DEVELOPMENTS IN THE LAW OF PENALTIES FOR ACCESS TO GOVERNMENT MEETINGS SINCE 1995

By

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To my parents, my husband and Dr. C.

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DEVELOPMENTS IN THE LAW OF PENALTIES FOR ACCESS TO GOVERNMENT MEETINGS SINCE 1995

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This thesis analyzed the penalties and remedies currently available for open meetings law violations, and used a survey to gauge how experts in open government perceive penalties available in some state's laws for open meetings violations. This thesis was the first study to use the methodology created by the Marion Brechner Citizen Access Project (MBCAP) as a component in developing suggestions for improving existing penalties and remedies provisions and developing a model law. Using the Marion Brechner Citizen Access Project methodology allowed for open government experts to review and rate the civil and criminal penalty provisions currently available in the open meetings laws of thirty-eight states. Additionally, this thesis looked at changes to penalty provisions for open meetings law violations that have been made in some states since 1995 and what non-legal publications revealed about lawmakers' motivations for enacting such changes.

The review of penalty and remedy provisions across the country revealed that no two states are alike when it comes to enforcement of open meetings laws. Additionally, lawmakers and open government experts in the eleven states that have changed penalty provisions since 1995 most often cited little to no enforcement as a motivation for supporting increased penalties.

Further, the results of the MBCAP survey indicate that the board of open government experts saw room for improvement in the thirty-eight states that provide for civil and/or criminal penalties for open meetings violations.

A comprehensive review of penalties available across the country had not been done in more than fourteen years. Overall the research in this thesis made evident that room for improving penalty and remedy provisions in state open meetings laws exists. To that end, this thesis proposed several recommendations for improving open meetings laws across the country and a model law both developed by the researcher based on the findings of the research questions posed in this thesis. The recommendations and model law were developed with the purpose of adding to the discussion on how open meetings laws across the country might be improved to preserve and uphold the values of open government.

CHAPTER 1
INTRODUCTION

In the small city of Spanish Fort, Alabama, the city council held a little noticed special meeting to discuss the annexation of a property to the city. When a reporter from The Mobile Register, a local newspaper, entered the meeting the mayor asked: "How did you find out about this meeting?"[1] When later pressed about the remark, the mayor said it was an innocent remark but that it "didn't sound really good, did it?"[2]

At least on paper, public officials who violate open meetings laws face a slew of penalties the most severe of which include jail time and removal from office. All fifty states and the District of Columbia have enacted open meetings laws.[3] Many states' open meetings laws contain penalty provisions to remedy violations. Penalties may include civil and criminal penalties, invalidation of action and removal from office.[4] While state laws may provide for penalties to be levied against public officials who violate open meetings laws, violations persist and little evidence exists that penalties are enforced.[5] In 2007, a survey of open meetings laws by The Associated Press found that "laws are sporadically enforced, penalties for failure to

[1] Kendal Weaver, *State Newspapers Put Focus on Sunshine Law as New Measure Offered*, THE ASSOCIATED PRESS, Mar. 8, 2004.

[2] *Id*.

[3] *See* Charles N. Davis, et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41 (1996) [hereinafter *Sunshine Laws*].

[4] *Id*.; Meri K. Christensen, Note, *Opening the Doors to Access: A Proposal for Enforcement of Georgia's Open Meetings and Open Records Laws*, 15 GA. ST. U. L. REV. 1075, 1082 (1999).

[5] *See Sunshine Laws*, *supra note* 3, at 42; *See also* Robert Tanner, *Few Penalties Levied for Failure to Heed Open Government Laws*, USA TODAY, Mar. 10, 2007, http://www.usatoday.com/news/nation/2007-03-10-sunshinelaws_N.htm.

comply are mild and violators almost always walk away with nothing more than a reprimand."[6] Frustrated at what seem like persistent and unpunished violations of state open meetings laws, open government advocates across the country persistently call on legislators to give open meetings laws more teeth by increasing penalties for violations.[7] The Associated Press study found that fewer than ten states even track open meetings violation complaints.[8] While examples of public bodies and public officials violating the law abound, examples of cases in which state and district attorney and courts have imposed penalties for open meetings violations are hard to come by.

In one example in Florida, the State Attorney's Office in Broward County, Florida, in May 2005 civilly charged four of the five city commissioners of Pompano Beach with violating the Sunshine Law.[9] The commissioners had allegedly met at a private breakfast with then county Sheriff Ken Jenne to discuss a law enforcement contract renewal. According to Florida's open meetings law, "any public officer" who violates Florida's open meetings law is guilty of a noncriminal infraction, punishable by fine not exceeding $500.[10] The commissioners instead

[6] *See* Tanner, *supra* note 5 (quoting Bill Chamberlin: "There is largely a culture in state and local government that violating public meetings and open records laws is not the same as committing a crime," Chamberlin said. "It's largely treated as a nuisance rather than a law.").

[7] *See e.g.* Charles Walston, *House Approves Pair of Measure to Put 'teeth' in the Sunshine Laws,* ATLANTA-J. CONST., Feb. 13, 1999; *See also, infra*, Chapter Three.

[8] Tanner, *supra* note 5.

[9] Elgin Jones, *Commissioners May Have Violated Sunshine Law,* S. FLA. TIMES, Jan. 22, 2009, at 3A.

[10] *See* FLA. STAT. ANN. §286.011(3)(a) (2009); *See also* FLA. STAT. ANN. § 286.011(3)(b)&(c) (2009)(stating that a person "who knowingly violates" the open meetings law may be found guilty of a misdemeanor of the second degree.); *See also* FLA. STAT. ANN. § 775.082(4)(b) (2009) (stating that a person convicted of a misdemeanor of the second degree may serve a term of imprisonment "not exceeding 60 days."); *See also* FLA. STAT. ANN. § 775.083(1)(e) (2009) (stating that in addition to the possibility of imprisonment, a fine of "not to exceed" $500 may be assessed against a person convicted of a second degree misdemeanor. The fine may be assessed in addition to or in lieu of jail time.).

made an agreement with prosecutors, in which the commissioners were required to donate $200 to their favorite charity as penalty for the violations.[11]

According to scholars Charles N. Davis, Milagros Rivera-Sanchez and Bill F. Chamberlin, although enforcement of open meetings laws may not be consistent, the public access guaranteed by open meetings laws is crucial to creating an informed citizenry that can be involved in their government and can keep a watchful eye on public officials.[12] Because of the important role of open meetings laws in mandating such access, this study will create a comprehensive review of the penalties available for violations of open meetings laws across the country. Additionally, this study will look at states that have revised penalty provisions for violating open meetings laws since 1995, as well as address motivations lawmakers had for changing penalty provisions, as contained in published non-legal records or as otherwise publicly revealed.[13] This study will yield insight into the efficacy of penalties for open meetings violations. Many of those penalties have not been revised in decades.[14]

In recent years, some states have worked toward updating outdated penalty provisions, while others have tried to add penalties to the laws. For example, an article in The News

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[11] *Id; See also Ken Jenne*, S. FLA. SUN-SENTINEL, http://www.sun-sentinel.com/topic/politics/crimes/ken-jenne-PEPLT007449.topic (stating that unrelated to the Sunshine Law violations of the Pompano Beach commissioners, Jenne resigned as sheriff in September 2007. Three months later, he pleaded guilty to public corruption charges and was sentenced to one year and one day in federal prison.).

[12] *See Sunshine Laws*, *supra* note 3, at 42. *See also infra* notes 27-65 for a discussion on the theoretical basis for public access.

[13] *See e.g. Sunshine Laws*, *supra* note 3. The year 1995 was chosen as a starting point because in their 1996 article Davis et al., looked at remedies provided for open meetings violations and enforcement of those remedies across the country up to that point.

[14] *See Sunshine Laws*, *supra* note 3. A survey of existing literature shows that nothing similar has been done since the 1996 article *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions* by Charles N. Davis, Milagros Rivera-Sanchez and Bill F. Chamberlin. This thesis will build on the work done by Davis, Rivera-Sanchez and Chamberlin by looking at states that have changed penalty provisions since 1995, as well as using the ratings system from the Marion Brechner Citizen Access Project to gauge strength of penalty provisions.

Tribune, a newspaper from the state of Washington, discussed a bill proposed during the 2008 Regular Session of the Washington state legislature that would have raised the civil penalty for open meetings violations from $100 to between $250 and $1,000. The article pointed out that the $100 fine, which was enacted in 1971, adjusted for inflation, would be $539 today.[15] State Representative Larry Haler, who introduced the legislation, said that $100 was not enough money to constitute a meaningful deterrent to violations of the open meetings laws.[16] Open government advocates supported increasing the fines arguing that the tenfold increase of the penalty to $1,000 would be enough to get public officials to pay more attention to complying with the state's open meetings laws.[17] But others, including the Association of Washington Cities did not support the increase arguing that a $1,000 penalty was too steep for unintentional violations or violations occurring in smaller jurisdictions where officials may not make $1,000 per month for service.[18] The executive director for the Association of Washington Cities at the time likened the fine for violating the open meetings law to a speeding ticket, arguing that if a public official was fined the current $100 penalty once, it would be enough for the official not to repeat the violation.[19] The bill stalled in the state's House.[20]

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[15] TheNewsTribune.com, House Bill Boosts Penalty for Officials Who Do Public's Business in Private (When They Shouldn't), http://blogs.thenewstribune.com/politics/2008/02/14/house_bill_boosts_penalty_for_officials_ (last visited Dec. 6, 2008).

[16] Chris Mulick, *Lawmaker seeks to boost fine for open meeting act violations*, TRI-CITY HERALD, Jan. 6, 2008.

[17] *Id*.

[18] *Id*.

[19] *Id*. (citing Stan Finkelstein, then executive director for the Association of Washington Cities).

[20] H.B. 2567, 2008 Leg., Reg. Sess. (Wash. 2008).

In another example, during the 2009 legislative session Indiana lawmakers introduced a bill that would have created penalties for open meetings violations.[21] Currently, Indiana does not have civil or criminal penalties for open meetings violations. [22] The bill would have imposed a civil penalty against an officer or employee of a public agency or the public agency of not more than $100 for the first violation and not more than $500 for the second violation. [23] The bill would have also created an education fund for a program administered by the state's Public Access Counselor to educate the public and public agencies on compliance with the state's open meetings law. [24] The bill passed unanimously in the state Senate but died in the House. [25] Opponents of adding penalties to the law argued that penalties would unfairly burden officials who were just following orders from upper-level official to withhold information.[26]

This study will conclude in a development of a model enforcement statute that can provide guidance for states in updating their penalty provisions for violations of open meetings laws. At least one improvement that may be suggested in the model statute will be the inclusion of a timeframe within penalties laws for when the penalties should be reviewed and revised to preserve the efficacy of the laws. A model statute could become a tool for the improvement of penalty laws across the country. Improved penalty laws could lead to improved enforcement of

[21] S.B. 0232, 2009 Reg. Sess. (Ind. 2009).

[22] IND. CODE ANN. §§ 5-14-1.5 to -8 (2009).

[23] S.B. 0232, 2009 Reg. Sess. (Ind. 2009).

[24] S.B. 0232, 2009 Reg. Sess. (Ind. 2009).

[25] S.B. 0232, 2009 Reg. Sess. (Ind. 2009).

[26] *Editorial: Accessibility Is a Vital Part of Officials' Duties: But There Is No Penalty for Keeping Records and Meetings Closed,* NEWS-SENTINEL, Jan. 26, 2009.

penalties for violations of open meetings laws, as well as improved compliance with the laws that guarantee public access to government agencies and officials.

The introduction above provided a brief overview to the issue of enforcement of open meetings laws and the goal of this thesis. The following sections, will discuss the history and development of open meetings laws, including legal scholars' support for public access to government rooted in First Amendment principles of free speech and press. The literature review included in the following sections will review previous research relating to penalties and enforcement for open meetings violations. Following the literature review, the research questions to be answered in this thesis will be discussed. Finally, this section will conclude with a discussion of the methodological approach that was used in answering the research questions.

Background

This section will review the development of open meetings laws across the country, the First Amendment theory behind public access to government information and previous research on enforcement of open meetings laws. The previous research over the last fifty years has demonstrated a continued concern for the efficacy of enforcement provisions and inconsistent enforcement of penalties for open meetings violations across the country.

History and Theory

Access to the deliberation process of government bodies and officials has long been at the heart of the ideals of democratic government. Scholars, legislators[27] and the courts agree that open meetings are vital to reducing government secrecy, checking government corruption and providing a forum for discussion on matters of public importance.[28] Indeed, according to

[27] *See generally* ALA. CODE §36-25A-1 (2009); *See generally also* 65 PA. CONS. STAT. § 702 (2008).

[28] *See, e.g., Sunshine Laws*, *supra* note 3, at 43.

attorney Christopher W. Deering, "[p]ublic knowledge of the decision-making process upon which government action is based is the foundation for participatory democracy."[29] Although the First Amendment does not expressly provide a right to access, the idea is rooted in the First Amendment rights of freedom of speech and freedom of press. Public access to government information and proceedings serves to educate the public so that the public can in turn make informed decisions about their governance and check abuses of power by public officials. [30]

Alexander Meiklejohn argued that the need for an educated public is inherent in the freedom of speech guaranteed by the First Amendment in his 1948 book *Free Speech and Its Relation to Self-Government.*[31] Meiklejohn theorized that in the American system of self-government freedom of speech is necessary for achieving the public's interest by guaranteeing that everyone has a right to speak and share their ideas and beliefs about how they should be governed.[32] According to Meiklejohn, "[t]he primary purpose of the First amendment is, then,

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[29] Christopher W. Deering, *Closing the Door on the Public's Right to Know: Alabama's Open Meetings Law After Dunn v. Alabama State University Board of Trustees*, 28 CUMB. L. REV. 361, 373 (1997-1998).

[30] *See* Zemel v. Rusk, 381 U.S. 1 (1964) (stating that while the First Amendment provides a right to speak and publish, it does not provide an unrestrained right to gather information); *See* Pell v. Procunier, 417 U.S. 817 (1974) (establishing that the First Amendment does not guarantee the press a special right of access not available to members of the public); *See* Christensen, *supra* note 4, at 1077-1078 (discussing that access is not only vital for citizen information and debate, but also for newsgathering. Also discussing that efforts to enact open meetings laws were led in many cases by journalism organizations including American Society of Newspaper Editors and the journalism fraternity, Sigma Delta Chi.); *See e.g.*, Charles N. Davis, et al., *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. L. & POL'Y 35, 36 (1998) [hereinafter *Guardians of Access*] (stating that the First Amendment does however provide a right to publish information about government); Deering, *supra* note 29, at 372-373; *See* Margaret S. Dewind, *The Wisconsin Supreme Court Lets the Sun Shine In: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 838 (1988); *See also* DON R. PEMBER AND CLAY CALVERT, MASS MEDIA LAW 340 (2009-2010 ed., McGraw-Hill 2008) (stating that "there never was a solid common-law right to attend the meetings of public bodies…the constitutional provisions regarding freedom of expression have proved inadequate with regard to access."); *See* ANN TAYLOR SCHWING , OPEN MEETINGS LAWS 2D 1 (2d ed. 2000) (citing Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168-71 (3d Cir. 1986) and Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569, 572 (D. Utah 1985). *dism'd as moot*, 832 F.2d 1180 (10th Circ. 1987).

[31] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1949), *reprinted in* A. MEIKLEJOHN ,POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 1-89 (1960)

[32] *Id*. at 54-55, 79.

that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."[33] He argued that the public gains the knowledge necessary to govern themselves through participation.[34] Frederick Schauer, in *The Role of the People in First Amendment Theory*, summarized Meiklejohn's theory as the relationship between a master, or the sovereign public, and its servant, or public officials: "It is anomalous for servants of the people to decide what information and ideas their masters may or may not receive."[35]

However, for the public to gain the knowledge necessary for self-government, it must have access to its government. Harold Cross argued in his 1953 book *The People's Right to Know*, that a right of access is inextricable from a guarantee of a free press and of freedom of speech because without access to government information, a press in its watchdog role would be "fettered into futility."[36] According to Cross, public access to government proceedings is vital to keeping members of the public informed of their government's actions and dealings. Through access the public and press can become informed of their government's actions, publish information about those actions and speak out for what they believe their government should be doing.[37]

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[33] *Id*. at 75.

[34] *Id*. at 75.

[35] Frederick Schauer, *The Role of The People in First Amendment Theory*, 74 CAL. L. REV. 761, 778 (1986).

[36] HAROLD CROSS, THE PEOPLE'S RIGHT TO KNOW 132 (1953).

[37] *Id*. at 131-132 (writing in 1953 "[t]he public business is the public's business. The people have the right to know. Freedom of information about public records and proceedings is their just heritage. Citizens must have the legal right to investigate and examine the conduct of their affairs. They must have a simple, speedy means of enforcement. These rights must be raised to the highest sanction. The time is ripe. The First Amendment points the way. The function of the press is to carry the torch.").

Vincent Blasi further expanded the links between public access to government and the First Amendment rights of freedom of speech and press in the 1977 article, *The Checking Value in First Amendment Theory*.[38] Blasi traced the roots of "the checking value" to the late 1690s, beginning with John Locke's *Second Treatise on Civil Government* and essayists and pamphleteers who relied on Locke while writing about the important role of freedom of expression and publication in political debate. Prominent writers were "Cato," an English political writer whose work in the 1720s influenced American colonists, and outspoken English politician John Wilkes, whose work critical of King George III in the late 1700s led to his expulsion from Britain.[39]

In his article, Blasi wrote about the checking value in the tumultuous 1960s and 1970s, in the midst of the civil rights movement, antiwar protests against the Vietnam War and Watergate. Questions over the press' involvement in covering these events, and the public's actions in protesting the government's role in these events, left the U.S. Supreme Court struggling to apply earlier First Amendment theories, such as individual autonomy and self-government, which did not address the public's right to protest when they disagreed with government actions.[40] Blasi posited that the peaceful demonstrations against escalations in the Vietnam War, civil rights marches, and the uncovering of Watergate, were displays of the public's opinion, and demonstrated "the value that free speech, a free press, and free assembly can serve in checking

[38] Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 524 (1977).

[39] *Id*. at 530-533 (discussing among other things pamphleteers' and opposition leaders' role in sparking debate and providing a check on governing bodies).

[40] *Id*. at 524-525.

the abuse of power by public officials."[41] Through marches, voting, halting cooperation with agencies and revolting, informed members of the public can check government abuses and ensure that government acts in accordance with the public's ideals.[42]

While rooted in First Amendment principles, the ideas of access and open government may not have been among the founders' priorities. In the early history of the United States, the country and its leaders followed in the long established tradition of secrecy which had shrouded the British Parliament for centuries.[43] Indeed, even the framers of the Constitution and the members of the first Congress met and deliberated in secrecy.[44] In creating the Bill of Rights, adopted in 1791, the House held open debates, but the Senate, which drafted the final language of the Bill of Rights, deliberated in closed sessions. The Senate continued to deliberate in closed session until 1795.[45] Additionally, evidence exists that during the late 1700's, the leaders of the country believe the Constitution imposed few limits on government secrecy in the executive branch.[46] Despite an inclination to secrecy among the country's leaders, open meetings laws

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[41] *Id*. at 527 (stating that "[I]n the last decade, the First Amendment has had at least as much impact on American life by facilitating a process by which countervailing forces check the misuse of official power as by protecting the dignity of the individual, maintaining a diverse society in the face of conformist pressures, promoting the quest of scientific and philosophic truth, or fostering a regime of "self-government" in which large numbers of ordinary citizens take an active part in political affairs.").

[42] *Id*. at 539.

[43] Cross, *supra* note 36, at 180.

[44] *Id*.

[45] Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794-98*, 7 COMM. L. & POL'Y 51, 59 (2002).

[46] *See id*. at 62 (discussing Presidents George Washington and Thomas Jefferson's leadership in negotiating secret commercial treaties with both the British and the French during the war between the British and French in the late 1700s. The public and press were kept in the dark about the federal government's dealings until the agreements had been made, in the case of the British with what became known as Jay's Treaty, or, until secret telegrams were revealed in the case of the French in what became known as the XYZ Affair. These events sparked an angry backlash from both the press and public, who did not agree with the treaties.).

emerged in the U.S. in the late 1700's and early 1800's, with such states as Pennsylvania in 1776 and Connecticut in 1818 requiring that legislative proceedings be open to the public.[47]

Beyond requiring openness in state legislatures, the first open government laws to require access to state or local agencies were enacted in the late 1800's and imposed openness on specific entities.[48] For example, in 1868 a Kansas law required the school board to hold open meetings.[49] A California law enacted in 1883 required the county boards of supervisors to hold public meetings.[50] In 1887, the Legislative Assembly of the Dakota Territory, which would later become North Dakota, enacted a law requiring city councils to meet in public.[51]

Public scrutiny of government proceedings allows citizens to understand how their government works and question its actions.[52] Despite the importance of access to transparency in a democracy, there is no common law or constitutional right for the public to attend meetings of government bodies, and the U.S. Supreme Court has never addressed the issue.[53] Instead,

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[47] Schwing, *supra* note 30, at 1-2.

[48] Meri K. Christensen, *supra* note 4, at 1075; Schwing, *supra* note 19, at 2.

