

USE OF NEW ELECTRONIC MEDIA: ISSUES AND CURRENT STATUS IN ALL 50  
STATES

By

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To my parents, who put up with many a long phone call in the night, and who made sure I had a love of learning instilled from the beginning.

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I thank my friends, family, and teachers for their guidance and support throughout the last two years. I never would have made it this far, with any kind of success, without them.

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Abstract of Thesis Presented to the Graduate School  
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This study is a comprehensive study of the use of new electronic media by public officials subject to open meetings laws. The thesis looks at the statutes and case law in all 50 states and the District of Columbia. It also examines pertinent Attorney General opinions. With recent advancements in technology, electronic media has become more and more prevalent. The purpose of this study was to see what the state of the law is with regards to public official's use of electronic media, specifically: teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and personal digital assistants.

This thesis covers past literature concerning electronic media and open meetings law, provides a brief overview of the capabilities of each media, before presenting the law. After a thorough analysis, this thesis recaps the issues raised by electronic media, gives policy recommendations, and presents a model-law.

## CHAPTER 1

### INTRODUCTION TO THE TOPIC

#### **The Problem with New Electronic Media**

Technology has evolved enormously in the last decade to the point where it has become ingrained in everyday life. Technology such as e-mail, cell phones, and personal digital assistants (or PDAs) that enables personal communication has especially grown in use and capability. As a result many areas of law are attempting to catch up and incorporate updates that deal with the issues arising from improved technology. Professor Susan Ross, in a 1998 article, framed this problem as what happens when “ambiguous open meetings statutes are confronted by new information technologies that enable government agencies to conduct business through virtual means.”<sup>1</sup>

Open meetings laws vary from state to state and are designed to make the process of government transparent to American citizens.<sup>2</sup> These laws require open meetings of federal, state, and local level governing bodies based on a number of varying criteria. According to Ross, at least some government bodies that fall under open meetings law engage in tactics, intentional or not, that result in circumvention of the law.<sup>3</sup>

Prior to the advent of new technology these circumventions were often one-on-one physical meetings, called “daisy chaining,” where each person in the committee or group took turns talking to everyone. In this way, members of a public body can essentially deliberate without actually calling an official meeting open to the public. Concerns about “daisy chaining”

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<sup>1</sup> Susan Dente Ross, *Breakdown or Breakthrough in Participatory Government?*, 19 NEWSPAPER RESEARCH JOURNAL 1, 1 (1998).

<sup>2</sup> See David J. Barthel, *A Healthy Tan is Better Than Sunburn: Ohio’s ‘Sunshine Law’ and Nonpublic Collective Inquiry Sessions*, 34 CAP. U.L. REV. 251, 252 (2005).

<sup>3</sup> Susan Dente Ross, *Breakdown or Breakthrough in Participatory Government?*, 19 NEWSPAPER RESEARCH JOURNAL 1, 1 (1998).

have expanded with new concerns about teleconferencing, videoconferencing, e-mailing, text messaging, instant messaging, and PDAs.<sup>4</sup> Many current state open meetings laws address the ways electronic media facilitate illegal agency meetings, even though they still happen. Now, when a group wants to circumvent open meetings law, it is much easier than taking the time to meet in groups of two, face-to-face. Officials will forward an e-mail discussion, or a text message about a future vote, or otherwise use an electronic communication technology. These circumventions are not always deliberate since public officials are not often aware of how open meetings law is affected by these new forms of electronic media.<sup>5</sup>

These issues, such as the law's delay in catching up with burgeoning electronic media, or the circumvention of the law with electronic media, are greatly magnified by the increased adoption of technology by state governments.<sup>6</sup> Statehouses now often have wireless Internet when just a few years ago this was highly unlikely.<sup>7</sup> Lawmakers can usually access the Internet, including e-mail and instant messaging during debates, hearings, and public meetings, an ability that some access advocates, including Campbell, fear threatens government transparency.<sup>8</sup>

Current open meetings laws have addressed how public officials subject to the laws are using electronic media to varying degrees and with varying degrees of success. According to the academic Boydston, retaining information from electronic correspondences, or involving the public in these electronic discussions, are the greatest challenges in applying open meetings law

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<sup>4</sup> Jaci Boydston, *Messages or Meeting?*, THE NEWS MEDIA AND THE LAW 26, 26 (Summer 2007).

<sup>5</sup> Joel Campbell, *Cyberspace Discussion May Violate Open Meetings Laws*, 92 QUILL, 20, 20-21 (2004).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

under electronic conditions.<sup>9</sup> Some states provide general policy to protect public participation in government and the retention of electronic conversations while other states list detailed directions for public bodies.<sup>10</sup> Most state laws though do not deal with specific electronic media in their statutes<sup>11</sup> and even if they do, they rarely get enforced.<sup>12</sup> Since very few open meetings violations, especially electronic ones, are pursued legally most evidence of violations of open meetings laws due to electronic media is anecdotal.<sup>13</sup> There are a few cases and Attorney General opinions which are covered in this thesis.

Open meetings laws allow oversight of government affairs. The laws also allow people to become more familiar with the democratic process by watching deliberations and votes taking place. It is therefore important for these laws to be examined in light of the impact new technology has had and to critically examine some of the violations that have been made public. In 2002, for example, a Virginia judge ruled that the Fredericksburg City Council violated open meetings law by picking a library commission appointee through e-mail.<sup>14</sup> In 2003, the *Salt Lake Tribune* discovered that a local health board held discussions about a controversial water fluoridation issue through e-mail.<sup>15</sup> BlackBerry devices were adopted in 2003 by the mayor of

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<sup>9</sup> Jaci Boydston, *Messages or Meeting?*, THE NEWS MEDIA AND THE LAW 26, 26 (Summer 2007).

<sup>10</sup> Susan Dente Ross, *Breakdown or Breakthrough in Participatory Government?*, 19 NEWSPAPER RESEARCH JOURNAL 1, 3 (1998).

<sup>11</sup> Joel Campbell, *Cyberspace Discussion May Violate Open Meetings Laws*, 92 QUILL, 20, 20-21 (2004).

<sup>12</sup> Charles N. Davis, Sandra F. Chance, & Bill F. Chamberlin, *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. LAW & POL'Y 35, 38 (1998).

<sup>13</sup> Joel Campbell, *Cyberspace Discussion May Violate Open Meetings Laws*, 92 QUILL, 20, 20-21 (2004).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

New Orleans and his staff.<sup>16</sup> Subsequently, when the minor league hockey team in New Orleans wanted the transcripts from e-mails sent by BlackBerry PDAs they were denied due to the fact that messages on BlackBerry devices are not archived. As a result, e-mail messages sent from BlackBerry devices are not required to be archived according to New Orleans regulations.<sup>17</sup>

In 2006 in Jacksonville, Florida, one of the mayor's aides raised concerns by attempting to set up a texting system where the mayor could text all 19 City Council members simultaneously.<sup>18</sup> More recently, in 2007, it was discovered that the Idaho House Democrats forced a caucus through by instant messaging.<sup>19</sup> This has led to an investigation, still in progress, of whether the House violated open meetings law in Idaho.<sup>20</sup>

This thesis will conduct a legal analysis of current state open meetings laws and case law, as well as pertinent Attorney General opinions. From synthesizing this data, the paper will present policy recommendations and a model open meetings law that could be adapted by states trying to appropriately respond to the problems presented by government agencies' use of new electronic media.<sup>21</sup> The author of this thesis hopes that the work can be a useful resource for policymakers seeking to understand this issue and other academics wanting to use this data in the future.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Carrie Johnson, *Technology is Testing Open-Government Laws*, ST. PETERSBURG TIMES, January 8, 2006, at B1.

<sup>19</sup> Jaci Boydston, *Messages or Meetings?*, THE NEWS MEDIA & THE LAW, 26 (Summer 2007).

<sup>20</sup> *Id.*

<sup>21</sup> Increasingly among academics, there is a call for such model laws and policies that deal with these new electronic media. Joel Campbell, *Cyberspace Discussion May Violate Open Meetings Laws*, 92 QUILL, 20, 20-21 (2004).

## **Purpose**

This thesis is designed to address the public policy issues surrounding the current legal situation with regards to new electronic media and open meetings laws. The thesis will explore the electronic technologies available to government agencies that are required to meet through public meeting, including how the use of each available technology may benefit or, more commonly, hinder the application of open meetings law. The six kinds of technology being examined are: teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and personal digital assistants (PDAs). The thesis will also determine what current state laws say about using new electronic technologies to supplement or complement public meetings.

## **Parameters**

This thesis is designed to present an overview of the open meetings laws regarding the use of new electronic media. Since this topic and subsequent data has the possibility of being very large, several limitations have been put in place to make the research manageable. First, this paper will not examine all communication technologies that have been developed before open meetings law were adopted.<sup>22</sup> Instead, this paper will limit its discussion of technology to communications technology developed since 1996, when the Federal Electronic Freedom of Information Act (E-FOIA) was passed.

E-FOIA, or the 1996 amendment to the Freedom of Information Act, was recognition by the federal government of the increasing use and importance of electronic media in the operations of the federal government.<sup>23</sup> The 1996 amendment required many electronic records

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<sup>22</sup> Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 756-57 (2004). Open meetings requirements date back to the foundation of America, but the first true state open meetings law was passed in 1915, and the vast majority of the rest of the states' open meetings laws were not passed until the 1960s. *Id.*

<sup>23</sup> Electronic Freedom of Information Act, <http://www.balancedscorecard.org/bkgd/efoia.html> (last accessed December 3, 2007).

to be kept and maintained in a way analogous to more traditional public records. The timeline of the data collection for this thesis, ending on December 1, 2007, includes the widespread emergence of many important electronic media, such as e-mail and teleconferencing, which are presently still an issue in how individuals subject to public meetings laws use these media.

Another limitation in this thesis, aside from the media examined, is the depth of background information provided. There will be a chapter on the history and evolution of open meetings law, as well as basic information on the nature of the technology discussed. Both of these areas will be summarized from secondary sources, and are not designed to make up the bulk of this paper. Even though a working understanding of the technology discussed is vital, more comprehensive explanations are not needed for the purposes of this paper.

The third and final major limitation of this paper is the electronic media covered. Many technologies have emerged since 1996 but only certain communication media will be examined. The media being examined are teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and personal digital assistants (PDAs) such as Blackberries. Some of these media, such as teleconferencing, existed prior to 1993 but are still an important part of the discussion, while other technologies, such as PDAs, are relatively new and policy makers have only begun to consider how they are used by officials subject to open meetings law. The timeline was framed with the passing of E-FOIA, and the technologies were chosen after considering the literature.

## **Literature Review**

The extensive use of cellular phones, personal computers, and other emerging electronic media in the last two decades has made private communications by new communications techniques, such as text messaging and e-mail, possible. The increased efficiency in

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communication since the 1960s has streamlined many parts of government operations as a result, but also poses concerns with regards to open meetings. As a result, the literature on the subject of open meetings and new electronic media often struggles to find a balance between encouraging government officials to take advantage of increased electronic efficiency, and maintaining the spirit of open meetings law for the preservation of the democratic process.<sup>24</sup>

The evolution of technology has created problems and potential loopholes unforeseen in the 1960s when open meetings laws were being created.<sup>25</sup> A legal note in the Harvard Law Review, for instance, only discussed four potential problem areas for open meetings law, none of which involved increased efficiency in communication, and therefore potential complications with open meetings.<sup>26</sup> The four areas of open meetings law the note foresaw as problematic were (1) identifying which government bodies were subject to open meetings statutes, (2) creating guidelines for giving proper public notice of open meetings, (3) determining what executive or other sessions could be closed properly to the public, and (4) properly enforcing open meetings statutes.<sup>27</sup> An argument could be made that these areas can broadly be applied to include issues with new electronic media.<sup>28</sup> However, the current literature supports the argument that the four categories, traditionally, have been much more narrowly defined not to include emerging technology in its scope.<sup>29</sup>

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<sup>24</sup> Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 755 (2004).

<sup>25</sup> John F. Connor & Michael J. Baratz, *Some Assembly Required: the Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 729 (2004).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Much of the literature concerning electronic media and open meetings has an introductory section arguing the pros and cons of open meetings in general, or explores one type of particular state statute. In a 2005 legal comment the author David J. Barthel, a lawyer, writes about a possible open meetings violation at Ohio State University and summarizes open meetings literature for both arguments. The author first discusses why proponents of open meetings argue for government transparency.<sup>30</sup>

Barthel begins by arguing that open meetings are “grounded in the First and Ninth Amendments.”<sup>31</sup> Most importantly, a democratic society functions best when it is run by an informed citizenry, he contends.<sup>32</sup> As a result, citizens should not just have knowledge of the final decisions lawmakers reach, but the actual process lawmakers go through to get to these decisions.<sup>33</sup> Barthel uses James Madison’s famous quotation:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.<sup>34</sup>

Furthermore, Barthel continues that if government officials know that they are being observed the argument is that they will be better prepared and informed than if they believe

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<sup>30</sup> David J. Barthel, *A Healthy Tan is Better Than Sunburn: Ohio's 'Sunshine Law' and Nonpublic Collective Inquiry Sessions*, 34 CAP. U.L. REV. 251, 252 (2005).

<sup>31</sup> *Id.* at 277.

<sup>32</sup> *Id.* at 252.

<sup>33</sup> *Id.* at 253.

<sup>34</sup> See, eg., *Id.* at 252-3; Martin E. Halstuk, *Policy of Secrecy- Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-1798*, 7 COMM. L. & POL'Y 51–76 (2002). But see Paul H. Gates, Jr. & Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 13 AM. JOURNALISM 43 (1996) (arguing that scholars using this Madison quote as a justification for a right to government-held information, have misinterpreted the original intent, which was to promote the idea of public education, not public access).

nobody is paying attention.<sup>35</sup> While the government benefits from public scrutiny, it also has the opportunity to perform better as a result of this scrutiny.<sup>36</sup> The comment argues that public's confidence in its own government is re-enforced by increasing the efficiency of public officials at meetings.<sup>37</sup>

The final argument by Barthel is that by making broad exceptions to open meetings law, there is the risk that public officials will use such exceptions to hide unethical behavior.<sup>38</sup> This argument especially applies to new technology. The government, by making blanket exceptions for certain types of media, may be creating loopholes for government officials to use to circumvent the law.<sup>39</sup> The comment explains that these so-called loopholes result in a structural shift of the meeting from a unit that involves group decision-making to a unit of individual deliberation.<sup>40</sup> Policy makers are meeting one-on-one, or through new media, to avoid triggering open meetings requirements. New technology such as e-mail, for example, allows for serial communications between members of a public body without requiring a face-to-face meeting. In this sense a discussion takes place between individuals without ever requiring a group meeting.

Barthel then summarizes the arguments of persons who believe not all of the results of open meetings law have been positive for the deliberative process.<sup>41</sup> One of the main arguments against open meetings, taken from the Welborn Report, a study of federal access laws, is that

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<sup>35</sup> *Id.* at 278.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 278-9.

<sup>39</sup> In reviewing the statutes, it becomes clear that the issue is less blanket exceptions than the issue, and more allowing exemptions by not making specific provisions for new electronic media in the open meetings law.

<sup>40</sup> *Id.* at 282.

<sup>41</sup> *Id.* at 253.

public policy makers unnecessarily censure themselves in order to look better to the public.<sup>42</sup> As a result, sensitive issues are more likely to be ignored and fact finding is “chilled” due to the increased public oversight through open meetings.<sup>43</sup> Barthel’s comment ultimately makes an argument for a moderate approach in the decision making process to counter the Welborn Report. Barthel recommends that, early on in decision making processes, such procedures as fact finding should be conducted without public oversight, and only the actual deliberation and decision-making process should be open to the public in the form of open meetings.<sup>44</sup>

A 2004 law review article by John F. Connor and Michael J. Baratz, lawyers in a significant open meetings technology case, argue that, overall, open meetings laws “infringe upon public officials’ freedoms of speech and association.”<sup>45</sup> Connor and Baratz’s law review article highlights the conflict between transparency and productivity by pointing out that “there is an inherent tension between open government on one hand, and government efficiency on the other.”<sup>46</sup>

The Public Affairs Council of Louisiana, a private nonprofit research organization, published a report on the “Promise and Peril of New Technology” in 2003 as an update to prior reports published in 2002 and 1998.<sup>47</sup> Although the report focuses specifically on Louisiana’s public records and open meetings laws, it addresses issues that apply to other states and offers

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<sup>42</sup> *Id.* at 281.

<sup>43</sup> *Id.* at 280-281.

<sup>44</sup> *Id.* at 295.

<sup>45</sup> John F. Connor & Michael J. Baratz, *Some Assembly Required: the Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 762 (2004).

<sup>46</sup> *Id.* at 722.

<sup>47</sup> PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, LOUISANA’S SUNSHINE LAWS: THE PROMISE AND PERIL OF NEW TECHNOLOGY 1 (2003).

more comprehensive recommendations for the management of new electronic media than most other literature does.

The Public Affairs report outlines the problems and benefits of each kind of new technology. The report cites concerns that e-mail allows “members to ‘meet’ without meeting.”<sup>48</sup> The report also addresses the benefit that e-mail communication creates for open meetings, mentioning that it creates a cost-efficient and effective way for the public to receive notices and minutes of open meetings.<sup>49</sup> E-mail specifically has characteristics that make it less threatening to the spirit of open meetings law.

Video/teleconferencing gets its own section in the Public Affairs Louisiana report in response to statistics that cite the fact that, in 2001, two years before the report’s publication, Louisiana agencies spent 2.9 million minutes in teleconferencing alone.<sup>50</sup> The report goes through the pros and cons gathered from the experiences in other states before concluding that videoconferencing should be allowed as long as specific requirements designed to ensure continued public participation are in place.<sup>51</sup>

The report recommends that teleconferencing, as opposed to videoconferencing, should be banned as an in-person substitution for open meetings since it presents more challenges to public participation than videoconferencing.<sup>52</sup> Teleconferencing was one of the first of the “new” technologies to threaten how open meetings were conducted. In 1982, for instance, there was a short American Bar Association article by Vicki Quade addressing “increased use of

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<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

teleconferencing to meet quorum requirements” in Illinois.<sup>53</sup> The Illinois Attorney General, when asked his opinion on three separate incidences regarding public bodies possibly circumventing open meetings law by using teleconferencing, shared a view that is still prominent with many lawmakers today.<sup>54</sup> The Attorney General stated that if the public receives proper notification and can still participate in the meeting, then there is no violation regardless of how the electronic media is used.<sup>55</sup>

In a 2004 law journal article by Stephen Schaeffer, a lawyer, a significant section differentiates between inadvertent deliberation with electronic communication, purposeful circumvention using electronic communication, and pre-deliberation with electronic communication.<sup>56</sup> Schaeffer’s analysis discusses the possibility that the *information* conveyed in the communication may be more significant with regards to maintaining or circumventing open meetings law than the *mode* of communication.<sup>57</sup> For example, if a pre-deliberation discussion is removed from an imminent decision-making meeting, he says, there should not be limits on what members can discuss or through what kind of technology.<sup>58</sup>

Susan Ross made several specific recommendations a decade ago that could still be applied today. She recommends that states should treat virtual meetings exactly the same as

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<sup>53</sup> Vicki Quade, *Teleconferencing: Open Meetings Issue Raised*, 68 A.B.A.J. 401 (1982).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 783-85 (2004).

