2011 OML Legislative Amendments

New Developments in Nevada OML

AB 59
AB 257

Open Meeting Law Task Force

AB 59 represents several substantive changes to Nevada's Open Meeting Law. AB 59 was the Attorney General's bill. It represented the work product of the Attorney General's OML Task Force formed in March of 2010. The Task Force met regularly every month with the Attorney General and her staff to systematically review sections of the OML which needed improvement or amendment. It was formed partly because of continuing issues related to enforcement of the OML.

The Task Force was represented by volunteers. District Attorneys, City attorneys, the Media, former and current legislators, the public and other stakeholders such as the ACLU, NACO and Nevada League of Cities all were represented and contributed to the the Attorney General's bill.

It was a comprehensive effort, both to clarify certain language and to explore whether the Attorney General's enforcement authority needed strengthening.

The Task Force continued meeting once a month until December of 2010.

This office presented several study papers presenting current enforcement statistics, and examination of other State's OML laws and experience to the Task Force. Task Force members augmented the process with valuable suggestions for study after review of this office's recent statistical records.

AB 59 was just one of three OML bills introduced into the 2011 legislature. AB 257 and AB 389 were legislative member bills. AB 389 failed to meet the deadline to pass both houses. It would have

required a public body to hear both favorable and unfavorable comments before taking action. AB 257, amended the very important public comment requirement. It was passed out by both houses and was signed into law by the Governor making significant amendments.

Let's begin with AB 59

AB 59: Section 1.5

Public bodies meeting in a quasi judicial capacity are subject to the OML: (effective January 1, 2012)

Only one exception to this statute: State Board of Parole Commissioners, but only when acting on a prisoner's parole.

Making quasi-judicial bodies subject to the OML was a surprise result and it happened, of course late in the session. AB 59 as introduced in the Attorney General's bill in December of 2010 proposed this language:

> *"Public Body" does not include ... an entity which would otherwise be considered a public body when such public body is engaged in proceedings that are judicial or quasi–judicial in nature.* (AB 59 pre-filed on December 15, 2010; section 4, (c))

What happened between introduction and enrollment?

AB 59 was heard first in Assembly Committee on Government Affairs. When AB 59 passed out of committee on a motion to "amend and do pass" there was no amendment regarding quasi-judicial bodies. The AG's language exempting quasi-judicial bodies from the OML had not been altered. The proposal to exempt quasi-judicial bodies would codify Nev. Supreme Court caselaw, *Stockmeier v. Nv. D.O.C. Psychological Review Panel, 122 Nev. 385, 390 (2006),* which held that a "quasi-judicial" proceeding is sufficiently akin to a judicial proceeding to render it exempt from the OML."

Stockmeier said that to be exempt from the OML any public body need only provide at a minimum certain due process requirements: (1) the right to present and object to evidence, (2) the

right to cross examination, (3) a written decision from the public body, and (4) the right to appeal to a higher authority. Two justices (Hardesty and Maupin) dissented and urged that the "judicial function" test be adopted instead of the majority's test that modest due process protections should determine whether a public body qualified as a quasi-judicial proceeding. Justice Hardesty explained that, potentially, the additions of due process protections by any public body could be utilized to evade the OML.

In her presentation to the Legislature the AG pointed out that the Justice Hardesty and Maupin's dissent's in *Stockmeier* may have created a hole in the OML structure of coverage. The AG encouraged the Legislature to decide whether to close this perceived hole in the OML, which, if abused, could allow public bodies to easily circumvent the OML. Justice Hardesty's dissent mentioned the P.U.C., the NIAA, Bd of Architecture, Bd of Dental examiners, county planning commissions, and Boards of County Commissioners, all of which could easily circumvent the OML by the simple adoption of basic due process protections.

On May 18, Senate Government Affairs Committee amended AB 59 adding section 1.5 to make all quasi-judicial bodies subject to the OML unless it secured an exemption from the Legislative Commission. A definition of quasi-judicial was also inserted in the amendment to AB 59.

On May 31st the Assembly Government Affairs Committee refused to concur with the Senate's amendment. AB 59 then moved to conference committee. In conference a compromise was reached. The Senate amendment was accepted, but the conference committee agreed to further amendment which dramatically changed section 1.5.

The compromise kept the mandate that all quasi-judicial bodies be subject to the OML; however it eliminated the possibility of securing an exemption from the Legislative Commission. It also eliminated the AB 59 sub-section defining quasi-judicial.