[49] Schwing, *supra* note 30, at 2, *citing* Smoot & Clothier, Open Meetings Profile: The Prosecutor's View, 20 Washburn L.J. 241, 259 (1981), *citing* KAN. STAT. ANN. § 75-2929b(c) (1997)*; See also* Schwing, *supra* note 30, at 2 (stating that an1895 Michigan law that required public city council meetings, that in 1897 Oklahoma passed a law requiring that county commissioners meet in public, and that Utah passed a similar law in 1898 and Florida in 1905).

[50]Charles N. Davis, Enforcement of State Open Meetings Laws: A Utilitarian Analysis (1995) (unpublished thesis, University of Florida) (on file with George A. Smathers Libraries, University of Florida), at 37, *citing* Herlick, California's Secret Meetings Law," 37 CAL. ST. B.J. 541 (1962).

[51] *Id*, *citing* Ch. 73, art. 3, § 11 (1887), Laws of the Legislative Assembly of Dakota Territory).

[52] *See Sunshine Laws*, *supra* note 3, at 42-43; *See also* Brian Kane, *Idaho's Open Meetings Act: Government's Guarantee of Openness or the Toothless Promise?*, 44 IDAHO L. REV. 135, 159 (2007) (stating that "in a representative democracy the nation's citizens act through their elected representatives and thus require some mechanism through which to gauge both their representation and their governance.").

[53] John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 723 (2004); *Sunshine Laws*, *supra* note 3, at 42-43; *See also Guardians of Access*, *supra* note 30, at 36 (1998) (stating that the Supreme Court has said that the First Amendment does not "guarantee the ability of journalists to obtain news about government activities.").

public access to meetings of government bodies is provided by statutory law that has largely developed over the last fifty years in each of the fifty states and the District of Columbia.[54]

According to an unsigned note in the Harvard Law Review Association, support for the adoption of open meetings laws rose out of public frustration at the increasing amount of business being conducted behind closed doors by state and local government agencies.[55] Alabama was the first state to have a modern, or comprehensive, open meetings law in 1915 that were broadly applicable to state and local entities, instead of focusing on specific entities as earlier laws had.[56] Until the 1950s, Alabama was the only state with an open meetings law. Between 1953 and 1962, twenty-six states passed open meetings laws, three passed such laws between 1962 and 1967, ten between 1967 and 1972 and the final eleven by 1976.[57] In 1976, Rhode Island and New York became the last two states to adopt open meetings laws.[58] According to attorney Ann Taylor Schwing, an additional ten states strengthened their open meetings laws in the wake of public outrage from secrecy and corruption exposed during

[54] O'Connor & Baratz, *supra* note 53, at 723-724; *See also* O'Connor & Baratz, *supra* note 53, at 761 (stating that "the right of the public to observe the deliberations of its local government officials is not, and has never been, an absolute one even with the enactment of open meeting statutes.").

[55] Harvard Law Review Association, Note, "Open Meeting Statutes: The Press Fights for the "Right to Know," 75 HARV. L. REV. 1199, 1199 (1962).

[56] *See* Deering, *supra* note 29, at 367-368; Schwing, *supra* note 30, at 2; *See* Davis, *supra* note 50, at 37, *citing* 1915 Ala. Acts No. 278 (currently codified at ALA. CODE § 36-25A-9).

[57] James H. Cawley, *Sunshine Law Overexposure and the Demise of Independent Agency Collegiality,* 1 WIDENER J. PUB.L. 43, 54 (1992).

[58] Schwing, *supra* note 30, at 3.

Watergate.[59] Laws requiring open meetings became known as Sunshine Laws. According to James H. Cawley, the name came from the legislature of the Sunshine State, Florida.[60]

Open meetings laws provide statutory requirements for state and local government agencies to conduct their decision making in public. Typically, most state open meetings laws prevent officials from conducting the public's business in both official meetings and "informal" meetings, such as dinners and recreational outings, out of public view.[61] Open meetings laws generally contain: 1) identification of government bodies subject to the law and 2) provisions for conducting meetings that are not specifically exempt from the law in public.[62] In many states, a "quorum"[63] of the public body must be present for open meeting requirements to apply.[64] Often open meetings laws also define terms such as "meeting." The difference in the definition of words such as "meeting" and "public official" can impact who is affected by the requirements of the law. Many state's open meetings laws also contain "a laundry list" of exemptions for situations in which public bodies may hold closed sessions. Those exemptions usually relate to situations in which privacy or sensitivity concerns are believed to outweigh the public interest in openness.[65] However, while each state and the District of Columbia have open meetings laws

[59] *Id*. at 4.

[60] Cawley, *supra* note 57, at 54.

[61] Kevin C. Riach, *Civil Procedure—Epilogues to a Farce: Reestablishing the Power of Minnesota's Open Meting Law—Prior Lake American v. Mader*, 33 WM. MITCHELL L. REV. 681, 683-684 (2007).

[62] O'Connor & Baratz, *supra* note 53, at 724-725.

[63] BLACK'S LAW DICTIONARY (4th ed. 2004) (defining "quorum" as "[t]he minimum number of members (usual majority of all the members) who must be present for a deliberative assembly to legally transact business.").

[64] *See* Dewind, *supra* note 30, at 838 (1988).

[65] *Id*. at 763.

mandating sunshine in public agencies, not all states contain even one enforcement provision for those laws.

The discussion above reviewed the development of open meetings laws and the theory behind access to government proceedings. Scholars including Alexander Meiklejohn, Harold Cross and Vincent Blasi have linked the First Amendment guarantees of free speech and press to access to government proceedings. They have argued that for the public to be active in self-government, the public must first be knowledgeable about the actions of its government and such knowledge cannot be acquired without access to government proceedings. A review of the history of access to government proceedings revealed that it may not have been the priority of the earliest governments of the country. Nevertheless, as of the late 1970s all states and the District of Columbia had enacted open meetings laws. The following discussion will review the previous research on penalties for violations and enforcement of open meetings laws.

Review of Literature

Penalties for open meetings violations and enforcement of those laws have been the focus of many articles since the majority of open meetings laws were enacted beginning in the 1950s. The articles that provided the most pertinent background for the proposed study will be reviewed below. First articles that addressed open meetings laws across the country will be discussed, followed by articles that focused on a particular state's law.

One of the earliest reviews of open meetings laws was published as an unsigned note in the Harvard Law Review in the April 1962 article *Open Meeting Statutes: The Press Fights for the "Right to Know."*[66] At the time the article was written, twenty-six states had adopted open

[66] Harvard Law Review Association, *supra* note 55, at 1219 (This article continues to be a well-cited authority in open meetings research.).

meetings laws.[67] The article reviewed all aspects of those laws including notice provisions and enforcement and penalties provided by the laws. The article also reviewed the applicability of open meetings laws to executive sessions.[68] The study found that at that time penalties for violation of open meetings laws in state laws included criminal penalties in eleven states, invalidation of action in two states and injunctions in three states.[69] Arkansas was the only state that allowed for removal from office as a penalty.[70] The study concluded that the success of the laws had been "neither immediate nor uniform" and that there was undoubtedly room for improving the laws.[71] While recognizing the importance of open meetings for the press and the public interest, the study argued that the sometimes legitimate interests of secrecy in fact gathering or consultation had been overlooked.[72] Additionally, the study found that many statutes had not been carefully drafted, overlooking key issues on the procedures for holding open meetings.[73]

More than two decades later in 1985, attorneys W. Richard Fossey and Peggy Alayne Roston, addressed the use of invalidation as a remedy for open meetings violations.[74] Their

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[67] *Id*. at 1204; *See id*. at 1199 n.6 (States that had adopted laws by 1962 were Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma Pennsylvania, Utah, Vermont, Washington and Wisconsin); *See, supra* note 46 and accompanying text (discussing dates the laws were adopted).

[68] *Id*. at 1204-1217.

[69] *Id*. at 1211.

[70] *Id*. at 1215.

[71] *Id*. at 1199.

[72] *Id*. at 1219-1220.

[73] *Id*.

[74] W. Richard Fossey and Peggy Alayne Roston, *Invalidation as a Remedy for Violation of Open Meetings Statutes: Is the Cure Worse than the Disease?*, 20 U.S.F. L. REV. 163, 167- 169 (1985-1986) (stating that "[i]nvalidation has been used to challenge a broad range of substantive action.").

study found that thirty-four states allowed for invalidation as a remedy in their open meetings laws by the mid-1980s. The authors also identified an increasing trend in courts across the country of actions seeking invalidation as a remedy for an open meetings violation.[75] The cases revealed, however, that courts had failed to articulate standards for when decisions taken in violation of a state's open meetings law should be invalidated.[76] Because of this, Fossey and Roston argued that invalidation may not be an effective remedy for open meetings violations because—instead of a remedy—it could be used as a tool for political manipulation by self-interested individuals desiring to delay or undo a government action.[77] The attorneys contended that for invalidation to be an effective remedy, safeguards had to be imposed against its use for political purposes in contentious situations. They suggested that if states retained invalidation as a remedy they should amend the laws to require plaintiffs who unsuccessfully sought invalidation in court actions to be assessed attorneys' fees for the defendants and to require invalidation actions be brought within thirty days of the alleged violation. Additionally, Fossey and Roston recommended state laws be amended to provide for a statutory cure provision that would allow a government body or official to remedy a violation in some way, such as by redoing the actions that violated the law, making court action seeking invalidation unnecessary.[78]

Instead of focusing on one remedy as Fossey and Roston did, the 1996 article *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions,* by then graduate student Charles N. Davis and professors Milagros Rivera-Sanchez

[75] *Id*. at 174.

[76] *Id*.

[77] *Id*. at 171 (discussing the potential for invalidation to provide a "private veto" power over legislation to a self-interested minority that could use such a power to "thwart the public's will.").

[78] *Id*. at 175.

and Bill F. Chamberlin, looked at all remedies provided for open meetings violations in laws across the country.[79] Their study is the most recent evaluation of whether, and if so, how courts have applied penalties for open meetings violations. Looking at statutes and appellate case law across the country, the authors found "poorly drafted enforcement provisions" that provided reluctant courts too much discretionary power over enforcement.[80] According to the authors, "[w]ithout adequate enforcement provisions, the courts are powerless to prevent public officials from conducting illegally closed meetings."[81] Suggesting stronger enforcement provisions with less discretionary power for courts, the authors developed a model enforcement statute that limited "good faith" exemptions and strengthened other remedies, including invalidation and civil and criminal penalties.[82]

In looking beyond state laws for penalties to how those laws had been enforced, professors Charles N. Davis, Sandra F. Chance and Bill F. Chamberlin, in the 1998 article *Guardians of Access: Local Prosecutors and Open Meetings Laws*, looked at the role of judicial and prosecutorial discretion in enforcement of open meetings laws. The professors concluded that too much prosecutorial discretion existed and that such discretion negatively influenced enforcement of open meetings laws across the country.[83] The researchers surveyed almost 600 officials responsible for enforcement of open meetings laws around the country.[84] The survey,

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[79] *See generally Sunshine Laws*, *supra* note 3.

[80] *Id*. at 58-59.

[81] *Id*. at 42.

[82] *Id*. at 59, 61 (containing "A Model Enforcement Provision for State Sunshine Laws.").

[83] *Guardians of Access*, *supra* note 30, at 35-54.

[84] *See id*.

which was mailed to "every prosecutor with enforcement power under a state open meetings law in the nation" between 1994 and 1995, is the only existing study of prosecutors' enforcement of open meetings laws and their opinions about enforcement laws.[85] It revealed that "enforcement efforts are sporadic at best and nonexistent at worst."[86] Additionally, the survey found that investigations of open meetings complaints were rare as well.[87] Despite finding weak enforcement, the survey also found prosecutors' support for the principles of open meetings leading the researchers to conclude that education and deterrence would improve compliance with the laws.[88] The respondents said that open meetings laws should be enforced primarily to "deter future violations" and to "educate public officials on the open meetings laws."[89] The article concluded that current enforcement provisions were not effective remedies to open meetings violations.[90]

In addition to the articles discussed above that have addressed penalties for open meetings violations and enforcement of those penalties across the country, several articles have focused on enforcement problems in specific states. Although narrow in focus, the arguments and analysis in the articles on the strengths and weaknesses of enforcement laws in single states can be applied to an analysis of enforcement laws across the country.

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[85] *Id*. at 42.

[86] *Id*.

[87] *Id*. at 44.

[88] *Id*. at 54.

[89] *Id*. at 47, 49 (explaining that the respondents stated that a majority of violations happened because of ignorance and were not purposeful).

[90] *Id*. at 50, 54 (stating that "enforcement of open meetings laws is a rare occurrence, and most prosecutors do not view criminal prosecution as a remedy for the majority of open meetings violations.").

In a study of Virginia's Freedom of Information Act, Eleanor Barry Knoth argued that too much legislative and judicial discretion over penalty provisions for open meetings violations had frustrated "the public's right to free entry to public meetings."[91] Knoth relied on several decisions from the Virginia Supreme Court in which the court recognized a violation of the open meetings law had occurred but had not applied a remedy or penalty for the violation.[92] According to Knoth, the court's failure to penalize violations "frustrated the policy underlying" the state's open meetings law and was evidence that the state's law was ineffective because it allowed for too much judicial discretion in applying remedies and penalties for open meetings violations.[93] To solve the "inadequacy" of Virginia's enforcement provisions that allowed too much judicial discretion, Knoth proposed that legislatures provide more guidance for courts and include provisions in the open meetings law for mandatory injunctive relief and for removal from office if an official violates the law on two separate occasions.[94]

Meri K. Christensen, in looking at enforcement of Georgia's open meetings law, had a different suggestion for improving enforcement of the law.[95] Christensen compared remedies available in the open meetings laws of Minnesota, Utah and New York to the remedies available in Georgia's law. Christensen concluded that Georgia's law was different from those states

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[91] Eleanor Barry Knoth, Note, *The Virginia Freedom of Information Act: In adequate Enforcement*, 25 WM. & MARY L. REV. 487, 487, 488, 493-494, 497 (1984) (discussing Virginia's Freedom of Information Act enacted in 1968, but adopted in its current form in 1976. After 1976, the courts in Virginia could still use discretion over granting injunctive relief, but the use of the word "shall" in the law's invalidation provision meant the courts had no discretion over declaring an action void. Additionally, Virginia's law provides for recovery of attorneys' fees and a requirement that the court "shall impose" a civil fine for willful violations.).

[92] *Id*. at 498-504.

[93] *Id*. at 488, 515.

[94] *Id*. at 501-502, 515.

[95] Christensen, *supra* note 4, at 1075-1097.

because a resident of Georgia could only obtain relief for a violation of the open meetings law by filing a court action, which made the process difficult, more expensive and less accessible.[96] According to Christensen, the difficulty in obtaining enforcement was one reason that Georgia's laws were "essentially unenforced."[97] To remedy the state's poor enforcement, Christensen recommended state legislators create "an administrative forum" which would allow citizens "to air their grievances and receive a quick, inexpensive resolution" to their complaints related to open meetings violations.[98]

Patience A. Crowder, a professor of law at the University of Tulsa, argued for the need to strengthen civil and criminal penalties, in particular monetary fines, as a way to strengthen open meetings laws as a whole.[99] In reaching that conclusion, Crowder looked at the "anti-public norm of inner-city redevelopment" projects that were often agreed to in deals made out of the public eye.[100] Crowder used a case study of an underserved community, where residents learned of a redevelopment plan created by city officials and an educational institution once it had been agreed to. The deal had been in the works for five years, but residents learned about it only after the deal had been made.[101] Further, because the agency overseeing the redevelopment project

[96] *Id*. at 1091.

[97] *Id*. at 1091.

[98] *Id*. at 1076.

[99] *See* Patience A. Crowder, *"Ain't No Sunshine": Examining Informality of State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007).

[100] *Id*. at 625.

[101] *Id*. at 627.

was a quasi-public agency, it argued it was exempt from the open meetings law because of the real-estate nature of the project.[102]

Crowder also relied on state court decisions in Maryland and Wisconsin holding that quasi-public redevelopment agencies were subject to the open meetings laws to argue that open meetings laws should be revised to include redevelopment boards. She did not focus on any specific state's open meetings law when making her recommendations. Beyond amending open meetings laws, Crowder argued that the penalties for violating open meetings laws at the time the article was written in 2007 were "insignificant" and suggested that increasing fines could increase the effectiveness of monetary penalties as a deterrent to violations.[103] She argued that the most common remedies available, including fines, invalidation, and requiring a public body to hold a second meeting as a remedy for an improperly closed meeting, were "inconsequential" and failed to "inspire enough trepidation to discourage willful violations by members of public bodies."[104] Another suggestion that Crowder posited was for local governments "to condition the receipt of public financing on adherence to open meetings laws."[105]

In the 2007 article *Idaho's Open Meetings Act: Government's Guarantee of Openness or the Toothless Promise?,"* Kane analyzed several Idaho Supreme Court decisions to conclude that the supreme court had held that a violation occurred but had not held the public body liable for it.[106] He focused on the state supreme court's decision in *State of Idaho v. Yzaguirre*, where it

[102] *Id*. at 640.

[103] *Id*.

[104] *Id*. at 652.

[105] *Id*. at 653.

[106] Kane, *supra* note 52, at 148-157.

held that county commissioners who had closed a meeting in violation of the act were not liable because they had not "knowingly" violated the law and that it was not done with "evil intent."[107] He argued that the Idaho Supreme Court had undermined the state's purpose of Idaho's open meetings law in serving the public interest by not holding public bodies responsible for violations.[108] He concluded by proposing that the Supreme Court review it's decision in *Yzaguirre* in favor of a broader interpretation of the law that would be more in line with the public interest at stake in the open meetings law.[109]

While laws guaranteeing openness exists, previous research on penalties for violations of those laws reveal problems with sporadic enforcement. Among the problems with enforcement of open meetings laws identified in previous research were poorly drafted laws and excessive judicial and prosecutorial discretion. A review of the previous literature revealed that a national study of penalties for violations of open meetings laws has not been conducted since the 1996 article by Davis, Rivera-Sanchez and Chamberlin.[110] Additionally, no study has looked at states that have changed penalty provisions in the last fifteen years or possible motivations lawmakers had for making the changes. The next section will discuss the questions to be answered in the proposed thesis.

[107] *Id*. at 151-156 (discussing *State of Idaho v. Yzaguirre* 163 P.3d 1183 (2007)).

[108] *Id*. at 160-161.

[109] *Id*. at 159-160.

[110] *See supra* notes 79-82 and accompanying text.

Research Questions

The following are the research questions which the proposed thesis will answer.

- **RQ1:** To what extent do statutes in the fifty states and the District of Columbia provide for civil penalties, criminal penalties and remedies to be applied against public bodies and public officers violating state open meetings laws?
- **RQ2:** In states where penalty provisions for open meetings violations have been changed since 1995, what changes have lawmakers made to civil and/or criminal penalties for violating the state's open meetings laws?
- **RQ3:** In states where lawmakers have changed penalty provisions for open meetings violations since 1995, what do newspaper accounts, FOI audits and surveys from open government organizations including the Indiana Coalition for Open Government and the Citizen Advocacy Center reveal about lawmakers' motivations to change the laws?
- **RQ4:** How do states' statutes relating to penalties for violations of open meetings requirements rate on the scale developed by the Marion Brechner Citizen Access Project?
- **RQ5:** Based on the findings from questions one, two, three and four what suggestions can the researcher make on how current state laws providing for penalties for open meetings violations could be changed or amended to help encourage enforcement and compliance with state open meetings laws in the future?

Methodology

This study required a legal research methodology. Additionally, the methodology and rating scale developed by the Marion Brechner Citizen Access Project was employed in order to aid in rating which state penalty statutes, on their face, appear to best facilitate open meetings.

Legal Research

To carry out the fifty-state statutory study of penalties for violations of open meetings laws a legal research methodology was applied. The researcher used a combination of databases for the primary and secondary sources required to complete this research. The primary sources analyzed in this study included statutes in each of the fifty states and the District of Columbia. Using LexisNexis and Westlaw databases, the open meetings statutes of all fifty states and the District of Columbia, were collected. The statutes were collected by locating them on the

databases' compilation of each state's statutes. In answering the first research question discussed in the previous section, all states' penalty provisions were compared to create a national picture of penalties, appeals and remedial action for open meetings violations across the country. This study focused specifically on state statutes dealing specifically with open meetings.

In providing context and background for this study, especially within the literature review, the study relied on secondary sources including journal articles and periodical articles addressing open meetings issues. The secondary sources came from a variety of law review and policy journals that were accessed through LexisNexis, Westlaw and other databases accessible via UF Smathers Libraries. Other sources, including audits on open meetings violations maintained by state auditors or attorneys general that were available via the Internet or that could be requested, were also considered. Additionally, information and reports compiled by researchers at other centers that monitor sunshine laws such as The Brechner Center for Freedom of Information,[111] the First Amendment Center[112] and the National Freedom of Information Coalition[113] were used.

To answer the second research question discussed in the previous section, records of bills that have become law related to changing civil and/or criminal penalties for open meetings violations were collected. The researcher collected the text of the bills from the Web sites of each state's legislature and from the LexisNexis legislative records, which contain texts of bills that have become law in each state. Further, past and current state laws were collected using the LexisNexis legislative archive, which contains the text of state statutes as they were in past

[111] The Brechner Center for Freedom of Information, The Brechner Center for Freedom of Information Home Page, http://www.brechner.org (last accessed June 16, 2009).