<sup>57</sup> *Id.*

<sup>58</sup> Nicholas Johnson, *Open Meetings and Closed Minds: Another Road to the Mountaintop*, 53 DRAKE L. REV. 11, 40 (2004). The idea that discussion should not be limited unless it affects imminent decision-making is from Iowa’s Open Meetings law. *Id.*

physical meetings in terms of requirements and standards.<sup>59</sup> States should equalize access to both physical and electronic meetings so that citizens of different geographical and economic backgrounds have access.<sup>60</sup> To this end there should be free access for all citizens at certain points in the community such as city halls, public libraries and universities and other appropriate venues.<sup>61</sup> Susan Ross concludes by stating that, if these guidelines are implemented, then virtual meetings can be conducted when needed, as often as needed, by agencies since transparency is being preserved.<sup>62</sup>

There are significant gaps in the literature overview concerning new electronic media and open meetings law. Articles either concentrate on the pros and cons of maintaining open meetings law, or explore the question of one type of particular state statute. Overall, most of the literature concerning open meetings and technology specifically addresses certain foreseeable problems possible with emerging technology. The literature generally recommends better enforcement of necessary regulations already in place to prevent abuse, and a general relaxation of restrictions on communicating through technology.<sup>63</sup> There is no comprehensive research that examines new electronic media's use under open meetings laws though, especially on a state by state basis. This thesis fills that gap in the research by looking at how officials subject to open meetings law are using new electronic media. This thesis will also present a summary of where

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<sup>59</sup> Susan Dente Ross, *Breakdown or Breakthrough in Participatory Government?*, 19 NEWSPAPER RESEARCH JOURNAL 1, 10 (1998).

<sup>60</sup> *Id.* at 11.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 786 (2004).

state open meetings law currently stand with regards to the media and will make recommendations on where this body of law should head.

### **Research Questions**

This paper will examine three research questions to look at how public officials subject to open meetings laws are using new forms of electronic media in all fifty states. First, what are the new electronic technologies that have the potential to change the public's access to open meetings and the deliberative process? Each technology carries its own set of uses but also potential pitfalls in the enforcement of open meetings law. By looking at each electronic media on an individual basis, this paper will better be able to separate the major issues that should be addressed by policy changes.

The second research question is how the current law addresses the concerns presented by these new technologies? Many of the laws have not been updated since electronic media like Blackberries, other PDAs, and even e-mail have been prevalent. Other laws are on point. These on-point statutes have specific policies that deal with the challenges presented by new technologies and may serve as a guiding framework for other states seeking to update their laws. Court cases form the rest of the binding law, while pertinent Attorney General opinions flesh out some of the guidelines for public officials that are not covered directly by statutes or case precedents.

The final question is what is a model of “good” open meetings law that appropriately addresses the issues raised and summarized by the first two research questions? This thesis will seek to provide a guideline for policy makers to use when constructing updates to current open meetings law.

## **Research Methods**

The background for the first research question is provided by secondary research of academic and legal journals. Some newspaper articles of a less academic nature were included as well when they related specific incidences of circumventing open meetings law through new electronic media. Several databases were used to produce this secondary research. The following search terms were used to produce the secondary legal resources: “quorum and open meeting,” “instant messaging and open meeting,” “e-mail and open meeting,” “electronic messaging and open meeting,” “text messaging and open meeting,” “PDA and open meeting,” “BlackBerry and open meeting,” and “conference call and open meeting.” The research question will be answered by a comparative analysis of the secondary materials in order to outline the legal loopholes possible with the electronic media covered.

The second research question involves an examination of state law, case law, and pertinent Attorney General opinions, all relying on primary legal research. All 50 state’s open meetings statutes and related case law will be analyzed to determine how they regulate new technology. Each state’s statutes and cases will be reviewed regardless of when they were adopted. For instance, if a state has not updated its open meetings law since 1996, or even 1966, it will still be analyzed for this section of the paper. Attorney General opinions will also be examined in a systematic manner for the second research question. This thesis will examine how the laws attempt to address the issues raised by new electronic media.

The foundation for this primary legal research will come from previous work done by this author and others for the Marion Brechner Citizen Access Project (MBCAP).<sup>64</sup> MBCAP provides a summary of each state’s open meetings law, a citation to the statute, and a rating

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<sup>64</sup> Marion Brechner Citizen Access Project, <http://www.citizenaccess.org/> (last visited September 27, 2007).

given by a blind review board ratings process that puts the statute in question on a scale of transparency and openness. MBCAP's previous research will be used to the extent of providing a starting point for citations. From there the author will conduct research and analysis of all statutes and case law in LexisNexis. Attorney General opinions will be restricted to opinions that cite directly to pertinent statutes found.

The third research question will be answered through the author's legal analysis of the data collected for the first and second research question. By categorizing and synthesizing all current literature, fifty state statutes, and by seeing what legal issues arise through subsequent cases and Attorney General opinions, the author will be able to craft an appropriate "model" law.

## CHAPTER 2

### BACKGROUND TO THE TOPIC

#### **Brief History of Open Meetings Law**

The idea that states should adopt laws protecting access to government meetings is a fairly new concept. Open meetings laws themselves were mostly a product of the 20<sup>th</sup> century. There was never a common law right historically for either the press or the public to attend any sort of government meeting.<sup>1</sup> The United States constitutional delegation of 1787, for example, met in complete and total secrecy.<sup>2</sup> There is also no express or even implied requirement in the U.S. Constitution for open meetings in federal agencies.<sup>3</sup> There is a limited recognition for a right to access of information in terms of reporting on the activities and spending of the legislative and executive branches.<sup>4</sup> The Supreme Court has held that there is also a First Amendment right of access specifically to courts and court records.<sup>5</sup> There are two values according to Schwing from the First Amendment that are expressed and valued by open meetings law—the public’s right to know and government accountability—though these values are not recognized as protected by the courts.<sup>6</sup>

Alabama passed the first comprehensive open meetings law in 1915 and was still the only state in 1950 to have one.<sup>7</sup> While other states continued to create laws in the following years, the government scandal of Watergate in the 1970s made government transparency more of a

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<sup>1</sup> ANN TAYLOR SCHWING & CONSTANCE TAYLOR, OPEN MEETINGS LAWS 1 (1994).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 5.

<sup>4</sup> See U.S. CONST. art. I, § 5.

<sup>5</sup> 448 US 555 (1980).

<sup>6</sup> ANN TAYLOR SCHWING & CONSTANCE TAYLOR, OPEN MEETINGS LAWS 6-7 (1994).

<sup>7</sup> *Id.* at 3.

priority.<sup>8</sup> Between 1972 and 1973 nine states created their own first open meetings law and ten more states strengthened theirs.<sup>9</sup> Presently, every single state has adopted some kind of open meeting statute.<sup>10</sup>

However, open meetings laws can vary greatly state to state though. The public policies and governing rules generally are fairly uniform and display some similar characteristics.<sup>11</sup> The general reasoning given by Schwing and Taylor for open meetings law is that the “government is the public’s business and should be conducted in public so that the basis and rationale for governmental decisions as well as the decisions themselves are easily accessible to the people.”<sup>12</sup> To facilitate better understanding of each state’s open meetings law, many states with Attorney Generals have empowered state Attorney Generals to consider and issue opinions on specific applications of open meeting law.<sup>13</sup>

### **Who the Laws Generally Apply To**

Open meetings laws tend to apply to public, collegial, and deliberative bodies that meet for deliberation.<sup>14</sup> These bodies vary with the specific structure of each state government and the particulars of that state’s open meeting law. Some state government bodies are not subject to open meetings laws at all. These generally include courts, judicial bodies, quasi-judicial bodies, state legislative bodies, committees of state legislatures, political parties, political party caucuses,

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 44.

<sup>11</sup> *Id.* at 23.

<sup>12</sup> *Id.* at 24.

<sup>13</sup> *Id.* at 51.

<sup>14</sup> See Marion Brechner Citizen Access Project, <http://www.citizenaccess.org/> (last visited September 27, 2007). Check out entities category. *Id.*

the governor and his/her cabinet, interstate and multi-state bodies, and private entities that may one way or another be excluded from the laws of many states.<sup>15</sup>

### **Application of Open Meetings Law**

Open meetings laws have generally been upheld in courts.<sup>16</sup> The courts have consistently trumped the first amendment rights of public officials conducting official business by ruling that private deliberations about public business should be sacrificed in favor of the government interest that is fulfilled by maintaining openness.<sup>17</sup> One exception that tends to exist is when the personal privacy interests of the individuals subject to open meetings law is at stake.<sup>18</sup> For example, the personal e-mails of public officials are often not subject to open meetings law.

Some access advocates who have studied enforcement argue that very little has been done to enforce compliance with open meetings laws.<sup>19</sup> One of the main criticisms of open meetings laws is the lack of effective enforcement.<sup>20</sup> Many, but not all, state laws provide for criminal penalties, civil penalties, writs of mandamus, injunctive relief, invalidation of government action, and other state specific penalties but their use depends on a variety of external factors.<sup>21</sup> Factors include common law limitations, judicial interpretations, and, of

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<sup>15</sup> ANN TAYLOR SCHWING & CONSTANCE TAYLOR, OPEN MEETINGS LAWS 100-140 (1994).

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.* at 31. See *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W. 2d 790, 793 (1977), *Cole v. State of Colorado*, 673 P. 2d 345, 347 (Colo. 1983), and *People ex. Rel Hopf v. Barger*, 30 Ill. App. 3d 525, 332 N.E. 2d 649, 658-59 (1975). See Schwing for a more extensive listing of applicable cases.

<sup>18</sup> *Id.* at 33. There are obviously other examples, but this example is on point with the purpose of this thesis. *Id.*

<sup>19</sup> Charles N. Davis, Sandra F. Chance, & Bill F. Chamberlin, *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. LAW & POL'Y 35, 35 (1998).

<sup>20</sup> *Id.* at 38.

<sup>21</sup> *Id.*

course, willingness to prosecute.<sup>22</sup> Many law enforcement officials either do not sufficiently understand open meetings laws, or do not care what the requirements for open meetings laws are.<sup>23</sup>

While there has been no recent systematic study of the enforcement of open meetings laws, there is one study that more qualitatively looks at the issue. Three leading researchers conducted a survey in 1998 of Attorneys General to ascertain some of the more qualitative and anecdotal aspects of enforcement.<sup>24</sup> This survey found that “whether because of statutory weakness, budgetary priorities or for other, unstated reasons, prosecutors rarely, if ever, enforce state open meetings law.”<sup>25</sup> The survey concluded that despite the lack of enforcement, most officials try to follow open meetings law and that violations occur mostly from ignorance of these laws.<sup>26</sup> Enforcement is compounded further by the use of electronic media for meetings. Electronic meetings are “meetings in which visual images, the spoken word, or typewritten messages are exchanged electronically by people who may be far apart.”<sup>27</sup>

### **Brief Explanation of the Electronic Media Discussed**

There is a variety of media that has been developed since open meetings laws became popular. Most current media today revolve in some way around the Internet. The Internet is a

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<sup>22</sup> *Id.* See article for in-depth explanations of these factors and how they specifically impede enforcement of open meetings law. *Id.*

<sup>23</sup> Michele Bush Kimball, *Law Enforcement Records Custodians' Perceptions and Decision-Making Behaviors in Response to Florida's Public Records Law*, 1 (2001) (unpublished Masters thesis, on file with the University of Florida).

<sup>24</sup> See Charles N. Davis, Sandra F. Chance, & Bill F. Chamberlin, *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. LAW & POL'Y 35, 38 (1998).

<sup>25</sup> *Id.* at 43.

<sup>26</sup> *Id.* at 49.

<sup>27</sup> ROBERT JOHANSEN, ELECTRONIC MEETINGS: TECHNICAL ALTERNATIVES AND SOCIAL CHOICES, 1 (1979).

digital communication service.<sup>28</sup> Numbers, which is how computers communicate, can be arranged to encode information in a variety of formats: documents, audio, and video.<sup>29</sup> All data is encoded in a series of zeroes and ones, which helps to make digital information universal. Computers made by different companies from around the world can communicate or talk with each other (via e-mail, website sharing, etc).<sup>30</sup> These digital networks send compressed data which allows for more information to be sent at once.<sup>31</sup> The structure of the Internet allows for a variety of uses, from the World Wide Web and e-mail to gaming and videoconferencing.<sup>32</sup>

Some electronic media have had more impact on open meetings laws than others due to their use and compatibility. The first research question is answered in this chapter: what are the new electronic technologies that have the potential to change the public's access to open meetings? This thesis will be looking at six specific forms of electronic media which are of special interest: teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and PDAs. Due to the emerging nature of many of these media, academic and even trade scholarship on the capabilities and uses of these media has not always been current. As a result, some of the background information is not as complete as needed. A large effort was made to include as complete a profile of each technology when possible. At times less academic works, such as unverified web sources or guide books were used to try to flesh out some of the sections in this chapter. The first technology covered is also the most prevalent: teleconferencing.

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<sup>28</sup> Joshua Azriel, *Internet Hate Speech in the United States and Canada: A Legal Comparison* 48 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>29</sup> Joshua Azriel, *Internet Hate Speech in the United States and Canada: A Legal Comparison* 48 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

## Teleconferencing

Teleconferencing is the first of the technologies developed that this thesis examines.<sup>33</sup>

Teleconferencing uses the telephone as its basis for communication. The telephone was developed in the late 1870s, mostly by Alexander Graham Bell.<sup>34</sup> AT&T was the major company in telephone communications and actually was granted monopoly status by the government for a large part of the twentieth century.<sup>35</sup> Today more than 97% of homes have at least one telephone.<sup>36</sup> Telephones have long been the backbone of many other kinds of communications technologies, such as teleconferencing.<sup>37</sup> Teleconferencing consists of a basic telephone call where more than two parties are involved.<sup>38</sup>

In some circumstances, extra parties can only listen in on the call and not participate, while in other circumstances everyone can listen and electronically participate verbally.<sup>39</sup> In more recent years, advances in technology have allowed for teleconferencing to be conducted through phone lines with the use of a computer.<sup>40</sup> While traditional one-on-one telephone calls are not usually considered to be teleconferencing, and are not the focus of this thesis, regular two-party

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<sup>33</sup> AccuConference, *The History of Teleconferencing*, (2007), <http://www.accuconference.com/blog/TheHistoryOfTeleconferencing.aspx>.

<sup>34</sup> Christopher Sterline, *CBQ Review Essay: History of the Telephone (Part One)*, 35 COMMUNICATION BOOKNOTES QUARTERLY 222, 222 (2004).

<sup>35</sup> Jonathan Sterne, *Encyclopedia of New Media: Telephony*, SAGE PUBLICATIONS (2008), [http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n229.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n229.html). This is an on-line book with entries written by either experts in the field of new technology, or those intimately acquainted with the developmental history of the media.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Wikipedia, *Conference Call*, [http://en.wikipedia.org/wiki/Conference\\_call](http://en.wikipedia.org/wiki/Conference_call). Normally, Wikipedia would not be considered a valid resource for a thesis. In this case, due to the extreme lack of information on the basic information for certain media, especially teleconferencing, a less academically sound source was provided with the understanding that the information cannot be verified or guaranteed to come from an unbiased source.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

phone calls will be discussed because state laws often include two party phone calls and teleconferencing within the same legal jurisdiction. Obviously the mechanics of the two kinds of telephone calls are similar; only the number of people participating are different. The implications of teleconferencing and open meetings will be discussed with videoconferencing.

## **Videoconferencing**

Videoconferencing consists of the transmission of video and sound between two different physical locations.<sup>41</sup> The first videoconferencing technology was the Picturephone, developed in 1964 for one-on-one communication between two people.<sup>42</sup> The product was not popular and had very few subscribers.<sup>43</sup> Some researchers have speculated that the Picturephone was not successful because it did not let customers engage in large conference calls, called multipointing, similar to what teleconferencing allowed at the same time.<sup>44</sup> Multipoint videoconferencing was developed in the 1970s and 1980s by the company British Telecom.<sup>45</sup> In the interim the equipment required to run videoconferencing was a major deterrent in the face of cheaper more popular technologies, mainly teleconferencing.<sup>46</sup>

Videoconferencing works when video cameras and microphones translate data into digital information that can be sent via computers to the other location.<sup>47</sup> The information is compressed to go into the computer at the location of origin, where it is sent through telephone

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<sup>41</sup> Theresa M. Senft, *Encyclopedia of New Media: Videoconferencing*, SAGE PUBLICATIONS (2008), [http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n244.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n244.html).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

lines and decompressed by the computer at the destination location and received through the destination's video cameras and microphones.<sup>48</sup> There are other technical ways for videoconferencing to happen, but the described process is the one most often used.<sup>49</sup> It is much more common now to have a videoconferencing system that relies entirely upon equipment built into computers, such as webcams and headsets that are directly connected to a laptop or desktop computer.<sup>50</sup>

A major advancement was made in videoconferencing technology in 1994 when Intel introduced videoconferencing for Windows over the Internet with desktop PCs.<sup>51</sup> Advancements in Internet bandwidth and capabilities has made videoconferencing a much more useful option in the last several years, increasing the use of videoconferencing as a viable technology.<sup>52</sup> In 2002 videoconferencing was a \$2 billion a year industry and was projected to be a \$7 billion a year industry in 2006, showing that the medium has enjoyed increased popularity and use due to advancements making it a good option for group communications.<sup>53</sup>

Both teleconferencing and videoconferencing with regards to open meetings, allow public officials to have conversations with more than one person without being physically present together. This can be problematic because instead of putting the effort into physical “daisy chaining,” public officials can merely make a phone call and have a “meeting” over the

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Unfortunately more recent numbers are not available due to the fact that very little academic research has been done on the subject. *Id.*

phone or with videoconferencing technology in their respective offices.<sup>54</sup> The more direct effect of this is that public officials can conduct discussions about public business outside of open meetings requirements, often without anyone knowing about it.

