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Innovative Remedies for Open Meeting Violations

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Most states provide for routine remedies in their open meeting laws or in general law, including injunctive and declaratory relief, extraordinary writs, and invalidation. Each of these remedies has its advantages and disadvantages. A few states have adopted additional remedies that may enable better tailoring of the remedy to a violation. Some statutes simply confirm the court's power to impose a remedy that might have been within the court's power in any event, while others are truly innovative.

Required Opening of Minutes of Closed Sessions

The preferred remedy for violation of the federal open meeting law is release of the transcript of closed proceedings rather than invalidation of agency action.¹ Several states follow this approach when there is a transcript, tape recording, or other meaningful record of closed proceedings.² When ordering disclosure of minutes of improperly closed meetings, trial courts may review and redact the minutes to protect information that truly should not be disclosed.³

Required Future Recordation of Closed Sessions

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California expressly empowers courts to compel a public body to audiotape closed sessions and preserve recordings for a future period of time under conditions the court directs, with audiotapes subject to prescribed discovery procedures.⁴ Tape recordings are discoverable after a prescribed showing of alleged violations during closed sessions and in camera review.

Required Re-Creation of Improper Secret Communications

Following improper e-mail exchanges among city council members, the North Dakota Attorney General ordered:

The Council members must recreate the conversations from the deleted e-mails to the best of their ability. The recreated statements and the e-mail that was saved should be provided at no cost to Mr. Flatland and anyone else requesting them. At the next regular meeting, the Council should explain the conversations that took place so that there is a record of the meeting in the Council's minutes.⁵

Following an improper gathering, the mayor and city council were required to explain at the next regular meeting what happened, who attended, and why, with an express agenda item describing the topic and with minutes summarizing the explanation.⁶ After a street and culvert inspection constituting an unnoticed meeting, the public body was required to create and provide minutes to the complainant or face costs, attorney's fees, and liability if the complainant were to sue.⁷

Mandatory Training

A number of states routinely conduct open meeting law training programs for public officials and members of public bodies, frequently under the auspices of the attorney general. In a smaller number of states, open meeting violations can justify a requirement that specific individuals complete designated training requirements in addition to or in lieu of other remedies.⁸

In Arizona, the Cochise County Attorney reportedly ordered the mayor, city attorney, city clerk, and others to attend training after finding that the City of Tombstone had violated notice and agenda requirements and had improperly ejected an individual from a meeting.⁹ The Massachusetts Attorney General required all trustees of the Gloucester Community Arts Charter School to attend a training approved by the Attorney General annually in

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2011 and 2012.¹⁰ A state ombudsman or commission empowered to investigate and address open meeting violations may be empowered to require training of members of public bodies.¹¹

Nevada has adopted a unique training and public notice device. If the Attorney General makes findings of fact and conclusions of law that a public body violated the open meeting law, "the public body must include an item on the next agenda posted for a meeting of the public body which acknowledges the findings of fact and conclusions of law" but does not constitute "an admission of wrongdoing for the purposes of a civil action, criminal prosecution or injunctive relief."¹²

Forfeiture of Office or Future Public Office

A public official guilty of violating the open meeting law can forfeit public office under specific forfeiture provisions in the open meeting law in some states.¹³ Arizona's open meeting law empowers courts to remove a public officer from office if the officer violated the law with intent to deprive the public of information.¹⁴ Hawaii provides that, on conviction, a person found to have willfully violated any open meeting provision can be "summarily removed" from the public body.¹⁵ Ohio provides for removal of a member of the public body who knowingly violates an injunction issued under the open meeting act; only the attorney general or prosecuting attorney may sue for removal.¹⁶

Some states allow one "free" violation. Iowa provides for "an order removing a member of a governmental body from office if that member has engaged in a prior violation of this chapter for which damages were assessed against the member during the member's term."¹⁷ Minnesota provides:

(a) If a person has been found to have intentionally violated this chapter in three or more actions brought under this chapter involving the same governing body, such person shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving.