[112] First Amendment Center, First Amendment Center Home Page, http://www.firstamendmentcenter.org (June 16, 2009).

[113] National Freedom of Information Coalition, National Freedom of Information Coalition Home Page, http://www.nfoic.org (last visited June 16, 2009).

years. The text of statutes related to penalty provisions before being changed were found searching the state's legislative archive using statute citations. Having the text of laws before and after penalty for violations of open meetings laws were enacted allowed for a comparison of each state's laws.

To answer the third research question discussed in the previous section related to motivations, published or otherwise publicly revealed, that lawmakers had for changing penalty provisions, newspaper accounts were collected from each state using LexisNexis Academic News Module. Because state legislative histories or other records of discussions and debates in state legislatures are very difficult to obtain, newspaper accounts containing interviews with open government advocates, the public and the lawmakers who either supported or opposed changes to penalty provisions provided most of the information to determine the reasons spurring changes to penalties for violating open meetings laws. Additional sources for understanding motivations for and against changes came from two surveys done by open government organizations in individual states, the Indiana Coalition for Open Government and the Citizen Advocacy Center, which have addressed enforcement of open meetings laws. A survey conducted by the Indiana Coalition surveyed people who had filed complaints of open meetings violations with Indiana's Public Access Counselor.[114] Among other things, the survey found that that sixty-nine percent of those surveyed said the Public Access Counselor had advised them that they should have access to the record or meeting in question and could pursue action in court to

[114] Yunjuan Luo & Anthony L. Fargo, Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study (2008), http://indianacog.org/files/PAC_final2.pdf.

gain access.[115] However, only nineteen percent of those people said they had pursued further legal action to obtain access.[116]

The study conducted by the Citizen Advocacy Center surveyed open meetings laws in five Midwest states, finding that all five states had a variety of enforcement and penalty provisions but experienced spotty enforcement that led to public bodies being "less likely to be responsive for information requests and more likely to inappropriately deny them."[117]

To help in answering the third research question, the researcher considered initiating phone calls to individual states discussed, that could not have been done with an acceptable methodology given the rest that was done for the thesis.

Marion Brechner Citizen Access Project

To answer the fourth research question discussed in the previous section dealing with the relative strength of each state's penalty provisions, the Marion Brechner Citizen Access Project's ratings system was used. [118] The Marion Brechner Citizen Access Project (MBCAP) was started in 1998 and is the first study to "rank all state public records and open meeting laws in their entirety."[119] The project combines legal research and social science methods to rate the many provisions in open records and open meetings statutes for openness.[120] The project's social

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[115] *Id*. at 10

[116] *Id*.

[117] Citizen Advocacy Center, Accessing Government: How Difficult Is It? 5 (2008), http://www.citizenadvocacycenter.org/OpenGovt/CAC_GovReports_Full_Digital.pdf.

[118] Marion Brechner Citizen Access Project, Marion Brechner Citizen Access Project Home Page, http://www.citizenacces.org (last visited June 16, 2009).

[119] Bill F. Chamberlin, Cristina Popescu, Michael F. Weigold & Nissa Laughner, *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J.L. & PUB. POL'Y 415, 416 (2008).

[120] *Id*.

science component is based on grounded theory, which allows for the contents of the state's statutes to guide the development of the categories, or provisions of the laws, to be rated.[121] Each state's law related to a particular provision of the open meetings or open records law is compiled and given to members of the Sunshine Advisory Board (SAB), who "compare the relative 'openness' of states within each category of information."[122] The SAB's ratings are averaged and weighted, based on whether the provisions are derived from a state constitution, a state supreme court opinion, a state statute, a federal appellate court opinion, a state administrative body, or an attorney general to yield its final sunshine rating.[123]

The project's rating system helps gauge how particular provisions in a state's open meetings or open records law maximize or minimize "openness."[124] Using the project's grounded theory methodology allowed for each aspect of penalty provisions, such as injunctions, criminal penalties or civil penalties, in each state to be categorized and analyzed against similar provisions in states across the country. As a researcher for the MBCAP, the author of this thesis is familiar with the ratings process and put the data found through the researching process for this thesis in the project's format for rating. The MBCAP ratings system was useful in developing the analysis section of the proposed thesis by helping to determine the "relative

[121] *Id*. at 423.

[122] *Id*. at 426, 431.

[123] *Id*. at 434, 433 (The MBCAP uses a 10-point weighting scale: 9.6 points for state constitution, 8.84 points for state supreme court opinions, 7.62 points for state statutes, 7.28 points for federal appellate court opinions, 6.5 points for state appellate court opinions, 5.38 points for federal trial court opinions, 5.28 points for state administrative bodies with legal authority and 4.08 points for state attorney general opinions. These weights are applied to the SAB's ratings to yield a score from 1-7. A score of 7 means "sunny." A score of 6 means "mostly sunny." A score of 5 means "sunny with clouds."A score of 4 means "partly cloudy" or "neither more open" nor "more closed." A rating of 3 means "cloudy." A rating of 2 means "almost dark" and 1 is "dark" or "completely closed.").

[124] *Id*. at 441- 442.

'openness'" of each state's open meetings law as it relates to penalties and remedies available for enforcement of each state's open meetings law.

Development of Model Law

Finally, the fifth research question discussed in the previous section was answered through the researcher's interpretation of the data collected and analyzed in addressing questions one, two, three and four. The suggestions for improvement and model law were developed based on the researcher's findings as discussed and analyzed in Chapters Two, Three and Four. The suggestions and model law were a product of the research in this thesis and in this way the researcher hopes to further scholarship in the field by proposing areas of improvement in the law based on the findings from: 1) the fifty-state study of penalties and remedies currently available in state open meetings laws; 2) the study of states that have recently changed their laws; 3) the study of the possible motivations lawmakers had for changing those laws, as available in published record; 4) concerns expressed by those opposed to changes in penalty provisions made in states that have changed their laws since 1995, as available in published record; 5) and the results of the MBCAP survey.

The fifty-state study yielded insight into which penalties and remedies for open meetings violations have been the most and the least adopted across the country. The study of states that have changed penalty provisions in open meetings laws since 1995 and the published record of those who either supported or opposed the law yielded insight into motivations for changing the law on the part of supporters and concerns about changing the law on the part of opponents. Addressing the motivations of supporters and the concerns of opponents as addressed in the published record yielded information about how penalty provisions could be improved to address the goals of supporters and concerns of opponents to changes in penalties for violations of open meetings laws. Finally, the MBCAP survey yielded insight into how experts in open government

perceive current civil and criminal penalties in states that include such penalties in open meetings laws and help identify those penalties that the surveyed experts identify as providing the most sunshine and the least sunshine. Based on the researcher's analysis of each of these aspects, the suggestions for improvement of penalties for violations of open meetings laws and the model penalties statute were developed.

Conclusion

As demonstrated by the previous research discussed in this chapter, open meetings violations persist and questions about the efficacy of penalties for violations of open meetings laws and enforcement of those laws have been asked virtually since the majority of states began adopting open meetings laws in the late 1950s and 1960s. Conspicuously absent in the previous research was any article arguing that penalties were effective and being enforced. Additionally, violations of open meetings laws continue to make the news.[125] The following chapters will review the penalties and remedies provided in the open meetings laws of every state and the District of Columbia, look at states that have changed their penalties since 1995 and possible motivations for those changes. Additionally, this study will discuss the findings of a survey conducted using the MBCAP methodology that asked members of the board to rate the civil and criminal penalties available in some states' open meetings laws across the country. Through the research and analysis that will be discussed in the following chapters, this thesis will identify areas where penalty provisions could be improved and conclude by developing a model law that may provide a framework for states updating the penalty provisions for open meetings laws, many of which have not been updated in decades.

[125] *See e.g. supra* notes 1-2, 9-11 and accompanying text.

CHAPTER 2
PENALTIES AND REMEDIES IN STATE STATUTES ACROSS THE COUNTRY

This chapter will review the findings of the study that looked at penalties and remedies provided in open meetings laws in the fifty states and the District of Columbia. Across the country, all states make available either penalties or remedies, or both, for violations of a state's open meetings law. The District of Columbia, however, does not address penalties or remedies for violations of the open meetings law.

In all, the study yielded fourteen different categories addressed by at least one state statute. The statutory categories will be discussed in the chapter as follows:

- Civil Penalties
- Criminal Penalties
- Invalidation and Cures
- Removal from Office
- Awarding of Attorneys' Fees and Court Costs
- Who Pays Attorneys' Fees, Court Costs and Penalties
- Injunctions
- Declaratory relief
- Writ of mandamus
- Who Can Bring Actions to Enforce a State's Open Meetings Law
- Statute of Limitations
- Litigation Priority
- Burden of Proof
- Fees and Fines Assessed Against Plaintiff for Frivolous Suits

Penalties for Open Meetings Violations

According to Russell Weaver, a law professor, courts punish persons who violate laws in order to "to deter similar misconduct" by others and to "express social disapproval" for the behavior that resulted in a violation of the law.[1] Legal scholars also frequently say that courts use penalties to return a person to the position he or she may have been in if it had not been for

[1]*See, e.g.*, RUSSELL WEAVER ET AL., PRINCIPLES OF REMEDIES LAW 2 (2007); JAMES M. FISCHER, UNDERSTANDING REMEDIES 695 (1999).*Weaver* 695.

the wrong.[2] In the case of open meetings laws, states try to use civil and criminal penalties, invalidation of illegal meetings and required reimbursement of attorneys' fees to punish violation of the law. [3] To restore the status quo before the violation of the open meetings laws is a much more difficult challenge. A citizen was prohibited from a meeting and therefore was unable to participate in the decision making process at that meeting. Will forcing the government agency to reconvene the meeting, maybe arriving at the same decision already reached, really provide an adequate legal remedy? States struggle with the answer to that question. States also struggle to find a way ensure that laws that are passed are enforced.

Across the country, thirty-eight states provide for civil penalties, criminal penalties, or both, for violations of the open meetings laws. Five states—Connecticut,[4] Florida,[5] Georgia,[6]

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[2] *See e.g. id* at 2.

[3] DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 6 (3rd ed. 2002).

[4] CONN. GEN. STAT. § 1-206(2) (2008) (stating that if the state's committee in charge of reviewing complaints for violations of the open meetings law finds that a violation has occurred, it may levy a civil penalty against the violating official of "not less" than $20 nor more than $1,000); CONN. GEN. STAT. § 53a-42 (2008); CONN. GEN. STAT. § 53a-36 (2008); CONN. GEN. STAT. § 1-240 (2008) (stating that any member of a public agency who fails to comply with an order from the state body responsible for enforcing the open meetings law is guilty of a Class B misdemeanor. A conviction for a Class B misdemeanor can carry a fine of "not to exceed" $1,000 and a jail term "not to exceed" 6 months.).

[5] FLA. STAT. ANN. § 286.0105(3)(a) (2009) (stating that "any public officer" who violates the state's open meetings law is guilty of space "noncriminal infractions," punishable by a fine "not exceeding" $500.); FLA. STAT. ANN. § 775.082(4)(b) (2009); FLA. STAT. ANN. § 286.011(3)(b)&(c) (2009); FLA. STAT. § 775.083(1)(e) (2009) (stating that any member of a public body "who knowingly violates" the state's open meetings law "by attending a meeting not held in accordance with the provisions" of the law is guilty of a misdemeanor of the second degree. Additionally, "conduct which occurs outside the state which would constitute a knowing violation" of the open meetings law is also a second degree misdemeanor. Any person convicted of a misdemeanor of the second degree faces a term of imprisonment "not exceeding 60 days." Additionally, a fine of "not to exceed" $500 may be assessed against a person convicted of a second degree misdemeanor. The fine may be assessed in addition to—or in lieu of—jail time.).

[6] GA. CODE ANN. §50-14-5 (2009) (stating that the state's attorney general "shall have the authority" and "discretion" to enforce the state's open meetings law "through either civil or criminal penalty."); GA. CODE ANN. § 50-14-6 (2009) (stating that under the state's open meetings law, "any person knowingly and willfully conducting or participating in a meeting" that violates the law "shall be" guilty of a misdemeanor and upon conviction "shall be" punished by a fine "not to exceed" $500.).

Michigan[7] and North Dakota[8]—provide for both civil and criminal penalties in the state open meetings laws. Twelve states' laws do not specifically include civil or criminal penalties for open meetings law violations. Those states are Alaska,[9] Colorado, [10] Delaware, [11] Indiana, [12] Kentucky, [13] Massachusetts, [14] Montana, [15] New Hampshire, [16] New York, [17] North Carolina, [18] Oregon[19] and Tennessee. [20]

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[7] MICH. COMP. LAWS. SERV. § 15.273(3) (2009) (stating that a person who "intentionally violates" the state's open meetings laws "shall be personally liable" for penalties in a civil court action "of not more" than $500, "plus court costs and actual attorney fees to the person or group who brought the action."); MICH. COMP. LAW SERV. § 15.272 (2009) (stating that any public official "who intentionally violates" the state's open meetings law is guilty of a misdemeanor punishable by a fine of "not more than" $1,000 for the first offense. If the same official is convicted again for an open meetings law violation during the same term, the official "shall be" guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.).

[8] N.D. CENT. CODE, § 44-04-21.2 (2009) (for any "intentional or knowing" violations of the state's open meetings law, a court "may" award damages of $1,000 or "actual damages caused by the violation, whichever is greater."); N.D. CENT. CODE, § 44-04-21.3 (2009); N.D. CENT. CODE, § 12.1-32-01(5) (2009) (stating that under the state's open meetings law, "a public servant…who knowingly violates" the open meetings laws is guilty of a class A misdemeanor. Class A misdemeanors carry a maximum penalty of one year's imprisonment, a fine of $2,000, or a combination of both.).

[9] ALASKA STAT. §§ 44.62.310-.312 (2009).

[10] COLO. REV. STAT. §§ 24-6-401 to 402 (2008).

[11] DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009).

[12] IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009).

[13] KY. REV. STAT. ANN. §§ 61.800 - .850 (2009).

[14] MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009).

[15]MONT. CODE ANN. §§ 2-3-101 to -221 (2007).

[16] N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009).

[17] N.Y. PUB. OFF. LAW §§ 100-107 (2009).

[18] N.C. GEN. STAT. §§ 143-318.9 to .18 (2009).

[19] OR. REV. STAT. §§ 192.610-.710 (2007).

[20] TENN. CODE ANN. §§ 8-44-101 to -111 (2009).

The following sections will discuss states that provide for civil penalties followed by states that provide for criminal penalties. Additionally, other penalties provided for in state open meetings laws will be discussed including: Invalidation, which declares null and void action taken at a proceeding that violated the law, addressed in thirty-seven states; and removal from office of the violating public official, addressed in five states. Also, the return of attorneys' fees to prevailing plaintiffs, addressed in thirty-seven states, and the eleven states that address who pays for fees and fines associated with penalties for violations will be discussed.

Civil Penalties

A civil penalty is one that is imposed by a court that requires a person or entity found to have violated a state's open meetings law to pay for the wrong committed.[21] In all, twenty-two states provide for civil penalties to be levied against violators of the law in the state's open

[21] BLACK'S LAW DICTIONARY (4th ed. 2004).

meetings law. [22] Table 2-1, located at then end of this chapter, contains a complete listing of states that have civil penalties.[23]

Scholars have argued that civil penalties can be effective as a remedy because they can be used to penalize an individual violator of the law, as opposed to all members of a public body or the agency itself.[24] Through civil penalties, individual members of a body who are found to have violated the law can be held personally liable for paying a fine.[25] In addition, the burden of proof for civil penalties, typically by a preponderance of evidence, is less than for criminal penalties, which requires proof beyond a reasonable doubt.[26] The lower burden of proof may

[22] *See* ALA. CODE § 36-25A-9(g) (2009); ARIZ. REV. STAT. § 38-431.07(A) (2008); CONN. GEN. STAT. § 1-206(c) (2008); FLA. STAT. ANN. § 286.011(3)(a) (2009); GA. CODE ANN. § 50-14-5 (2009); IDAHO CODE ANN. § 67-2347(2) (2008); IOWA CODE § 21.6(3)(a)(1) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); LA. REV. STAT. ANN. § 42:13 (2009); ME. REV. STAT. ANN. tit. 1, § 410 (2009); MD. CODE ANN. GOVERNMENT § 10-511 (2008); MICH. COMP. LAWS. SERV. § 15.273(3) (2009); MINN. STAT. § 13D.06(1) (2008); MISS. CODE ANN. § 25-41-15 (2008); MO. REV. STAT. § 610.027(3) (2009); N.J. REV. STAT. § 10:4-17 (2009); N.D. CENT. CODE § 44-04-21.2 (2) (2009); OHIO REV. CODE ANN. § 121.22(I)(1) (2009); R.I. GEN. LAWS. § 42-46-8 (2009); VA. CODE ANN. § 2.2-3714 (2009); WASH. REV. CODE ANN. § 42.30.120(1) (2009); WIS. STAT. § 19.96 (2008). The following twenty-eight states and the District of Columbia do not address civil penalties in the state's open meetings laws: ALASKA STAT. §§ 44.62.310-.312 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); CAL. GOV'T CODE §§ 54950-54963 (2008); CAL. GOV'T CODE §§ 11120-11132 (2008).COLO. REV. STAT. §§ 24-6-401 to 402 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008). N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); 65 PA. CONS. STAT. §§ 701-716 (2008); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); W. VA. CODE §§ 6-9A-1 to -6 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[23] *See, infra*, pp. 106.

[24] *See* Charles N. Davis, et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 55 (1996) [hereinafter *Sunshine Laws*].

[25] ANN TAYLOR SCHWING , OPEN MEETINGS LAWS 2D 508 (2d ed. 2000).

[26] *Id*. at 509.

also make those enforcing open meetings laws, such as state and county attorneys, "more willing to seek civil penalties for violations."[27]

However, civil penalties also may prove more difficult to impose for violations of open meetings laws in states that allow officials to use a "good faith" defense to argue that a violation was unintentional, or argue that the violation was not committed with the knowledge that the action was a violation of the state's open meetings law. [28] Of the twenty-two states that provide for civil penalties to be imposed for violations, only six states do not specify that the violation must have been knowingly or intentionally committed. Those states are Alabama,[29] Connecticut,[30] Florida,[31] Iowa[32] and Ohio.[33] The other sixteen states limit the imposition of penalties to instances where it is found that the violation was a "knowing" or "willful."[34] Table 2-1, located at the end of this chapter, contains a complete listing of states that have civil penalties.[35]

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[27] Schwing, *supra* note 25, at 509.

[28] *Sunshine Laws*, *supra* note 24, at 54.

[29] ALA. CODE § 36-25A-9(g) (2009).

[30] CONN. GEN. STAT. § 1-206(c) (2008).

[31] FLA. STAT. ANN. § 286.011(3)(a) (2009).

[32] IOWA CODE § 21.6(3)(a)(1) (2008).

[33] OHIO REV. CODE ANN. § 121.22(I)(1) (2009).

[34] ARIZ. REV. STAT. § 38-431.07(A) (2008); IDAHO CODE ANN. § 67-2347(2) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); LA. REV. STAT. ANN. § 42:13 (2009); ME. REV. STAT. ANN. tit. 1, § 410 (2009); MD. CODE ANN. GOVERNMENT § 10-511 (2008); MICH. COMP. LAWS. SERV. § 15.273(3) (2009); MINN. STAT. § 13D.06(1) (2008); MISS. CODE ANN. § 25-41-15 (2008); MO. REV. STAT. § 610.027(3) (2009); N.J. REV. STAT. § 10:4-17 (2009); N.D. CENT. CODE § 44-04-21.2 (2) (2008); R.I. GEN. LAWS. § 42-46-8 (2009); VA. CODE ANN. § 2.2-3714 (2009); WASH. REV. CODE ANN. § 42.30.120(1) (2009); WIS. STAT. § 19.96 (2008).

[35] *See, infra*, pp. 106.

The penalties range from not less than $25 [36] for any member of a governmental body who "knowingly" attends a meeting of a governmental body held in violation of the law to a penalty "not to exceed $5,000 against a public body or any of its members found to have committed a 'willful or knowing violation'."[37] Alabama,[38] Connecticut,[39] Florida,[40] Iowa,[41] laws allow "any" person or member of a public body to be assessed damages if found guilty of violating the state's open meetings law. Additionally, Idaho,[42] New Jersey,[43] South Carolina[44] and Virginia[45]

[36] WIS. STAT. § 19.96 (2008).

[37] R.I. GEN. LAWS. § 42-46-8 (2009).

[38] ALA. CODE § 36-25A-9(g) (2009) (stating that for each meeting proven by a preponderance of evidence before state court to have violated the state's open meetings law a civil penalty may be levied. For each meeting violated, the penalty "shall not exceed" $1,000 or one half of the defendant's monthly salary for service on the governmental body, whichever is less. The penalty shall not be paid by the governmental body nor reimbursed by the governmental body to the official that was penalized.).

[39] CONN. GEN. STAT. § 1-206(c) (2008) (stating that if a violation of the Connecticut Freedom of Information Act is found after review by the Freedom of Information Commission, the commission may levy a civil penalty against the violating official of "not less" than $20 nor more than $1,000.).