## E-Mail

Electronic mail, or e-mail for short, was developed originally in the 1960s when messages by one person were sent to others working on the same mainframe computer.<sup>55</sup> Ray Tomlinson, a researcher in the late 1960s, started working on a program that allowed people on the same network to send messages to each other.<sup>56</sup> This primitive form of e-mail required users within one network to know each other's identification and computer address.<sup>57</sup> In 1972 Tomlinson released two programs that worked together- one sending mail and one receiving mail, to the public.<sup>58</sup>

In 1975 John Vittal wrote an all-in-one program called MSG.<sup>59</sup> Not only did this program send and receive mail, but it also included automatic addressing and a reply function.<sup>60</sup> Most e-mail systems still use the basis of this program and even thirty plus years later most of the changes that have been made to this communications technique are stylistic and designed to increase the ease of use.<sup>61</sup>

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<sup>54</sup> Jaci Boydston, *Messages or Meeting?*, THE NEWS MEDIA AND THE LAW 26, 26 (Summer 2007).

<sup>55</sup> Norman Clark, *Encyclopedia of New Media: Email* SAGE PUBLICATIONS (2008), [http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n91.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n91.html).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

In the late 1980s and early 1990s e-mail gained in popularity until 1996 when its use then skyrocketed due to the proliferation of free e-mail among multiple networks.<sup>62</sup> The Internet was developed in 1989 and released to the public in 1991.<sup>63</sup> The Internet is a vehicle that allows documents to be linked to other documents, and sent back and forth between two or more parties.<sup>64</sup> These documents can be browsed by computers connected to the interface of the Internet.<sup>65</sup> The development of web-based e-mail accounts allowed people to pay for the Internet.<sup>66</sup> As it became more popular, many communications companies began to offer their customers e-mail accounts with their Internet service.<sup>67</sup>

Electronic mail is an electronic messaging system that sends a single message to either one or many designated recipients.<sup>68</sup> All e-mails share a basic structure, starting with the header, which includes the sender of the e-mail, its recipient, and technical data.<sup>69</sup> E-mails also have a body of text and sometimes an attachment.<sup>70</sup> E-mails can be just plain text or complex content

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<sup>62</sup> *Id.*

<sup>63</sup> Kevin Featherly, *Encyclopedia of New Media: World Wide Web*, SAGE PUBLICATIONS (2008), [http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article\\_n255.html](http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article_n255.html).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Norman Clark, *Encyclopedia of New Media: Email*, SAGE PUBLICATIONS (2008), [http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article\\_n91.html](http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article_n91.html).

<sup>68</sup> Joshua Azriel, Internet Hate Speech in the United States and Canada: A Legal Comparison 49 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>69</sup> Norman Clark, *Encyclopedia of New Media: Email* SAGE PUBLICATIONS (2008), [http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article\\_n91.html](http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article_n91.html).

<sup>70</sup> *Id.*

that includes audio, video, and graphics.<sup>71</sup> E-mail is sent across the Internet through the use of software which users download to their personal computers or other digital devices.<sup>72</sup> E-mail is automatically saved in many different places. It is saved in at least four places: the mail client, or the computer devoted to manage e-mail, the e-mail sever of both the sender and recipient, and the automatic backup.<sup>73</sup> Messages can be saved in additional places when specified.<sup>74</sup>

E-mail has reached almost complete saturation in use. This means that almost everyone, including public officials, use e-mail to conduct business.<sup>75</sup> One main feature of e-mail is that it is written out like a letter, but has an instantaneous nature to its communication because it does not have to be physically mailed.<sup>76</sup> If two people can access their e-mail at the same time, then they can essentially have a conversation through exchange of e-mail. With wireless Internet being so prevalent, the use of e-mail to communicate can take place everywhere a public official carries his or her cell phone or PDA, both of which can access e-mail if they are in range of a wireless network or can connect with a physical Internet connection.

E-mail lets public officials write each other in a quick way that can stimulate an extended discussion. Because of its informal nature and prevalence in various electronic media, such as PDAs, cell phones, and laptops, it is very easy for public officials to communicate with this media. That ease of use can lend itself to open meetings violations, both purposeful and

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<sup>71</sup> Joshua Azriel, *Internet Hate Speech in the United States and Canada: A Legal Comparison* 49 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>72</sup> *Id.*

<sup>73</sup> ROBERT KOA, *BLACKBERRY FOR DUMMIES* [E-BOOK] (2006).

<sup>74</sup> *Id.*

<sup>75</sup> Norman Clark, *Encyclopedia of New Media: Email* SAGE PUBLICATIONS (2008), [http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article\\_n91.html](http://www.sage-erference.com.lp.hscl.ufl.edu/newmedia/Article_n91.html).

<sup>76</sup> Joshua Azriel, *Internet Hate Speech in the United States and Canada: A Legal Comparison* 49 (2006) (unpublished dissertation, on file with the University of Florida).

unintentional, if a personal e-mail contains a quick note about an upcoming vote, or other matter of public business. E-mail's nature also makes it very difficult to know if these kinds of e-mails are being sent, making enforcement of open meetings with regards to e-mail often up to the public officials themselves.

### **Text Messaging**

Text messaging is often known technically as short messaging system, or SMS.<sup>77</sup> It was created in the early 1990s, with the first message being sent between a computer and cell phone in 1992.<sup>78</sup> It was not available commercially until 1994.<sup>79</sup>

Text messaging is essentially a brief two-way communication between cell phone users.<sup>80</sup> Alphanumeric e-mail messages can be sent by typing them using the cell phone keypads, where each number of the keypad is assigned letters in the alphabet.<sup>81</sup> Text messages used to be strictly text based but technological advancements have allowed for MMS, or Multimedia Messaging System.<sup>82</sup> MMS allows media-rich messages to be sent, which means that messages can incorporate sounds, images, and video, among other things, as part of the text message.<sup>83</sup>

Text messaging is currently more popular outside of the United States, especially in countries where land lines for non-mobile telephones can not be successfully implemented, due

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<sup>77</sup> Kevin Featherly. *Encyclopedia of New Media.: Short Messaging System*, SAGE PUBLICATIONS (2008), <[http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n211.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n211.html)>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* New technology allows users to send messages to multiple users. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

either to geographic barriers or the lack of money.<sup>84</sup> Text messaging was originally adopted by a younger demographic but in more recent years has gained in use among older demographics of cell phone users.<sup>85</sup>

Text messaging has similar benefits and concerns that e-mail does. Instead of being tied to computers and/or Internet usage, text messaging can be used by anyone with a cell phone, or PDA. Text messaging is tied to cell phone usage. When the people communicating are carrying their cell phones, the communication is usually faster than e-mail.<sup>86</sup> Text messages are usually short in nature, because of the limited capabilities of the technology that supports it, but text messages are even more difficult to document and track than e-mails since text messages do not exist in as many places as e-mail. This makes text messaging a potential problem with regards to public officials attempting to circumvent open meetings laws.

### **Instant Messaging**

Instant messaging originally was invented in 1971 as a chat program for government computers.<sup>87</sup> Instant messaging was adapted for public consumption in 1996 by an overseas company, Mirabilis.<sup>88</sup> Instant messaging is a chat function that lets people “talk” with each other over the Internet.<sup>89</sup> This is usually a one-on-one communication, using real time

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Gary W. Larson, *Encyclopedia of New Media.: Instant Messaging*, SAGE PUBLICATIONS (2008), <[http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n121.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n121.html)>.

<sup>88</sup> WILLIAM R. DAVIE, PRNCIPLES OF ELECTRONIC MEDIA 111 (2006).

<sup>89</sup> *Id.*

communication.<sup>90</sup> Mirabilis's instant messaging system allows people with e-mail to find each other and initiate a chat with other persons who have e-mail.<sup>91</sup> Within six months Mirabilis had over 850,000 users on their instant messenger, which was called ICQ or I Seek You.<sup>92</sup>

Instant messaging allows people to communicate instantly in real time.<sup>93</sup> It serves as both a monitoring tool, allowing users to "watch" each other's presence online, and as a messaging tool that people can use to communicate.<sup>94</sup> Messages "pop up" when a new message is typed so that people can receive and respond instantly.<sup>95</sup> Originally, instant messages, or IMs, were text only.<sup>96</sup> Currently IMs are info-rich and can contain voice, video, and pictures.<sup>97</sup>

One of the early draw backs of instant messaging systems was that users could not IM between different programs.<sup>98</sup> The programs had no standardized set of protocols that could communicate.<sup>99</sup> An ICQ user, for example, could not message an AOL Instant Messaging user. This has since been remedied. Many users download special third party software that allows

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<sup>90</sup> Gary W. Larson, *Encyclopedia of New Media.: Instant Messaging*, SAGE PUBLICATIONS (2008), <[http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n121.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n121.html)>.

<sup>91</sup> WILLIAM R. DAVIE, PRNCIPLES OF ELECTRONIC MEDIA 112 (2006).

<sup>92</sup> *Id.*

<sup>93</sup> Joshua Azriel, Internet Hate Speech in the United States and Canada: A Legal Comparison 53 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>94</sup> Gary W. Larson, *Encyclopedia of New Media.: Instant Messaging*, SAGE PUBLICATIONS (2008), <[http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n121.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n121.html)>.

<sup>95</sup> Joshua Azriel, Internet Hate Speech in the United States and Canada: A Legal Comparison 53 (2006) (unpublished dissertation, on file with the University of Florida).

<sup>96</sup> ROBERT KOA, BLACKBERRY FOR DUMMIES [E-BOOK] (2006).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Gary W. Larson, *Encyclopedia of New Media.: Instant Messaging*, SAGE PUBLICATIONS (2008), <[http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n121.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n121.html)>.

multiple messaging systems to be tracked. This allowed an IM user to “see” when their ICQ friend is online.

A feature of instant messaging software is that archiving is designed so that the messages are not kept long term. There are other third party archiving tools that can keep track of messages.<sup>100</sup> Some companies choose to install these programs in order to better comply with regulations, both company regulations and regulations related to state public record laws, requiring that messages be kept for a certain length of time.<sup>101</sup>

Instant messaging enjoys widespread use in the workplace. In 2003, 53% of companies were found to be using IM, both officially and unofficially.<sup>102</sup> A study on the business practices in the United Kingdom found that 40% of employees who answered the survey admitted to using instant messaging services to avoid work and, more significantly to this study, to avoid being caught as they would if they were using e-mail.<sup>103</sup>

Instant messaging is an extremely useful tool and cuts down both on phone calls and e-mail. It is also unfortunately an extremely problematic media type to regulate and particularly to enforce effectively because of its fleeting nature. Unless users choose to use a kind of archiving tool, the messages they send exist only as long as the sender and receiver’s messaging windows are open on their computers. Copies of instant messages, unlike e-mail, are not stored on a third party server. This means that discovering a public official using instant messaging to communicate outside the scope of a public meeting would be very difficult.

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<sup>100</sup> Melanie Turek, *Messaging Compliance: Why it Matters*, 34 BUSINESS COMMUNICATIONS REVIEW 39, 41 (2004).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> WILLIAM R. DAVIE, PRNCIPLES OF ELECTRONIC MEDIA 112 (2006).

## **Personal Digital Assistants (PDAs)**

Personal digital assistants, or PDAs, are hand-held computers that act as personal organizers.<sup>104</sup> PDAs are a converged communication device, meaning that they have multiple communication functions.<sup>105</sup> They were initially developed in 1984 by a UK technology company called Psion.<sup>106</sup>

PDAs generally have LCD display screens with a touch panel and input device, usually a plastic pen called a stylus, or a nib.<sup>107</sup> Almost every PDA has infrared capability, which means that it can link to devices such as printers and desktop computers.<sup>108</sup> Most also have a wireline modem, or the ability to connect to a phone line or dial up modem.<sup>109</sup> This means that the information on PDAs can easily be sent to other wired electronic devices.

PDAs themselves can be divided into traditional PDAs, personal communicators, and mobile companions.<sup>110</sup> Traditional PDAs are pen, or stylus based, personal organizers.<sup>111</sup> They may or may not have a wireless feature.<sup>112</sup> Personal communicators on the other hand are primarily designed to operate as wireless devices.<sup>113</sup> The third type of PDAs are mobile PDAs,

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<sup>104</sup> Kim Sungwoo, Exploring Factors Influencing Personal Digital Assistant (PDA) Adoption, 2 (2003) (unpublished dissertation, on file with the University of Florida).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> RONALD K. JURGEN, DIGITAL CONSUMER ELECTRONIC HANDBOOK 26.4 (1997).

<sup>108</sup> *Id.* at 26.10.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 26.1.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 26.2.

<sup>113</sup> *Id.*

which are actually small notebook computers.<sup>114</sup> Almost all PDAs have a combination of capabilities, including those of an information management system, a mobile phone, wireless and connected Internet, e-mail, MP3/movie player, a digital camera, GPS, and other more brand specific features.<sup>115</sup> The three main functions of PDAs can be identified as: information, entertainment, and communication.<sup>116</sup>

PDAs allow a public official who is casually strolling through a hallway to text message, e-mail, instant message, or even call a colleague and have a discussion that is much more difficult to trace than through an employee's computer logs. PDAs are problematic because they can perform multiple communication functions. Most PDAs now have wireless technology as well as wired and can access Internet from a majority of places. PDAs also often act as cell phones.

One particular brand of PDA that has become popular in recent years is the BlackBerry. BlackBerry devices have several brand specific features. BlackBerry PDAs, like almost every current PDA on the market, has the capability to connect and send e-mail, text messages, instant messages, and PIN-to-PIN communications.<sup>117</sup> The two specific features are the e-mail and PIN capabilities.

BlackBerry devices can receive mail from up to ten different e-mail accounts.<sup>118</sup> Unlike others PDAs, BlackBerry owners can specify which e-mail address the recipient sees when the e-

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<sup>114</sup> RONALD K. JURGEN, DIGITAL CONSUMER ELECTRONIC HANDBOOK 26.2 (1997).

<sup>115</sup> Kim Sungwoo, Exploring Factors Influencing Personal Digital Assistant (PDA) Adoption, 5 (2003) (unpublished dissertation, on file with the University of Florida).

<sup>116</sup> *Id.*

<sup>117</sup> ROBERT KOA, BLACKBERRY FOR DUMMIES [E-BOOK] (2006).

<sup>118</sup> *Id.* This means that instead of logging in and checking ten different accounts, the BlackBerry owner can check their single BlackBerry e-mail account where the ten different accounts are fed to. *Id.*

mail is sent from this centralized account.<sup>119</sup> A single login brings a BlackBerry user to a central e-mail account that can send messages that appear to be coming from different accounts, all from this centralized login. Hypothetically, a public official might receive an official e-mail about an upcoming meeting that would fall under the open meetings law in his or her BlackBerry e-mail account. The public official might want to respond or discuss an item in the e-mail so, to avoid being penalized for violating open meetings law, sends a reply “from” a personal, not work account.<sup>120</sup>

Another feature in BlackBerry devices is the PIN-to-PIN feature, which is basically a two-way pager service, or text messaging, between BlackBerry devices.<sup>121</sup> PIN-to-PIN communications are different from e-mail or other forms of messaging, such as instant messaging or pure text messaging, because these communications do not leave the BlackBerry universe.<sup>122</sup> The message only exists in two places: the BlackBerry originating the message, and the BlackBerry receiving the message.<sup>123</sup> A PIN message cannot be retrieved without physically having the sending PDA or the retrieving PDA; once the PIN is deleted from both it is gone forever. As a result PIN communications are more secure than e-mail and, ultimately, more difficult to track for transparency.<sup>124</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> Many state open meetings laws have clauses protecting the individual privacy interests of public officials. This of course varies from state to state, but in some states personal e-mail is not considered a public record. *See* 24 C.R.S. 6-402 (2007).

<sup>121</sup> ROBERT KOA, BLACKBERRY FOR DUMMIES [E-BOOK] (2006).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

One manual on the use of BlackBerry devices encourages users to take advantage of the privacy offered by PIN communications by stating that “if you whisper a little secret in someone’s ear, only you and that special someone know what was said. In a way, PIN-to-PIN messaging is the same thing, with one BlackBerry whispering to another BlackBerry. Now that’s discreet.”<sup>125</sup> If the employers are issuing the BlackBerry they are given the option by the BlackBerry company to block PIN functions.<sup>126</sup> This means that people can send blocked users PIN communications- the blocked users simply cannot send PINs themselves.<sup>127</sup> This function, even in its blocked setting, has the potential to be problematic if public officials communicate or deliberate about matters that should be discussed in open meetings, not behind closed office doors via PIN transfers.

### **Moving Forward to the Law**

The electronic media itself is not at issue for open meetings advocates. It is the use of each kind of media by public officials and whether or not this use circumvents open meetings law that is the concern of this thesis. The following chapter, Chapter 3, examines the current open meetings law and cases in all fifty states, as well as pertinent Attorney General opinions, with regard to the electronic communications system this thesis discusses.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

## CHAPTER 3

### THE CURRENT STATE OF THE LAW: STATUTORY OVERVIEW WITH RELEVANT CASE LAW AND ATTORNEY GENERAL OPINIONS

This chapter discusses the second research question, which asks how the current law addresses the concerns presented by these new technologies, by looking at how the current open meetings statutes, case law, and pertinent Attorney General opinions are addressing the issues presented by teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and personal digital assistants. The majority of the statutes that address these new media do so in the definitions section of the open meetings law, usually when defining how meetings are open to the public.

The purpose of this thesis is to make sense and give meaning to the discussion and issues surrounding new electronic media and open meetings law. To do this properly, the law must be more than an alphabetic list of all fifty state statutes. The statutes, case law, and pertinent Attorney General opinions are organized initially by technology. Instead of simply listing each state under the technology named in the statute, this thesis has identified categories to place the statutes under within the technologies. The categories were developed from primary research on the statutes.

The categories were developed after doing the primary research and reading through all of the statutes. During this process it became apparent that the statutes could be separated into three main categories based on how in-depth the statute dealt with electronic media. The case law and pertinent Attorney General opinions also fit into these categories. The first category is “No Reference.” While all fifty states have open meetings laws, many of the states do not have law that mentions electronic media. The second category is “Brief Application.” This category includes the majority of the laws that refer to electronic media within the states’ open meetings laws. Statutes, case law, and Attorney General opinions are included in this category if they

briefly mention electronic media, or if the main purpose of the statute is to provide a short definition of how the electronic media should be used within open meetings.