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AB 59: Section 2

AG's Opinion finding violation must be agendized

A public body must agendize an AG Opinion finding an OML violation. This new statute requires the Opinion to be agendized on its next meeting agenda for discussion and the opinion must be made available to the public as supporting materials.

One of the first concerns explored by the Task Force members resulted in a recommendation that an Attorney General opinion which found a violation of the OML must be agendized at the public body's next meeting. It was felt that an opinion finding a violation by a public body was not always acknowledged during meetings of that public body. The public might not even realize that this office found an OML violation because opinion might not have been distributed to all members. This office has since amended our administrative practice so that now we send each member of a public body a copy of an opinion whether a violation was found or not.

The public's interest in the actions and deliberations of its representatives was not being served because the matter may have escaped the attention of some or all of the members of the public.

This requirement was offered in the interest of transparency and good government so that the public may have the opportunity to discuss with its elected or appointed public representatives an opinion from this office finding a violation of the OML. The statute clearly states that the public body's inclusion of discussion of the AG's opinion on an agenda is not an admission of wrongdoing for purposes of civil, criminal or injunctive relief.

AB 59 Section 3;
Subpoena authority.

Administrative subpoena power provides certainty that our investigations can be completed within the applicable limitations periods and that the AG can obtain information necessary to the investigation other than minutes, agenda, and audio/video recordings.

Other documents and/or information necessary to an investigation could include, affidavits, statements, personal correspondence, electronic records including email correspondence, and local government documents.

Limitation periods applicable to investigations are 60 and 120 days from the date of the meeting. They run concurrently.

Complaints sometimes arrive 30 days or more after the meeting or other alleged violation. Then we must open an investigation, send the public body request for discovery which itself takes time. Sometimes an involved request, i.e. statements or affidavits from all members of the body, can take 2 weeks to put together. The result for this office is a shorter time to review the discovery, conduct further investigation, if necessary, then determine if a violation occurred. A late complaint coupled with an involved discovery request can jeopardize our ability to finish an investigation prior to the 60 day limitations period.

For example in 2009 we reviewed 39 public body response times to our discovery request. The average response time was 18.4 days. Four of these 39 responses were very tardy taking more than 50 days.

Even though most public bodies respond to our requests in a timely fashion providing us with requested information other than agendas, minutes and audio recording, the availability of an administrative subpoena ensures we receive all relevant information.

AB 59 Section 4
Definition of Public body

The former definition of "public body" left many State executive committees and blue ribbon commissions outside ambit of the Open meeting law. The Governor and executive heads of agencies were not "entities" subject to the OML under the previous definition of public body, so that groups or bodies appointed by them were viewed by this office as also not an entity subject to the OML. AB 59 amended the definition of public body changing the legal status of Blue Ribbon commissions and any other group or committee

appointed by the Governor or any state agency head under the control of the Governor, to one that is subject to the OML. (as long as at least two members are not State employees).

More and more blue ribbon committees, special commissions and government task forces are being created to address public issues. Currently many of these blue ribbon committees are not subject to the OML. Many of these are composed of individuals drawn from other walks of life than state service. They are experts in their fields, but they are not staff from an executive agency.

The more controversial or intractable the issue, the higher the probability a blue ribbon committee, special commission or government task force will be created and used to deal with the problem – potentially out of the public's view.

Section 2 **amends the definition of "public body" to ensure that the actions and deliberations of any body created to serve the public's business is transparent,** if at least two members are not employees of the executive department of State government.

The public should be able to see these multimember groups discharge their responsibilities because of the growing role these groups play in formulation of public policy.

Now "public body" is defined based on the **process** by which the body was created – not its **function**. It will not ensnare staff committees so long as all the members of the committee or blue ribbon commission are public employees. It provides that all committees, commissions and other multimember bodies appointed to serve the governor or any official under the policy control of the governor must comply with open meeting law requirements **if membership includes at least two individuals not employed by the state.**

There are two parts to the proposal defining creation of a public body:

Formal creation: NRS 241.015(a), and

Informal creation: NRS 241.015(b).

Both are based on process of creation. Subpart (b) may seem confusing at first read, however here's the key:

(b) ... it only applies to the executive branch of State Government. It does not apply to local government at all.

Subpart (b) applies to any board, commission or committee appointed by:

(1). **Governor and public officers** under his direction:

(2). A Governor appointed multi-member **entity;** and

(3) ... a **public officer** under the direction of an executive agency or governor appointed entity.