[40] FLA. STAT. ANN. §286.011 (3)(a) (2009) (stating that "any public officer" who violates Florida's open meetings law is guilty of a noncriminal infractions, punishable by fine not exceeding $500.).

[41] IOWA CODE § 21.6(3)(a)(1) (2008).

[42] IDAHO CODE ANN. § 67-2346(2) (2008) (stating that any member of a governing body "who knowingly conducts or participates in a meetings" that violates the open meetings laws "shall be subject" to a civil penalty not to exceed $150 for the first violation and not to exceed $300 "for each subsequent violation." The penalties were increased in 2009 and now provide that any member of a governing body who participates in a meeting in violation of the open meetings law "shall be subject" to a civil penalty not to exceed $50. Additionally, any member of a governing body who "knowingly" violate the open meetings law shall be subject to a civil penalty not to exceed $500. The new law also contains a provisions requiring that any member of a governing body who is found to have violated the open meetings law for a second or subsequent "shall be subject" to a civil fine of up to $500.); *See also* S.B. 1142, 60th Leg., 1st Reg. Sess. (Id. 2009).

[43] N.J. REV. STAT. § 10:4-17 (2009) (stating that any person who "knowingly" violates the law "shall be fined" $100 for the first offense and no less than $100 nor more than $500 for any subsequent offense.).

[44] S.C. CODE ANN. § 30-4-110 (2008) (any person who "willfully" violates the Freedom of Information Act "shall be deemed guilty of a misdemeanor and upon conviction shall be fined" not more than $100 or imprisoned for not more than 30 days for the first offense, not more than $200 and not more than sixty days for the second offense and not more than $300 or imprisoned for not more than ninety days for the third and any further subsequent offense.)

specify civil penalties to be imposed for violations of open meetings laws on an incremental basis for subsequent violations.

Some laws also distinguish whether the penalty should be assessed against the entire governmental body,[46] the violating official,[47] or both.[48] For example, in Alabama, for each meeting proven by a preponderance of the evidence before state court to have violated the state's open meetings law a civil penalty may be levied.[49] For each meeting violated, the penalty "shall not exceed" $1,000 or one half of a defendant's monthly salary for service on the governmental body, whichever is less.[50] The penalty shall not be paid by the governmental body nor reimbursed by the governmental body to the official that was penalized.[51] The penalty also specifically applies to members of a governing body who voted to go into executive session and remained there during a discussion found by a court to have violated the law.[52] The penalty

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[45] VA. CODE ANN. § 2.2-3714 (2009) (stating that if the state's court "finds that a violation was willfully and knowingly made" the court shall impose upon the violating member of a public body a civil penalty of not less than $ 250 nor more than $ 1,000, which amount shall be paid into the State Literary Fund. For a second or subsequent violation, the civil penalty shall be not less than $ 1,000 nor more than $ 2,500.)

[46] *See e.g.* MISS. CODE ANN. § 25-41-15 (2008); OHIO REV. CODE ANN. § 121(I)(1) (2009).

[47] ARIZ. REV. STAT. § 38-431.07(A) (2008); CONN. GEN. STAT. § 1-206(2) (2008); FLA. STAT. ANN. § 286.0105(3)(a) (2009); IDAHO CODE ANN. § 67-2347(2) (2008); IOWA CODE § 21.6(3)(a)(1) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); LA. REV. STAT. ANN. § 42:13 (2009); MD. CODE ANN. GOVERNMENT § 10-511 (2008); ME. REV. STAT. ANN. tit. 1, § 410 (2009); MICH. COMP. LAWS. SERV. § 15.273(3) (2009); MINN. STAT. § 13D.06(1) (2008);MO. REV. STAT. § 610.027(3) (2009); VA. CODE ANN. § 2.2-3714 (2009); R.I. GEN. LAWS § 42-46-8 (2009); WASH. REV. CODE ANN. § 42.30.120(1) (2009); WIS. STAT. § 19.96 (2008).

[48] *See e.g.* MO. REV. STAT. § 610.027(3) (2009); R.I. GEN. LAWS. § 42-46-8 (2009).

[49] ALA. CODE § 36-25A-9(g) (2009).

[50] *Id*.

[51] *Id*.

[52] *Id*.

"shall not be" paid by the governmental body the officials serves, nor reimbursed to the official by the governmental body.[53]

The potentially heaviest monetary penalties were in North Dakota and Rhode Island. In North Dakota, for "intentional or knowing" violations of the open meetings law the court may award damages of $1,000 or "actual damages caused by the violation, whichever is greater."[54]

Rhode Island courts "may impose" the heaviest civil fine in the country, to its extreme up to $5,000 against a public body or any of its members found to have committed a "willful or knowing violation."[55]

Connecticut law provides for a much wider range in civil penalties. According to the state's law if a violation of the Freedom of Information Act is found after review by the Freedom of Information Commission, the commission may levy a civil penalty against the violating official of "not less" than $20 nor more than $1,000.[56]

The remaining states statutes are fairly similar with varying monetary penalties. Maryland and Louisiana law require that a penalty for an open meetings violation "not to exceed" $100.[57] In Washington, each member of the governing body who attends a meeting where action is taken in violation of the Washington open meetings law, with "knowledge of the fact that the meeting is in violation" of the law "shall be" personally liable for a civil penalty in the amount of $100.[58]

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[53] *Id*.

[54] N.D. CENT. CODE, § 44-04-21.2 (2009).

[55] R.I. GEN. LAWS § 42-46-8 (2009).

[56] CONN. GEN. STAT. § 1-206(2) (2008).

[57] MD. CODE ANN. GOVERNMENT § 10-511 (2008); LA. REV. STAT. ANN. § 42:13 (2009).

[58] WASH. REV. CODE ANN. § 42.30.120(1) (2009).

Georgia does not specify minimums and maximums for a penalty, only stating that the state's attorney general "shall have the authority" and discretion to enforce the state's law through civil penalty.[59] According to Minnesota's open meetings law, "any person who intentionally violates" the Open Meetings Law "shall be subject to" a civil penalty of not more than $300 "for a single occurrence." The penalty "may not be paid by the public body."[60] In Arizona,[61] Kansas, [62] Florida, [63] Maine[64] and Michigan, [65] the courts may impose a $500 penalty for violations.

In Iowa, the open meetings law does not require that a public official knowingly or willfully commit the law to be subject to penalties for violations. However, the state's open meetings law specifies situations in which the penalty "shall not be assessed." The penalty "shall not be assessed" if a member proves: 1) the member voted against the closed session which violated the law; 2) the member "had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements" of the law; or 3) the

[59] GA. CODE ANN. § 50-14-5 (2009).

[60] MINN. STAT. § 13D.06(1) (2008).

[61] ARIZ. REV. STAT. § 38-431.07(A) (2008) (stating that for each violation of the state's Public Meetings and Proceedings law, the court "may impose" a civil penalty "not to exceed" $500 against a person who violates the law or who "knowingly aids, agrees to aid or attempts to aid another person in violating this article").

[62] KAN. STAT. ANN. § 75-4320(a) (2008) (According to Kansas' open meetings law, "any member" of a body or agency "who knowingly violates" the law or who "intentionally fails to furnish information" is subject to a civil penalty "not to exceed" $500 for each violation.).

[63] FLA. STAT. ANN. § 286.0105(3)(a) (2009) (stating "[a]ny public officer" who violates Florida's open meetings law is guilty of a noncriminal infractions, punishable by fine not exceeding $500).

[64] ME. REV. STAT. ANN. tit. 1, § 410 (2009) (stating that every "willful violation" of the open meetings law, the agency or officer who committed the violation "shall be liable for a civil violation" of not more than $500.).

[65]MICH. COMP. LAWS. Serv. § 15.273(3) (2009) (stating that a person who "intentionally violates" Michigan's open meetings laws "shall be personally liable" in a civil action for damages "of not more" than $500, plus court costs and actual attorney fees to the person or group who brought the action.).

member "reasonably relied upon" a decision of a court or a formal opinion of the attorney general or attorney for the governmental body. Under Iowa law, the court "shall" assess each member of a governmental body who violates the law a penalty of no less than $100 and not more than $500.[66]

In addition, several states include other provisions for civil penalties that set them apart from the other states. In two states—Wisconsin and Missouri—their laws include situations in which a penalty may not be imposed for a violation of the open meetings law. In Wisconsin, any member of a governmental body, who "knowingly" violates the state's open meetings law, "shall forfeit without reimbursement" not less than $25 nor more than $300 for each such violation.[67] A member of a governmental body is not liable, however, for attending a meeting held in violation of the state's open meetings law if the member makes or votes in favor of a motion to prevent the violation from occurring.

Missouri law is the only state that when imposing civil penalties differentiates between a violation that was "knowingly" committed and one that was "purposefully" committed.[68] Although the law does not define what constitutes violations that were "purposefully" committed or "knowingly" committed, the amount of the penalty imposed for a purposeful or knowing violation differs. Upon a finding by a preponderance of evidence by state court that a government body or member of that government body "knowingly violated" the open meetings law that member or body shall be subject to a civil penalty in an amount up to" $1000.If a member of government body is found by a preponderance of evidence to have "purposely"

[66] IOWA CODE § 21.6(3)(a)(1) (2008).

[67] WIS. STAT. §§ 19.81-.98 (2008).

[68] MO. REV. STAT. § 610.027(3) (2009).

violated the open meetings law that member or body "shall be subject to a civil penalty" up to $5,000. According to Missouri law, the court "shall determine" the amount of the penalty by taking into account: 1) the size of the jurisdiction; 2) the seriousness of the offense; and 3) whether the public governmental body or member of the body has previously violated the law.

Finally, Ohio and Mississippi were the only states to require the penalty be imposed against the public body with no mention of penalties against the violating official. According to Mississippi law, the Mississippi Ethics Commission, after finding that a public body "has willfully and knowingly violated" the open meetings law, "may impose" a civil penalty not to exceed $100, "plus all reasonable expenses incurred by the person or persons in bringing the complaint."[69] Similarly, according to Ohio's open meetings law, "upon proof of a violation or threatened violation" of the state's open meetings law, the state's court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." If an injunction is issued, the court "shall" order the public body to pay a civil penalty of $500 to the party that sought the injunction.[70]

Criminal Penalties

State laws also may provide for criminal penalties to be imposed for open meetings violations. In all, twenty-one states provide for officials who violate open meetings laws to be convicted of misdemeanor criminal offenses.[71] Of those, five states—Connecticut, Florida,

[69] MISS. CODE ANN. § 25-41-15 (2008)

[70] OHIO REV. CODE ANN. § 121.22(I)(1) (2009).

[71] ARK. CODE ANN. § 25-19-104 (2008); Cal Gov's Code § 11130.7 (2008); CAL. GOV'T CODE § 54959 (2008); CONN. GEN. STAT. § 1-240 (2008) FLA. STAT. ANN. § 286.011(3)(b) (2009); GA. CODE ANN. § 50-14-6 (2009); HAW. REV. STAT. § 92-13 (2009); 5 ILL. COMP. STAT. ANN. 120/4 (2009); MICH. COMP. LAWS SERV. § 15.272 (2009); NEB. REV. STAT. ANN. § 84-1414 (2009); NEV. REV. STAT. ANN. § 241.040(1) (2009); N.M. Stat. Ann. § 10-15-4 (2008); N.D. CENT. CODE § 44.04.21.3 (2009); OKLA. STAT. tit. 25, § 314 (2009); 65 PA. CONS. STAT. § 714 (2008); S.C. CODE ANN. § 30-4-110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TEX. GOV'S CODE ANN. § 551.144(a)-(c) (2007); UTAH CODE ANN. § 52-4-305 (2008); VT. STAT. ANN. tit. 1, § 314(a) (2009); WASH. REV.

Georgia, Michigan and North Dakota—also provide for civil penalties, which were discussed in the previous section. Table 2-2, located at the end of this chapter, contains a complete listing of states that have criminal penalties.[72]

Imposing criminal penalties for open meetings violations, much like the civil penalties discussed earlier, has been found by scholars and attorneys to have some drawbacks. Davis et al., have argued that criminal penalties are too strong a sanction and could potentially discourage people from seeking office.[73] Additionally, a survey conducted in the mid-1990s of local enforcement of open meetings penalties by local prosecutors found that "enforcement of open meetings laws is a rare occurrence, and most prosecutors do not view criminal prosecution as a practicable remedy for the majority of open meetings violations."[74] Additionally, penalty provisions containing criminal penalties give prosecutors a great deal of discretion in determining how to prosecute violations.[75] Such discretion could facilitate prosecutorial

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CODE ANN. § 42.30.120(1) (2009); W. VA. CODE § 6-9A-7(a) (2008); WYO. STAT. § 16-4-408(a) (2008). The following twenty-eight states and the District of Columbia do not address criminal penalties for open meetings violations: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ALASKA STAT. §§ 44.62.310-.312 (2009); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009); IOWA CODE §§ 21.1-.11 (2008); KAN. STAT. ANN. §§ 75-4317 to -4320b (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); LA. REV. STAT. ANN. §§ 42:1-:13 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MO. REV. STAT. §§ 610.010- .035 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WIS. STAT. §§ 19.81-.98 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[72] *See, infra,* pp. 107.

[73] *See generally Sunshine Laws*, *supra* note 24.

[74] *See* Charles N. Davis, et al., *Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. L. & POL'Y 35, 50,54 (1998) [hereinafter *Guardians of Access*].

[75] *See* Mandi Duncan, *The Texas Open Meetings Act: In Need of Modification or All Systems Go?*, 9 TEX. TECH. ADMIN. L.J. 315, 327 (2008) (discussing the Texas Open Meetings Act).

reluctance in bringing claims against "political brethren" or conversely result in over-eagerness to bring claims against opponents.[76]

According to attorney Ann Taylor Schwing, criminal penalties, unlike other penalties, may be viewed by county and state attorneys, charged with seeking the penalties, with some trepidation because of the stigma associated with a criminal conviction.[77] Additionally, criminal penalties also carry a higher burden of proof than civil penalties. Compared with the preponderance of evidence standard required for civil penalties, criminal penalties require the heavier burden of proof of beyond a reasonable doubt. This may make criminal penalties more difficult to obtain in court than civil penalties.[78]

Upon conviction, criminal penalties could include jail time, fines or both. In all states providing for criminal penalties to be imposed for violations of open meetings laws, the penalties are misdemeanors. In no state is a violation of the open meetings laws a felony. Seventeen states restrict convictions to knowing or willful violations.[79] Five states—Arkansas, Connecticut, Illinois, New Mexico and South Dakota—make no such specification.[80] In one state, Washington, the state's open meetings law specifically states that a violation "does not constitute

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[76] *Id*.

[77] Schwing, *supra* note 25, at 509.

[78] *Id* at 496-497.

[79] ARK. CODE ANN. § 25-19-104 (2008); CAL GOV'T CODE § 11130.7 (2008); CAL. GOV'T CODE § 54959 (2008); FLA. STAT. ANN. § 286.011(3)(b) (2009); GA. CODE ANN. § 50-14-6 (2009); HAW. REV. STAT. § 92-13 (2009); MICH. COMP. LAWS SERV. § 15.272 (2009); NEB. REV. STAT. ANN. § 84-1414 (2009); NEV. REV. STAT. ANN. § 241.040(1) (2009); N.D. CENT. CODE § 44.04.21.3 (2009); OKLA. STAT. tit. 25, § 314 (2009); 65 PA. CONS. STAT. § 714 (2008); S.C. CODE ANN. § 30-4-110 (2008); TEX. GOV'T CODE ANN. § 551.144(a)-(c) (2007); UTAH CODE ANN. § 52-4-305 (2008); VT. STAT. ANN. tit. 1, § 314(a) (2009); W. VA. CODE § 6-9A-7(a) (2008); WYO. STAT. § 16-4-408(a) (2008).

[80] ARK. CODE ANN. § 25-19-104 (2008); CONN. GEN. STAT. § 1-240 (2008); 5 ILL. COMP. STAT. ANN. 120/4 (2009); N.M. STAT. ANN. § 10-15-4 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009).

a crime."[81] See Table 2-2, located at the end of this chapter, which contains a complete listing of states that have criminal penalties and each state's requirements for imposing penalties for such violations.[82]

Two states only specify jail sentences for a violation of open meetings laws. South Dakota allows for a person to be convicted of a Class 2 misdemeanor that is punishable by thirty or less days of imprisonment.[83] Utah law provides that a person who knowingly or intentionally violates the law or abets or advises a violation be found guilty of a class B misdemeanor, which in Utah is punishable by a jail term "not exceeding" six months.[84]

In six states misdemeanor convictions for violations of the open meetings law are punishable through a monetary fine.[85] The fines range from not more than $100 per violation to not more than $750.[86] Arkansas and Pennsylvania require the misdemeanor to be penalized with a fine not exceeding $100.[87] Laws in Georgia, [88] New Mexico, [89] Vermont[90] and West

[81] WASH. REV. CODE ANN. § 42.30.120(1) (2009).

[82] *See, infra,* pp. 107.

[83] S.D. CODIFIED LAWS § 1-25-1 (2009); S.D. CODIFIED LAWS § 23A-45-9 (2009).

[84] UTAH CODE ANN. § 52-4-305 (2008); UTAH CODE ANN. § 76-3-204(2) (2008).

[85] ARK. CODE. ANN. § 25-19-104 (2008); ARK. CODE ANN. § 5-4-201(b)(3) (2008); GA. CODE ANN. § 50-14-6 (2009); N.M. STAT. ANN. § 10-15-4 (2008); 65 PA. CONS. STAT. § 714 (2008); VT. STAT. ANN. tit. 1, § 314 (2009); W. VA. CODE § 6-9A-7(a) (2008).

[86] ARK. CODE ANN. § 25-19-104 (2008); GA. CODE ANN. § 50-14-6 (2009); N.M. STAT. ANN. § 10-15-4 (2008); VT. STAT. ANN. tit. 1, § 314(a) (2009); W. VA. CODE § 6-9A-7(a) (2008); WYO. STAT. § 16-4-408(a) (2008).

[87] ARK. CODE. ANN. § 25-19-104 (2008); ARK. CODE ANN. § 5-4-201(b)(3) (2008); 65 PA. CONS. STAT. § 714 (2008) (stating that any member of any agency found guilty of participating in a meeting with "the intent and purpose" of violation Pennsylvania's open meetings law shall be sentenced to pay a fine not exceeding $ 100 plus costs of prosecution.).

[88] GA. CODE ANN. § 50-14-6 (2009) (stating that "any person knowingly and willfully conducting or participating in a meeting" that violates the law "shall be" guilty of a misdemeanor and upon conviction shall be punished by a fine "not to exceed" $500.).

Virginia[91] require a misdemeanor violation of the state's open meetings law to be punishable by a fine of up to $500. However, unlike the others, West Virginia provides for incremental penalties for subsequent violations.[92]

Finally, Wyoming law provides for the highest monetary penalty. However, Wyoming is unique among states providing only for a monetary penalty because it also provides situations in which the violator may not be penalized. A misdemeanor violation under the state's open meetings law is punishable upon conviction by a fine of not more than $750.[93] According to Wyoming law, any member or members of an agency who knowingly and willfully takes an action in violation of the state's open meetings act shall be guilty of a misdemeanor. Any member of the governing body of an agency who attends or remains at a meeting where an action is taken knowing that the action is in violation of this act shall also be guilty of a misdemeanor, unless the member's objections are recorded in the meeting's minutes, made public, or recorded in the minutes of the next regularly scheduled meetings.

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[89] N.M. STAT. ANN. § 10-15-4 (2008) (stating that any person who violates the state's open meetings law is guilty of a misdemeanor and upon conviction "shall be" punished by a fine of not more than $500 for each offence.).

[90] VT. STAT. ANN. tit. 1, § 314 (2009) (stating that any member of a public body " who knowingly and intentionally violates" Vermont's open meetings law or "who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting" shall be guilty of a misdemeanor and shall be fined not more than $500.).

[91] W. VA. CODE § 6-9A-7(a) (2008) (stating that any member of governmental body "who willfully and knowingly violates" West Virginia's open meetings law is guilty of a misdemeanor and shall be fined not more than $500. A member of a governmental body who is convicted of a second or subsequent violation of the state's open meetings law is guilty of a misdemeanor and shall be fined not less than $100 nor more than $1,000.).

[92] *Id*.

[93] WYO. STAT. § 16-4-408(a) (2008).

Other states allow for either or both jail time and fines if a public body or official is found to have violated the law. For example, California,[94] Connecticut[95] and Nevada[96] allow for either or both a penalty of up to $1,000 and a jail term of up to six months be imposed of someone found guilty of a misdemeanor for violating the open meetings law. In Texas, any member of a governmental body that "knowingly" calls, aids or participates in a meeting in violation of the state's open meetings laws commits a misdemeanor punishable by a fine of not less than $100 and not more than $500, confinement in county jail for not less than one month or more than six months or both.[97] Or, in Florida any member of a public body "who knowingly violates" the state's open meetings law "by attending a meeting not held in accordance with the provisions" of the law is guilty of a second degree misdemeanor. Additionally, "conduct which occurs outside the state which would constitute a knowing violation" of the sunshine law also is a second degree misdemeanor.[98] Second degree misdemeanors in Florida are punishable by imprisonment "not

[94] CAL GOV'T CODE § 11130.7 (2008) (stating that a member of a state body or local agency who attends a meeting of a state or local agency in violation of the state open meetings laws "where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled" to under the state open meetings law is guilty of a misdemeanor.); CAL GOV'T CODE § 54959 (2008) (stating that California law also requires the legislature to be subject to open meetings, but the law makes not mention of penalties for violations of the law by the legislature.); CAL PEN CODE § 19 (2008) (stating that a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding $1,000, or by both).