The third category, “More Extensive” has two subcategories, “Facilitate agency communication” and “Facilitate public access.” “More Extensive” includes law that deals with electronic media in a more in-depth manner. The first subcategory, “Facilitate agency communication,” includes statutes, case law, and pertinent Attorney General opinions that incorporate electronic media as a way to make open meetings easier to run for the agency. For example, an agency that had a large jurisdiction might run into difficulty meeting in person regularly and therefore may be allowed to meet via teleconference in the statute. The second sub-category, “Facilitate public access,” includes law that is designed to increase public access to open meetings. For example, an agency might be required to have the technology to allow citizens to participate in a meeting by teleconference when attending the meeting in person is a hardship.

Portions of the law do not fit exactly within all three categories, but most of it fits in this system, making it a positive way to analyze such a large set of information.<sup>1</sup> The first category, because it deals with law that does not mention electronic media, is set apart in the beginning of this chapter. The other statutes, case law, and Attorney General opinions will be divided by technology, then looked at in the two remaining categories under each technology. Attorney General opinions, when listed together under a category, will be put in chronological order.

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<sup>1</sup> North Dakota is the only statute that is particularly problematic. *See* 44 N.D. Cent. Code § 04-17.1 (2008). The others fit within the structure of the categories in this thesis. The law fits into all of the categories within its open meetings law. *Id.* The statute does not fit as well into the law as the other statutes because it clearly includes multiple categories.

## **Overview of Electronic Technology in Open Meetings Statutes**

Even though every state has its own open meetings law, not all of the laws have been updated to reflect the emergence of electronic media and the issues raised as a result. Eighteen states do not include electronic media in their open meetings statutes, which means that thirty-one states mention electronic media. The majority of the current open meetings statutes address electronic media in at least a cursory manner. Most of the statutes merely reference the existence of electronic media but some are extremely in-depth.

Figure 3-A is a chart showing the break-down of how often each technology is specifically addressed in state statutes. The totals in the chart are more than 51, as might be expected from having fifty statutes and the District of Columbia to examine, since some statutes mention more than one technology due to varying depth of detail in the statutes. Eighteen states fall under the “None” category, and twenty-three are “General.” References to teleconferencing and videoconferencing technologies show up more than any of the other technologies within the statutes. Teleconferencing shows up in nineteen states; videoconferencing shows up in thirteen states. E-mail is only mentioned in three state statutes; text messaging, instant messaging, and PDAs in two. The technologies are addressed in order of how often they are mentioned: teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, PDAs, with General statutes being addressed last since they are the catch all statutes.

While this chart gives a good visual overview of the general breakdown of how often the electronic media are addressed in the statutes, it does not comprehensively cover how the technology is addressed since some statutes include more than one technology in the statute. To accomplish a more in-depth analysis to answer the second research question, the study examined how each technology, both independently and in context of other technologies, is addressed in the statutes. Along with the statutes I have included case law and relevant Attorney General

opinions. The many updates most of these statutes have gone through make it difficult to get a comprehensive sense of the state of electronic media and open meetings law without putting the discussions of statutes, case law, and Attorney General opinions in the same place in the thesis. Most of the statutes, for example, have been updated, sometimes significantly, within the last three years to reflect changes and updates in electronic media. The case law and Attorney General opinions date back all the way to 1980, and therefore often refer to statutes that have been updated. Examining the evolution of the reasoning behind the updates can give valuable insight into how specific statutes were shaped by prior case law and Attorney General opinions.

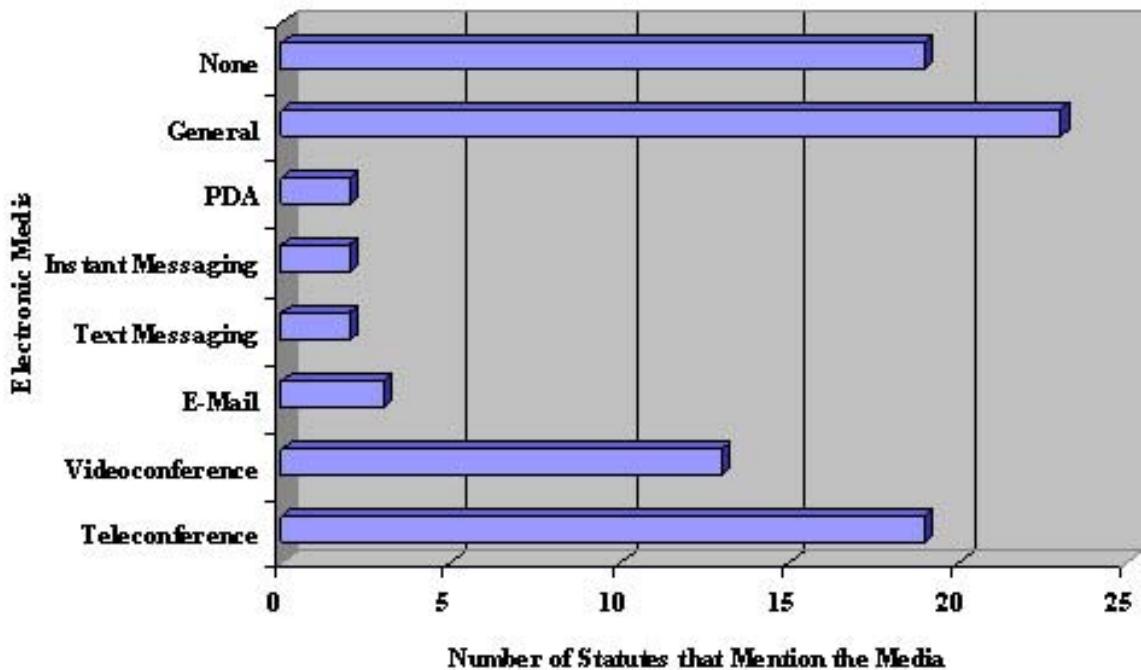


Figure 3-1- Electronic media in open meetings statutes

### **Cited Case Law and Attorney General Opinions**

Due in part to the fact that many of the statutes do not include electronic media, or only include short descriptions without any guidelines, it is necessary to further inform the discussion of electronic media with both case law and Attorney General opinions. While the court decisions, and especially the Attorney General opinions, do not always carry the same weight as the statutes, many times lawmakers will refer to more recently updated case law and Attorney General Opinions to guide the creation of new statutes. Illustration 3-B gives a visual overview of how the cases deal with electronic media. Attorney General opinions are not put in a chart since only representative opinions were used for this thesis. The review of the case law, on the other hand, is comprehensive and can be viewed in a summarizing chart. Most of the media are not mentioned at all in the case law and therefore are not included in the chart.

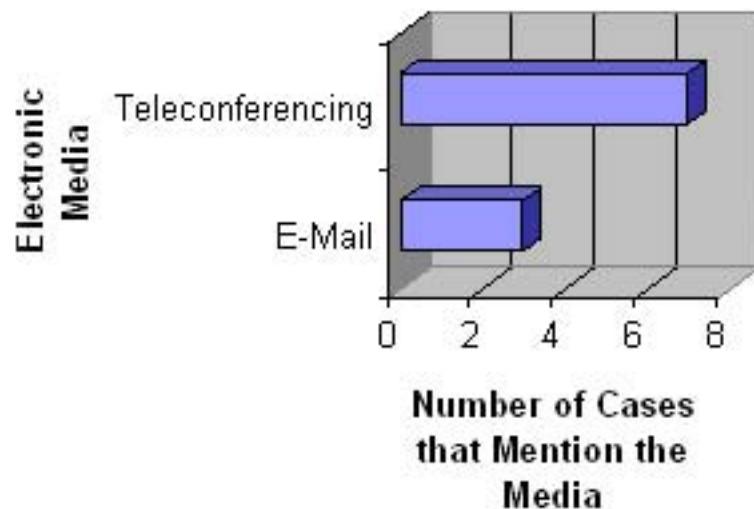


Figure 3-2- Electronic media in case law

Not very many cases fell under the search criteria. Nine were found overall. As in the statutes, teleconferencing is the media most often addressed in the case law. In fact, the only other medium that is addressed is e-mail. Videoconferencing, instant messaging, text messaging, and PDAs are not mentioned at all.

Despite the fact that the Attorney General opinions are not actually law, there are quite a few more Attorney General opinions than cases, thirty overall. Teleconferencing once again dominates, with there being twenty-two in total. Videoconferencing, e-mail, and general electronic media are mentioned much less- three, three, and two times respectively.

The case law, as with the statutes, was examined for all fifty states. In states where there were statutes that mentioned electronic media within the open meetings law, that statutory citation was used as a search string in LexisNexis. In states where there was no mention of electronic media within the open meetings statute, the citation for the main open meetings statute, was used as a search string for LexisNexis and was refined, when needed, with subsequent search strings such as “open meeting” or “electronic.”

Attorney General opinions do not have the force of law that statutes and case law have, and therefore the thesis does not look at all Attorney General opinions in all fifty states as their purpose in this thesis is to provide supplementary information. The Attorney General opinions were obtained by running a search on Attorney General opinions that cited the statutes found, and that also referenced electronic media as a major fact or factor in the opinion. All cases and Attorney General opinions that fall within the search criteria outlined are being examined without regard to when the opinion was written. This means that cases and opinions that reference the technology this thesis examines will be included even if they were decided and

written prior to 1996, the timeframe used for determining which electronic media to study for this thesis.

In general, the statutes are organized by media type, such as teleconferencing; category, such as “Brief Application; and within the media type and category, by themes that were discovered by an analysis of the statutes. For example, if several of the statutes in the same media and category deal with quorum requirements, they will be placed together. Cases and Attorney General Opinions will be organized in the same manner. It should be clarified that only the statutes have the force of law. The cases are a part of the law in that they build precedent and sometimes help shape future statutes. When there is no statute to address an issue in a state, but there is a case in good standing, the case is considered the law on that issue. Even then, only the holding of a case is considered law. Discussion from dicta in the cases is often used in this thesis to further illustrate the discussion on the use of electronic media. The discussions in these cases are not discussing law, but rather some of the reasoning of legal officials such as judges concerning why certain decisions concerning the law were made. Attorney General opinions are advisory and do not have the weight of being law under any circumstances. Like dicta, they are included to provide a larger picture about the use of new electronic media by public officials.

### **No Reference**

Eighteen states do not have a statute that directly references electronic media within the scope of the state’s open meetings law. These states are Arkansas, Delaware, Florida, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New York, Ohio, Pennsylvania, Utah, Washington, Wisconsin, and Wyoming. Three of these eighteen states have cases that establish legal precedent despite the lack of a related statute. These states are Nevada, Ohio, and Washington, each of which had one case that is discussed under the appropriate technology. The other relevant cases were decided in states with statutes.

## **Teleconference**

Teleconferencing is the most prevalent technology addressed overall. Nineteen states address teleconferencing in their open meetings laws, more mentions than any other technology. There are seven cases and twenty-two Attorney General opinions, with some states having more than one case or Attorney General opinion. Teleconferencing is one of the oldest technologies included in this study. More lawmakers are familiar with it, and have spent more time using it.<sup>2</sup> Teleconferencing is also a communications tool well suited for group communications via a traditional, and therefore a familiar technology, the telephone. The categories explained in the beginning of this chapter are put into practice below.

### **Brief Application**

Seven states have statutes that only incorporate teleconferencing briefly, to amplify the first definition of a more traditional meeting. The states, and the District of Columbia, are Colorado, Illinois, Kansas, Mississippi, Vermont, Virginia, and West Virginia. Some of the states specifically include teleconferencing in their definition while others- such as, the District of Columbia- have definitions of electronic media that would include teleconferencing.<sup>3</sup> Some of the statutes seem to leave large legal loopholes that could be misused by public officials and which are discussed later within this chapter.

Three states' statutes- Colorado, Mississippi, and Illinois- and one court case in Ohio include teleconferencing in their definitions of what constitutes open meetings. Colorado's statute deals with electronic mail in some detail by saying that e-mails written for public business

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<sup>2</sup> Jonathan Sterne, *Encyclopedia of New Media: Telephony*, SAGE PUBLICATIONS (2008), [http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article\\_n229.html](http://www.sage-ereference.com.lp.hscl.ufl.edu/newmedia/Article_n229.html).

<sup>3</sup> 1 D.C. Code § 129.04 (2007).

are subject to open meetings requirements,<sup>4</sup> but only refers to teleconferencing by saying that a meeting includes “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.”<sup>5</sup> Colorado also has an Attorney General opinion that looks at a different aspect of teleconferencing by examining how teleconferencing facilitates agency communications. The opinion examines how a specific state agency, in this case the Lottery Commission, can use teleconferencing to make meetings easier, which will be discussed in the section “Facilitates agency communication.”<sup>6</sup> Mississippi’s statute defines meeting, and then includes teleconferencing and videoconferencing within this definition.<sup>7</sup>

In Illinois the definition of a meeting includes nearly all kinds of electronic media. The definition says a meeting is “any gathering, whether in person or by video or audio conference, telephone call, electronic means (such as, without limitation, electronic mail, electronic chat, and instant messaging), or other means of contemporaneous interactive communication.”<sup>8</sup> This definition in the 2008 statute updated the law which was predicated by an older statute not including teleconferencing and that a 1995 appellate court decision was based on.<sup>9</sup>

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<sup>4</sup> See pg. 90.

<sup>5</sup> 24 C.R.S., § 6-402 (b) (2007).

<sup>6</sup> 20, Co. Op. Att'y Gen. 1 (1985).

<sup>7</sup> 25 Miss. Code Ann. § 41-3 (b) (2008).

<sup>8</sup> 5 ILCS § 120/1.02 (2008).

<sup>9</sup> Freedom Oil v. Illinois Pollution Control, 275 Ill. App. 3d 508 (1995). In 1995 the Appellate Court of Illinois looked at whether the Illinois Pollution Control Board violated open meetings law when it held a meeting through teleconferencing. The Board published a notification of the teleconference, which was held to correct a clerical error from a previous physical meeting. The petitioner argued that the current statute did not allow for meetings by teleconferences. In quoting past Attorney General opinions, the court recapped that, by specifically excluding teleconferencing and other electronic media from open meetings considerations, a dangerous loophole would be created for public officials. If teleconferences were not to be considered a meeting, then public officials could simply call each other and deliberate outside of the public eye. The court concluded after weighing past Attorney General opinions and precedence from other states with similar situations, that teleconferencing could at times fall

In 2005 the Court of Appeals of Ohio decided a case in which a local school board was accused of violating the open meetings law on several counts.<sup>10</sup> The main issue was an e-mail that is discussed in-depth below under the e-mail category.<sup>11</sup> The school board was also charged with violating the law via a telephone call which was held between two school board members involving deliberations, though not necessarily deliberations about a matter of public business.<sup>12</sup> In this instance, the court ruled that the telephone call was not a meeting since it was not pre-arranged and only involved two individuals, and was not one of many one-on-one conversations between school board members on a matter of public business.<sup>13</sup>

The District of Columbia and Vermont do not specifically mention teleconferencing in their statutes, but have a broad enough interpretation of electronic media that teleconferencing would be included within the scope of open meetings law. The District of Colombia has a statute that does not specifically name teleconferencing within its parameters.<sup>14</sup> It says that electronic communication, which would include teleconferencing, can be used as long as committee members and the public can be clearly heard.<sup>15</sup> There are several different scenarios that this kind of stipulation about teleconferencing could include. The public may be able to literally dial into the open meeting, and by using teleconferencing, hear and interact with members of the

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under open meetings law and that meeting conducted via telephone should conform to the requirements and spirit of that law. *Id.*

<sup>10</sup> Haverkos v. Northwest Local School Board, 2005 Ct. of App. Ohio 3489 (2005).

<sup>11</sup> See pg. 80.

<sup>12</sup> Haverkos v. Northwest Local School Board, 2005 Ct. of App. Ohio 3489 (2005).

<sup>13</sup> *Id.*

<sup>14</sup> The statute in question only refers to meetings of the Statehood Delegation Fund Commission. 1 D.C. Code § 129.04 (2007). Electronic media is not addressed in the more general open meetings law, therefore teleconferencing is limited to the scope of the statute covered in the body of the text. 1 D.C. Code § 129.04 (2007).

<sup>15</sup> 1 D.C. Code § 129.04 (2007).

agency holding the meeting. Public officials might be calling into the open meeting from a home location. The law is being followed if the meeting is open to the public, as long as the officials calling in can hear and interact with the public officials and the public present at the official physical location. Vermont also includes “audio communication,” such as teleconferencing, broadly in the definition of electronic meetings.<sup>16</sup>

Three states’ statutes- Kansas, Virginia, and West Virginia- leave large loopholes for public officials to exclude the public. In Kansas, for instance, a meeting is defined to be basically any kind of interactive communication, including phone calls, that is made by the majority of the quorum to discuss public business.<sup>17</sup> The statute does not provide for any kind of public participation in these meetings public meetings which, theoretically, could be held completely from members’ homes. However, the statute generally includes teleconferencing within the law, unlike its predecessor.<sup>18</sup>

Four Attorney General opinions dealt with Kansas teleconferencing and open meetings. These opinions were issued in 1980, 1981, and twice in 1998. While these opinions are based on previous versions of the current statute, they provide some of the reasoning for the current version of the statute and including them in this section shows how the statutory law evolved. There are two other Attorney General opinions for Kansas, while are included in the e-mail media section.

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<sup>16</sup> 1 V.S.A. § 310 (2007).

<sup>17</sup> 75 K.S.A. § 4317 (a) (2006).

<sup>18</sup> See *State of Kansas v. Board of County Commissioners*, 866 P. 2d 1024 (Kan. Sup. Ct 1994). In 1994 the Supreme Court of Kansas ruled on whether or not telephone calls made by three county commissioners at the expense of the county and to conduct official business violated Kansas’s open meetings law. This case is interesting because, ultimately, the Supreme Court decided that the actions of the city commissioners’ did not violate the state’s open meetings law because at that time the state had not included teleconferencing within its scope of open meetings. Unlike many of the cases that have been reviewed, this case entirely rests on the argument that “there is no common-law right of the public or the press to attend meetings of governmental bodies, and any such right is created by statute and is governed by the statutory language employed.” *Id.*

In the earliest opinion, written in 1980, the Kansas Attorney General and First Deputy Attorney General advised that a teleconference among members of a public body can constitute a meeting when there are enough members in on the call for the transaction of business to have occurred.<sup>19</sup> All members should have prior notification of the meeting, and be able to participate.<sup>20</sup>

A year later, in 1981, the Kansas Attorney General and Deputy Attorney General wrote that simply because a telephone was used to facilitate a meeting, did not mean that public officials could use that as an excuse to circumvent the spirit behind open meetings law and transparency.<sup>21</sup> According to the advice in the opinion, electronic communications held according to the requirements of open meetings law, even if electronic media were not provided for in the most current statute, should be legal.<sup>22</sup>

In 1998 the Kansas Attorney General and Assistant Attorney General said that public bodies could achieve a quorum by assuring that a sufficient number of members of the governing authority had the opportunity to participated in a discussion, even if a quorum did not exist in one place at one time.<sup>23</sup> The opinion said that both e-mail and the telephone could be used to achieve a quorum even if one did not exist in “real time.”<sup>24</sup> The opinion also states that, since the open meetings law is “remedial in nature” in that it does not directly address electronic media, the statute current at the time of this opinion, which did not clearly address electronic

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<sup>19</sup> 80, Kansas Op. Att'y Gen. 173 (1980).

