



# REPRESENTING A PUBLIC BODY IN REAL TIME:

## DOES THE PUBLIC BODY LAWYER HAVE A ROLE, DURING THE PUBLIC MEETING, TO PREVENT OPEN MEETING LAW VIOLATIONS?

BY GEORGE TAYLOR, ESQ.

The representation of a public body in real time, during a public meeting, is stressful enough without complications resulting from public discussion among members and then during public comment, but what role can the public body lawyer play when the meeting heats up? What role does the public body lawyer<sup>1</sup> have, if any, to advise and/or intervene during a meeting to prevent potential violations of the Open Meeting Law (OML)? This issue should be discussed, and agreed upon, before representation begins at a public meeting.

### With Communication Between the Board and Counsel, this Open Meeting Law Violation Could Have Been Avoided

At a public meeting, just before the public comment agenda item, the chair made a surprise announcement. The chair stated he would question the speaker's facts, before he let the comment proceed, if he felt the basis put forth for the comment was untrue.<sup>2</sup> There was no indication in the record that counsel, or the other members of the public body, knew in advance about the chair's verbal announcement. A member of the public rose to speak about fees, asserting that the public paid less for certain recreational privileges than residents were required to pay. The chair stopped the speaker in mid-sentence, dismissed him and thanked him. When the speaker said he was not done speaking, the chair told him that he was done because he had just made a statement that was not true. There was a heated exchange; the speaker eventually sat down without having exhausted his allotted three minutes of public comment.<sup>3</sup>

This public comment incident is representative of a myriad of potential issues and disputes that arise every year during public meetings, and can result in Open Meeting Law violations.<sup>4</sup> Each year,

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the Attorney General's office accepts between 40 and 60 Open Meeting Law complaints for investigation. Roughly one third of these investigations reveal a violation (usually inadvertent) committed by the public body or a member of the public body. Reduction in the volume of complaints, and subsequent findings, of OML violations is important, therefore, we believe it is crucial that counsel define his or her role during public meetings in consultation with the client public body.<sup>5</sup> RPC 1.2(d) states that a lawyer "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Client public body members should be encouraged to discuss with counsel any foreseeable public body action or individual member action/conduct, if a member is uncertain of its legality under the OML. Each public body member should understand the scope of representation and counsel's role during public meetings.<sup>6</sup>

In Nevada, attorneys routinely appear at public body meetings held by the governing bodies of cities and counties. It may be assumed the lawyer's role is to provide advice, not only on the meeting agenda and parliamentary procedure issues, but also to provide a backstop for the public body when OML issues arise. Most of the time counsel's representation works well. There is no requirement in the OML (NRS 241) for legal representation at public meetings; in fact, this office reviews many OML complaints concerning alleged violations of the OML when there was no attorney present to observe and/or provide guidance to the public body.

Because the OML is silent about the role of counsel at public body meetings, many public bodies – whether appointed as advisory bodies or created by local ordinance or state statute – may assume that counsel is there to advise

and prevent violations of the OML and other requirements of the law applicable to the public bodies. But, is the public body member's conduct and individual participation in a public meeting protected, by the presence of counsel, from the penalties set out in the OML for violations?<sup>7</sup> As discussed below, public body members may be protected from penalties if the member has sought advice of counsel and acted in accordance with the advice.

The legislature did not enact penalties to discourage participation by individuals on state and local government public bodies. Volunteers and elected officials need not fear civil or criminal charges, based on their participation, because of an inadvertent OML violation. Indeed the legislature intended to encourage public participation, despite inadvertent violations. Inadvertent violations may be "cured" if the public body takes corrective action, either during the meeting or by rescheduling the matter in question to a future agenda.<sup>8</sup>

Legislative penalties are directly aimed at the knowing violation. Where counsel does render advice regarding matters ongoing during a public body meeting, failure to heed that advice can lead to a finding that a deliberate violation occurred. Under today's OML, failure to heed the advice of counsel could lead to prosecution and/or a civil penalty.

Another factual example should serve to remind counsel of the importance of defining his representation of the public body during public meetings.

## Public Body Fails to Heed Counsel's Advice

Counsel not only was present at the public meeting of the Campus Environment Committee (a committee of the Board of Regents for the University and Community College System of Nevada (UCCSN)), but he reminded the committee three times to cease discussion of an informational item when the discussion turned to topics not listed on the agenda item. The agenda item read: "Review of UCCSN Policies on Reporting; Review UCCSN, state, and federal statutes, regulations, case law and policies that govern the release of materials, documents, and reports to the public." Counsel warned the committee that the topic being discussed under this item – a report regarding a UNLV dormitory raid – was so detailed that its discussion may have been in violation of the OML.<sup>9</sup> Each successive reminder went unheeded. This issue ended up in the Nevada Supreme Court. The court held that the committee violated the OML because the discussion went too far in discussing the details of the report.<sup>10</sup> Thus, had the committee heeded the advice of counsel, the violation might have been avoided.

Whether a member of a public body could be subject to criminal prosecution for an OML violation has been an issue in Nevada, as in other jurisdictions. In 1981, the Office of the Attorney General, under Richard Bryan, opined

that when members of a public body rely on advice of counsel, they should not be expected to know that a violation occurred.<sup>11</sup> In a subsequent opinion, this office opined that the presence of an attorney may allow a member of a public body to receive reliable advice as to whether the member possessed the requisite knowledge that the meeting or action was being taken in violation of the OML.<sup>12</sup> A civil penalty for violation of the OML, applicable to individual members, was enacted by the legislature in 2011.<sup>13</sup>

The importance of a public body lawyer's role during meetings can be crucial to avoiding an OML violation. ■

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- 1 Public body lawyer or counsel is used herein to mean private counsel employed to represent a public body, and a government lawyer is one who represents a state agency public body or local government public body.
  - 2 In *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) the court guaranteed freedom of expression upon public questions under the First Amendment to the U.S. Constitution.
  - 3 Open Meeting Law Opinion, 11-024 (November 21, 2011); *also see* Attorney General Open Meeting Law Manual, § 8.05; NRS 241.020(2)(c)(7) (reasonable restrictions on public comment must be clearly expressed on the meeting agenda.)
  - 4 NRS Chapter 241.
  - 5 Nevada Rules of Professional Conduct (as amended through September 30, 2011), Rule 1.2(d)
  - 6 Although many state and local government-created public bodies have been assigned a government lawyer to represent them at public meetings, the role of the assigned lawyer should be discussed and understood by members and the lawyer, at each meeting.
  - 7 NRS 241.040 Criminal and civil penalties;
  - 8 Attorney General Manual, §11.01-11-04 (11th Ed. 2012)
  - 9 *Sandoval v. The Board of Regents of the University and Community College System of Nevada and the Campus Environment Committee*, 119 Nev. 148, 67 P.3d 902 (2003).
  - 10 *Id.* at 119 Nev. 155, 67 P.3d at 906.
  - 11 Op. Nev. Att'y Gen. No. 81A (February 23, 1981).
  - 12 Open Meeting Law Opinion, 00-013 (April 21, 2000); *also see* n. 1; "knowledge" is an element both for prosecution of a misdemeanor violation and for the civil penalty violation.
  - 13 NRS 241.040.



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