[95] CONN. GEN. STAT. § 1-240 (2008) (stating that any member of a public agency who fails to comply with an order from the Freedom of Information Commission is guilty of a Class B misdemeanor. Each occurrence is a separate offense.); CONN. GEN. STAT. § 53a-42 (2008) (stating that a conviction for a Class B misdemeanor may carry a fine of " not to exceed" $1,000.); CONN. GEN. STAT. § 53a-36 (2008) (stating that a conviction for a Class B misdemeanor may carry a jail term "not to exceed" 6 months).

[96] NEV. REV. STAT. ANN. § 241. 040(1) (2009); NEV. REV. STAT. ANN. § 193.150(1)-(2) (2009).

[97] TEX. GOV'T CODE § 551.144 (2007).

[98] FLA. STAT. ANN. § 286.011(3)(b)&(c) (2009).

exceeding 60 days."[99]Additionally, a fine of "not to exceed" $500, in addition to—or instead of—may be assessed against a convicted person.[100]

Nevada law is different among states that provide for either or both fine or jail time in that it allows for a penalty of community service in lieu of all, or a part of, a jail sentence or fine for an open meetings law violation. According to Nevada law, each member of a pubic body attending a meeting "where action is taken" in violation of the open meetings law "with knowledge" shall be guilty of a misdemeanor punishable by imprisonment for not more than six months and, or, by a fine of not more than $1,000.[101]

States including Hawaii, [102] Illinois,[103] Michigan,[104] North Dakota[105] and Oklahoma [106] were among the states providing for the highest fine and longest jail terms for violations of open

[99] FLA. STAT. ANN. § 775.082(4)(b) (2009).

[100] FLA. STAT. § 775.083(1)(e) (2009).

[101] NEV. REV. STAT. ANN. § 241. 040(1) (2009); NEV. REV. STAT. ANN. § 193.150(1)-(2) (2009).

[102] HAW. REV. STAT. § 92-13 (2009) (stating that "any person who wilfully [*sic*] violates any provisions of this part shall be guilty of misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by law."); *See infra* notes 178-186 and accompanying text (discussing removal from office as a penalty); *See also* HAW. REV. STAT. § 706-640(1)(d) (2009) (stating that a person convicted of a misdemeanor "may be sentenced" to pay a fine "not exceeding" $2,000.); *See also* HAW. REV. STAT. § 706-641(4) (2009) (stating that in determining the amount and method of payment of a fine, the court "shall" take into account: 1) the financial resources of the defendant; and 2) the nature of the burden that its payment will impose.); *See also* HAW. REV. STAT. § 706-663 (2009) (stating that for a person convicted of a misdemeanor, the court "may" also impose a sentence of imprisonment "for a definite term to be fixed by the court and not to exceed one year."); *See also* HAW. REV. STAT. § 706-606 (2009) (Hawaii is unlike other state's laws, in that it's open meetings law provides direction for the court to consider in imposing penalties for misdemeanors, including: 1) the nature and circumstances of the offense; 2) the history and characteristics of the defendant; 3) the kinds of sentences available; and 4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Additionally, the court "shall consider" that the sentence imposed: 1) reflect the seriousness of the offense; 2) promote respect for law; 3) provide just punishment for the offense; 4) afford adequate deterrence to criminal conduct; 5) protect the public from further crimes of the defendant; and 6) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.).

[103] 5 ILL. COMP. STAT. ANN. 120/4 (2009); 730 ILL. COMP. STAT. ANN. 5/5-9-1(3) (2009); 730 ILL. COMP. STAT. ANN. 5/5-8-3(3) (2009).

[104] MICH. COMP. LAW SERV. § 15.272 (2009) (stating that a public official "who intentionally violates" the Open Meetings Act is guilty of a misdemeanor punishable by a fine of not more than $1,000 for the first offense. If the

meetings laws. For example, in North Dakota, according to the state's open meeting s law, "a public servant…who knowingly violates" the open meetings laws is guilty of a class A misdemeanor, which carries a penalty of a maximum of one year's imprisonment, a fine of $2,000, or both.[107] According to Illinois law, the penalty for violating the state's open meetings law shall "shall not exceed" a $1,500 fine[108] or, a jail sentence of "not more than" 30 days.[109]

Nebraska and South Carolina laws also allow for either one or both jail time and monetary fine. Both states are different from the states mentioned thus far in that they allow for increasing fines for subsequent violations. In all, four states—Michigan, Nebraska, South Carolina and West Virginia—specify increasing severity of violations upon conviction of multiple violations of open meetings laws.[110] In Nebraska, for example, any member of a public body who

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same official is convicted again during the same term, he/she shall be guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.).

[105] N.D. CENT. CODE, § 44-04-21.3 (2009); N.D. CENT. CODE, § 12.1-32-01(5) (2009).

[106] OKLA. STAT. tit. 25, § 314 (2009) ((stating that In Oklahoma, "[a]ny person or persons willfully violating" any of the provisions of Oklahoma's open meetings law shall be guilty of a misdemeanor punishable by a fine not exceeding $500 or by imprisonment in the county jail for a period not exceeding one year or by both such fine and imprisonment.).

[107] N.D. CENT. CODE, § 44-04-21.3 (2009); N.D. CENT. CODE, § 12.1-32-01(5) (2009).

[108] 5 ILL. COMP. STAT. ANN. 120/4 (2009); 730 ILL. COMP. STAT. ANN. 5/5-9-1(3) (2009).

[109] *Id*.

[110] *See* MICH. COMP. LAW SERV. § 15.272 (2009) (a public official "who intentionally violates" the Michigan open meetings law is guilty of a misdemeanor punishable by a fine of not more than $1,000 for the first offense. If the same official is convicted again during the same term, the official shall be guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.); *See also* S.C. CODE ANN. § 30-4-110 (2008) (any person who "willfully" violates the Freedom of Information Act "shall be deemed guilty of a misdemeanor and upon conviction shall be fined" not more than $100 or imprisoned for not more than 30 days for the first offense, not more than $200 and not more than sixty days for the second offense and not more than $300 or imprisoned for not more than ninety days for the third and any further subsequent offense.); *See also* W. VA. CODE § 6-9A-7(a) (2008) (stating that any member of governmental body "who willfully and knowingly violates" West Virginia's open meetings law is guilty of a misdemeanor and shall be fined not more than $500. A member of a governmental body who is convicted of a second or subsequent violation of the state's open meetings law is guilty of a misdemeanor and shall be fined not less than $100 nor more than $1,000.).

"knowingly violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation" of the law could be found guilty of a Class IV misdemeanor punishable by a maximum penalty of $500 fine and a minimum penalty of $100 fine for the first offense. For subsequent offenses, the same individual could be found guilty of a Class III misdemeanor, which is punishable by a maximum term of three months imprisonment, or $500 fine, or both, for subsequent offenses. Or, a minimum penalty of neither jail time nor fine.[111]

Invalidation

Thirty-seven states' open meetings laws contain provisions allowing courts to invalidate an action taken by a public body in violation of the law. [112] Table 2-3, located at the end of this

[111] NEB. REV. STAT. ANN. § 84-1414 (2009); NEB. REV. STAT. ANN. § 28-106 (2009); S.C. CODE ANN. § 30-4-110 (2008) (stating that any person who "willfully" violates the Freedom of Information Act "shall be deemed guilty of a misdemeanor and upon conviction shall be fined" not more than $100 or imprisoned for not more than thirty days for the first offense, not more than $200 and not more than sixty days for the second offense and not more than $300 or imprisoned for not more than ninety days for the third and any further subsequent offense.); *See also* W. VA. CODE § 6-9A-7(a) (2008) (stating that any member of governmental body "who willfully and knowingly violates" West Virginia's open meetings law is guilty of a misdemeanor and shall be fined not more than $500. A member of a governmental body who is convicted of a second or subsequent violation of the state's open meetings law is guilty of a misdemeanor and shall be fined not less than $100 nor more than $1,000.); *See also* MICH. COMP. LAW SERV. § 15.272 (2009) (stating that a public official "who intentionally violates" the Michigan open meetings law is guilty of a misdemeanor punishable by a fine of not more than $1,000 for the first offense. If the same official is convicted again during the same term, the official shall be guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.).

[112] *See* ALA. CODE § 36-25A-9(f) (2009); ALASKA STAT. § 44.62.310(f) (2009); ARIZ. REV. STAT. § 38-431.05(A) (2008); CAL. GOV'T CODE § 11130.3(a) (2008); CAL. GOV'T CODE § 54960.1 (2008); COLO. REV. STAT. § 24-6-402 (2008); CONN. GEN. STAT. § 1-206(c) (2008); HAW. REV. STAT. § 92-11 (2009); IDAHO CODE ANN. § 67-2347(4) (2008); 5 ILL. COMP. STAT. ANN. 120/3(c) (2009); IND. CODE ANN. § 5-14-1.5-7 (2009); IOWA CODE § 21.6(3)(c) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); KY. REV. STAT. ANN. § 61-848(5) (2009); LA. REV. STAT. ANN. § 42:11(A) (2009); MD. CODE ANN. GOVERNMENT § 10-510(d)(4) (2008); ME. REV. STAT. ANN. tit.1, § 409 (2009); MASS. ANN. LAWS ch. 30 A, § 11A1/2 (2009); MICH. COMP. LAWS. SERV. § 15.270 (2009); MO. REV. STAT. § 610.027(5) (2009); MONT. CODE ANN. § 2-3-213 (2007); NEB. REV. STAT. ANN. § 84-1414(1) (2009); NEV. REV. STAT. ANN. § 241.037(3) (2009); N.H. REV. STAT. ANN. § 91-A:8(II) (2009); N.J. REV. STAT. § 10:4-15 (2009); N.M. STAT. ANN. § 10-15-3(A) (2008); N.Y. PUB. OFF. LAW § 107(1) (2009); N.C. GEN. STAT. § 143.318.16A(e) (2009); N.D. CENT. CODE § 44-04-21.2(2) (2009); OHIO REV. CODE ANN. §121.22(H) (2009); OKLA. STAT. tit. 25, §313 (2009); OR. REV. STAT. § 192.680(2) (2007); R.I. GEN. LAWS § 42-46-8(d) (2009); TENN. CODE ANN. § 8-44-105 (2009); TEX. GOV'T CODE ANN. § 551.141 (2007); W. VA. CODE § 6-9A-6 (2008); WIS. STAT. § 1.97(3) (2008). The following thirteen states and the District of Columbia do not address invalidation: *See* ARK. CODE ANN. §§ 25-19-101 to -209 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); FLA. STAT. ANN. § 775.082(4)(b) (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

chapter, contains a complete listing all states that provide for invalidation in the state's open meetings law.[113] This study revealed several distinctions in state's requirements for invalidating an action. According to W. Richard Fossey and Peggy Alayne Roston, attorneys, invalidation became popular in the 1970s as open meetings and access provisions began to focus on efforts to reform the government.[114]

State laws in nineteen states of the thirty-seven contain language specifying that any decision found to have been made in violation of the law "shall be" or "is" void.[115] Open meetings laws in seven states give courts more discretion in invalidating an action by stating that an action taken in violation of the law "may" be null.[116] In addition several states, laws contain invalidation provisions limiting the time after the action occurred in which suits to invalidate that action can be brought. Time limits for bringing action in those states ranges from twenty-one days of when the violative action is made public in Alabama, Kansas and Massachusetts,[117]

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[113] *See, infra*, pp. 108.

[114] W. Richard Fossey and Peggy Alayne Roston, *Invalidation as a Remedy for Violation of Open Meetings Statutes: Is the Cure Worse than the Disease?*, 20 U.S.F. L. REV. 163, 167168 (1985-1986) (stating that "[i]nvalidation has been used to challenge a broad range of substantive action.").

[115] *See* ARIZ. REV. STAT. § 38-431.05(A) (2008); COLO. REV. STAT. § 24-6-402 (2008); 5 ILL. COMP. STAT. ANN. 120/3(c) (2009); IND. CODE ANN. § 5-14-1.5-7 (2009); IOWA CODE § 21.6(3)(c) (2008); IDAHO CODE ANN. § 67-2347(4) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); KY. REV. STAT. ANN. § 61-848(5) (2009); LA. REV. STAT. ANN. § 42:11(A) (2009); ME. REV. STAT. ANN. tit.1, § 409 (2009); NEB. REV. STAT. ANN. § 84-1414(1) (2009); NEV. REV. STAT. ANN. § 241.037(3) (2009); N.M. STAT. ANN. § 10-15-3(A) (2008); N.D. CENT. CODE § 44-04-21.2(2) (2009); OHIO REV. CODE ANN. §121.22(H) (2009); OKLA. STAT. tit. 25, §313 (2009); OR. REV. STAT. § 192.680(2) (2007); TENN. CODE ANN. § 8-44-105 (2009); TEX. GOV'T CODE ANN. § 551.141 (2007); W. VA. CODE § 6-9A-6 (2008); WIS. STAT. § 1.97(3) (2008).

[116] *See* CONN. GEN. STAT. § 1-206(c) (2008); HAW. REV. STAT. § 92-11 (2009); N.Y. PUB. OFF. LAW § 107(1) (2009); N.C. GEN. STAT. § 143.318.16A(e) (2009); R.I. GEN. LAWS § 42-46-8(d) (2009).

[117] ALA. CODE § 36-25A-9(f) (2009) (stating that court may invalidate action if complaint was filed within twenty-one days of when the action is made public and "the violation was not the result of mistake, inadvertence, or excusable neglect" and invalidation of the government action would not "unduly prejudice third parties who have changed their position or taken acting in good faith reliance upon the challenged action"; additionally, "any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violating of this chapter which occurred prior to such meeting); KAN. STAT. ANN. § 75-4320(A) (2008) (stating that binding action taken at meeting "not in substantial compliance" shall be voidable in any action brought by attorney

thirty days in Idaho, Montana and Pennsylvania,[118] forty-five days in New Jersey, [119] sixty days in Louisiana[120] and Michigan,[121] ninety days in Hawaii,[122] one-hundred-and-twenty days in Nebraska,[123] and no later than two years after the violation in Missouri.[124] In Indiana, if a court

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general or county or district attorney in the district court of the county in which the meeting was held within 21 days of the meeting); MASS. ANN. LAWS ch. 30 A, § 11A1/2 (2009) (stating that court order may invalidate action within twenty-one days of date such action is made public).

[118] IDAHO CODE ANN. § 87-2347(1) (2008) (stating that "if an action, or any deliberation or decision-making that leads to an action, occurs at any meeting which ails to comply with" the open meetings law "such action shall be null and void.") IDAHO CODE ANN. § 67-2347(4) (2008) (stating that actions must be filed within 30 day so of alleged violation for purpose of having action declared null and void); MONT. CODE ANN. § 2-3-213 (2007) (stating that "[t]he district courts of the state have jurisdiction to set aside an agency decision under this part upon petition of any person whose rights have been prejudiced. A petition pursuant to this section must be filed within thirty days of the date on which the petitioner learns, or reasonably should have learned, of the agency's decision."); 65 PA. CONS. STAT. § 713 (2008) (stating that a legal challenge shall be filed within thirty days from the date of the meeting which is open or within thirty days from the discovery of any action that occurred at a closed meeting in violation of the chapter. "No legal challenge may be commenced more than one year from the date of said meeting. The court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached." If the court finds one or more violations occurred it may declare any or all of the actions taken at the meeting invalid. If court finds not violation all action "shall be fully effective.").

[119] N.J. REV. STAT. § 10:4-15 (2009) (stating that action may be voidable by Superior Court within 45 days of proceeding).

[120] LA. REV. STAT. ANN. § 42:11(A) (2009) (stating that an action taken in violation of the law "shall be voidable by a court of competent jurisdiction. A suit to void any action must be commenced within sixty days of the action.").

[121] MICH. COMP. LAWS. SERV. § 15.270(3)(b) (2009) (stating that circuit court has jurisdiction only if procedures are followed within sixty days after the approved minutes are made available to the public (3)(a) or if the decision involves approval of contracts, receipt or acceptance of bids, making of assessments, or issuance of bonds within 30 days.).

[122] HAW. REV. STAT. § 92-11 (2009) (stating that "[a]ny final action taken in violation of sections 92-3 and 92-7 may be voidable upon proof of violation. A suit to void any final action shall be commenced within ninety days of the action.").

[123] NEB. REV. STAT. ANN. § 84-1414(1) (2009) (stating that "[a]ny motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the Open Meetings Act shall be declared void by the district court if the suit is commenced within one hundred twenty days of the meeting of the public body at which the alleged violation occurred. Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in substantial violation of the Open Meetings Act shall be voidable by the district court if the suit is commenced more than one hundred twenty days after but within one year of the meetings of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.).

[124]MO. REV. STAT. § 610.027(5) (2009) (stating that "Suit for enforcement shall be brought within one year from which the violation is ascertainable and in no event shall it be brought later than two years after the violation. This subsection shall not apply to an action taken regarding the issuance of bonds or other evidence of indebtedness of a

declares an action void, the court may enjoin the governing body from implementing that action until is has been given "substantial reconsideration at a meeting or meetings" that comply with the state's open meetings law.[125] In determining whether to declare any policy, decision, or final action void according to Indiana law, a court "shall" consider the following "among other relevant factors:" 1) extent to which the violation affected substance of policy, decision or final action, denied or impaired public right to observe and record; 2) extent to which the violation impaired the public's right to know the public's business; 3) extent that the public interest will be served in voiding the policy by asking if voiding the action outweighs the benefits gained by effectuating the policy challenged; 4) the prejudice likely to accrue to policy if voided; 5) the extent that the defendant acted in compliance with an informal inquiry response or advisory opinion.[126] Indiana law also specifically allows that "any person" can file action in court to declare void any policy, decision or final action taken at an executive session that was held in violation of the state's open meetings law.[127]

Maine contains a similar provision specifically addressing executive sessions. The law states that "any person" may file action in court to declare void any policy, decision or final action taken at an executive session that was held in violation of the state's open meetings law.[128]

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public governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebtedness.").

[125] IND. CODE ANN. § 5-14-1.5-7(d)-(e) (2009).

[126] *Id*.

[127] *Id*. *at* (a)(3)(A).

[128] ME. REV. STAT. ANN. tit. 1, § 409(2) (2009).

Alabama law further requires that for an action to be invalidated the violation not be "the result of mistake, inadvertence, or excusable neglect." [129] Alabama law also requires that invalidation of the government action would not "unduly prejudice third parties who have changed their position or taken acting in good faith reliance upon the challenged action."[130]

Alaska,[131] Iowa[132] and Mississippi[133] require that the courts invalidate an action only if the court finds that "the public interest" in enforcement outweighs the harm to the public interest and to the public entity by voiding that action. According to Alaska law, in holding an action void due to violation of the open meetings law, the court shall consider: 1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided; 2) the disruption that voiding the action may cause to the affairs of the public entity and individuals; 3)"the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;" 4) the extent to which governing body had previously held meetings in compliance to consider subject; 5) the amount of time that

[129] ALA. CODE § 36-25A-9(f) (2009).

[130] *Id*.

[131] ALASKA STAT. § 44.62.310(f) (2009) (stating that a court may void action "only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action.").

[132] IOWA CODE § 21.6(3)(c) (2008) (stating that finding of a preponderance of evidence the court "shall void any action taken in violation of this chapter, if the suit for enforcement of this chapter is brought within six months of the violation and the court finds under the facts of the particular case that the public interest in the enforcement of the policy of this chapter outweighs the public interest in sustaining the validity of the action taken in the closed session. This paragraph shall not apply to an action taken regarding the issuance of bonds or other evidence o indebtedness of a governmental body if a public hearing, election or public sale has been held regarding the bonds or evidence of indebtedness.").

[133] MO. REV. STAT. § 610.027(5) (2009) (stating that "[u]pon a finding by a preponderance of the evidence that a public governmental body has violated any provision of" the open meetings act that "the public interest in the enforcement of the policy…outweighs the public interest in sustaining the validity o the action taken in the closed meeting record or vote" the court shall void the action. Provisions for invalidation do not apply to issuance of bonds or other indebtedness, election or public sale of bonds.).

has passed since action was taken; 6) the degree to which public entity and individuals "have come to rely on the action; 7) the extent that the governmental body has, before or after the lawsuit was filed, to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;" 8) the degree violations were "wilful, [sic] flagrant, or obvious;" and 9) the degree to which governing body failed to adhere" to open meetings policy.[134]

Maryland,[135] New Hampshire[136] and New York[137] restrict the use of voiding an action for "willful" violations.

Iowa's open meetings law requires a finding by a "preponderance of evidence" for the court to declare an action void.[138] Missouri is the only other state to require a finding by a "preponderance of the evidence."[139]

Lastly in four states—California, Kansas, Kentucky and Nebraska—open meetings laws contain a standard of "substantial" compliance to be applied when determining whether an action should be invalidated. In California, a "willful" action by either a state or local body "shall not be" determined null and void if the action was in "substantial compliance" with the law.[140]

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[134] ALASKA STAT. § 44.62.310(f)(1)-(8) (2009).