<sup>20</sup> *Id.*

<sup>21</sup> 81, Kansas Op. Att'y Gen. 268 (1981).

<sup>22</sup> *Id.*

<sup>23</sup> 98, Kansas Op. Att'y Gen. 26 (1998).

<sup>24</sup> *Id.*

media's role in open meeting, should be broadly applied to include electronic media.<sup>25</sup> The opinion advises that the use of real-time communication has been established as being consistent with the requirements of a public meeting, but the opinion also makes clear that interactive communications, even if they are not held "real time," can constitute meetings as well.<sup>26</sup>

In the second 1998 opinion, the Kansas Attorney General and Assistant Attorney General wrote a very similar opinion on the use of serial communications to discuss public business, often electronically.<sup>27</sup> Serial communications involve meetings of small numbers of members of a public body who, in order not to gather in a way that would constitute a quorum and therefore an official meeting, discuss an issue that will come before the body in a public meeting.<sup>28</sup> Serial communications occur via both telephone and e-mail.<sup>29</sup> The opinion also stated that since the open meetings law is "remedial in nature" it should be broadly applied.<sup>30</sup> The second 1998 opinion repeats the first opinion in advising that the use of real-time communication has been established as being consistent with being a public meeting, but the opinion also makes clear that interactive communications, even if they are not held "real time" can constitute meetings as well.<sup>31</sup>

The other two states which have a large legal loophole after Kansas- Virginia and West Virginia- are similar to Kansas's statute, one that allows public officials to discuss public

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

business in a private meeting. Virginia has a brief definition-based statute for electronic communications.<sup>32</sup> This statute does not explicitly provide for public access to electronic meetings and therefore has the same difficulties inherently built into the structure that Kansas does.<sup>33</sup> West Virginia also has a statute that has the potential to limit public access to permitted electronic meetings by not guaranteeing public access.<sup>34</sup>

These eight state's statutes- Colorado, Illinois, Kansas, Mississippi, Vermont, Virginia, and West Virginia- and also the District of Columbia, while generally brief, provide at least some parameters for public officials on the use and incorporation of electronic media into open meetings law.

### **More Extensive Application**

There are eleven teleconferencing statutes that include a more extensive application of electronic media to open meetings. Six of these statutes facilitate agency communication and five facilitate public access to open meetings.

#### **Facilitate agency communication**

Six state statutes permit the use of teleconferencing and other electronic media so that agencies or committees that might have difficulty meeting can more easily meet quorum requirements or conduct business in a timely manner. One organizational challenge related to electronic media is how a governmental unit spread out over a large geographic area can meet regularly.<sup>35</sup> One state statute, Georgia, and one Attorney General opinion from South Dakota,

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<sup>32</sup> 2 Va. Code Ann. § 2-3701 (2008).

<sup>33</sup> *Id.*

<sup>34</sup> 6 W. Va. Code § 9A-2 (2007).

<sup>35</sup> 20, Co. Op. Att'y Gen. OLS8502678 (1985). This is an Attorney General opinion from Colorado, based off an earlier version of the statute currently enacted in law and discussed under "brief application" in teleconferencing.

examine this. Georgia's statute grants agencies with state-wide jurisdiction permission to use teleconferencing to meet, as long as the meeting is conducted in compliance with the open meetings requirements.<sup>36</sup> Georgia also has a case that involves electronic media.

In 2001, the Court of Appeals of Georgia examined a case that involved multiple issues with regards to open meetings.<sup>37</sup> The issue pertinent to this thesis arose because of several discussions by public officials that took place via a teleconference, one that involved a discussion of why the public officials had closed a previous meeting to the public.<sup>38</sup> The court ruled that while the facts established that public business was discussed through these phone calls, the actions did not technically fall within the scope of the then current open meetings law, and thus avoided violating the letter of the law.<sup>39</sup> The legislature had defined a meeting as a gathering that takes place at a specific place and time. Therefore these individual telephone calls would not count.<sup>40</sup> The public officials committed what would be defined as daisy-chaining, but because the calls were not made at a specified time, the actions could not qualify as a meeting and were not illegal.

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This opinion is another example of how physical limitations, such as geography, are taken into consideration. In 1985, the Colorado Attorney General addressed the issue of whether it is lawful to use teleconferencing to make a quorum with the Lottery Commission during an emergency situation. The opinion does allow the Lottery Commission this privilege because the Commission falls under legislation that exempts it from open meetings requirements during emergencies. The opinion does, in conclusion, condemn the use of teleconferencing to circumvent open meetings laws, despite its use by the Lottery Commission. Much of the language used to "condemn" teleconferencing would likely no longer be used due to updates in statutory definitions of electronic meetings for the state of Colorado. *Id.*

<sup>36</sup> 50 O.C.G.A. § 14-1 (f) (2007).

<sup>37</sup> Claxton Enterprise v. Evans County, 549 S.E. 2d 830 (Ga. App. 2001).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

The court goes on to specify that meetings by teleconference are not immune to open meetings violations as long as the initial requirements of meeting are met to qualify it as being protected by the law.<sup>41</sup> The issue of serial communications, or daisy chaining, when public officials call each other or talk to each other one on one until there is a kind of group consensus, is not addressed in the 2007 Georgia statute covered in this thesis. Some states do make provisions against this practice, or include individual phone calls within the scope of open meetings law.

A 2004 South Dakota opinion by the state Attorney General looked at options for public agencies, in this case a county Board of Commissioners, which had difficulty meeting due to geographical issues, such as driving the distances across the state, involved with travel.<sup>42</sup> In cases where public officials cannot make the meeting because of travel, teleconferencing can sometimes be used as an alternate way of meeting.<sup>43</sup> The opinion advised that the commission in question could meet via teleconference when geographic issues were a major consideration, as long as the meetings strictly adhered to the state's electronic open meetings requirements.<sup>44</sup>

The other main issue under "Facilitate agency communication," aside from geographic considerations, which the other statutes refer to, is when and by what requirements members are required to be physically present for the meeting as opposed to participating by electronic medium. There are five states- Idaho, New Mexico, Missouri, North Carolina, and Rhode Island- that look at this issue. There is one court case from Nevada and five Attorney General Opinions from South Dakota, Alaska, Georgia, and New Mexico. Idaho is the first

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<sup>41</sup> *Id.*

<sup>42</sup> 94, S.D. Op. Att'y Gen. 15 (2004).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

statutory example of member requirements. In Idaho, presence by teleconference is considered the same as physical presence, as long as one member is physically present at the place the meeting was announced, so that the public may attend the meeting in person.<sup>45</sup> The technology, in this case, teleconferencing, must therefore be audible so that physically present members and the public can properly interact with those on the conference call.<sup>46</sup> New Mexico is very similar, but has even stricter stipulations about members participating via teleconference.<sup>47</sup> Members calling in must be clearly identified each time they speak, for instance, and all participants must be able to hear each other absolutely at all times.<sup>48</sup>

In Missouri, almost any electronic media is allowed to be used for public meetings, as long as the public has access to the declared vote, and the meeting involves public business.<sup>49</sup> Missouri is unusual as its statute specifies that informal electronic gatherings that are conducted for social purposes, even among multiple public officials, are not subject to Missouri's open meetings law.<sup>50</sup> This is of course not very unusual for meetings in general. North Carolina also has exceptions made for informal gatherings held both physically and electronically.<sup>51</sup>

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<sup>45</sup> 67 Id. Op. Att'y Gen. 2342 (5) (2008).

<sup>46</sup> *Id.*

<sup>47</sup> 10 N.M. Stat. Ann. § 15-1 (c) (2008).

<sup>48</sup> *Id.*

<sup>49</sup> 610 R.S. Mo. § 010 (2008).

<sup>50</sup> 610 R.S. Mo. § 010 (5) (2008).

<sup>51</sup> 143 N.C. Gen. Stat. § 318.10 (d) (2007). "... a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article." *Id.*

Rhode Island's open meetings law strictly limits the use of electronic media in almost all circumstances, and more than any other states.<sup>52</sup> The statute states that teleconferencing and other uses of electronic communication cannot be used to circumvent the spirit of open meetings law.<sup>53</sup> Electronic media is only allowed for scheduling physical meetings, and meetings can only include electronic participation when members of a public body are either serving in the armed forces overseas, or physically unable to attend the meeting in person due to a disability.<sup>54</sup>

In 1998 the Nevada Supreme Court agreed that public agencies can use the telephone to conduct a public meeting in some situations but that individual phone calls to a university circumvented the open meetings law.<sup>55</sup> The court agreed with a district court that the University of Nevada erred when it sent out a media advisory to members of the University of Nevada's Board of Regents asking for feedback.<sup>56</sup> The Nevada Supreme Court said the intent of the Nevada legislature was that bodies should be prohibited "from making decisions via serial electronic communications."<sup>57</sup> The board did technically violate open meetings requirements, but did not act on the information gathered from the phone calls.<sup>58</sup> The court concluded that "a quorum of a public body using serial electronic communication to deliberate toward a decision or

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<sup>52</sup> 42 R.I. Gen. Laws § 46-5 (2008).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Frankie Sue v. Board of Regents, 956 P. 2d 770 (1998).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

to make a decision on any matter over which the public body has supervision” is a violation of the requirements for transparency.<sup>59</sup>

Five Attorney General opinions refer to the requirements of agency members in attending open meetings electronically. In 1988 the Attorney General of South Dakota said that official meetings of public bodies could be conducted via telephone if proper notice of the meeting was given and the public was allowed an opportunity to participate.<sup>60</sup> The Attorney General said that the state’s Board of Nursing could conduct emergency teleconference meetings due to the nature of the board, which sometimes requires “urgent” meetings that fall outside of the set, published meeting times.<sup>61</sup> The opinion states that in general, agencies should consider openness to be the priority.<sup>62</sup> Meetings that would otherwise fall outside open meetings requirements should be treated as such.<sup>63</sup>

In a 1994 opinion, the Alaskan Assistant Attorney General wrote that the Municipal Bond Bank Authority members could participate when needed by calling in from unofficial teleconferencing facilities.<sup>64</sup> This issue arose from the question of whether or not the physical location of a board member participating by telephone had to be disclosed in the public notification of the public meeting.<sup>65</sup> According to the Attorney General, due in part to the nature of the organization, which includes a large amount of travel and short notice of meetings, it is

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<sup>59</sup> *Id.*

<sup>60</sup> 88 Op. Att’y Gen. S.D. 35 (1988).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 661 Alaska Op. Att’y Gen. 94-0662 (1994).

<sup>65</sup> *Id.*

necessary sometimes for members to participate via teleconferencing from unannounced locations.<sup>66</sup> As such it is impractical to require that every single location of a public official who could be must be released in the advanced notification of the meeting to the public.<sup>67</sup> Usually a public notice requires that the date, time, place of meeting, and location of teleconferencing facilities be released.<sup>68</sup> In this opinion, the Assistant Attorney General writes that “teleconference facilities” refer only to the official locations where the public can attend via this technology, and does not limit officials to these locations.<sup>69</sup> The Assistant Attorney General also writes that locations should be included in the written record of the meeting, and that officials should attend either in person or from these official facilities.<sup>70</sup>

A 1994 opinion by the Georgia Attorney General said that an otherwise absent member of a state governing body could via teleconferencing be considered to be in attendance at a physical meeting for the purposes of a quorum.<sup>71</sup> The issues were whether or not a state agency could conduct regularly scheduled meetings by telephone and whether, if a physical meeting was being conducted, a member could meet the quorum requirements by use of teleconferencing.<sup>72</sup> According to the Attorney General, meeting by teleconferencing should be allowed as long as a physical location is available where members who choose to attend, as well as members of the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> 24 Op. Atty Gen. Ga. 94-11 (1994).

<sup>72</sup> *Id.*

public, can hear everything being discussed by all participants, including those telephoning in.<sup>73</sup> If those criteria are met, the advice of the Attorney General is that then a member may be considered in attendance for quorum purposes, as long as his or her involvement is “properly recorded in the record.”<sup>74</sup>

A 1995 Attorney General Opinion in Alaska reasoned that a large organization, in this case the Local Boundary Commission, could meet by teleconferencing due to its size and difficulty in physically meeting, but that they should call in from “publicly noticed teleconferencing facilities, unless attendance at a teleconferencing facility would cause undue hardship.”<sup>75</sup> The opinion cites *Hickel v. Southeast Conference*<sup>76</sup> when the Attorney General opinion concluded that a public official’s inability to make it to an appointed teleconferencing facility should not exclude that official from the meeting, as long as an effort was made to attend, either in person or from a location, that the public had notice of.<sup>77</sup> The opinion said that such occasions as illness, weather, and a different travel and work schedule might constitute “undue hardship” on a case by case basis.<sup>78</sup>

In 2006 the Assistant Attorney General of New Mexico said that members of public bodies could use electronic communication to participate in public meetings only when the agency is allowed to do so by statute or rule.<sup>79</sup> Otherwise, the opinion said, public bodies-

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 663 Alaska Op. Att’y Gen. 95-0524 (1995).

<sup>76</sup> *Hickel v. Southeast Conference*, 868 P. 2d 919 (1994).

<sup>77</sup> 663 Alaska Op. Att’y Gen. 95-0524 (1995).

<sup>78</sup> *Id.*

<sup>79</sup> Op. Att’y Gen. N.M. No Number in Original (2006).

including the Board of Directors for a town's Community Library- must meet the requirements of the open meetings law that mandates the members of public bodies to physically attend its meetings.<sup>80</sup>

### **Facilitate public access**

Sometimes teleconferencing statutes have provisions that are designed to make it easier for the public to have access or attend the public meetings. This is done by requiring that public officials participating electronically do so in a way that the public cannot be excluded from the deliberations. This is also done by making provisions for the public to participate fully electronically, either by providing for facilities where the public can participate electronically, or by providing agency materials outside of the physical meeting so members of the public participating electronically can have full knowledge of the proceedings. Five states facilitate access to meetings through teleconferencing. From a reading of the statutes in this section, stress is generally placed on maintaining and improving government transparency in increased access statutes. The electronic media is to make access easier, not more complicated.<sup>81</sup>

One state statute and one Montana court opinion require public officials to include the public when using electronic media. California's statute, passed in 2007, is more in-depth than Montana's access statute. California's statute closely defines what a teleconference meeting is,<sup>82</sup> and then authorizes its use for all local agency meetings and the public's benefit.<sup>83</sup> A 2001

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<sup>80</sup> *Id.*

<sup>81</sup> Alaska Stat. § 44.62.312 (6) (2008). This part of the Alaskan statute, for example, stipulates that teleconferencing is for the convenience of the public. *Id.*

<sup>82</sup> Cal Gov Code § 54953 (4) (2007). The specific language reads that teleconferencing "means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both" and specifies that "the legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law." *Id.*

<sup>83</sup> Cal Gov Code § 54953 (1) (2007).

California opinion by the Attorney General and Deputy Attorney General looks at whether the state is required to provide a teleconference link to a disabled public official who is not accessible to the public.<sup>84</sup> The Attorney General wrote that the state is not required to do so under the current federal American's with Disabilities Act.<sup>85</sup> The California Legislature, the opinion stresses, "has determined that attendance by members of a city council [...] at scheduled meetings accessible to the public is an essential function of the office" and "facilitates the people's right to participate."<sup>86</sup> According to California law cited in the opinion, the need for public officials to attend meetings, even from an official teleconferencing facility, is an essential aspect of their job and cannot be outweighed by physical difficulties.<sup>87</sup>

In 1980 the Supreme Court of Montana decided on a complicated open meetings matter.<sup>88</sup> The state Supreme Court agreed that the telephone conference counted as a meeting and that the meeting was improperly closed since no proper notification was given to the public.<sup>89</sup> The issue most pertinent to this thesis is that, after a series of physical meetings that could have violated open meetings law, the county commissioners met and took a final vote via telephone on a matter of public business.<sup>90</sup> The public was not able to participate on the teleconference, but the city commissioners argued that since physical public meetings had been

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<sup>84</sup> California, No. 00-1210, November 14, 2001

<sup>85</sup> *Id.* See 42 U.S.C. § 12101-12213. For the American's with Disabilities Act. *Id.*

<sup>86</sup> California, No. 00-1210, November 14, 2001

<sup>87</sup> *Id.*

<sup>88</sup> *Board of Trustees v. Board of County Commissioners*, 606 P. 2d 1069 (1980).

<sup>89</sup> *Id.* The newspaper story was an insufficient notification since the usual open meetings notice was not given out in the newspaper and the public could not be expected to know that the paper was where the notice would be. Therefore the news paper story as notification did not meet open meetings requirements. *Id.*

<sup>90</sup> *Id.*

held on the same issue, the public had a chance to be informed.<sup>91</sup> The city commissioners also argued that notice in the form of a newspaper story was given of the telephone meeting.<sup>92</sup>

There are four states- Alaska, Oregon, California, and South Dakota- with statutes and one state, that of Alaska, with a court opinion, that make provisions for public participation during official meetings. Alaska has a statute that makes provisions for the public to participate fully via teleconferencing.<sup>93</sup> One part of the statute details the terms of public meetings, which includes teleconferencing, and even proscribes that “agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable” so that members of the public who dial into the meeting can follow along with the agenda and other materials.<sup>94</sup> When there is a vote that is taken when teleconferencing is being employed, a roll call is required so that anyone listening by phone can know exactly how each member voted.<sup>95</sup> There is a 1994

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 44 Alaska Stat. § 62.310 (a) (2008).

<sup>94</sup> *Id.*

<sup>95</sup> Alaska Stat. § 44.62.310 (a) (2008).

