our main goal right now is to cure and take corrective action so the public is not disadvantaged.

Trevor Hayes stated that something he and Barry Smith have talked about over the years is maybe there should be some sort of public acknowledgement of violation. Should it be on next agenda? One of his frustrations is that the fact of a violation is never presented at another meeting. The public may never know.

Judy Caron agreed. When the certificates of mailing are sent out to a board finding it in violation, are all members of the board notified, or just the individual? Is the whole board notified of the actions that came out of the AG's office? Because the fact of violation isn't made public. She has sat on boards when a violation had occurred but not disclosed. Someone brought it forward during public comment. The public body may not acknowledge it and there is no way to prove to the public that they ever received the letter from the Attorney General's office the way things are handled now.

General Masto asked if this would have to be put on the next agenda to approve that the opinions, etc. be sent to all board members?

Mr. Taylor indicated that we can certainly send the opinion or any type of action we take to each member and that it can be done administratively. Whether we can force the public body to do that is more problematic. However as part of a settlement, I think we can negotiate that. We may be blurring the line between administrative action and something we want on our legislative agenda

General Masto moved on to Agenda Item #(4(a)(5) "Attorneys Fees; Costs." She was not sure the Legislature would have an appetite for this item.

Trevor Hayes stated, practically, I don't see the Legislature passing this. In a perfect world maybe, but not at this time.

General Masto stated we should check to see what other states do in this regard.

General Masto restated that only the issue of personal liability for fines should make it on the Attorney General's legislative agenda – all agreed? Response was yes.

Next Agenda Item #4(b), clarification or reformulation of the definition of "committee or sub-committee" was discussed.

Mr. Taylor stated that right now when the head of an agency appoints a group of people regardless of whether they are state employees or citizens, and if their charge is to report back to the agency head, then we do not consider that to be a public body. Scott Doyle's letter, p.3, 2nd paragraph was discussed. There are several approaches to defining "committee." However, Mr. Doyle's comments suggested consistency could be achieved by making all multi-member bodies appointed by the Governor meet the OML.

There was further discussion of Mr. Doyle's written comments on committees, subcommittees, and subsidiaries especially as it relates to the Governor's office and the Governor's appointments of commissions, committees, and any multi-member group.

George Taylor stated that staff is exempt right now from the OML. For example, an agency head could call staff for any reason at any time to discuss policy or anything else. What distinguishes the discussion here is that the Governor or an agency head sometimes formally appoints a group of people to do a specific thing and they have a meeting, they may even form a consensus, or they may even vote, but they would not be a public body as long as they only report back to the agency head.

Barry Smith stated that he thinks the language in other states pretty much covers every possibility, I mean it covers every public agency, every public body that is more than one person. That is how they exclude the executive positions. Some of them don't distinguish. Some of them specifically include the executives and administrators, but the approach I think we should take is to try and define what we want to do, what we think the policies should be and then define it from there. In fact that's where I see there is a conflict in the OML as it exists now, because it does attempt to define the roles and functions. Are they publicly funded, are they

performing a governmental purpose if that is what they were assigned to do. So we attempt to do that and then we say but if it is this kind of body and it is only appointed by one person then it doesn't qualify. That is the conflict I see. The approach is I think for us to try and figure out what we think it should be and define it from there. Does that make sense?

Catherine asked if the task force should more closely define committees in terms of state employees and other combinations of persons as public bodies, or should the function of the group of people define the OML's application?

General Masto then discussed the Governor's health care forum. She asked whether it should be subject to the OML?

Trevor Hayes expressed opinion that it should be included. Others also expressed the same opinion.

Barry Smith offered his opinion that we are not going to be able to include broad of language of inclusion because it is just not going to fly.

Mr. Smith stated that it relates to a couple of other things on here such as are they publicly funded, and also Scott talked about, are they merely fact finding? I wouldn't make that an exemption or an exception but I think all those things we can define and we can figure out who we think ought to be open and who doesn't have to be because they are basically staff meetings.

General Masto asked whether fact finding committees are normally exempt from the OML?

Mr. Taylor said it appears to him to be an important area, I know it is for me in my practice. There is a lot of press and media here who cover these committees, boards and commissions all the time. I would certainly like to see some ideas from the members on how to define a committee given the current state of the OML. How would we make this work and make it easier for people to know if they serve on a committee subject to the OML.