This definition serves the current statutory requirement of openness codified in chapter 241 of NRS. This definition of "public body" does not force one to make subjective judgments about whether a group is a public body based on its function.

For example, under this proposal it would not matter that the public body's purpose is merely "fact finding". If a Blue Ribbon commission is formed, as described above in subpart (b) of AB 59, and if it has at least two members who are not state employees then it is subject to the OML regardless of its function or to whom it is to make a recommendation.

However, a subcommittee, committee or working group appointed by a public body continue to be subject to the OML.

The function of any public body should not exempt it from public scrutiny.

AB 59 Section 5
Agenda requirements

Public Body agendas have been inconsistent when providing important information for the public describing how meetings will be conducted and what constitutes reasonable time, place and manner restrictions on public comment. This amendment codifies AG interpretations over many years. It makes several informational matters, important to the public, required language on every agenda.

They include an important requirement to place the phrase "for possible action" next to each item which heretofore had been designated as an "action" item, (2) notification that items may be taken out of order, or combined, and (3) that an item may be delayed or removed from the agenda at any time. Finally, the public body must clearly explain the parameters of any reasonable restriction on public comment. For example public comment "content" may be restricted to matters within the jurisdiction and control of the public body, but an individual's expressed "viewpoint" during public comment may never be restricted.

Hypothetical: Is the OML violated when, during a public meeting, the Chair refused to allow public comment which was not factual or which in his opinion was not factual?

Facts: Chair announced to audience prior to the public body's noticed meeting that in addition to the agenda's published public comment rules, he was also going to question the factual basis for any comment before letting it go any further. For support for this new restriction he referred the audience to recent "grandiose and exaggerated statements about certain circumstances in the community" which he claimed were not true.

Apparently, he would be the arbiter of the truth?

... or was he justified because of recent "exaggerations."

AB 59 Section 6
Applications for employment not subject to NRS 241.033 notice requirements

OML Notice requirement found in NRS 241.033, which require personal notice prior a meeting to consider a person's character, alleged misconduct, professional competence or physical or mental

health, doesn't apply to the public body when that person has applied for employment.

This amendment was added by a member of the assembly; just as it was passed out of committee. It was not a part of the AG's original bill.

Casual and/or tangential references to a person during a meeting is not a violation and this conforms to AG opinions going back many years.

AB 59 Section 7
Monetary penalties

Enforcement of the OML was an important and continuing topic for discussion by the Task Force. Many members carried this theme throughout the duration of meetings.

There were no civil penalties in the OML. The Task Force grappled with this issue. The issue was whether monetary penalties would create an effective enforcement tool as an adjunct to the criminal penalty existing in NRS 241.040. The criminal misdemeanor penalty had not been used to enforce OML in my experience, nor could any old-timers remember it having been used. So the Task Force reviewed enforcement statutes from many other states.

Civil monetary penalties for violation of open meeting laws are common in the U.S. Twenty-four states authorize statutory civil monetary penalties for violation of Open Meeting laws. Four of those states have both civil and criminal penalties available for OML violations.

In 2009 this office found 19 violations out of 49 matters investigated. 7 were technical violations and 12 were more substantive usually involving the "clear and complete" rule. In 2010 this office found 17 violations out of 61 matters investigated.

It was perceived by some Task Force members that this additional tool would fill the gap between the AG's authority to file a criminal misdemeanor action against an individual and the AG's other

methods of seeking voluntary compliance such as negotiation with the public body for corrective action, that is re-agendizing items for a new vote so that the "cure" is compliant with the OML.

It was perceived that AG opinions which found a violation, but for which the AG did not take further legal action, were insufficiently soft on some public bodies, which, it was alleged, acted with impunity in the face of OML requirements.

Features common to other state's laws authorizing a monetary civil penalty were either a fixed amount or range for an initial penalty, followed by increased penalties for subsequent violations. Section 7 provides a range up to and including $500. The statute designates the Attorney General to bring a civil action in any court of competent jurisdiction to recover the penalty. And the statute provides a limitations period of one year to bring such a civil action.

The Legislative decision to create this new type of remedy in the Nevada Open Meeting Law was a policy decision. It was partly based on experience from 1983 when the current injunctive and declaratory relief provisions were added to the existing misdemeanor provision because the Legislature found that just the penal provision afforded less than adequate enforcement tool.

The AG decided to offer this proposal to the Legislature for a determination of whether the public interest in transparency is served with the addition of a civil monetary penalty. The argument made by supporters is that without a monetary penalty there is no incentive for public body members to focus on compliance. This was a key argument used by proponents during the meetings of the Task Force. This issue was the most heated of any discussed.