Supreme Court of Alaska case<sup>96</sup> about teleconferencing and a 1982 Attorney General Opinion that reference past statutes and are no longer valid law.<sup>97</sup>

Oregon also has a statute that facilitates public access, though it makes significantly less provision for including the public directly in the meeting.<sup>98</sup> There only needs to be one place provided for the public to listen in to the electronic meeting and public officials do not have to be physically present.<sup>99</sup> In California, a roll call is required when teleconferencing is used.<sup>100</sup> California also has strict requirements that agendas and detailed information be posted at preset teleconferencing locations, and that the public be given a set time to participate in the meeting via teleconferencing.<sup>101</sup>

South Dakota's law is unusual in that not only is provision made for regular public meetings, but the statute also provides for teleconferencing in executive and closed meetings for

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<sup>96</sup> Hickel v. Southeast Conference, 868 P. 2d 919 (1994). In 1994, the Supreme Court of Alaska examined whether the Reapportionment Board of Alaska violated the open meetings law with regards to teleconferencing. The Supreme Court focused its discussion around the underlying principle of all open meetings law: "open decision-making is one of the essential aspects of the democratic process." The court found that not following certain protocols while using teleconferencing did not violate the state's statute because the use of teleconferencing is a convenience not a requirement. The board did not follow the procedural rules for using teleconferencing, but the fact that the public's ability to be involved in open government was enhanced by the optional use of teleconferencing for a physical meeting they could have chosen to attend in person outweighed the "imperfect" adherence to the open meetings law. Therefore citizens were allowed to call in from any location, not just set teleconferencing facilities, and it was enough that the Board announced where the physical meeting would be taking place, instead of releasing a full public notice of all the places a citizen might call in from. *Id.*

<sup>97</sup> 336 Alaska Op. Att'y Gen. 758-82 (1982). Alaska has one of the first Attorney General opinions to examine the implications of electronic media, in this instance teleconferencing. The main thrust of integrating electronic media and open meetings law, even in 1982, was to use "common sense and basic fairness" to maintain a level of governmental transparency. *Id.*

<sup>98</sup> ORS § 192.670 (2) (2007). For example, the meeting, as long as it is not an executive session, can be held entirely through electronic communication if a speaker or listening device is provided to the public. *Id.* This lessens the chance, though, of public participation or input in the open meeting.

<sup>99</sup> *Id.*

<sup>100</sup> Cal Gov Code § 54953 (2) (2007).

<sup>101</sup> *Id.*

both public officials and the general public.<sup>102</sup> Meetings that are open to the public and include teleconferencing must include accommodations to fully allow for public participation.<sup>103</sup> Votes must be taken by roll call so that the public can know which public official is voting for which provision.<sup>104</sup> There must also be at least one place for the public to both listen to, and participate in, the open meeting, subject to the notice requirements of South Dakota.<sup>105</sup>

The only state that does not fit comfortably within the definitions of the categories is North Dakota, where the statute was updated in 2008. The statute is very protective of both public officials and the public and addresses all three categories: “Brief Application,” “Facilitating agency communications,” and “Facilitating public access.” Instead of splitting up the four Attorney General Opinions for North Dakota, the opinions will be left together to present a clearer picture of the scope of this state’s law.

North Dakota’s statute first briefly applies a definition by including electronic media, such as teleconferencing. Then it discusses facilitating agency communications by addressing the quorum requirement in a clear way that helps streamline the process by defining a meeting as “1) a quorum of members of a governing body regarding public business; 2) less than a quorum of members of a governing body if they are attending ‘one or more small gatherings collectively’ to discuss public business and their total number constitutes a quorum.”<sup>106</sup> North Dakota, similar to Missouri and North Carolina, explicitly states that informal gatherings, such as an instant messaging conversation about lunch, that do not involve public business, should not fall under

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<sup>102</sup> 1 S.D. Codified Laws § 25-1 (2008).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

open meetings requirements.<sup>107</sup> Finally, in a related 2008 statute, North Dakota law facilitates public access by specifying that provisions must be made for the public to attend a meeting where teleconferencing or videoconferencing is involved.<sup>108</sup> Since the North Dakota statute is the only statute that directly addresses all three categories established in this thesis, its four attorney general opinions that deal with teleconferencing will be examined below, and not placed separately into the categories such as “Brief Application” that they would otherwise be placed in.

The first two opinions deal with facilitating agency communications. In 1994, the North Dakota Attorney General and Assistant Attorney General wrote an opinion on whether a school district violated open meetings requirements by discussing the then superintendent’s performance and non-renewal of a contract through unannounced phone calls before the public meeting.<sup>109</sup> The opinion said the school board was not in violation, but only because it could not be shown that the alleged telephone calls took place.<sup>110</sup> If the telephone calls had happened, it would have been a clear violation of the state’s open meetings law, the opinion said.<sup>111</sup>

In a 1998 North Dakota opinion, the misuse of teleconferencing was only part of a larger series of alleged violations of public officials who met several times, in various ways, to discuss public business.<sup>112</sup> In this particular instance, the opinion said that the school board members in

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<sup>107</sup> 44 N.D. Cent. Code § 04-17.1 (2008). North Dakota’s statute is actually more protective of open meeting principles than the other two states, Missouri and North Carolina, in that it also specifies that the informal gathering should “not include the attendance of members of a governing body at meetings of any national, regional, or state association to which the public entity, the governing body, or individual members belong.” *Id.*

<sup>108</sup> 44 N.D. Cent. Code, § 04-19 (2008). Specifically a speaker or monitor must be supplied to the physical location listed in the public notice of the meeting. *Id.*

<sup>109</sup> 94 Op. Att’y Gen. N.D. 0-18 (1994).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> 98 Op. Att/y Gen. N.D. 0-05 (1998).

question used a combination of teleconferencing and a few e-mails to communicate in an in-depth manner about an issue of public importance concerning an employee's job status.<sup>113</sup> One of these alleged meetings took place as a series of one-on-one phone calls over a series of time between members of the board of higher education, who, during the phone calls, discussed an employee who was not at the meeting's job performance.<sup>114</sup> Generally, the opinion said, public officials are not banned from communicating with each other outside of a public meeting, even about public business, on a limited basis.<sup>115</sup> At a certain point though, the communications involve enough of the public officials subject to public meetings requirements for a quorum, despite the fact that the conversations were not simultaneous.<sup>116</sup> Social or chance meetings are still not subject to the open meetings law, as "it is only when those meetings become steps in the decision-making process (information gathering, discussion, formulating or narrowing of options, or action) regarding public business that the open meetings law is triggered."<sup>117</sup>

The next two North Dakota opinions dealt with facilitating public access. A 2005 Assistant Attorney General opinion said that no open meeting violation occurred during an alleged teleconference involving members of a city council, a phone call without the proper notice to the public.<sup>118</sup> The attorney general said that the city council members participating in

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<sup>113</sup> *Id.* The opinion does not further address the issue of electronic mail and thus is not referred to in the e-mail subsection of the Attorney General Opinions. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 2005 Op. Att'y Gen. N.D. 0-04 (2005).

the telephone call did not constitute a quorum and therefore a quorum had not discussed council business outside of a public meeting.<sup>119</sup>

Another 2005 North Dakota Attorney General opinion also said that a different city council had not conducted an alleged phone call in violation of the open meetings law.<sup>120</sup> The opinion stated that, after reviewing the facts concerning the quorum, there was no teleconference violation of sharing public business outside of an open meeting.<sup>121</sup>

### **Videoconference**

Videoconferencing is the second most addressed electronic communications tool mentioned in the statutes and Attorney General opinions. Videoconferencing is most often linked with teleconferencing in the statutes. It is only referenced independently of teleconferencing in five states: Nebraska, Oklahoma, Kentucky, Minnesota and Hawaii. In the following seven states, as well as the District of Columbia,<sup>122</sup> videoconferencing is directly tied to teleconferencing: Idaho,<sup>123</sup> Illinois,<sup>124</sup> Mississippi,<sup>125</sup> Missouri,<sup>126</sup> North Dakota,<sup>127</sup> Vermont,<sup>128</sup> and Virginia.<sup>129</sup> The number of states treating videoconferencing with

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<sup>119</sup> *Id.*

<sup>120</sup> 2005 Op. Att'y Gen. N.D. O-07 (2005).

<sup>121</sup> *Id.*

<sup>122</sup> 1 D.C. Code § 129.04 (2007).

<sup>123</sup> 67 Idaho Code § 2342 (2008).

<sup>124</sup> 5 ILCS 120/1.02 (2008).

<sup>125</sup> 25 Miss. Code Ann. § 41-3 (2008).

<sup>126</sup> 610 R.S. Mo. § 010 (2008).

<sup>127</sup> 44 N.D. Cent. Code § 04-17.1 (2008).

<sup>128</sup> 1 V.S.A. § 310 (2007).

<sup>129</sup> 2 Va. Code Ann. § 2-3701 (2008).

teleconferencing could be due to the fact that while videoconferencing developed after teleconferencing, it is much like teleconferencing in its capabilities and limitations. The seven states, and the District of Columbia, that have combined teleconferencing and videoconferencing will be re-listed in the appropriate subcategories under videoconferencing, but will not be explained again in-depth since they were originally covered under teleconferencing.

While there are a significant amount of statutes that deal with videoconferencing, no cases in any of the states examine any issues concerning videoconferencing. Very few of the states reference videoconferencing in the opinions of Attorneys General either. This may be partly because many people, for example Attorneys General, see the use of teleconferencing and videoconferencing linked.<sup>130</sup>

### **Brief Application**

Under “Brief Application,” the following four states, and the District of Columbia, tie videoconferencing directly with teleconferencing: Mississippi, Illinois, Virginia, and Vermont. The District of Colombia has a brief statute that details in a definition both teleconferencing and videoconferencing.<sup>131</sup> Mississippi does as well.<sup>132</sup> Illinois has a broad definitional statute aimed at electronic media in general.<sup>133</sup> For example, the Illinois statute lists several specific media before referring to the use of electronic media in general, “without restrictions.”<sup>134</sup> Virginia does

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<sup>130</sup> 336 Op. Att'y Gen. Alaska 758-82 (1982). This opinion was discussed earlier under teleconferencing, but the opinion combines the use of teleconferencing and videoconferencing. *Id.*

<sup>131</sup> 1 D.C. Code § 207.42 (2007).

<sup>132</sup> 25 Miss. Code Ann. § 41-3 (b) (2008).

<sup>133</sup> 5 ILCS § 120/1.02 (2007).

<sup>134</sup> *Id.*

as well.<sup>135</sup> Vermont defines audio media broadly in the state’s open meetings law, which includes teleconferencing and videoconferencing.<sup>136</sup>

Three states- Kentucky, Nebraska, and Oklahoma- have statutes that only include videoconferencing within the scope of open meetings law. Kentucky’s statute simply names videoconferencing while the other two states more clearly detail the parameters of its use. The Kentucky statute merely includes videoconferencing in its broader definition of what constitutes a meeting, without specifying or providing parameters for its use.<sup>137</sup> This gives public officials a great deal of discretion in interpreting the statute when deciding how, and to what extent, videoconferencing can be used within the framework of their state open meetings law. The Nebraskan statute clearly defines videoconferencing, including interaction and input from the public, within the parameters of public meetings.<sup>138</sup> In Oklahoma, videoconferencing receives its own definition within the state’s open meetings law, and the statute specifies that this interactive medium requires interactive capabilities both for the public officials involved, and for the public.<sup>139</sup> Specifically, the definition states that videoconferencing is “a conference among members of a public body remote from one another who are linked by interactive

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<sup>135</sup> 2 Va. Code Ann. § 2-3701 (2008).

<sup>136</sup> 1 V.S.A. § 310 (2007).

<sup>137</sup> 61 KRS § 805 (2008). “State law defines a meeting as “all” gatherings of every kind, including video teleconferences, regardless of where the meeting is held.” *Id.*

<sup>138</sup> 84 R.R.S. Neb. § 1409 (2007). An example of a “clearly defined” statute: “Videoconferencing is considered a “meeting.” Videoconferencing “shall” facilitate “possible” interaction between meeting participants at all locations, by utilizing audio-video equipment that allows participants to hear and see each meeting participant at the other locations.” *Id.*

<sup>139</sup> 25 Okl. St. § 304 (2008).

telecommunication devices permitting both visual and auditory communication between and among members of the public body and members of the public.”<sup>140</sup>

### **More Extensive Application**

One of the benefits of both teleconferencing and videoconferencing that becomes apparent by studying the more extensive statutes is that these are the technologies least likely to create conflicts with open meetings laws. The nature of these technologies allows meetings to be conducted long distance or with absentee committee members without excluding the public. For example, in some states that have teleconferencing or videoconferencing statutory provisions, if a member of a public agency that is subject to that state’s open meetings requirements is serving in the military overseas, the meetings can still be held.<sup>141</sup> If the technology was being used outside of the view of the public, it would be considered a misuse of the electronic media. Several states, which have already been discussed under teleconferencing, appear to leave loopholes where this could be a possibility such as Kansas,<sup>142</sup> Virginia,<sup>143</sup> West Virginia,<sup>144</sup> and Kentucky.<sup>145</sup>

### **Facilitate agency communications**

Three statutes-from Idaho, Missouri, and Minnesota- and one attorney general opinion, detail or explain provisions that help agencies function better with the use of electronic media. Idaho has a statute that allows both teleconferencing and videoconferencing to be used make

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<sup>140</sup> *Id.*

<sup>141</sup> Rhode Island is one such example. 42 R.I. Gen. Laws § 46-5 (2008).

<sup>142</sup> 75 K.S.A. § 4317a (2006).

<sup>143</sup> 2 Va. Code Ann. § 2-3701 (2008).

<sup>144</sup> 6 W. Va. Code § 9A-2 (2007).

<sup>145</sup> 61 KRS § 805 (2008). See pg. 62-65 for in text discussion.

open meetings easier for public officials to attend.<sup>146</sup> Missouri has a statute that broadly applies to electronic media, including videoconferencing for the use of public officials.<sup>147</sup> Minnesota's statute is similar to Missouri's but provides for interactive television.<sup>148</sup> Under this statute, meetings can be conducted via a form of videoconferencing as long as members can all see and hear each other, and at least one person is physically present at the posted meeting location where the public is attending.<sup>149</sup> A public official's presence via interactive television, or videoconferencing, can count towards quorum requirements for the meeting, meaning that virtual presence counts as if real physical presence would when using this form of electronic media.<sup>150</sup> The statute makes provisions for the public's ability to remotely monitor the meeting through videoconference as well.<sup>151</sup>

The one Attorney General opinion that examines teleconferencing from the perspective of facilitating meetings focused on parole board meetings only. In 2005 the Tennessee Attorney General, Deputy Attorney General, and Solicitor General addressed the issue of whether video conferencing can be used for parole hearings.<sup>152</sup> The opinion concluded that two-way video conferencing can be used for parole hearings if no more than one board member, one of the hearing officers, and one of the victims participate remotely.<sup>153</sup> If two or more board members

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<sup>146</sup> 67 Idaho Code § 2342 (2008).

<sup>147</sup> 610 R.S.Mo. §.010 (2008).

<sup>148</sup> 3 Minn. Stat. § 055 (2007).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> 05 Op. Att'y Gen. T.N. 175 (2005).

<sup>153</sup> *Id.*

participate, then the meeting must closely adhere to open meetings law.<sup>154</sup> Parole revocation hearings can also be held using video conferencing.<sup>155</sup>

### **Facilitate public access**

The one statute that deals with public access to videoconferencing and facilitating public access is that of Hawaii. Hawaii has a very detailed statute concerning new electronic media that only deals with videoconferencing.<sup>156</sup> This statute is specific to the purpose of getting the public increased access to public meetings.<sup>157</sup> The videoconferencing equipment must allow full participation by both the public and public officials.<sup>158</sup> Proper notice has to be given of any absent public official's physical location, such as his or her office or living room, so that the public may attend even in the extreme.<sup>159</sup> This notification requirement lessens the likelihood of public officials sitting at home and using videoconferencing to have difficult to "find" meetings since, if a public official is going to be working from home, notice must be publicly posted and the public is therefore invited into that public official's home for that meeting. The Hawaii statute also stipulates that if the videoconferencing equipment is not working properly, and other arrangements cannot be made quickly, then the meeting will be terminated rather than allow it to

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> 92 H.R.S. § 3.5 (2008).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

go on without proper access.<sup>160</sup> North Dakota, one of the most protective of access and detailed of the statutes, also encompasses videoconferencing.<sup>161</sup>

There is one other Attorney General opinion about videoconferencing, the one where the Attorney General writes to discourage the use of videoconferencing meetings that are physically inaccessible to the public. In a 2002 Texas opinion, videoconferencing, along with teleconferencing, was said to be an unsatisfactory a solution for public participation in a meeting that was proposed to be held in Mexico.<sup>162</sup> Ultimately, the meeting was considered too problematic because it was going to be held out of the country with travel funds provided by the state. In terms of this thesis, the opinion said that videoconferencing is only allowed on a very limited basis, and, that setting the precedent for allowing meetings to take place outside of the country while the state carries the burden of the additional costs, is counterintuitive to legislative intent.<sup>163</sup>

### **E-mail**

Electronic mail, or e-mail, is one of the most used technologies being examined in this thesis, yet it is only addressed in three of the state statutes. Two court cases and six attorney general opinions help us understand the law in a handful of states. E-mail, due in part to its widespread acceptance among users, and its integration in other media such as PDAs, poses a potential threat to open access to government. All three of the statutes that look at e-mail only fall under “Brief Application” by defining its use in open meetings. None of the statutes that

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<sup>160</sup> *Id.*

<sup>161</sup> 44 N.D. Cent. Code § 04-17.1 (2008). *See* pg. 79-80.

<sup>162</sup> Op. Att'y Gen. Texas JC-0487 (2002).

<sup>163</sup> *Id.*

involve e-mail go into enough detail to explore facilitation of agency communications and facilitation of public access.

### **Brief Application**

There are three statutes that briefly cover how e-mail falls within open meetings laws. The first two statutes, Illinois and Missouri, do not have detailed specific provisions related to e-mail but instead include e-mail in an open meetings definition along with all of the other electronic media examined in this thesis.<sup>164</sup> Illinois has the broadest definition of which specific electronic media are covered by open meetings law, including, aside from teleconferencing, videoconference, and electronic mail, also instant messaging, instant messaging, and any other kind of interactive communication, such as PDAs.<sup>165</sup> The Missouri statute does not even name e-mail specifically, but includes business that is conducted by communication equipment, including “equipment” like instant messaging and therefore, by extrapolation, e-mail.<sup>166</sup>

Colorado, the third statute, is the only state to specifically address electronic mail in any depth in the statute, though it still only falls under the brief application category of this thesis. While the statute defines a meeting to include multiple electronic media, it specifically discusses e-mail.<sup>167</sup> The statute says that e-mail that is written concerning public business falls under the requirements of open meetings law.<sup>168</sup> It also specifies that e-mail among public officials that does not deal with public business is not to be considered a meeting.<sup>169</sup>

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<sup>164</sup> See 5 ILCS § 120/1.02 (2008). And 610 R.S. Mo. § 010 (2008).