There was discussion from Vegas.

Mr. Taylor said the definition of "committee" in statute is wide open or very broadly defined. The statute says the OML applies to "any committee, subcommittee, or any subsidiary thereof" and it doesn't distinguish committees from any group based simply on their

function. It just lumps them in. Our policy has been to try to draw a line, but it is not always a bright line.

Discussion from Las Vegas raised issues defining committees based on membership, function, and the identity of the appointing entity or person. It was also asked whether the OML should apply to the Governor.

General Masto stated she has meetings in her office where her staff advises her on issues and cases. These meetings are not subject to the OML.

Trevor Hayes discussed the Maryland law raised in Mr. Doyle's letter and how to apply something similar to Nevada law.

George Taylor stated that from the AG's manual, at section 3.02: "following the principal that a public body must be a multiple member entity, the office of the Attorney General opined that the OML does not apply to the Governor when he is acting in his official executive capacity." This is a long standing principal going back a long time. When we talk about the OML and an "entity," we have defined "entity" to be a multi-member collegial body. So based on that foundation, any agency head, the Governor, or any of his agency heads, have not been deemed to be subject to the OML. Then moving on to section 3.07 in our manual, there is a page and a half of opinions where we have had to examine to determine whether or not they are subject to the OML. Some have been deemed to be public bodies and some were not. It is a very wavy line. It's not a bright line, but I wanted you to know how we have managed this issue from our manual.

General Masto stated she understood the current state of the OML, but for purposes of this task force agenda, she asked whether this was an issue to take to the Legislature?

Trevor Hayes commented that it may be too much for the task force to take on.

Trevor Hayes expressed his view that Maryland law (Mr. Doyle's letter p. 3, para. 4) should be seriously considered with certain amendments.

General Masto summed up the discussion and asked staff to review cases where we have had to decide whether a body was subject to the OML or not. Prepare a discussion of a few cases

where the task force could determine what in the OML would have to be changed to make that body subject to the OML.

Mr. Taylor said that in section 3.07, we already have published opinions where certain bodies have been deemed to be public bodies and some weren't so that is a ready repository of information already available.

There was further discussion of the assignment.

Mr. Taylor stated that in considering this issue we engage in drawing lines because we have to make decisions every day about public bodies – is this a public body or not? So keep in mind that the statute is very broad. Literally every advisory body, every legislative body, fits within the statutory definition.

There was discussion about the applicability of the OML since inception.

General Masto moved on to Agenda Item #4(c). Should the Legislature require acknowledgment of OML violations by the public body in open session and should the AG file a yearly report of OML cases and their disposition?

Members stated their individual views, but generally agreed that public bodies should have to acknowledge violations during a public meeting even if it is only to apologize. Members felt an acknowledgment allowed the public body to be more accountable to the public.

The task force members discussed adding a yearly OML reporting requirement to the AG's legislative agenda. Content of the report was discussed as well as how and where to distribute it. Posting the report on the AG's website was discussed. It was also suggested that the report, something similar to the spreadsheet already compiled (and posted to the AG's web page) could be distributed electronically to all boards and commissions in the state and local governments.

Barry Smith asked why all AG dispositions including informal opinions and letters closing file are not available online.

George Taylor responded explaining the criteria used to determine which opinions to publish and the reasons that all case dispositions have not been published.

General Masto asked Mr. Taylor if there is a reason we wouldn't want to share all the information including informal opinions?

Mr. Taylor explained the AG's procedure to distinguish formal from informal opinions. Until very recently there were 55 to 60 opinions published by different authors. Some of these opinions may be inconsistent. So that is why this office has gotten away from publishing everything.

General Masto explained that some older opinions would have to be withdrawn or overruled.

Mr. Taylor replied that he has had to do that a couple of times.

Judy Caron expressed her view that it is important to put both the formal and informal opinions online because it shows the public the facts, the behavior of the (public body) commission and how they conduct meetings. It gives the public the ability to know what the public body does and by reading the complete opinion it gives them a starting point. It gives credibility to the OML and this office's enforcement of the OML. All opinions need to be reviewed. She asked how does someone who has received an informal opinion ask for a review to change opinions? There is no appeal process from an opinion from this office.

General Masto agreed that our office's biggest challenge is consistency. She agreed with the comments and asked, why not put them all on the website?