During testimony in Senate Gov't Affairs Committee Senators Hardy and Settylmeyer raised questions about the meaning of the new statutory phrase "... participates in such action with knowledge of the violation." There was much discussion. LCB's committee counsel was questioned. Ultimately, the AG explained our view of this issue and it was accepted by the Committee. Our intention is that enforcement against a member of a public body based on "participation" may only occur when the member makes a

commitment, promise, or casts an affirmative vote to take action on a matter under the public body's jurisdiction or control when the member knew his/her commitment, promise or vote was taken in violation of the OML. (knowledge requirement)

The civil penalty amendment requires that a public body take an affirmative action in order for the civil penalty to be potentially applicable. "Action" is defined in NRS 241.015(1) as an affirmative act; the AG will not interpret it to include mere silence or inaction by members, nor will a member's vote to postpone action subject him/her to the civil penalty.

Assembly Bill 257
Public comment
Legislative members bill

This bill made a tortuous route through the Legislature. This bill was sponsored by 10 members of the legislature, 5 from each house. The bill as introduced required public comment before the public body took action on an agenda item.

After amendment in the Assembly, the bill required two periods of public comment – one at the beginning of a meeting and one before adjournment. Language requiring public comment prior to taking action on an agenda item had been deleted.

Senate Committee on Gov't Affairs amended the bill to provide a choice to the public body. A public body could chose to provide two periods of public comment, one at the beginning of a meeting and one before adjournment. The second choice was to require public comment on each action item, but public comment must occur after discussion of the matter, but before the public body takes action.

The bill's final form was an assimilation of the two amendments. Public bodies have a choice of two methods of complying with public comment requirement. First choice: offer two periods, one at the beginning and one before adjournment. Second choice: provide public comment between discussion and action on every agenda action item and one period of general public comment before

adjournment for any matter within the jurisdiction or control of the public body that had not been specifically included on the agenda.

2011 OML Bills Not Enacted.
Assembly Bill 389
Amends the definition of public body:
Submitted by Ass'yman Ohrenshall

This bill was introduced by one member of the Assembly. It passed out of Assembly Committee on Gov't Affairs, but it failed to pass out of Senate committee and died on May 20th under a joint standing rule.

It would have required a public body to make a reasonable effort to allow competing views to be expressed on any item on the agenda. The bill would have also defined as a public body a nonprofit corporation (NRS chapter 82) which has the power of eminent domain.

Senate Committee on Gov't Affairs engaged this office and each other in discussion regarding including Home Owner's Associations within the definition of public body. Sen. Settylmeyer Schneider and Hardy discussed pros and cons. There was discussion among these members of the Senate Committee on May 2nd which indicated there was some support to move all Home Owners Associations under the OML umbrella, but there was never a motion to amend AB 59 or a request to draft such an amendment made, to define HOA's as public bodies.

AB 239
Assemblyman Bobzien, Washoe County

Assemblyman Bobzien's remarks before the Assembly Govt Affairs Committee on March 10th: "Assembly Bill 239 is intended to modernize the open meeting law in terms of addressing those government entities with websites. They should be posting public documents on their website. The intention of this bill is not meant to be a "gotcha" for any government agency. You will hear from a number of agencies this morning that have concerns about technical feasibility. It is my intent to work with them to address any

shortcomings this legislation may have, in terms of technical challenges in being able fulfill the requirements that are put into this bill. The intent is that if you have a website, and you have the capacity to post documents according to the requirements of this bill, you should be doing that."

This bill would have required the public entity to post minutes and supporting materials on its website, in addition to providing copies to the person who requested the supporting materials. It would require the public body to post the minutes on its website, to the extent that it was practical from a technical standpoint. Senator Bobzien acknowledged the technical burden for smaller public bodies. He stated that if it would not be technically feasible to get exhibits and minutes posted on a webpage, those entities would receive an exemption. The intention was that the bill apply to public bodies with a website that were already keeping exhibits and minutes in a format that was feasible for posting online.

AB 18
Parole Board Hearings are quasi-judicial

This bill would have amended NRS ch.218 to define meetings of Parole Commissioners as quasi-judicial, which would exempt those meetings from the OML pursuant to *Witherow v. St.Bd of Parole Commissioners.* 123 Nev. 305 (2007). However all quasi-judicial proceedings have now been made subject to the OML through AB 59. Parole Commissioners were granted the only exception from the OML in the final days of the session.