<sup>165</sup> 5 ILCS § 120/1.02 (2008).

<sup>166</sup> 610 R.S. Mo. § 010 (2008).

<sup>167</sup> 24 C.R.S. 6-402 (2007).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

One relevant court case and three Attorney General opinions examine whether or not e-mail is a passive communication or an active communication. The differentiation between passive and active varies slightly from case to case and opinion to opinion, as there is no formal legal distinction. The appellate court in Ohio deciding *Haverkos v. Northwest Local School Board*<sup>170</sup> defined a “passive” e-mail as one that was not planned and incited no response, and therefore could not constitute a meeting.<sup>171</sup> By implication then, for that court, an “active” email- one that would constitute a meeting- would therefore be one that was planned and involved an exchange of ideas.

In 2004 the Supreme Court of Virginia ruled that e-mail communication could constitute a meeting.<sup>172</sup> In *Beck v. Shelton*, a citizen alleged that the mayor and other city officials used e-mail to circumvent open meetings law by deliberating outside of public view.<sup>173</sup> The court considered the nature of e-mail in making its decision, pointing out that e-mail is not usually a simultaneous communication, but one involving delays in response more like with traditional written letters.<sup>174</sup>

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<sup>170</sup> The following is a court opinion case that is no longer valid precedent due to statutory updates that outdate the issues and change the material facts of the case. Still, this is a useful illustration of the tension between e-mail as a communication tool, and e-mail as a possible open meetings violation. See *Haverkos v. Northwest Local School Board*, 2005 Ct. of App. Ohio 3489 (2005). In 2005 the Court of Appeals of Ohio looked at whether or not an e-mail sent by a school board member to other members violated the state’s open meetings requirements. The court ruled that in this particular instance, the e-mail was not a violation of open meetings law because it was sent unsolicited, was not responded to by other board members, and did not involve public business. The court, in its discussion of the case, also addressed whether or not an e-mail under different circumstances could be considered a discussion in violation of open meetings law. Based on court cases and related rulings in other states, the court said that in general a passive e-mail, or one that incited no response and was unplanned, could not constitute a meeting. At the time this thesis was written, electronic communications were also not included in Ohio’s open meetings law, which the court said was an essential strike against considering e-mail as a possible open meetings violation. *Id.* This case was also discussed under teleconferencing. See pg. 60-61.

<sup>171</sup> See *Haverkos v. Northwest Local School Board*, 2005 Ct. of App. Ohio 3489 (2005).

<sup>172</sup> *Beck v. Shelton*, Supreme Court of Virginia, 267 Va. 482; 593 S.E.2d 195 (2004).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

In 1995 the Kansas Attorney General said that the most important issue determining whether e-mail communications of school board members were subject to open meetings law requirements was whether the communications were interactive and involved discussion.<sup>175</sup> The Attorney General's opinion said the most important issue was not whether the computers used for the e-mails were purchased by public funds.<sup>176</sup> The crucial element to qualify these communications as meetings were whether or not the communications were interactive and involve discussion, not just passive communications.<sup>177</sup> Passive was not defined as clearly in this opinion as in the Ohio Court case.

In a 1998, the Kansas Attorney General and Assistant Attorney General said members of public bodies could not do through email or serial meetings what they were prohibited from doing otherwise.<sup>178</sup> Electronic communications were permissible as long as they complied with open meetings law.<sup>179</sup> The Attorney General said that if communication became interactive enough or substantive enough to qualify as a “meeting” then it became subject to open meetings requirements.<sup>180</sup> This is so that “procedural safeguards,” or statutory penalties for violating open meetings law, are enacted when a possible violation of the spirit of open meetings requirements is taking place.<sup>181</sup> There is another 1998 Kansas opinion that was discussed in-depth under

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<sup>175</sup> 95 Op. Att'y Gen. K.S. 13 (2005).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> 98 Op. Att'y Gen. K.S. 49 (1998).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

teleconferencing, but which had an e-mail element as well.<sup>182</sup> The opinion said that both e-mail and the telephone could be used to achieve a quorum even if one did not exist in “real time.”<sup>183</sup>

A 2007 North Dakota opinion by the Assistant Attorney General looked at whether or not a city commission could hold a meeting through e-mail.<sup>184</sup> The e-mail was actually an exchange and deliberation about public business.<sup>185</sup> The Assistant Attorney General said that while not every e-mail sent by a public official is a meeting that should be subject to open meetings law, e-mails that meet meeting requirements should be considered as such.<sup>186</sup>

### **More Extensive Application**

There is one Attorney General Opinion that looks at facilitating agency communications with e-mail. There is one court case and one Attorney General opinion that look at facilitating public access through e-mail.

#### **Facilitate agency communications**

A 2007 North Dakota opinion by the Assistant Attorney General said while not every e-mail sent by a public official is an e-mail that falls under the open meetings law, e-mails that qualify as official meetings must meet the requirements of the open meetings law.<sup>187</sup> The e-mail was actually an exchange and deliberation about public business.<sup>188</sup> The opinion, unfortunately,

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<sup>182</sup> 98, Kansas Op. Att'y Gen. 26 (1998).

<sup>183</sup> *Id.*

<sup>184</sup> 2007 Op. Att'y Gen. N.D. O-14 (2007).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

does not explicitly indicate what is public business, or what would constitute “an exchange and deliberation,” leaving much up to the discretion of public officials.<sup>189</sup>

### **Facilitate public access**

One court case specifically examines when e-mail communications can violate a public’s right to attend a meeting. In 2001 one of the Court of Appeals of Washington ruled that, in light of the broad statutory definitions of what constitutes meetings, an e-mail exchange could be considered a meeting.<sup>190</sup> The statutory law does not specifically address the use of electronic media. The e-mails exchanged among the members of the board constituted a violation of open meetings requirements since they involved a quorum of members deliberating about public business.<sup>191</sup> The court stressed that there is a need to balance the public’s right to openness and public officials’ need to communicate and work effectively with tools like electronic mail.<sup>192</sup> Therefore, the “mere use or passive receipt [of an electronic communication such as an e-mail] does not automatically constitute a ‘meeting.’”<sup>193</sup> Therefore, the open meetings law was not violated when board members were only receiving factual information or communicating about personal matters.<sup>194</sup> The case was remanded for trial.<sup>195</sup>

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<sup>189</sup> *Id.*

<sup>190</sup> Wood v. Battle Ground, 107 Wa. App. 550,; 27 P.3d 1208 (2001).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

In 2005, the Attorney General of Arizona wrote an opinion that suggested some parameters for the use of e-mail by members of a public body subject to open meetings law.<sup>196</sup> The most important parameter identified by the Attorney General is that public officials must conduct business through public meetings and not inadvertently or, worse yet, intentionally, use e-mail to circumvent open meetings requirements.<sup>197</sup> The opinion said that a discussion between public officials and members of the public via e-mail that involves issues that may arise in deliberations in the public body may be considered a meeting and the emails may become open to the public.<sup>198</sup> The opinion stated that some one-way e-mail communications may fall outside the requirements of the open meetings law, even if those one-way e-mails are sent to a quorum-sized number of a public body.<sup>199</sup> However, one-way communications that are used to propose “legal action” are an obvious circumvention of the law, the opinion said.<sup>200</sup>

### **Text Messaging, Instant Messaging, and PDAs**

Text messaging, instant messaging and PDAs are not addressed with any real depth in the state open meetings statutes. There are no court cases or Attorney General opinions that address text messaging, instant messaging, or PDAs. All three media are referenced in the same two statutes- Illinois and Missouri. The Illinois and Missouri statutes fall under brief application for how the electronic media is integrated into the statute and therefore will not be readdressed.<sup>201</sup>

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<sup>196</sup> I05 Op. Att'y Gen. A.Z. 004 (2005).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See pgs. 90-91.

## **General**

Twenty-three statutes address the use of electronic media and open meetings in general. Fourteen of these statutes specifically encompass the use of other electronic media and have been discussed above in their appropriate category. Since these fourteen also include language that covers the general use of electronic media, they will be listed in the “General” category but will not be reexamined in depth. The vast majority of these fourteen statutes in the states of Colorado, Illinois, Kansas, Kentucky, Vermont, Virginia, and West Virginia, and of the District of Columbia, are discussed under the sections titled “Brief Application.” A few of the statutes- in the states of Idaho, Missouri, New Mexico, North Carolina, and Rhode Island- deal with “Facilitate agency communications.” Only one of these repeated statutes, Oregon, falls under “Facilitate public access.”

Some of the statutes do not detail any one specific electronic medium, but only generally refer to the use of electronic media and open meetings laws. These statutes have not been previously discussed in this thesis and will be discussed in appropriate categories below. There are nine states that have statutes that include electronic media within their scope, but not any one specific kind of media. The states are Alabama, Arizona, Connecticut, Iowa, Montana, New Jersey, South Carolina, Tennessee, and Texas. Most of the “General” statutes are brief in nature, but a few do deal with facilitating agency communications and facilitating public access to meetings.

### **Brief Application**

Most of these seven statutes are very vague. They generally provide a broad definition that includes electronic medium or technological devices in the definition of open meetings but do not detail the circumstances, opportunities, or limitations this inclusion opens up. There are five states- Arizona, Connecticut, Montana, New Jersey, and South Carolina- that have a general

statute that broadly defines electronic media as within the scope of open meetings law. In Arizona, the definition of a meeting includes a gathering by technological devices by a quorum of the public body.<sup>202</sup> This definition does not cover deliberations by less than a quorum of public officials. Connecticut's statute defines meeting to include any communication by means of electronic equipment.<sup>203</sup> A meeting under this statute would not encompass a chance, social, or other meeting not intended to discuss public business.<sup>204</sup> Montana's statute includes meetings held by electronic equipment, subject to the state's usual open meetings requirements, within the definition of a meeting.<sup>205</sup> New Jersey's statute states that all meetings, including meetings held by electronic communication, must be open to the public.<sup>206</sup> South Carolina's statute is similar.<sup>207</sup>

One statute, Alabama, is not very protective of open meetings and removes the possibility of electronic communications from within the scope of open meetings. The last statute, Tennessee, is completely the opposite of Alabama in that it is very protective of open meetings, to the point that it spells out that electronic communications will not be used to circumvent open meetings law.

In Alabama's statute, the definition of a meeting does not include electronic communication. Your statements about Alabama are very confusing and appear contradictory. Does Alabama not mention electronic meetings or ban them? There is a real difference. In

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<sup>202</sup> 38 A.R.S. § 431 (2008).

<sup>203</sup> 1 Conn. Gen. Stat. § 200 (2008).

<sup>204</sup> *Id.*

<sup>205</sup> 2 Mont. Code Anno. § 3-202 (2007).

<sup>206</sup> 10 N.J. Stat. § 4-8 (2008).

<sup>207</sup> 30 S.C. Code Ann. § 4-20 (2007).

general, a communication that qualifies as a public meeting cannot include the discussion of an issue that, “at the time of the exchange, the participating members expect to come before the governmental body at a later date.”<sup>208</sup> Electronic communication, which is not considered a public meeting, can include a quorum of public officials if they are meeting to report on information, or seek information on “issues of importance” to that public body.<sup>209</sup> While this law bans outright deliberations through electronic communication, it basically gives free reign to any other kind of electronic communication, and could be said to implicitly encourage public bodies to communicate without supervision such as through personal or small group communications that involve electronic media.

Tennessee’s statute is unusual in that it clearly states that electronic communication will not be used to “decide or deliberate public business” in circumvention of open meetings law.<sup>210</sup> Many of the statutes that have been discussed describe how or how not to use electronic communication but Tennessee and Rhode Island, which is discussed under a separate technology,<sup>211</sup> are the only states that clearly reinforce in the statute that it is the intent behind the use of electronic communications that matter as well. While this does not necessarily lessen the ways public officials can circumvent open meetings requirements, it does make it clearly illegal to look for loopholes in violation of official transparency.

### **More Extensive Application**

The remaining two statutes, Iowa and Texas, are split one and one between facilitating the function of agencies and facilitating public access. Iowa’s statute puts fairly strict limitations on

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<sup>208</sup> 36 Code of Ala. § 25A-2 (2008).

<sup>209</sup> *Id.*

<sup>210</sup> 8 Tenn. Code Ann. § 44-102 (2008).

<sup>211</sup> See pg. 69-70.

the circumstances surrounding electronic media's use for meetings instead of physical meetings. Texas's statute looks at an innovative way for the public to participate: internet broadcasts.

### **Facilitate agency communications**

Only one statute deals with facilitating agency communications. In Iowa, electronic meetings are allowed only when meeting in person is “impossible or impractical.”<sup>212</sup> This statute is somewhat unusual in that it puts strict limitations on what public officials can do with regards to holding open meetings electronically.<sup>213</sup> The statute requires that both formal and informal electronic meetings, meaning any conversations held by the majority of a public body when it discusses public business, no matter how chance or casual, should be open to the public.<sup>214</sup> For the meetings that are permitted by electronic media, the public must be granted access if at all possible, the meeting must have a physical place where the public can access the meeting, and in the minutes there must be justification for why a physical meeting was not possible.<sup>215</sup>

### **Facilitate public access**

Texas has a statute that deals specifically with “Internet Broadcasts.”<sup>216</sup> In Texas, a governmental body can legally provide access to public meetings over the Internet so that the public can view the meetings from home.<sup>217</sup> The meeting must abide by normal open meetings requirements, and the “broadcast” must follow notice practices outlined in another Texas

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<sup>212</sup> 21 Iowa Code § 8 (2007).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> 21 Iowa Code § 8 (2007).

<sup>216</sup> 551 Tex. Gov't Code § 128 (2007).

<sup>217</sup> *Id.*

statute.<sup>218</sup> The public is not authorized to provide any kind of input in the meeting, but can still attend the meeting in person and follow the set open meetings standards.

Chapter 4 answers the final research question. To do this, the final chapter identifies the issues this thesis has outlined with regards to open meetings, makes policy recommendations, and presents a model-law before concluding the thesis.

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<sup>218</sup> *Id.*

## CHAPTER 4

### CONCLUSIONS

Overall, eighteen states do not have a statute that includes any kind of electronic media within its scope of open meetings law, though three of those eighteen states have case law that directly addresses at least some form of electronic communications and open meetings. Most of the states that do have statutes that include electronic media have very general statutes, meaning that they may not specifically refer to any one kind of media, or how to use the media effectively to advance the purposes of open meetings laws. There are twenty-three states with general statutes, and no cases or Attorney General opinions.

One technology- teleconferencing- gets the vast majority of legal attention. Nineteen states have statutes that specifically refer to teleconferencing and there are seven cases and twenty-two Attorney General opinions that deal with teleconferencing issues.

Videoconferencing receives significantly less legal focus, but is the second most mentioned technology with thirteen state statutes, no cases, and one Attorney General opinion. The remaining technologies receive meager notice in comparison to teleconferencing and videoconferencing.

E-mail is mentioned in three state statutes, two cases, and six Attorney General opinions. Text messaging, instant messaging, and PDAs are included in only two state statutes, both of which are ones that also discuss e-mail. There are no cases or Attorney General opinions. The review of all statutes, case law, and Attorney General opinions makes it clear that while there is a body of law that deals at least peripherally with the use of electronic media and open meetings law, there are some significant gaps in the coverage.

While the purpose of this thesis is to cover the use and status of electronic media with regards to open meetings and public officials, it is important that this work also step outside of

the pure legal research and offer an analysis of the state of the law. The final research question in this thesis is: what is a model of “good” open meetings law that appropriately addresses the issues raised and summarized by the first two research questions? This chapter will address this by first examining issues that arise when the new electronic media are being used for official government meetings before moving to policy recommendations that will be used as the basis of a model law. The chapter will conclude with future possibilities for academic research and a final summary.

### **Issues with New Electronic Media**

Through examining the statutes and case law for all fifty states, in addition to the applicable Attorney General opinions, a number of recurring issues appear. Some of the issues are discussed in depth in the case law and Attorney General opinions; others are only hinted at in the statutes but can be inferred from the past literature and individual circumstances. Most of these issues are theoretical in nature. Some issues that became apparent in the study of the technology and literature review were not addressed at all by state law or Attorney General opinions. Yet, some of the issues not yet addressed in law are essential to an understanding of not just how electronic media is being used now, but also how it could be used by public officials to affect the public’s access to open meetings in both a positive and negative way in the future. These issues that are not addressed by current law are generally much more concrete and dealing more with the specific features of each technology.

Most of the majority of this thesis has looked almost exclusively at the applied side of open meetings and electronic media through legal analysis. Meaning, the discussion to date has mostly focused on the open meetings side of the discussion the law and general research has taken a reactive role in examining media after issues or violations have been pursued through

legal avenues. While being reactive is the nature of law to a great extent,<sup>1</sup> academia is sometimes more proactive in examining areas of possible conflict. However, almost no attention has been paid by the courts and academia after the 1990s to how new electronic communications technologies can be used to circumvent open meetings laws. Specifically, few scholars and journalists have examined what technical components of the different media could provide ways to violate the spirit of open meetings law because the current law has not caught up to the capabilities of these media. This chapter will, as much as possible, explore some of the issues that may be going unnoticed, as well violations of the law that may be possible in the future.

The first of the specific issues is identifying what meetings are covered by open meetings law. Currently all fifty states have some sort of open meetings law.<sup>2</sup> Thirty-two states have statutes that in some way, shape, or form include electronic media within the scope of open meetings. However, electronic communications has become such an integrated part of the workday even for public officials, that all fifty states should have open meetings laws that address the particular problems that arise when public meetings are held using electronic technologies.

Case precedent exists in several states that either do not have comprehensive statutes recognizing new technologies, or face conflict over the fact that they at one time did not such have a statute.<sup>3</sup> In many of these cases the lack of a statute meant that the use of electronic communication for conducting public meetings, even if it blatantly violated the spirit of open meetings law by involving an in-depth discussion of public business outside of the public eye,

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<sup>1</sup> The courts, for example, must wait until issues are brought before them to rule.

<sup>2</sup> ANN TAYLOR SCHWING & CONSTANCE TAYLOR, OPEN MEETINGS LAWS 44 (1994).