[135] MD. CODE ANN. GOVERNMENT § 10-510(d)(4) (2008).

[136] N.H. REV. STAT. ANN. § 91-A:8(II) (2009).

[137] N.Y. PUB. OFF. LAW § 107(1) (2009).

[138] IOWA CODE § 21.6(3)(c) (2008).

[139] MO. REV. STAT. § 610.027(5) (2009).

[140] CAL GOV'T CODE § 11130.3 (b)(3) (2008); CAL GOV'T CODE § 54960.1 (d)(1)(2008).

However, in Kansas,[141] Kentucky[142] and Nebraska, [143] the laws are worded so as to require action not taken in "substantial" compliance with the law to be declared void.

In addition to providing for an action taken in violation of a state's open meetings law to be invalidated, five states—Hawaii, Iowa, Louisiana and Nebraska and New Jersey— provide specific time limits on when an action can be filed. Invalidation of action was discussed earlier in this chapter; however, in addition to providing for invalidation, these five states limit the time in which suit can be brought seeking to void an action that was taken in violation of the open meetings law.

For example, in Hawaii, "any action" taken in violation of the open meetings law "may be voidable upon proof of violation" as long as the suit to void any final action "shall be commenced" within ninety days of the action.[144] Iowa allows for one of the longest periods of time to bring actions to void an action in violation of the open meetings laws. According to Iowa law, the court "shall void any action" taken in violation of the state's open meetings law if the suit for enforcement of the law is brought within six months of the violation "and the court finds under the facts of a particular case that the public interest" in enforcement would "outweigh the public interest in sustaining the validity of the action taken in closed session."[145]

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[141] KAN. STAT. ANN. § 75-4320(a) (2008) (stating that binding action taken at meeting "not in substantial compliance" shall be voidable).

[142] KY. REV. STAT. ANN. § 61.848(5) (2009) (stating that any rule, resolution, regulation, ordinance, or other formal action of a public agency "without substantial compliance…shall be voidable.").

[143] NEB. REV. STAT. ANN. § 84-1414(1) (2009) (stating that " [a]ny motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in substantial violation of the Open Meetings Act shall be voidable by the district court if the suit is commenced more than one hundred twenty days after but within one year of the meetings of the public body in which the alleged violation occurred. A suit to void any final action shall be commenced within one year of the action.").

[144] HAW. REV. STAT. § 92-11 (2009).

[145] IOWA CODE § 21.6(3)(c) (2008).

In Louisiana, "[a]ny action" taken in violation of the Louisiana's open meetings law "shall be voidable," or a civil penalty may be levied, only if a suit is commenced within sixty days of the date the alleged action.[146] According to Nebraska law, "any motion, resolution, rule, regulation, ordinance, or formal action" taken in violation of the open meetings law "shall be" declared void in a suit commenced within one-hundred-and-twenty days of the meeting at which the alleged action occurred. Further, "any motion, resolution, rule, regulation, ordinance, or formal action" taken in "substantial violation" of the open meetings law "shall be" voidable in a suit commenced within the same time period. Lastly, a suit to void any final action "shall be" commenced within one year of the action.[147] In New Jersey, an action taken at a meeting in violation of the open meetings law "may be voidable" in a suit brought within forty-five days of the proceeding.[148]

Through invalidation, courts can nullify a government body's decision if it was made in violation of a state's open meetings law. Fossey and Roston, attorneys, argued that—instead of a remedy—it could be a political tool for self-interested individuals desiring to delay or undo a government action.[149] Because of the amount of time litigation can take, using invalidation as a remedy threatens the "finality of any governmental action" because the action remains in a sort of limbo until a court decides the case.[150] This could be years in some cases.[151] While sunshine

[146] LA. REV. STAT. ANN. § 42:9 (2009).

[147] NEB. REV. STAT. ANN. § 84-1414(1) (2009).

[148] N.J. REV. STAT. § 10:4-15(a) (2009).

[149] Fossey, *supra* note 114, at 171 (discussing the potential for invalidation to provide a "private veto" power over legislation to a self-interested minority that could use such a power to "thwart the public's will.").

[150] *Id*. at 169.

[151] *Id*.

experts tend to favor invalidation as a remedy,[152] courts have been found reluctant to grant invalidation in situations where the body has argued that the violation was "inadvertent or based on a technicality in the law."[153]

However, some scholars have argued that invalidation could serve as an effective remedy to violations because it forces government officials to revisit the decisions they made behind closed doors.[154] The Citizen Advocacy Center, which among other causes supports open government, supports invalidation as a remedy for open meetings violations. The center has argued that a state that did not mandate invalidation for votes taken in improperly closed sessions was "violat[ing] good open government principles and strip[ping] power from the public" to take action against open meetings violations.[155]

Invalidation can be corrected by curing the violation, effectively removing the violation and in most cases eliminating the need for penalties or other remedies. Nine states contained provisions for a public body to cure a violation of the open meetings law. [156] Cure provisions

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[152] *Id*. at 164.

[153] *Sunshine Laws*, *supra* note 24, at 50.

[154] *Sunshine Laws*, *supra* note 24, at 52.

[155] Citizen Advocacy Center, Accessing Government: How Difficult Is It? 103 (2008), http://www.citizenadvocacycenter.org/OpenGovt/CAC_GovReports_Full_Digital.pdf.

[156] ALASKA STAT. § 44.62.310(f) (2009); ARIZ. REV. STAT. § 38-431.05(B)(1)-(4) (2008); CAL. GOV'T CODE § 11130.3(a) (2008); CAL. GOV'T CODE § 54960.1(e) (2008); Act effective July 1, 2009, Ch. 161, 2009 ID Laws 1142; MICH. COMP. LAWS. SERV. § 15.270(5) (2009); MO. REV. STAT. § 610.027(6) (2009); N.J. REV. STAT. § 10:4-15(a) (2009); N.D. CENT. CODE § 44-04-21.2(3) (2009); OR. REV. STAT. § 192.680(1) (2007). The following forty-one states and the District of Columbia do not address cure provisions in the state statute on open meetings: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008). DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); FLA. STAT. ANN. §§ 286. 001-012 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); IOWA CODE §§ 21.1-.11 (2008); KAN. STAT. ANN. §§ 75-4317 to -4320b (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); LA. REV. STAT. ANN. §§ 42:1-:13 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT.

allow a public body to correct a violation of the open meetings law, usually by rescinding the action taken at a meeting that was held in violation of the law.[157] The action may then be readdressed at a meeting held in compliance with the open meetings laws. If a public body follows the procedure outlined in the statute, they will have in effect removed the violation and in most circumstances eliminated the need for further penalties or remedies to be imposed. However, in at least one state curing the violation may not be enough when the open meetings law has been violated. According to Indiana law, if the court finds that a governing body of a public agency has violated the law "it may not find the violation was cured by the governing body by only having taken final action at a meeting that complies" with the state's open meetings law.[158]

Open meetings laws in Alaska,[159] Arizona,[160] Michigan[161] and New Jersey[162] contain provisions for how to cure the violation. For example, in Alaska, a governmental body that

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ANN. §§ 91-A:1-:9 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008).N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); 65 PA. CONS. STAT. §§ 701-716 (2008); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); TENN. CODE ANN. §§ 8-44-101 to -111 (2009);TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); W. VA. CODE §§ 6-9A-1 to -6 (2008); WIS. STAT. §§ 19.81-.98 (2008);WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[157] BLACK'S LAW DICTIONARY (4th ed. 2004) (defining cure as "[t]o remove legal defects or correct legal errors.").

[158] IND. CODE ANN. § 5-14-1.5-7(c) (2009).

[159] ALASKA STAT. § 44.62.310(f) (2009).

[160] ARIZ. REV. STAT. § 38-431.05(B)(1)-(4) (2008) (stating that a public body may prevent action taken in violation of this section from being voided by "ratification shall take place at a public meeting within 30 days after discovery of the violation or after such discovery should have been made by the exercise of reasonable diligence.").

[161] MICH. COMP. LAWS. SERV. § 15.270(5) (2009) (stating that in proceedings to invalidate a decision taken in violation of the open meetings law, the body "may, without being deemed to make any admission contrary to its interest, reenact the disputed decision" in conformity with the open meetings law. A decision reenacted "shall be" effective from the date of reenactment and "shall not be declared invalid by reason of a deficiency in the procedure used for its initial enactment.").

"violates or is alleged to have violated" the law "may cure the violation or alleged violation" by holding another meeting in compliance with the notice requirements and other requirements of the open meetings law. The meeting conducted as a cure must be conducted in "substantial and public reconsideration of the matters considered at the original meeting."[163] Laws in California,[164] Missouri,[165] North Dakota,[166] and Oregon[167] only state that the violation can be cured but do not specify how. For example, North Dakota's open meetings law states that civil and criminal penalties and judicial remedies, including declaratory relief, injunction, a writ of prohibition or mandamus and reasonable attorneys' fees, are not available if the violation has been corrected before civil action is filed, provided that "no person has been prejudiced or harmed by the delay."[168] However, the law also states that the provision for a cure does not apply if the attorney general has found prior violations by the public entity.[169]

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[162] N.J. REV. STAT. § 10:4-15(a) (2009) (stating that a public body "may take corrective or remedial action" for an action that occurred in violation of the open meetings law and would otherwise be voidable by acting "de novo" at a new public meeting held in conformity with the open meetings law.).

[163] ALASKA STAT. § 44.62.310(f) (2009).

[164] CAL. GOV'T CODE § 11130.3(a) (2008) (stating that for state agencies, "nothing" in the law "shall be construed to prevent a state body from curing or correcting an action challenged" under open meetings law.); CAL. GOV'T CODE § 54960.1(e) (2008) (stating that for local agencies "nothing" in the law "shall be construed to prevent a state body from curing or correcting an action challenged" under open meetings law. Further, the law requires that if a court determines the body has cured or corrected the violation by subsequent action the action "shall be" dismissed with prejudice.).

[165] MO. REV. STAT. § 610.027(6) (2009) (stating that a public governmental body "which is in doubt about the legality of closing a particular meeting" may bring suit at the expense of that public governmental body in circuit court "to ascertain the propriety of any such action, or seek a formal opinion of the attorney general or an attorney for the governmental body.").

[166] N.D. CENT. CODE § 44-04-21.2(3) (2009).

[167] OR. REV. STAT. § 192.680(1) (2007) (stating that a decision made by a governing body in violation of the open meetings law that would otherwise be voidable "shall not be voided" if the body reinstates the action while in compliance with the law. A decision that is reinstated is effective from the date of its initial adoption.).

[168] N.D. CENT. CODE § 44-04-21.2(3) (2009).

[169] *Id*.

Idaho has perhaps the newest cure provision. The provision was signed into law April 13, 2009, and became effective July 1, 2009.[170] It was added to the law in the same bill that increased civil penalties for violating the state's open meetings law.[171] The provision allows for an agency to cure a violation upon self-recognition of a violation or upon written notice by the clerk of the agency of an alleged violation.[172] The body has fourteen days to either acknowledge the violation and state intent to correct it or reject the claim.[173] After acknowledging a violation the body has fourteen days to correct the violation by declaring action taken at the meeting in violation of the law be void.[174] If the agency cures the violation within the allotted fourteen day period, no civil penalties may be imposed on the body for the violation.[175]

Allowing public bodies or officials to cure violations of open meetings laws could provide an easier remedy to correct a violation of the law. Cure provisions, however, also have the potential to weaken the effectiveness of open meetings laws because by curing a violation, no penalties may be levied against the body of official who violated the law. In a study of open meetings laws in Illinois, Ohio, Michigan, Minnesota and Wisconsin, the Citizen Advocacy Center argued that cure provisions, which in effect allow a body or official to "re-do" a vote that was done in secret, hurt the effectiveness of the state's open meetings laws because such a provision allows public bodies to easily circumvent the requirements of open meetings by

[170] S.B.1142, 60th Leg., 1st Reg. Sess. (Idaho 2009).

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*.

allowing them to re-adopt a decision that had been made out of the public view in the public view and escape accountability.[176] Re-voting in public will not undo the deliberation and decision-making process that had taken place behind closed doors.[177] Because cure provisions allowed state bodies to "to moot legal claims filed against it for an open meetings violation" the Citizen Advocacy Center recommended states statutorily prohibit cure provisions.[178]

Removal from Office

Five states have provisions allowing for an officer to be removed from office for violations of the state's open meetings law. [179] The remaining forty-five states and the District of Columbia do not address removal from office as a remedy for an open meetings law violation.[180]

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[176] Citizen Advocacy Center, *supra* note 155, at 33.

[177] *Id*. at 63-64, 134.

[178] *Id*. at 65; *See also* Teri Henning, *Guest Essay: Report Sunshine Law Violations*, CHAMBERSBURG PUB. OPINION, Mar. 16, 2007 (Teri Henning was the general counsel for the Pennsylvania Newspaper association at the time the column was written and published).

[179] ARIZ. REV. STAT. § 38-431.07(A) (2008); HAW. REV. STAT. § 92-13 (2009); MINN. STAT. § 13D.06(3) (2008); OHIO REV. CODE ANN. § 121.22(I)(4) (2009); IOWA CODE § 21.6(d) (2008).

[180] The following forty-five states and the District of Columbia do not address removal from office as a remedy for a violation of the open meetings law: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ALASKA STAT. §§ 44.62.310-.312 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); CAL. GOV'T CODE §§ 9027-9031 (2008); CAL. GOV'T CODE §§ 54950-54963 (2008); CAL. GOV'T CODE §§ 11120-11132 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); FLA. STAT. ANN. §§ 286. 001-012 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009); KAN. STAT. ANN. §§ 75-4317 to -4320b (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); LA. REV. STAT. ANN. §§ 42:1-:13 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MICH. COMP. LAWS. SERV. §§ 15.261-.275 (2009); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MO. REV. STAT. §§ 610.010- .035 (2009); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008); N.Y. PUB. OFF. LAW §§ 100-107 (2009);N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); N.D. CENT. CODE §§ 44-04-19 to –21.3 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); 65 PA. CONS. STAT. §§ 701-716 (2008); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); W. VA. CODE § 6-9A-7 (2009); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

Table 2-3, located at the end of this chapter, contains a complete listing all states that provide for invalidation in the state's open meetings law.[181]

While removal from office can be a useful remedy in situations where there have been repeated violations, some scholars and attorneys have argued that it may be too strong a remedy in situations where the violation has been unintentional. [182] Hawaii,[183] Minnesota[184] and Ohio[185] limit courts to removing officials from office in cases where the violation was willful or intentional. Arizona law states that a court "may" remove an officer from office.[186] Iowa restricts removal powers by requiring that after a finding of a preponderance of evidence a court "shall issue an order removing a member of a governmental body from office if that member has engaged in a prior violation" of the open meetings law "for which damages were assessed against the member during the member's term."[187]

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[181] *See, infra,* pp. 108.

[182] *See Sunshine Laws*, *supra* note 24, at 57-59; *See also* Schwing, *supra* note 25, at 527.

[183] HAW. REV. STAT. § 92-13 (2009) (stating that "Any person who willfully [*sic*] violates any provisions of this part shall be guilty of a misdemeanor, and upon conviction, may be summarily removed from the board unless otherwise provided by law.").

[184]MINN. STAT. § 13D.06(3) (2008) (stating that A person must forfeit office if found to have "intentionally violated" chapter in three or more actions involving the same governing body forfeit any office or involvement with public body for amount of time of office then serving (a); if court in reviewing third violation finds evidence of addition violations).

[185] OHIO REV. CODE ANN. § 121.22(I)(4) (2009) ("A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general.").

[186] ARIZ. REV. STAT. § 38-431.07(A) (2008)

[187] IOWA CODE § 21.6(d) (2008) (stating that finding of a preponderance of evidence the court "shall issue an order removing a member of a governmental body from office if that member has engaged in a prior violation of this chapter for which damages were assessed against the member during the member's term.").

Awarding of Attorneys' Fees and Court Costs

In all, thirty-seven states address the return of attorneys' fees to prevailing parties.[188] Table 2-4, located at the end of this chapter, contains a complete listing all states that provide for the return of attorneys' fees and court costs.[189]

Generally, in civil litigation, what is commonly known as the "American Rule," which holds that each party pays its own fees and costs, is dominant.[190] The competing rule is known as "loser pays," which allows for the losing party to bear the cost of representation incurred by the prevailing party.[191] However, statutory law can provide the exception to the "American Rule," as it does in the thirty-seven states' open meetings laws that provide for attorneys' fees and, in some cases, court costs to be covered for a prevailing party.[192] A statute may allow for

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[188] ARK. CODE ANN. § 25-19-107(d) (2008); ARIZ. REV. STAT. § 38- 431.07(A) (2008); CAL. GOV'T CODE § 11130.5 (2008); CAL. GOV'T CODE § 54960.5 (2008); COLO. REV. STAT. § 24-6-402(h)(9) (2008); DEL. CODE ANN. tit. 29, § 10005(d) (2009); FLA. STAT. ANN. § 286. 011(4) (2009); GA. CODE ANN. § 50-14-5(b) (2009); HAW. REV. STAT. ANN. § 92-12(c) (2009); 5 ILL. COMP. STAT. ANN. 120/3(d) (2009); IND. CODE ANN. § 5-14-1.5-7(f) (2009); IOWA CODE § 21.6(3)(a)–(b) (2008); KAN. STAT. ANN. § 75-4320a(c) (2008); KY. REV. STAT. ANN. § 61.848(6) (2009); LA. REV. STAT. ANN. § 42:11(C) (2009); MD. CODE ANN. GOVERNMENT § 10-510(d)(5)(i) (2008); MICH. COMP. LAWS. SERV. § 15.271(4) (2009); MINN. STAT. § 13D.06(4)(a) (2008); MO. REV. STAT. § 610.027(3) (2009); MONT. CODE ANN. § 2-3-221 (2007); NEB. REV. STAT. ANN. § 84-1414(3) (2009); N.C. GEN. STAT. § 143-318.16B (2009); N.D. CENT. CODE § 44-04-21.2(1) (2009); NEV. REV. STAT. ANN. § 241. 037(2) (2009); N.H. REV. STAT. ANN. § 91-A:8(I) (2009); N.M. STAT. ANN. § 10-15-3(C) (2008); N.Y. PUB. OFF. LAW § 107(2) (2009); OHIO REV. CODE ANN. § 121.22 (2) (a) (ii) (2008); OR. REV. STAT. § 192.680(2) (2007); 65 PA. CONS. STAT. § 714.1 (2008); R.I. GEN. LAWS. § 42-46-8 (d) (2008); S.C. CODE ANN. § 30-4-100(b) (2008); TEX. GOV'T CODE ANN. § 551.142(b) (2007); UTAH CODE ANN. § 52-4-303(4) (2008); VA. CODE ANN. § 2.2-3713(D) (2009); WASH. REV. CODE ANN. § 42.30.120(2) (2009); W. VA. CODE § 6-9A-7(b) (2008); WIS. STAT. § 19.97(1) (2008). The following thirteen states and the District of Columbia make no mention of reimbursement of attorneys' fees and court costs in the state's open meetings laws: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ALASKA STAT. §§ 44.62.310-.312 (2009); CONN. GEN. STAT. §§1-200 to 1-242 (2008); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[189] *See, infra,* pp. 109.

[190] Fischer, *supra note 1,* at773-774.

[191] Weaver, *supra* note 1, at 774.

[192] *Id*. at 774.

the recovery of costs and attorneys' fees, allowing for the recovery of each independently of one another, or, a statute may allow for the recovery of costs generally, which could include attorneys' fees. If attorneys' fees are not specifically mentioned in the statute, it could limit how much a plaintiff can recover in attorneys' fees.[193] Ultimately, the judge in the case has discretion on whether and how much attorneys' fees and costs should be awarded under the law.[194]

Scholars have noted that a return of attorneys' fees is an important factor in encouraging civil litigation against open meetings violators.[195] The return of attorneys' fees can have both a punitive and restorative role. In addition to compensating the prevailing party, courts may award attorneys' fees and other costs for several reasons.[196] Costs may include filing fees, fees for witnesses and other fees incurred by a plaintiff during litigation.[197] Attorneys' fees and costs can be seen as a way of decreasing the costs otherwise paid for by the civil justice system. Additionally, attorneys' fees can also help encourage someone without money to bring an action.[198] For example, in looking at Indiana's open meetings law, a writer for the *South Bend Tribune* argued that open meetings laws are made easier to flout because public officials know the cost of going to court to enforce the law is more than most citizens can afford.[199]

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[193] Fischer, *supra* note 1, at 775.

[194] *See e.g.* Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 832 (Ga. Ct. App. 2001); *See e.g. also* Evans County Bd. of Comm'rs v. Claxton Enter., 255 Ga.App. 656, 399 (GA Ct. App. 2002).

[195] *See e.g.* Katrina G. Hull, *Disappearing Fee Awards and Civil Enforcement of Public Records Laws*, 52 U. KAN. L. REV. 721, 724 (2004) (noting that "[t]he right of access to government information is meaningless without enforcement.).

[196] Fischer, *supra* note 1, at 775.

[197] *Id*.

[198] *Id*.

[199] Kevin Corcoran, *Open Meetings Laws Lack Bite for Violators: The State of Secrecy Indiana Fails the Test of Access*, SOUTH BEND TRIBUNE, Feb. 26, 1998, at A1.