Mr. Taylor responded with reference to the preface to the AG's OMLO web page. The preface explains the criteria used in the past for publishing opinions.

General Masto stated that if we put all that information on our website, then everyone has access to it. It makes sure members of public bodies can look on the website for information.

Barry Smith stated there is plenty of upside to publishing all dispositions because of people like me. I get a lot of phone calls from reporters who ask what should I do, should I call George? These kinds of things. The first thing I do is say let me see if I can find something that they have already ruled on. The opinions are very helpful but the informal ones are helpful as well and I am sure that DAs and other groups are doing the same thing. It is a handy way to find information.

Barry Smith raised the issue of searching for information on the AG's web page. He asked for separate files to make the search feature easier.

General Masto said she was aware of the issue and that our IT department is looking at software to make searching for information easier.

Judy Caron agreed. She uses the search feature frequently and she looks forward to help with searching for opinions.

Next the task force discussed OML training for public bodies.

Mr. Taylor stated the OML training is voluntary. He receives calls from people who know training from this office is available. He travels all over the State giving OML presentations to advisory bodies, to boards, commissions, and all other state bodies, so yes it is available.

Barry Smith asked what authority the Attorney General has to order corrective action? Is it in the statute, because that is really what we are talking about. That is one form of enforcement and that is probably the best form that comes to mind. It might be better to get some language in there to give the Attorney General the authority to order some kind of corrective action. Ask the public body, what are you going to do to correct it? Perhaps they have to attend OML training.

General Masto stated that from her perspective, members of public bodies need to complete some kind of training, quarterly or on some other schedule, but they would be able to come to one of this office's training presentations.

Judy Caron asked whether the OML statute should define some of the responsibilities of board members and their duties to attend OML training and a requirement to read the OML manual as a prerequisite to serve. Training educates board members when they are applying for a position, or if they are appointed, that they will abide by the OML.

There was a discussion of training, its length and whether online video training is available.

Mr. Taylor said there is no "corrective action" language in our statute that requires a public body to take "corrective action." Our provision in the manual recommends corrective action, which is

what we call “cure.” The AG’s authority is found in NRS 241.037, paragraph 3. It says, “Any suit brought against a public body shall require compliance with the provisions of this statute within 60 days or 120 days.” Our manual encourages corrective action. We investigate the complaint and if there has been a violation, we require the public body take corrective action and revote on the matter in a public meeting.

There was further discussion of public bodies and the possibility of a legal requirement to publicly acknowledge a violation and subsequent corrective action.

Judy Caron thought the law should mandate that fines or prosecutions are possible so no one can say he or she was not aware of the requirement. Members need to know that in the beginning they must abide by these rules.

General Masto asked George Taylor if there is a requirement that public body members have to acknowledge that they have read the OML. Is there some kind of form that they return to our office?

Mr. Taylor stated that some county and local governments already do. We do not do that on the state level.

Next the members discussed #4(d) – whether the AG’s authority should extend to subpoena power? After a short discussion this item was moved to a lower priority list.

Next there was a discussion of the AG’s statutory time frames for investigation and disposition. General Masto said there are two times frames: 60 and 120 days. The members discussed how the OML should treat late responders. The suggestion from Mr. Doyle was to extend one or both deadlines one day for each day a response is late.

Barry Smith stated that he likes Scott’s idea but it seems like it could go on forever. If they never respond, then the calendar never runs out so what’s the resolution? He said that perhaps a combination of both so you do have an option to extend that time period, but at some point there has to be a resolution or it may be that the public body is automatically in violation.

The idea of the day-to-day extension was discussed. It was suggested to draft language extending one or both limitation periods day-to-day until either a response is received or the public body faces an additional penalty.

Barry Smith thought that makes sense. You never know what extenuating circumstances might come up so there should be a mechanism that extends that calendar but there has to be an ultimate end to it.

General Masto asked Mr. Taylor to draft a recommendation to bring back to the next meeting.

Discussion of Item 4(e) – whether private corporations serving a public purpose should be subject to the OML?

George Taylor stated that the last time the task force met on March 18, the subject of this issue was the monorail project in Las Vegas. Senator Care discussed it.

Several members were opposed to pursuing this issue. It was moved to a lower priority list.

Next item discussed was 4(f) – serial briefings.