(b) The court determining the merits of any action in connection with any alleged third violation shall receive competent, relevant evidence in connection therewith and, upon finding as to the occurrence of a

separate third violation, unrelated to the previous violations, issue its order declaring the position vacant and notify the appointing authority or clerk of the governing body.¹⁸

Iowa at one time provided for removal only after the third violation for which damages were assessed then amended its law to provide for removal on the second violation.¹⁹ The North Dakota Attorney General can refer to the appropriate state's attorney a public servant found to have violated the open meeting law in more than one opinion.²⁰

When the open meeting law is silent, violation of the open meeting law is often a basis for recall or ouster under generally applicable recall statutes in various states or under other provisions prescribing penalties.²¹ In these circumstances, the recall or termination must satisfy whatever requirements are imposed by general law. Approximately 20 states authorize recall of statewide officers, and almost 40 states authorize recall of local elected officials.²²

In addition to statutory provisions for ouster from public office, the Kansas Constitution provides: "The legislature may reduce the salaries of officers, who shall neglect the performance of any legal duty."²³

Discipline of Attorneys Who Participate in a Violation

Penalties can attach not only to the public body and its members but also to attorneys who participate, advise, or enable the public body to engage in a violation.²⁴ Discipline may be appropriate, for example, under the rules of professional conduct that prohibit an attorney from counseling or assisting a client in conduct the attorney knows to be illegal and from engaging in illegal conduct.²⁵

The Tennessee Supreme Court noted, for example, that a public body could recess to executive session for the ostensible purpose of discussing pending litigation and then conduct other public business in secret in violation of the law and ruled: "any attorney who participates, or allows himself to be used in a manner that would facilitate such a violation, would be in direct violation of the Code of Professional Responsibility and subject to appropriate disciplinary measures."²⁶

These forms of discipline supplement other penalties that may be imposed for violation of open meeting laws, so that attorneys

remain subject to possible civil and criminal fines. In a Florida case, for example, the attorney for the City of Hollywood was convicted of a noncriminal infraction when she incorrectly advised the mayor, city manager, city employees, and volunteers that they were not subject to the open meeting law and could meet in private to discuss purchase of property by the city.²⁷

Endnotes

1. *Braniff Master Executive Council of Airline Pilots Ass'n Int'l v. Civil Aeronautics Board*, 693 F.2d 220, 226 (D.C. Cir. 1982).
2. *E.g.*, *Booth Newspapers, Inc. v. Wyoming City Council*, 425 N.W.2d 695, 701 (Mich. Ct. App. 1988); OKLA. STAT. tit. 25, § 307(F) (2011) (willful violation of provisions governing executive session shall "[c]ause the minutes and all other records of the executive session, including tape recordings, to be immediately made public"); TEX. GOV'T. CODE § 551.104 (2012); UTAH CODE § 52-4-304(2)(b) (2012) ("the judge shall publicly disclose or reveal from the recording or minutes of the closed meeting all information about the portion of the meeting that was illegally closed").
3. 5 ILL. COMP. STAT. § 120/3(c) (2012) (court may order "public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act"); *Manning v. City of East Tawas*, 593 N.W.2d 649, 653 (Mich. Ct. App. 1999).
4. CAL. GOV'T CODE §§ 11130(b), (c), 54960(b), (c) (2012), *construed in* *Kleitman v. Superior Court*, 87 Cal. Rptr. 2d 813, 820-21 (Cal. Ct. App. 1999).
5. N.D. Op. Atty. Gen. 2010-O-09 (July 1, 2010); *accord* *District Attorney for Northern District v. School Committee of Wayland*, 918 N.E.2d 796, 804 n.9 (Mass. 2009) ("release of the written e-mail correspondence is the only way to 'cure' the improper deliberations").
6. N.D. Op. Atty. Gen. 2009-O-17 (Sept. 11, 2009); *accord* N.D. Op. Atty. Gen. 2010-O-14 (Nov. 12, 2010) (county ambulance board must prepare minutes for unnoticed meeting, make them available to general public, and provide them free to the requester).
7. N.D. Op. Atty. Gen. 2011-O-04 (Feb. 7, 2011); *accord* N.D. Op. Atty. Gen. 2011-O-03 (Jan. 26, 2011).
8. *E.g.*, N.Y. PUB. OFF. LAW § 107(1) (2011) (after finding a

violation, "the court may require the members of the public body to participate in a training session concerning the obligations imposed by this article conducted by the staff of the committee on open government."); *Our View: J-E Can Still Get Open Meeting Law Training*, Auburn, N.Y., available at http://auburnpub.com/news/opinion/editorial/article_f9415a1e-31a2-11e0-8ad4-001cc4c03286.html (last visited Feb. 2, 2012); Sherry Anne Rubiano, *Dysart Board Gets Lesson on Open Meeting Law*, ARIZ. REPUBLIC. (Sept. 13, 2008), available at www.azcentral.com/news/articles/2008/09/13/20080913gl-nwvedmeet0913cover.html (last visited Feb. 2, 2012) (Attorney General required training before closing investigation).