Additionally, making a defendant pay a plaintiff's costs can be a way of punishing "inappropriate and socially unproductive conduct."[200] This may be especially pertinent to open meetings law, where in violating an open meetings law public officials have harmed the public's interest by not allowing members of the public access to government proceedings.[201]

Of the thirty-seven states providing for the return of attorneys' fees, four states—Arkansas,[202] Illinois,[203] Texas[204] and Virginia[205]—limit the return of reasonable attorneys' fees and costs to those who "substantially prevail." Generally, a person substantially prevails if he or she has been awarded some type of relief by the court either by a judgment or court order.[206] According to Texas law, a court "may assess costs of litigation and reasonable attorneys' fees incurred by a plaintiff or defendant who substantially prevails in an action" for enforcement of the open meetings law. In exercising its discretion to award fees, the court "shall consider whether the action was brought in good faith and whether the conduct of the governmental body

[200] *Id*.

[201] *Id*.

[202] ARK. CODE ANN. § 25-19-107(d) (2008) (stating that if a plaintiff, who brought an action to enforce the open meetings law, "substantially prevails," the court has discretion to assess against the defendant "reasonable" attorneys' fees and other litigation expenses reasonably incurred by the plaintiff. However, "no expenses shall be assessed against the State of Arkansas or any of its agencies or departments.").

[203] 5 ILL. COMP. STAT. ANN. 120/3(d) (2009) (stating that the court "may assess" against any party, except the state attorney, "reasonable" attorneys' fees and other litigation reasonably incurred by a party who "substantially prevails" in any action brought to enforce the open meetings law.).

[204] TEX. GOV'T CODE ANN. § 551.142(b) (2007)(stating that a court "may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action" for enforcement of the open meetings law. In exercising its discretion to award fees, the court "shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.").

[205] VA. CODE ANN. § 2.2-3713(D) (2009) (stating that if the court finds a violation of the open meetings law, the petitioner, or person who brought the complaint, shall be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner "substantially prevails," unless "special circumstances would make an award unjust." In making this determination, "a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position.").

[206] 37A AM. JUR. 2D *Freedom of Information Acts* § 569 (2009).

had a reasonable basis in law."[207] According to Texas law, the court may assess costs of litigation and "reasonable" attorneys' fees incurred by a plaintiff or defendant who substantially prevails in an action for enforcement of the open meetings law. In exercising its discretion, the court "shall" consider: 1) whether the action was brought in good faith; and 2) whether the conduct of the governmental body had a reasonable basis in law.[208]

According to Arkansas law, if a plaintiff who brought an action to enforce the open meetings law "substantially prevails," the court has discretion to assess against the defendant "reasonable attorneys' fees and other litigation expenses reasonably incurred" by the plaintiff. However, "no expenses shall be assessed against the State of Arkansas or any of its agencies or departments."[209] According to Illinois law, the court "may assess" against any party, except the state, "reasonable" attorneys' fees and "other litigation costs" by a party who "substantially prevails" in any action brought to enforce the open meetings law.[210]

According to Virginia law, if a court finds a violation of the open meetings law, the petitioner, or person who brought the complaint, shall be entitled to recover reasonable costs and attorneys' fees from the public body if the petitioner "substantially prevails." The petitioner may recover fees and costs unless "special circumstances would make an award unjust." In making this determination, "a court may consider, among other things, the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public

[207] TEX. GOV'T CODE ANN. § 551.142(b) (2007).

[208] *Id*.

[209] ARK. CODE ANN. § 25-19-107(d) (2008).

[210] 5 ILL. COMP. STAT. ANN. 120/3(d) (2009).

body's position."[211] Finally, according to Virginia law, if a court finds the denial to be in violation of the provisions of the state's open meetings law, the petitioner shall be entitled to recover reasonable costs and attorneys' fees from the public body. In making this determination, a court "may consider," among other things, "the reliance of a public body on an opinion of the Attorney General or a decision of a court that substantially supports the public body's position."[212]

Several states across the country contain similar provisions for the return of attorneys' fees and court costs in open meetings cases. The laws in the ten states restricting the return of attorneys' fees to prevailing plaintiff—Colorado,[213] Indiana, [214] Michigan, [215] Montana, [216] Nebraska, [217] Nevada, [218] New York, [219] North Dakota , [220] Utah[221] and Washington[222]—say that

[211] VA. CODE ANN. § 2.2-3713(D) (2009).

[212] *Id*.

[213] COLO. REV. STAT. § 24-6-402(h)(9) (2008) (stating that a court "may award" attorneys' fees and costs to "prevailing citizens" in actions brought to enforce the open meetings laws.).

[214] IND. CODE ANN. § 5-14-1.5-7(f) (2009) (stating that the court "shall award reasonable attorneys fees and court costs" to a person who brings an action to enforce the open meetings law.).

[215] MICH. COMP. LAWS. SERV. § 15.271(4) (2009) (stating that a person who succeeds in an action to compel compliance or enjoin further violations of the open meetings law "shall recover" court costs and attorneys' fees for the action.).

[216] MONT. CODE ANN. § 2-3-221 (2007) (stating that a plaintiff who prevails in an action brought in district court to enforce the plaintiff's rights" "may be" awarded costs and "reasonable" attorney fees.).

[217] NEB. REV. STAT. ANN. § 84-1414(3) (2009).

[218] NEV. REV. STAT. ANN. § 241. 037(2) (2009).

[219] N.Y. PUB. OFF. LAW § 107(2) (2009).

[220] N.D. CENT. CODE § 44-04-21.2(1) (2009) (stating that if the court finds a violation it "may award" "reasonable" attorneys' fees against the entity found to have violated the open meetings law.).

[221] UTAH CODE ANN. § 52-4-303(4) (2008).

court "may" award "reasonable" attorneys' fees and court costs to a successful plaintiff in a suit brought to enforce the open meetings law. Three states— Hawaii,[223] New Mexico[224] and Maryland[225]—allow the return of fees and costs to either prevailing party. Additionally, five states—Arizona, Kentucky, Missouri, North Carolina and Pennsylvania—require the violation to have been found to have been willful or knowing to allow for the return of attorneys' fees.[226]

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[222] WASH. REV. CODE ANN. § 42.30.120(2) (2009) (stating that "any person who prevails against a public agency in any action in the courts for a violation" of the open meetings law "shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.").

[223] HAW. REV. STAT. ANN. § 92-12(c) (2009) (stating that the court "may order payment of reasonable attorney fees and costs to the prevailing party" in a suit to enforce the open meetings law.).

[224] N.M. STAT. ANN. § 10-15-3(C) (2008) (stating that a court "shall award costs and reasonable attorney fees to any person who is successful" in bringing a court action to enforce the open meetings law. If the prevailing party in a legal action is a public body defendant, it "shall be" awarded court costs.).

[225] MD. CODE ANN. GOVERNMENT § 10-510(d)(5)(i) (2008) (stating that a court "may" assess against "any party reasonable counsel fees and other litigation expenses that the party who prevails in the action incurred.")

[226] ARIZ. REV. STAT. § 38- 431.07(A) (2008) (stating that a court "may assess" attorneys' fees for a plaintiff, or person who brought an action, to enforce the open meetings law. If the court finds that a public officer violated the law "with intent to deprive the public of information," the court "may remove" the public officer from office and "shall assess" the public officer, or a person who "knowingly aided, agreed to aid or attempted to aid" the public officer in violating the law, with "all of the costs and attorney fees awarded to the plaintiff."); KY. REV. STAT. ANN. § 61.848(6) (2009) (stating that any person who prevails in an action found to be willful may be awarded court costs and "reasonable" attorneys' fees. Additionally, "it shall be at the courts discretion of the court to award the person an amount not to exceed one hundred dollars for each instance in which the court finds a violation." The agency found in violation "shall" pay the fees.); MO. REV. STAT. § 610.027(3) (2009) (stating that a court "may order" payment by a governmental body or a member of a governmental body all costs and reasonable attorneys' fees to party successfully establishing a violation of the open meetings law if the court finds that the governmental body or member of that governmental body knowingly or "purposely" violated the law.); N.C. GEN. STAT. § 143-318.16B (2009) (stating that a court may award prevailing part "reasonable" attorneys' fees "to be taxed against the losing party or parties as part of the costs." The court may order that all or any portion of any fee as assessed be paid personally by any individual member or members of the public body found by the court to have "knowingly or intentionally committed the violation."); 65 PA. CONS. STAT. § 714.1 (2008) (stating that if the court determines that an agency "willfully or with wanton disregard" violated the open meetings law, in whole or in part, the court "shall award" the prevailing party "reasonable" attorneys' fees and costs of litigation or "an appropriate portion of the fees and costs.").

Louisiana[227] and South Carolina[228] law state that the court "may award" a person who prevails in whole or in part "reasonable" attorneys' fees. Minnesota law states that a court "may award reasonable costs" and attorneys' fees up to $13,000 to any party in an action.[229]

In another nine states, the law allows for the public body or public official found to have violated the open meetings law be held liable for paying attorneys' fees and court costs. Those nine states are California,[230] Delaware,[231] Florida,[232] Georgia,[233] Iowa,[234] Kansas,[235] New Hampshire,[236] Ohio[237] and Oregon.[238] Florida law additionally provides that a board or

[227] LA. REV. STAT. ANN. § 42:11(C) (2009).

[228] S.C. CODE ANN. § 30-4-100(b) (2008).

[229] MINN. STAT. § 13D.06(4)(a) (2008).

[230] CAL. GOV'T CODE § 11130.5 (2008) (stating that state law for state agencies and for local agencies provide that the court "may award" court costs and "reasonable" attorneys' fees to a plaintiff, who brought an action for enforcement of the open meetings laws, where it has been found the body violated the open meetings law. The costs "shall be paid" by the state body and not from the personal liability of any public officer.); CAL. GOV'T CODE § 54960.5 (2008) (stating that the state's law on the legislature does not address awarding of attorneys fees and court costs to prevailing plaintiffs.).

[231] DEL. CODE ANN. tit. 29, § 10005(d) (2009) (stating that a court "may award" attorneys' fees and costs to a successful plaintiff of "any action" brought to enforce the open meetings laws.).

[232] FLA. STAT. ANN. § 286. 011(4) (2009) (stating that the court shall assess "reasonable" attorneys' fees against an agency if the court determines the agency violated the open meetings law.).

[233] GA. CODE ANN. § 50-14-5(b) (2009).

[234] IOWA CODE § 21.6(3)(a) (2008); IOWA CODE § 21.6(3)(b) (2008).

[235] KAN. STAT. ANN. § 75-4320a(c) (2008) (stating that a court "may" award court costs to the person seeking enforcement of the open meetings law if it finds a violation and "may assess" those fees from a violating agency or official.).

[236] N.H. REV. STAT. ANN. § 91-A:8(I) (2009) (stating that a public body or agency or employee or member who violated the open meetings law and refuses to provide access to a person who "reasonably requests" it "shall be liable" for "reasonable" attorneys' fees and costs during a lawsuit brought to enforce the law if the court finds such lawsuit was necessary. Fees "shall not be awarded" unless the court finds that 1) the public body, public agency, or person knew or should have known that the conduct engaged in was a violation" of the law; 2) "where the parties, by agreement, provided the no such fees shall be paid;" or 3) the court finds violation was in "bad faith" in refusal to allow access court may award such fees personally against officer, employee or other official.).

commission of any state or county agency that appeals a court order and is found to have violated the section shall be assessed by the court "reasonable" attorneys' fee for the appeal. The fees may be assessed against an individual member of the board or members and not fees shall be assessed if they were following advice of attorney.[239]

In Georgia, mentioned in the previous paragraph, the open meetings law states that the court "shall" award the complaining party "reasonable" attorneys' fees and other litigation costs reasonably incurred" if the court determines that an agency "acted without substantial justification in not complying" with the open meetings law. The court "shall" assess the fees "unless it finds that special circumstances exist." Whether the position of the complaining party was substantially justified shall be determined on the basis of the record as a whole, which is made in the proceeding for which fees and other expenses are sought.[240]

Additionally, in Iowa, also mentioned previously, the law requires the violation to have been proven by a "preponderance of evidence" to require payment of attorneys' fees and court costs.[241] According to Iowa law, upon finding a preponderance of evidence, the court "shall order the payment of all costs and reasonable attorneys' fees in the trial and appellate courts to

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[237] OHIO REV. CODE ANN. § 121.22(2)(a)(ii) (2009) (stating that if the court issues an injunction the court "shall order" the public body to pay all court costs and "reasonable" attorneys' fees. The court may in its discretion reduce award of attorneys' fees to the party that sought the injunction or not award any fees if the court determines that "based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis for the injunction 1) a well-informed public body reasonably would believe that the public body was not violation or threatening to violate the law; or 2) that a well-informed body "reasonably would believe" that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.).

[238] OR. REV. STAT. § 192.680(2) (2007).

[239] FLA. STAT. ANN. § 286.011(5) (2009).

[240] GA. CODE ANN. § 50-14-5(b) (2009).

[241] IOWA CODE § 21.6(3)(a)-(b) (2008).

any party successfully establishing a violation" of the open meetings law. The costs and fees shall be paid by those members of the governmental body who were found to have violated the law. The members "shall not be assessed such damages if the member: 1) voted against the closed session; 2) had good reason to believe and in good faith believed facts which, if true, would have indicated compliance with all the requirements of this chapter; or 3) reasonably relied upon a decision of a court or a formal opinion of the attorney general or the attorney for the governmental body.[242] However, "if no such members exist because they have a lawful defense" to the imposition of such damages, the costs and fees "shall be paid to" the successful party from the budget of the offending governmental body or its parent.[243]

Who Pays Attorneys' Fees and Court Costs

Eleven states specify instances in which public officials or public bodies found to have violated the open meetings law are liable for payment of any fines, attorneys' fees or court costs associated with the enforcement of the law.[244] Of those, only Alabama does not have a law

[242] IOWA CODE § 21.6(3)(a) (2008).

[243] *Id*. at (3)(b).

[244] ALA. CODE § 36-25A-9(g) (2009); ARIZ. REV. STAT. § 38-431.07(A) (2008); CAL. GOV'T CODE § 11130.5 (2008); CAL. GOV'T CODE § 54960.5 (2008); FLA. STAT. ANN. § 286.011(4) (2009); IOWA CODE § 21.6(3)(a) (2008); KAN. STAT. ANN. § 75-4320a(c) (2008); MINN. STAT. § 13D.06(4)(c)–(d) (2008); MO. REV. STAT. § 610.028(1) (2009) ; N.H. REV. STAT. ANN. § 91-A:8(I) (2009); N.C. GEN. STAT. § 143-318.16B (2009); OR. REV. STAT. § 192.680(4) (2007). The following thirty-nine states and the District of Columbia do not specify within the open meetings law who pays fees, costs and/or penalties: *See* ALASKA STAT. §§ 44.62.310-.312 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); LA. REV. STAT. ANN. §§ 42:1-:13 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MICH. COMP. LAWS. SERV. §§ 15.261-.275 (2009); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008); N.Y. PUB. OFF. LAW §§ 100-107 (2009);N.D. CENT. CODE §§ 44-04-19 to –21.3 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); 65 PA. CONS. STAT. §§ 701-716 (2008); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -

providing for the return of attorneys' fee and court costs to the prevailing party or plaintiff discussed above. While Alabama does not have a law discussing the return of attorneys' fees, penalties imposed against a member of a governmental body found to have violated the open meetings law "shall not be paid" by nor reimbursed to the member by the governmental body he or she serves.[245]

Five states—Arizona, Minnesota, New Hampshire, North Carolina and Oregon—specify that for a public body or official to be liable for damages, the violation must be found to have been willful or with intent.[246] For example, in New Hampshire, a public body, agency, member or employee who violates the open meetings law refusing to provide access to a person who "reasonably requests" it "shall be" liable for "reasonable" attorneys' fees and costs for a suit brought to enforce the law if the court finds such lawsuit "was necessary."[247] Fees "shall not be awarded" unless the court finds that 1) the public body, public agency, or person knew or should have known that the conduct engaged in was a violation" of the law; 2) "where the parties, by

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3713 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009).W. VA. CODE § 6-9A-7 (1991); W. VA. CODE §§ 6-9A-1 to -6 (2008); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[245] ALA. CODE § 36-25A-9(g) (2009).

[246] ARIZ. REV. STAT. § 38-431.07(A) (2008) (stating that if a court determines that a public officer violated the open meetings law "with intent to deprive the public of information," the court "may remove" the public officers form office and "shall assess" the public officer or a person who "knowingly aided, agree to aid or attempted to aid the public officers in violating" the law, or both, with all the costs and attorneys fees awarded to the plaintiff, who brought the action to enforce the law.); MINN. STAT. § 13D.06(4)(c) (2008) (stating that a public body "may pay any costs or attorney fees" incurred by or awarded against any of its members.); MINN. STAT. § 13D.06(4)(d) (2008) (stating that no monetary penalties or attorney fees "may be awarded" against a members of a public body unless the court finds that there was a "specific intent" to violate the open meetings law.); N.H. REV. STAT. ANN. § 91-A:8(I) (2009); N.C. GEN. STAT. § 143-318.16B (2009) (stating that a court may award prevailing part "reasonable" attorneys' fees "to be taxed against the losing party or parties as part of the costs." The court may order that all or any portion of any fee as assessed be paid personally by any individual member or members of the public body found by the court to have "knowingly or intentionally committed the violation."); OR. REV. STAT. § 192.680(4) (2007).

[247] N.H. REV. STAT. ANN. § 91-A:8(I) (2009).

agreement, provided the no such fees shall be paid;" or 3) where a court finds the violation was in committed in "bad faith".[248]

The laws of Iowa, like that of New Hampshire discussed in the previous paragraph, while not requiring intent for public bodies to be liable for fines and fees, specify the circumstances under which fees "shall not be assessed."[249] According to the Iowa law, upon finding a "preponderance of evidence," a court "shall order" the payment of costs and reasonable attorneys' fees in the trial and appellate courts to any party "successfully establishing a violation" of the open meetings law. The costs and fees shall be paid" by the members of the governmental body found to have violated the law.[250] The members "shall not be" assessed such damages if the member: 1) voted against the closed session; 2) believed in good faith that he or she was in compliance with the open meetings law; or 3) reasonably relied upon a decision of a court, a formal opinion of the attorney general or the attorney for the governmental body.[251] However, "if no such members exist because they have a lawful defense" to the imposition of such damages, the costs and fees "shall be paid to" the successful party from the budget of the offending governmental body or its parent.[252]

In addition to Iowa, four other states—California, Florida, Kansas and Missouri—do not require the violation to have occurred with intent for fees to be assessed against a violating

[248] N.H. REV. STAT. ANN. § 91-A:8(I) (2009).

[249] IOWA CODE § 21.6(3)(a) (2008).

[250] *Id*.

[251] *Id*.

[252] *Id*.

member of a body.[253] For example, according to Florida law, "any fees so assessed may be assessed against the individual member or members of such board or commission."[254]

Judicial Tools for Remedying Open Meetings Violations

Legislatures in some states authorize remedies via the state court system to stop or prevent violations of the open meetings laws. All state open meetings laws addressed some type of remedies available via the state court system for open meetings violations. The District of Columbia, however, makes no mention of remedies. In addition, some states, as discussed above, also provide for civil and/or criminal penalties for violations.

Courts are best able to take immediate actions to stop a wrong before it happens.[255] In many situations, through injunctions, writs of mandamus and declaratory relief, a court can prevent a wrong before it occurs.[256] Remedies, such as injunctions and declaratory relief, seek to prevent, repair or undo a harm, rather than compensate for it after the fact.[257] Through such remedies, a court can more precisely protect a person from the damage that would have occurred if an open meetings violations had occurred.[258] Penalties can punish officials for open meetings

[253] CAL. GOV'T CODE § 11130.5 (2008); CAL. GOV'T CODE § 54960.5 (2008) (State law for state agencies and for local agencies provide that the court "may award" court costs and "reasonable" attorneys' fees to a plaintiff who brought an action for enforcement of the open meetings laws, where it has been found the body violated the open meetings law. The costs "shall be paid" by the state body and not from the personal liability of any public officer. The state's law on the legislature does not address awarding of attorneys' fees and court costs to prevailing plaintiffs.); FLA. STAT. ANN. § 286.011(4) (2009); KAN. STAT. ANN. § 75-4320a(c) (2008) (stating that a court "may" award court costs to the person seeking enforcement of the open meetings law if it finds a violation and "may assess" those fees from a violating agency or official.); MO. REV. STAT. § 610.028(1) (2009) (stating that "a public governmental body may provide for the legal defense of any member charged with a violation" of the open meetings law.).

[254] FLA. STAT. ANN. § 286.011(4) (2009).

[255] Laycock, *supra* note 3, at 6.

[256] Laycock, *supra* note 3, at 3.

[257] Weaver, *supra* note 1, at 2.

[258] *Id*. at 136.

violations but they can do little to repair the harm that occurred because of decision-making behind close doors contrary to the law.