Mr. Taylor stated he thought Mr. Doyle did a good job of analyzing this issue. Mr. Doyle was not opposed to the serial briefings. In fact he said when he was the Douglas County district attorney it was a useful thing for him. He just has some theoretical reservations about transparency with regard to serial briefings, but if it is determined by this task force that we legislatively try to overrule *Dewey*, then there are two approaches. One is to join a minority of jurisdictions applying their OML to less than a quorum of any particular public body and the second approach is to adopt just a simple statutory prohibition against serial communication. This seems to be a summation of what your choices are with regard to serial briefing. Right now serial briefings are allowed according to Supreme Court case law in *Dewey* and as long as there is less than a quorum any serial meeting absent either a constructive or physical quorum between groups, is allowed under the OML.

Barry Smith said he would move this to a lower priority list for pretty much the same reason. It is something that I would like in an ideal world to have, but it is something that would kill a bill and it is a very distracting issue at this point.

Next item discussed was 4(f) - online bulletin board meetings.

George Taylor stated he talked with his contact in the Governor's office about this and they were asked to present this to the task

force. Maud Narroll, Planner for the Governor's Broadband Task Force, asked if at some point she could come and make a presentation about this issue. Basically the concept is a bulletin board where the people can meet online to conduct meetings. This is what the broadband task force in the Governor's office is working on right now. So a few of those people over there are interested in this and they asked to make a presentation to the task force.

General Masto asked if anybody here was aware of this issue? So their question is also how they comply with the OML?

General Masto said it might be a good presentation at our next meeting, to have them come in and present

Barry Smith stated that this is an interesting subject. That he would like to hear it, that from what he has read, various states, there is at least one state, I don't remember if it says a meeting has to be able to hear it and that was one of their ways of outlawing a meeting by email or text message. I think we can probably apply the same OML principals at any kind of meeting. It would be interesting to hear.

General Masto then moved on to Agenda item 4(g) - exceptions and exemptions.

Mr. Taylor was asked to explain this item. The OML contains three statutory exceptions. Of those three only one is used often. It is where a person's alleged misconduct, professional competence, or physical or mental health of a person is at issue. Chapter 241 says that a public body may close a meeting to discuss a person's alleged misconduct, etc. Exemptions are found elsewhere in the NRS, for example Chapter 288, and there are others but I will just use it as an example. We have always treated an exemption as a complete exemption, not just an exception, but a complete exemption from the OML with regard to having to record it, take minutes, notice the agenda and that sort of thing. Whereas under the exceptions in Chapter 241, even in a closed meeting they have to record and take minutes for eventual release. You may not see any problem with the way we are doing it right now, and if so, we can stick this down on the agenda somewhere on another list. There are exemptions found throughout the NRS.

Barry Smith stated, I think George's analysis is right as to how they are dealt with between exemptions and exceptions, but I think we probably do need to deal with other statutes separately from this one and not wrap it up in this debate. If we want to change 288, it

is probably better to separate that issue from 241. Scott has a very interesting analysis of it, it is kind of a wait and see approach at this point, but I like the intermediary stuff that he suggests that the negotiations must be open. I understand that Colorado's interpretation is that the planning sessions, the strategy sessions don't have to be open. Anyway I think 288 should probably come up as a separate issue.

General Masto asked if there is there an appetite to place this issue on a lower priority list? It was agreed to place it on a separate list.

Recognizing it was 4:00, General Masto recommended Agenda item #5 be considered on the next meeting agenda.

General Masto stated that Linda Fitzgerald will send an email out and set up the next meeting date. She then asked if anyone has any further comments?

Judy Caron noted that some agendas indicate that the public body has an exhibit file or correspondence file but the OML does not require these to be attached to minutes or available to the public. She asked how the public should have access to the exhibit file?

General Masto thought that was a good point and should be added to our list of topics for a future agenda.

Mr. Taylor wanted to remind everyone that the OML Task Force has a new web address, which is <http://oml.state.nv.us>. That will take you directly to the web page, go to the bottom of the page and you will find the agendas, a map of Nevada, the spreadsheets, the minutes, as well as other information.

General Masto asked if there were any other comments. Any comments from the public. Please state your name.

Karen Gray commented regarding the task force's discussion of subpoena power. She suggested distinguishing between criminal and civil subpoena authority.

No further comments were had and the meeting adjourned at 4:05 p.m.