9. Patrick Griffin, *County Orders City Officials to Take Open Meeting Training*, TOMBSTONE EPITAPH (Feb. 12, 2010), available at <http://theepitaph.com/government/319-county-orders-city-officials-to-take-open-meeting-training> (last visited Feb. 2, 2012).

10. Mass. Atty. Gen. OML Complaint (Dec. 17, 2010) (each member to submit written agreement to obey this order).

11. *E.g.*, Conn. FOI Comm'n 2010-444 (May 11, 2011) ("members of the respondent town council are ordered to contact the Commission to set up a training session on executive session procedures within three months").

12. NEV. REV. STAT. § 241.0395 (effective Jan. 1, 2012) (attorney general's opinion must be treated as supporting material for the agenda item).

13. See Mich. Op. Atty. Gen. 6800 (May 11, 1994) (describing legislative history of Michigan law including forfeiture provision in draft but omitting provision from final law); Daxton R. Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL'Y 265, 288-90 (2010).

14. ARIZ. REV. STAT. § 38-431.07(A) (2011).

15. HAW. REV. STAT. § 92-13 (2011).

16. OHIO REV. CODE § 121.22(I)(4) (2012).

17. IOWA CODE § 21.6(3)(d) (2011).

18. MINN. STAT. § 13D.06(3)(a) (2011), *construed in* *Brown v. Cannon Falls Township*, 723 N.W.2d 31 (Minn. Ct. App. 2006) (three separate actions are required; complaints tried concurrently do not suffice); *Claude v. Collins*, 518 N.W.2d 836,

842-43 (Minn. 1994), *rev'g* 507 N.W.2d 452 (Minn. Ct. App. 1993) (prior law: removal is required when three or more separate, intentional and unrelated violations are found in single litigation, if individual had reasonable time to learn responsibilities of office); *Willison v. Pine Point Experimental School*, 464 N.W.2d 742, 745 (Minn. Ct. App. 1991) (violations must be separate and independent but need not occur at separate meetings); see *Merz v. Leitch*, 342 N.W.2d 141, 146 (Minn. 1984) (Simonett, J., concurring) (questioning whether forfeiture of office can be constitutionally imposed for violations committed in good faith).

19. IOWA CODE § 21.6(3)(d) (2011) (removal of "a member of a governmental body from office if that member has engaged in a prior violation of this chapter for which damages were assessed against the member during the member's term").

20. N.D. CENT. CODE § 44-04-21.3 (2011).

21. *E.g.*, Annot., *What Constitutes Conviction Within Statutory or Constitutional Provision Making Conviction of Crime Ground of Disqualification for, Removal from, or Vacancy in, Public Office*, 10 A.L.R.5th 139 (1993); Annot., *Removal of Public Officer for Misconduct During Previous Term*, 42 A.L.R.3d 691 (1972); Annot., *Elections: Effect of Conviction Under Federal Law, or Law of Another State or Country, on Right to Vote or Hold Public Office*, 39 A.L.R.3d 303 (1971).

22. *Floyd Feeney, The 2003 California Gubernatorial Recall*, 41 CREIGHTON L. REV. 37 (2007).

23. KAN. CONST. art. 15, § 7.

24. *Smith County Education Ass'n v. Anderson*, 676 S.W.2d 328, 335 (Tenn. 1984).

25. *E.g.*, ABA Code of Professional Responsibility DR 7-102(A)(7), (8) ("a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent [or k]nowingly engage in other illegal conduct"); ABA Model Rules of Professional Conduct 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"); Cal. Rules of Prof. Conduct 3-210 ("A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.").

26. *Smith County Education Ass'n*, 676 S.W.2d at 335 (footnote omitted).

27. *State v. Chiaro*, No. 90-39277 TI40A (Fla. Co. Ct. Broward County, July 18, 1990), *discussed in Fla. Op. Atty .Gen.* 91-38 (May 30, 1991).

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