<sup>3</sup> See *Hickel v. Southeast Conference*, 868 P. 2d 919 (1994). Where the court said that the misuse of teleconferencing was not illegal because using teleconferencing was a convenience not a set part of open meetings law. *Id.*

was not considered in violation of open meetings law because the law did not include electronic media within the scope of the law.<sup>4</sup> This case precedent can be relied upon even more for public officials to justify discussions of public business outside of the structure of open meetings.<sup>5</sup>

The second issue is that states need to think carefully about which agencies should be allowed to use electronic technologies in place of physical public meetings. Then the state legislatures ought to draft statutes outlining which kinds of agencies should be granted exceptions from standard open meetings law requirements, and in what circumstances, and according to what rules.<sup>6</sup> These questions should be left up to the discretion of the courts and Attorney General as little as possible. Provisions for use of electronic technologies should be allowed in the cases of emergencies,<sup>7</sup> or when agencies service large geographical areas and travel is impractical or prohibitively expensive.<sup>8</sup>

Aside from identifying whether the electronic media are included within the scope of open meetings statutes, and which agencies should fall under these laws, the third issue is to clarify what constitutes a meeting with regards to the number of officials involved. In some states, a quorum is required for an electronic communication to be considered a meeting. This means that in any body with more than three members, officials can make decisions outside the framework of the open meetings laws by what is often referred to as daisy-chaining. Officials can talk to each other, two at a time, to discuss matters of public business outside of an open meeting-

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<sup>4</sup> See 98, Kansas Op. Att'y Gen. 26 (1998). Where the opinion said that since the law was “remedial in nature,” it should be broadly applied to include electronic media. *Id.* See Freedom Oil v. Illinois Pollution Control, 275 Ill. App. 3d 508 (1995). The court pointed this out when it said that by excluding electronic media from open meetings considerations, a dangerous loophole would be created for public officials. *Id.*

<sup>6</sup> See 1 D.C. Code § 129.04 (2007).

<sup>8</sup> See 94, S.D. Op. Att'y Gen. 15 (2004). Where a County Board of Commissioners is allowed to meet via teleconferencing because of difficulties some members face in getting to the meetings. *Id.* See 661 Alaska Op. Att'y Gen. 94-0662 (1994). See 663 Alaska Op. Att'y Gen. 95-0524 (1995). See Op. Att'y Gen. N.M. No Number in Original (2006). See 42 R.I. Gen. Laws § 46-5 (2008). See 88 Op. Att'y Gen. S.D. 35 (1988).

violating at least the spirit, if not the letter, of many open meetings laws. The availability of electronic media makes daisy-chaining pretty easy to do.

Some of the court precedent concerning the third issue examines times when two officials discussing public business extensively through electronic media. In some cases, these instances were considered an illegal meeting, usually because the kind of discussion taking place was private but involved public business that should have been discussed in a public meeting.<sup>9</sup> In others cases, because only two officials were involved, no matter what was discussed, the discussions were not considered to even be a meeting.<sup>10</sup> The state law in these two types of court cases did not always have a quorum requirement, but maybe did not clearly define how many people, or in what circumstances, a meeting is formed. It would be helpful for statutes to identify the parameters of member involvement, in clarifying what constitutes a meeting in terms of member attendance.

The fourth issue for electronic meetings concerns notification guidelines. For a meeting to be truly an open meeting and available to the public, members of the public must have prior notification. Without prior notification that a meeting is taking place, the public does not have a realistic way of knowing about, and making plans to, attend the meeting.<sup>11</sup> This is especially important with electronic meetings which may or may not physically take place in the customary location of meetings but rather may be in the private homes of the offices of public officials. In

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<sup>9</sup> See Frankie Sue v. Board of Regents, 956 P. 2d 770 (1998). Where the court ruled that public bodies should be prohibited “from making decisions via serial electronic communications,” or a series of one-on-one or one-on-several telephone communications. *Id.*

<sup>10</sup> Haverkos v. Northwest Local School Board, 2005 Ct. of App. Ohio 3489 (2005).

<sup>11</sup> See Board of Trustees v. Board of County Commissioners, 606 P. 2d 1069 (1980). Where a newspaper article about an upcoming meeting was ruled to be an insufficient notification of an electronic meeting. *Id.* See Claxton Enterprise v. Evans County, 549 S.E. 2d 830 (Ga. App. 2001). Where public business was discussed via telephone but because telephones were not covered within the scope of the current open meetings law, no illegal action had taken place. *Id.* See State of Kansas v. Board of County Commissioners, 866 P. 2d 1024 (Kan. Sup. Ct 1994).

addition, it can be difficult for members of the public to attend some forms of electronic meetings- such as meetings via PDA devices- since they do not know where to be at a given time. Further, the electronic meetings can take place in very different circumstances than traditional meetings, such as from the private offices of public officials.<sup>12</sup> In other words, it would be beneficial if state notice policies were written with the capabilities of the electronic media in mind so that the public has access to meetings.

It is equally beneficial to clarify whether a meeting qualifies as an official meeting if it is not properly noticed. For example, some courts have ruled that if a meeting is not at a set, notified time, then it can not be considered a public meeting.<sup>13</sup> This can be a large loophole for unscrupulous public officials if this becomes a legitimized legal precedent because some opinions have stated that if the meeting, that should be public, does not take place at a scheduled time then it is not a meeting at all and therefore it does not matter what business is discussed or what is decided at the non-meeting. The extreme of this would be for public officials to avoid disclosing discussions about public business in open meetings by holding meetings outside of set times.

The fifth issue raised by this thesis research is the technical logistics involved in using electronic communications for open meetings. Some of the statutes provide explicitly for public participation, but others are less clear or specifically do not address the issue at all.<sup>14</sup> This is more problematic with meetings that include electronic media than more traditional meetings.

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<sup>12</sup> See pg. 49.

<sup>13</sup> Claxton Enterprise v. Evans County, 549 S.E. 2d 830 (Ga. App. 2001).

<sup>14</sup> See 75 K.S.A. § 4317 (a) (2006). Where the statute does not make any kind of provisions for public participation and allows electronic meetings to take place in any kind of location, including, theoretically, the homes of public officials. *Id.*

For one thing, it is simply harder logically to make sure the public can participate in an electronic meeting than it is a meeting in a physical space. In addition, if a meeting is being held by teleconference and the public is expected to call in to participate, it will be difficult to participate unless agency materials, which would normally be provided at the physical location of the meeting to the public, are also explicitly provided at the official teleconferencing areas for the public as well.<sup>15</sup>

The four issues just discussed are somewhat theoretical in nature. The remaining issues are based off of a technical analysis of the new electronic media covered in this thesis. The two main issues that seem apparent that have not in some way been covered revolve around the short messaging, essentially text messaging, capabilities of different media. So the sixth issue is a concern with text messaging, which has the capability of being carried out in a near real-time situation that stimulates conversation, and which can be sent out to multiple people at once. One troubling example was described in Chapter 1. In 2006 a government aide figured out how to set up the text messaging systems of 19 city councilmen so that they could communicate en masse together through text messages, which are very difficult to track, on their cell phones.<sup>16</sup>

The seventh and final issue is currently restricted to the popular PIN to PIN capabilities of BlackBerry PDAs. PIN to PIN transfers are basically text messages, but text messages that do not exist in any way that can be documented outside of the device that sends the message and the device that receives the message.<sup>17</sup> Scrupulous public officials would hopefully not use this function to communicate public business since PIN to PIN communications- depending on state

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<sup>15</sup> See 44 Alaska Stat. § 62.310 (a) (2008). The Alaska statute specifically provides for agency materials to be at the public's teleconferencing location. *Id.*

<sup>16</sup> See Carrie Johnson, *Technology is Testing Open-Government Laws*, ST. PETERSBURG TIMES, January 8, 2006, at B1.

<sup>17</sup> ROBERT KOA, BLACKBERRY FOR DUMMIES [E-BOOK] (2006).

law- may well violate open meetings, but unscrupulous officials would probably find it terribly easy to discuss public business on their BlackBerry devices without detection.

### **Policy Recommendations**

A multitude of issues have been raised by the comprehensive overview of the literature, the technical capabilities of the electronic media, and the law that controls public access to meetings conducted at least in part through electronic technologies. It does little good to merely outline the current state of the law and its limitations without offering suggestions for future policy-makers about how to fix some of the flaws in the existing system. The six issues just covered will therefore be boiled down into some policy recommendations, with explanations to follow. Then a model law will be presented. This thesis offers six policy recommendations: 1) electronic meetings should be addressed by the open meetings law in all states, 2) agencies with special exemptions for the use of electronic technologies should be carefully described and named in state statutes, 3) the specific requirements for when an electronic communication is a meeting should be listed, 4) notification guidelines should be detailed, 5) requirements for public participation should be listed, and 6) broad language maintaining the spirit of open meetings law should be included.

The first recommendation, in more detail, is that every state ought to address the use of electronic media by public officials in its open meetings law. The failure to address the issue in the statutes leaves too many unanswered questions and too much discretion for courts and Attorneys General as issues arise. The vast majority of the states, thirty-two, have statutes that support some use of electronic media. Only one state, Rhode Island, severely restricts the use of electronic media in its open meetings law.<sup>18</sup>

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<sup>18</sup> 42 R.I. Gen. Laws § 46-5 (2008).

While open meetings laws generally include most state agencies within its scope, a few statutes, several court cases and Attorney General opinions have identified exceptions. These exceptions are generally for agencies with special characteristics or duties that the use of electronic media either help or hinder. Some agencies, because of geographic challenges—such as a state wide agency that is required to meet weekly—are given special dispensation to meet electronically,. Other agencies, because of specific purposes, such as agencies dealing with inmates, are allowed to meet electronically to complete certain tasks so that public officials can complete required tasks without traveling regularly to a state penitentiary. These agency exceptions should be outlined on a state by state basis within each state's open meetings law.

Aside from identifying specific agencies that should be treated differently, the specifics of member attendance for what qualifies a gathering as a meeting electronically, should also be directly addressed state statutes. It seems clear that clarifying changes need to be made so that officials do not illegally discuss public issues when a quorum requirement is not met. One way to deal with these issues is not to set any kind of attendance requirement for meetings, but to define meetings by the type of information exchanged. For example, a quorum should not be required to make a meeting qualify as a meeting under open meetings law. If two or more public officials are discussing matters of public importance, then the discussion adheres to open meetings standards, even if votes cannot be taken because of the number of officials participating means that there is not a quorum.

Notification guidelines should clearly be detailed in the state statutes. Due to the nature of electronic media, each state needs to decide if notification guidelines will be different for electronic media. Some statutes offer streamlined notification guidelines, while other states require more in-depth notification guidelines. For example, notification of a meeting taking

place via instant messaging would not need as long of a notification process because all computers can run instant messaging and most people, even if they do not own a computer, can generally access one, even if it is at a public library. This notification would still need to be in enough advance, days instead of weeks, for people to attend. Notification of a meeting taking place via videoconferencing or teleconferencing should require the same process as notification requirements for physical meetings because people either must travel to the location provided for the public to attend the meeting, or set time aside for attending the meeting electronically in a way that the more computer based instant messaging does not require.

Requirements for public participation with electronic meetings should also be clearly outlined. This will somewhat be based on media specifics. For example, a statute might provide for a number of places for the public to participate in a teleconferenced or videoconference meeting. A statute might also detail how members of the public can be added to an e-mail list, or an instant messaging chat that qualifies as a meeting. A more general blanket requirement for public participation can also be used, one that specifies that accommodations should be made for the public to attend public meetings.

These first five policy recommendations deal with the most prevalent issues that have shown up in this thesis's analysis of open meetings law. New issues will come up with the evolution of media, though, and while it is the nature of law to be reactive, partly because of the many ways open meetings laws can be willfully violated, a catch-all is often used. Therefore the final policy recommendation of this thesis is that a general statement should be included in each state statute requiring that the "spirit of open meetings law be maintained." This phrase is currently used in some existing statutes and is a necessary addition to make the model-law complete.

## **Model law**

There are three categories that this thesis identifies that each state's open meetings law could fall into: general, facilitate agency business and facilitate public access. Only one state, North Dakota, includes all three categories into the current state statute.<sup>19</sup> The model law will include all three categories, and incorporate the policy recommendations put forth in the section above. This law is designed to be adapted to the specific needs of each state and was created to guide policymakers with future decisions:

A public meeting is defined as a gathering of the members of a public body where matters pertaining to public business are discussed and decided. A meeting includes formal and informal gatherings of two or more members and can be conducted in conjunction with, or only with electronic media, including but not limited to: teleconferencing, videoconferencing, e-mail, text messaging, instant messaging, and personal digital assistant devices.

Meetings conducted with electronic media must abide by these guidelines: 1) one member must be physically present at an official location accessible to the public, 2) all members must be able to hear and interact fully with each other, 3) a roll call must be taken and recorded at the beginning of each meeting involving electronic media, 4) votes must be announced during the meeting and recorded in the official minutes of the meeting, and 5) certain agencies may meet in an entirely electronic format or abide by shortened notification requirements for specified amounts of time when fulfilling agency duties (insert state specific agencies that may need to deal with natural disaster response, medical crisis, or other extremely critical and time sensitive materials).

Provisions must be made for public participation in electronic meetings which require, but are not limited to: 1) public notification requirements should be followed according to the

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<sup>19</sup> 44 N.D. Cent. Code, § 04-19 (2008).

stipulations of where the physical member is presiding (for example if one member is required to be at a meeting room in city hall, the notification requirements for city hall would be in effect), 2) at least one official electronic location will be provided for public use, 3) agency materials pertinent to the meeting must be provided at the physical location of the meeting and any official electronic points of access, and 4) the public can clearly hear or read all discussions and deliberations in real-time.

Overall, electronic media should not be used to circumvent the spirit of open meetings law by discussing public business outside properly conducted public meetings.

### **Future Academic Research**

This area of media law, freedom of information, is still relatively unexplored in some respects. This thesis, for example, was the first comprehensive overview of new electronic media and open meetings law. While this thesis explored this narrow subject in-depth there are many avenues for future research that could build upon the research presented here and hopefully inform a broader audience about the current state of freedom of information in the United States.

One of the most important things future research could do is to examine studies similar to this thesis on other areas of open meetings law, such as an examination of the use of new electronic media and public records law. While some media, like e-mail, has been examined in the context of public record laws, very little comprehensive information is available on electronic media and public records. A systematic examination of the literature, statutes, and court cases could give a complete picture of the state of public records law as it applies to electronic records.

Another less law-oriented extension of this study would be to conduct some kind of systematic research of the mostly anecdotal violations of open meetings law through electronic media. While this thesis presents a few recent examples to contextualize some possible violations that have happened, a content analysis of newspaper stories or some other kind of

research method, such as a survey of executive officials, or even journalists, could be interesting. This kind of survey could provide concrete evidence of what kind of violations are happening, and what kind of difference there might be between what the law actually says, and what public officials are doing.

### **The Future of Open Meetings**

This thesis represents where the law actually is with regards to the use of new electronic media and open meetings law, but the law is not an immutable process. The main purpose of freedom of information law is to increase government transparency so that citizens have the opportunity to obtain an understanding of how the government is functioning and why decisions are being made. In the representative government that we govern with, society functions best when it is supported by an informed citizenry.<sup>20</sup> The function of open government laws is to provide access to public records and open meetings, the latter of which this thesis has focused on.

At the same time, there must be special attention paid to the tension between government transparency and government productivity.<sup>21</sup> While transparency is essential to democracy, it does the public no good if the democratic process is crippled by excessive bureaucracy. Government officials must be able to do their jobs. This is why this thesis has used a moderate approach, or one designed to keep government functioning, in presenting policy recommendations and the model-law. Electronic media can streamline the process of having public meetings by overcoming time, geographic, and even monetary obstacles, and therefore is supported by the thesis. Electronic media can facilitate agency communication and the public's

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<sup>20</sup> David J. Barthel, *A Healthy Tan is Better Than Sunburn: Ohio's 'Sunshine Law' and Nonpublic Collective Inquiry Sessions*, 34 CAP. U.L. REV. 251, 252 (2005).

<sup>21</sup> John F. Connor & Michael J. Baratz, *Some Assembly Required: the Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 762 (2004).

access to open meetings. If certain precautions are taken, then electronic media can be a useful tool for both productivity and transparency.

According to past academic research, it is essential to remember that there is a distinction between public officials deliberating circumventing open meetings laws, inadvertently circumventing open meetings laws, and having information gathering pre-deliberations that do not violate open meetings laws.<sup>22</sup> Past research has shown that most of the open meetings violations that occur are not purposeful.<sup>23</sup> That is why this thesis is a great contribution to academia, the public, and policy makers. This thesis hopefully allows for a better understanding of what the law actually says public officials can do with electronic media so that awareness can be raised as to possible inadvertent violations.

Due to the interactive and naturally convergent nature of the emerging electronic media, it can be very easy for both accidental and purposeful violations to occur. The more understanding there is about this subject, the more likely transparency will be maintained. Charles Davis, the executive director of the National Freedom of Information Coalition, has responded to concerns that the privacy of public officials is being compromised by applying open meetings to electronic media, “I tell people who complain about e-mail being public: Democracy is a messy business. You can’t do things under the cover of darkness.”<sup>24</sup>

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<sup>22</sup> Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 783-85 (2004).

<sup>23</sup> Charles N. Davis, Sandra F. Chance, & Bill F. Chamberlin, *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. LAW & POL’Y 35, 38 (1998).

<sup>24</sup> Jaci Boydston, *Messages or Meeting?*, THE NEWS MEDIA AND THE LAW 26, 26 (Summer 2007).

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## BIOGRAPHICAL SKETCH

I grew up in Houston, Texas and in 2002 attended my undergraduate at a small, private, liberal arts university, Trinity University, in San Antonio, Texas. I received my Bachelor of Arts in English in 2006, where I specialized in 17<sup>th</sup> and 18<sup>th</sup> century British poetry, with a secondary major in communications, and a minor in marketing. I was also very active in campus and community service where I was in several leadership positions, including serving as the founder and head of a program that funded student painted murals in the community, designed to combat gang graffiti and beautify San Antonio neighborhoods.

Directly after my bachelor's degree was awarded, I moved to Gainesville, Florida, to pursue my Master of Arts in Communications, with a specialization in Media Law. During this time I worked as a research assistant with Dr. Bill Chamberlin in the Marion Brechner Citizen Access Project, and taught in the Written and Oral Communications Department. I also published a chapter in an undergraduate level textbook, a content analysis that examined how female rap artists talked about women in their music.

After completing my master's degree in 2008, I will be attending Penn State for my PhD. I have received a fellowship for my first year and a guaranteed assistantship for the final two years of my program. After I receive my PhD, projected 2011, I hope to teach as a Professor of Media Law at the university level.