Injunctions, addressed in the open meetings laws of thirty-three states, can require compliance with a public body's legal obligations by halting current violations and preventing future ones.[259] For example, through injunctions, a court seeking to remedy an anticipated open meetings violation can issue an order to prevent the possible—or future—violation of the law.[260] In issuing injunctions, the court must consider the "public interest" in halting the violation.[261]

Through declaratory judgments—in the open meetings laws of fourteen states—courts can address uncertainty about whether actions are in compliance with the laws.[262] Declaratory judgments provide parties an opportunity to avoid future liability by allowing them to seek clarification on a legal question, or compliance with the Sunshine Laws, before taking action. This allows public bodies and officials an opportunity to save the time and expense of litigation by seeking clarification from a court about the legality of an action being considered.[263] Declaratory judgments do not compel an action, but are advisory in nature.[264] Courts could warn of future court action depending upon what a legal body decides to do.

The following subsections will discuss the remedies some state's laws allow state courts to issue including: Injunctions, declaratory relief and writs of mandamus. Table 2-5, located at the

[259] *Id*. at 50-51.

[260] *Id*. at 3.

[261] *Id*. at 50-51.

[262] *Id*. at 131.

[263] *Id*.

[264] *Id*. at 135.

end of this chapter, contains a complete listing of each remedy to be discussed in this section and every state that provides for the remedy in its open meetings law.[265]

Injunction

In all, thirty-three states specifically allow courts to issue injunctions to enforce the open meetings law. [266] An injunction orders possible violators to halt their actions and it prohibits future violations under penalty of contempt of court.[267] While most state laws simply mention that courts may issue injunctions, Ohio's law contains some unique requirements. According to Ohio law, if an injunction is issued, the court shall also order the public body it enjoins to pay a civil forfeiture of $500 to the party that sought the injunction and shall award to that party all court costs and "reasonable" attorneys' fees.[268]

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[265] *See, infra,* pp.110.

[266] ARIZ. REV. STAT. § 38-431.06(D) (2008); CAL GOV'T CODE ¸11130.3 (a) (2008); CAL. GOV'T CODE § 9031 (2008); CAL. GOV'T CODE § 54960(a) (2008); COLO. REV. STAT. § 24-6-402(7) (2008); DEL. CODE ANN. tit 29, § 10005(d) (2009); FLA. STAT. ANN. § 286.011(2) (2009); GA. CODE ANN. § 50-14-5(a) (2009); 5 ILL. COMP. STAT. ANN. § 120/3(c) (2009); IND. CODE ANN. § 5-14-1.5-7 (2009); IOWA CODE § 21.6(3)(e) (2008); KAN. STAT. ANN. § 75-4320a(a) (2008); KY. REV. STAT. ANN. § 61.848(1) (2009); LA. REV. STAT. ANN. § 42:11(A) (2009); MD. CODE ANN. GOVERNMENT § 10-510(d)(2) (2008); MICH. COMP. LAWS. SERV. § 15.271(1) (2009); MO. REV. STAT. § 610.030 (2009); NEV. REV. STAT. ANN. § 241.032(1) (2009); N.H. REV. STAT. ANN. § 91-A:8(III) (2009); N.J. REV. STAT. § 10:4-16 (2009); N.M. STAT. ANN. § 10-15-3(C) (2008); N.Y. PUB. OFF. LAW § 107(1) (2009); N.C. GEN. STAT. § 143-318.16A(a)-(b) (2009); N.D. CENT. CODE § 44-04-21.2(1) (2009); OHIO REV. CODE ANN. § 121.22(I)(3) (2009); 65 PA. CONS. STAT. § 713 (2008); R.I. GEN LAWS § 42-46-8(d) (2009); S.C. CODE ANN. § 30-4-100(A) (2008); TENN. CODE ANN. § 8-44-106(c) (2009); TEX. GOV'T CODE ANN. § 551.142(a) (2007); VT. STAT. ANN. tit. 1, § 314(b) (2009); VA. CODE ANN. § 2.2-3713(C) (2009); WASH. REV. CODE ANN. § 42-30-120 (2009); W. VA. CODE § 6-9A-6 (2008); WIS. STAT. § 19.97(2) (2008). The following seventeen states and the District of Columbia do not mention injunctions as a remedy for violations of the state's open meetings law: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ALASKA STAT. §§ 44.62.310-.312 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); S.D. CODIFIED LAWS § 1-25-1 (2009); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[267] *Sunshine Law, supra* note 24, at 47; Elizabeth Johnson Wallmeyer, Open Meeting Laws: A Comparison of the Fifty States and the District of Columbia (2000) (unpublished thesis, University of Florida) (on file with George A. Smathers Libraries, University of Florida), at 237.

[268] OHIO REV. CODE ANN. § 121.22(I)(1)-(2)(a) (2009).

In addition to enjoining future violations of the open meetings laws from occurring at meetings required to be open by law, courts may also enjoin an action taken at a meeting that may have violated a state's open meetings law from going into effect. Three states—Pennsylvania, South Carolina and Virginia—provide specific time frames for when petitions to enjoin action taken in violation of the law should be heard.[269] In Pennsylvania, a legal challenge shall be filed within thirty days from the date of the meeting or within thirty days from the discovery of any action that occurred at a closed meeting in violation of the law. Further,"[n]o legal challenge may be commenced more than one year from the date of said meeting.[270] According to Pennsylvania law, the court may enjoin any challenged action until a judicial determination of the legality of the meeting at which the action was adopted is reached." If the court finds one or more violations occurred it may declare any or all of the actions taken at the meeting invalid. If court finds no violation all action "shall be fully effective." [271] South Carolina law also allows for actions to be brought up to a year after the violation.[272] However, under Virginia law a petition for mandamus or injunction shall be heard within seven days of the date when the petition is made.[273]

[269] 65 PA. CONS. STAT. § 713 (2008); S.C. CODE ANN. § 30-4-100(a) (2008); VA. CODE ANN. § 2.2-3713(C) (2009); VT. STAT. ANN. tit. 1, § 314(b) (2009).

[270] 65 PA. CONS. STAT. § 713 (2008).

[271] *Id*.

[272] S.C. CODE ANN. § 30-4-100(a) (2008) (stating that "[a]ny citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists."

[273] VA. CODE ANN. § 2.2-3713(C) (2009).

As with civil penalties discussed earlier, in some cases appellate courts have dismissed cases where plaintiffs sought injunctions for open meetings violations based on the parties' "good faith" arguments.[274] Courts have often imposed a heavy burden of proof for granting injunctions, requiring plaintiffs to show "either that he will suffer irreparable injury unless the court enjoins the defendant, or that alternative legal remedies, such as monetary damages, are inadequate."[275] In one example, in November 2008, two Philadelphia newspapers filed an emergency suit seeking access to a meeting the Philadelphia City Council was about to hold behind closed doors to discuss the city's budget deficit.[276] By the time a judge had heard initial arguments in the suit, the meeting was over and the violation had occurred.[277] Ironically, the judge also refused to grant the newspapers an injunction to block the city council from holding closed meetings in the future because the newspaper could not prove a violation of the law had occurred since no one from the paper had been at the meeting and therefore no one could offer evidence that the discussion was in fact a violation of the law.[278] According to *The Patriot-News*, a Pennsylvania newspaper recounting the event, similar court decisions that place the burden of proving a violation occurred in a closed meeting on the public excluded from the meeting were common in the Pennsylvania.[279]

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[274] *Sunshine Laws*, *supra* note 24, at 48.

[275] Eleanor Barry Knoth, *The Virginia Freedom of Information Act: In adequate Enforcement*, 25 WM. & MARY L. REV. 487, 488-489 (1984).

[276] Keep the Door Open//Weak Sunshine Act Leaves Public in Dark, PATRIOT-NEWS, Nov. 30 2008, at F01.

[277] *Id*.

[278] *Id*.

[279] *Id*.

Declaratory Judgment

In some states, declaratory judgments are another way in which citizens or public officials can avoid violating a state's open meetings law by seeking a "prospective ruling from the court on whether a certain procedure will violate the sunshine law."[280] By allowing for officials to seek clarification of the laws, declaratory judgments can serve an educational purpose, giving public officials the opportunity to learn about the requirements of the law and conduct proceedings open to the public in accordance with the law without facing penalties.[281] Fourteen states' open meetings law allow for courts to grant declaratory relief.[282]

By providing for declaratory judgments, Iowa and Missouri laws limit the possibility of public officials or public bodies using the good faith excuse to avoid penalties for violating open meetings laws. According to Iowa law, a governmental body that is in doubt about the legality of closing a particular meeting may bring suit at the expense of that governmental body to

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[280] *Sunshine Laws*, *supra* note 24, at 46-47.

[281] *Id*.

[282] ALA. CODE § 36-25A-9(e) (2009); CAL. GOV'T CODE §11130.3(a) (2008); CAL. GOV'T CODE § 9031 (2008); CAL. GOV'T CODE § 54960(a) (2008); DEL. CODE ANN. tit. 29, § 10005(d) (2009); IND. CODE ANN. § 5-14-1.5-7 (2009); IOWA CODE § 21-6(4) (2008); LA. REV. STAT. ANN. § 42:11(A) (2009); MO. REV. STAT. § 610.027(6) (2009); N.Y. PUB. OFF. LAW § 107(1) (2009); N.C. GEN. STAT, § 143-318.16A(d) (2009); N.D. CENT. CODE § 44-04-21.2(1) (2009); 65 PA. CONS. STAT. § 715 (2008); S.C. CODE ANN. § 30-4-100(A) (2008); VT. STAT. ANN. tit. 1, § 314(b) (2009); WIS. STAT. § 19.97(2) (2008). The following thirty-six states and the District of Columbia do not address declaratory relief in the state's open meetings law: *See* ALASKA STAT. §§ 44.62.310-.312 (2009); ARIZ. REV. STAT. §§ 38-431 to -431.09 (2008); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); FLA. STAT. ANN. §§ 286. 001-012 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); KAN. STAT. ANN. §§ 75-4317 to -4320b (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MICH. COMP. LAWS. SERV. §§ 15.261-.275 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

ascertain the propriety of any action or seek a formal opinion of the attorney general or an attorney for the governmental body.[283] The law further states that ignorance of the requirements of the state's open meetings law "shall be no defense" to an enforcement proceeding brought to enforce compliance with the state's open meetings law.[284] In another example, Missouri law states that a public governmental body that is in doubt about the legality of closing a particular meeting may bring suit at the expense of that public governmental body to ascertain the propriety of any action, or seek a formal opinion of the attorney general or an attorney for the governmental body.[285]

Writ of Mandamus

In remedying open meetings violations, many state laws also allow for courts to issue writs of mandamus as a remedy. By issuing a writ, a court compels a body to do something.[286] Thirteen states allow the courts to issue writs of mandamus to enforce open meetings laws.[287]

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[283] IOWA CODE § 21-6(4) (2008).

[284] *Id*.

[285] MO. REV. STAT. § 610.027(6) (2009).

[286] Wallmeyer, *supra* note 267, at 238.

[287] ARIZ. REV. STAT. § 28-431.04 (2008); CAL GOV'T CODE § 11130.3 (a) (2008); CAL GOV'T CODE § 9031 (2008); CAL GOV'T CODE § 54960 (a) (2008); DEL. CODE ANN. tit. 29, § 10005(d) (2009); 5 ILL. COMP. STAT. ANN. 120/3(c) (2009); KAN. STAT. ANN. § 75-4320a(a) (2008); LA. REV. STAT. ANN. § 42:11(A) (2009); MICH. COMP. LAWS. SERV. § 15.271(3) (2009); N.M. STAT. ANN. 10-15-3(C) (2008); N.D. CENT. CODE § 44-04-21.2(1) (2009); TEX. GOV'T CODE ANN. § 551.142(a) (2007); VA. CODE ANN.. § 2.2-3713(C) (2009); WASH. REV. CODE ANN. § 42-30-120 (2009); WIS. STAT. § 19.97(2) (2008). *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); FLA. STAT. ANN. §§ 286. 001-012 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009); IOWA CODE §§ 21.1-.11 (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MO. REV. STAT. §§ 610.010- .035 (2009); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); 65 PA. CONS. STAT. §§ 701-716 (2008); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); UTAH

A public official or body that violates a writ can be held in civil contempt.[288] Although similar, mandamus and injunctions differ in that a mandamus compels a government official to perform a duty, while an injunction compels an official of a public body to halt threatened or future violations of the law. Additionally, courts can only issue writs to government officials, while injunctions can be issued to enjoin public officials, public bodies as a whole, or actions of public bodies from taking effect.[289] Writs are helpful because they can stop illegal meetings faster than the often lengthy process of litigation in court. Unlike a writ, filing a complaint to begin formal action in court will not prevent the public body from continuing what it is doing until the case is litigated.[290]

Procedural Controls

Open meetings laws in some states also contain other provisions for when action is taken via the state court system. These provisions include: 1) specifications on who can bring actions to enforce a state's open meetings law; 2) provisions limiting the amount of time after a violation has occurred in which a person can bring action to enforce the open meetings law; 3) specifications directing a state court to give priority in court to open meetings cases; 4) specifications on whether a person bringing the suit to enforce the law or the public body or official have the burden of proof in an open meetings action; and 5) provisions allowing for fees and fines to be assessed against persons bringing frivolous suits.

CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); W. VA. CODE §§ 6-9A-1 to -6 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[288] LA. REV. STAT. ANN. § 42:11(B) (2009) (stating that "[a]ny noncompliance with the orders of the court may be punished as contempt of court.").

[289] BLACK'S LAW DICTIONARY (4th ed. 2004); *See also* Schwing, *supra* note 25, 506.

[290] *Sunshine Laws*, *supra* note 24, at 45.

Who Can Bring Actions to Enforce Open Meetings Laws

In all, forty-one states address who can bring actions to enforce the open meetings law. The majority of states specify that either one or all of the following may bring actions to enforce the open meetings laws: Any person or aggrieved citizen, the state attorney general and the county and district attorneys.[291] Further, Texas and Alabama also specifically mention the news media, in addition to any person and state and district attorneys.[292] However, Arizona and Kansas limit the persons who can bring action to the state attorneys general or the county or district attorneys.[293] Instead of including any person, Massachusetts law states that a complaint seeking an order for enforcement of the open meetings laws may be sought by "registered voters,

[291] *See* ALA. CODE § 36-25A-9(a) (2009); ARIZ. REV. STAT. § 38-431.07(A) (2008); ARK. CODE ANN. § 25-19-107(a) (2008); CAL. GOV'T CODE § 11130(a) (2008); CAL. GOV'T CODE § 9031 (2008); CAL. GOV'T CODE § 54960(a) (2008); DEL. CODE ANN. tit. 29, § 10005(b) (2009); FLA. STAT. ANN. § 286.011(2) (2009); GA. CODE ANN. § 50-14-5(a) (2009); HAW. REV. STAT. § 92-12(c) (2009); IDAHO CODE ANN. § 67-2347 (2008); 5 ILL. COMP. STAT. ANN. 120/3(a) (2009); IND. CODE ANN. § 5-14-1.5-7 (2009); IOWA CODE § 21.6(1) (2008); KAN. STAT. ANN. § 75-4320(A) (2008); La. Rev. Stat. Ann. § 42:10(A) (2009); MD. CODE ANN. GOVERNMENT § 10-510(b)(1) (2008); MASS. ANN. LAWS ch. 30A, §11A1/2 (2009); MICH. COMP. LAWS. SERV. § 15.270(1) (2009); MINN. STAT. § 13D.06(2) (2008); MO. REV. STAT. § 610.027 (2009); MISS. CODE ANN. § 25-41-15 (2008); MONT. CODE ANN. § 2-3-114 (2007); NEB. REV. STAT. ANN. § 84-1414(3) (2009); NEV. REV. STAT. ANN. § 241.040(4) (2009); N.H. REV. STAT. ANN. § 91-A:7 (2009); N.J. REV. STAT. § 10:4-15(b) (2009); N.M. STAT. ANN. § 10-15-3 (2008); N.Y. PUB. OFF. LAW § 107(1) (2009); N.C. GEN. STAT. § 143-318.16(a) (2009); N.D. CENT. CODE § 44-04-21.2 (2009); OHIO REV. CODE ANN. § 121.22(I)(1) (2009); OR. REV. STAT. § 192.680(2) (2007); 65 PA. CONS. STAT. § 715 (2008); R.I. GEN. LAWS. § 42-46-8(a)&(c) (2009); S.C. CODE ANN. § 30-4-100(a) (2008); TEX. GOV'T CODE ANN. § 551.142(a) (2007); UTAH CODE ANN § 52-4-303(1)&(3)(a)-(b) (2008); VT. STAT. ANN. tit. 1, § 314(b) (2009); VA. CODE ANN. § 2.2-3713(A) (2009); WASH. REV. CODE ANN. § 42.30.130 (2009); W. VA. CODE § 6-9A-6 (2008);WIS. STAT. § 19.97(2) (2008). The following states and the District of Columbia do not address who can bring actions to enforce open meetings laws: *See* ALASKA STAT. §§ 44.62.310-.312 (2009); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. § 53a-42 (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[292] ALA. CODE § 36-25A-9(a) (2009) (stating that any media organization, Alabama citizen, the Alabama attorney general, or district attorneys may bring action to enforce the open meetings law. Further, "no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body.");TEX. GOV'T CODE ANN. § 551.142(a) (2007) (stating that "an interested person, including a member of the news media, may bring an action" for mandamus or injunction to stop, prevent, or reverse a violation or threatened violation" of the open meetings law by members of the governmental body.).

[293] KAN. STAT. ANN. § 75-4320(A) (2008); ARIZ. REV. STAT. § 38-431.07(A) (2008).

by the attorney general, or by the district attorney of the district in which the government body is located."[294]

Statute of Limitations

Within the open meetings laws of twenty-nine states, time limitations for bringing open meetings claims are specified.[295] While in some states statute of limitations for bringing claims are addressed in another part of the state's laws, this study focused only on statute of limitations if specified in a state's open meetings law. Statutes of limitations establish a time limit for when a suit can begin in a civil case.[296] The time limitation is based on the date when the violation occurred or was discovered.[297] The purpose of such limitations is to "require diligent prosecution" and to ensure that the claims will be addressed while the evidence is still

[294] MASS. ANN. LAWS ch. 30A, §11A1/2 (2009).

[295] *See* CODE OF ALA. § 36-25A-10 (2009); ALASKA STAT. § 44.62.310(f) (2009); CONN. GEN. STAT. §1-206(b)(1) (2008); DEL. CODE ANN. tit. 29, § 10005(a) (2009); HAW. REV. STAT. § 92-11 (2009); 5 ILL. COMP. STAT. ANN. 120/3(b) (1)-(2) (2009); IDAHO CODE ANN. § 67-2347(4) (2008); IND. CODE ANN. § 5-14-1.5-7(b) (2009); IOWA CODE § 21.6(3)(c) (2008); KAN. STAT. ANN. § 75-4320(a) (2008); KY. REV. STAT. ANN. § 61.848(2) (2009); LA. REV. STAT. ANN. § 42:9 (2009); MD. STATE GOVERNMENT CODE ANN. § 10-510(b)(2) (2008); MO. REV. STAT. § 610.027(5) (2009); NEB. REV. STAT. ANN. § 84-1414(1) (2009); N.J. REV. STAT. § 10:4-15(a) (2009); MICH. COMP. LAW SERV. § 15.270(A)(b) (2009); MONT. CODE ANN. § 2-3-114 (2007); N.Y. C.P.L.R. § 217 (2009); NEV. REV. STAT. ANN. § 241.037(3) (2009); N.C. GEN. STAT. § 143-318.16A(a) (2009); N.D. CENT. CODE § 44-04-21.2(1) (2009); OHIO REV CODE ANN. § 212.22(I)(1) (2009); OR. REV. STAT. § 192.680(5) (2007); 65 PA. CONS. STAT. § 713 (2008); R.I. GEN. LAWS § 42-46-8(b) (2009); S.C. CODE ANN. § 30-4-100(a) (2008); W. VA. CODE § 6-9A-6 (2008). The following twenty-one states and the District of Columbia do not address statute of limitation within the state's open meetings law: *See* ARIZ. REV. STAT. §§ 38-431 to -431.09 (2008); CAL. GOV'T CODE §§ 9027-9031 (2008); CAL. GOV'T CODE §§ 54950-54963 (2008); CAL. GOV'T CODE §§ 11120-11132 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); FLA. STAT. ANN. § 775.082(4)(b) (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008); OKLA. STAT. tit. 25, §§ 301- 314 (2009); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[296] BLACK'S LAW DICTIONARY (4th ed. 2004).

[297] *Id*.

available.[298] Table 2-6, located at the end of this chapter, contains a complete listing all states that provide time limits for filing actions for violations of the open meetings laws.[299]

The time limits range from within twenty-one days of the meeting taking place in Kansas[300] to within two years of the meeting occurring in Ohio.[301] Statutes of limitations specified in state's open meetings laws can play a role in an individual's decision to bring suit to enforce the open meetings laws.[302] Short statutes of limitations, such as allowing citizens sixty days to bring suit, can often be a hindrance to enforcement because of the time it may take to gather the information needed for deciding whether to bring suit and then finding the funding for attorneys' fees and court costs.[303] The Citizen Advocacy Center supports either a statute of limitations of at least two years after the violation occurred, as is the case in Ohio,[304] or, no statute of limitations for bringing suit, as is the case in Minnesota.[305]

The most commonly addressed triggering mechanisms for the clock to start on time limits in state's open meetings laws included from when minutes became public, from when a person knew or should have known of a violation, and from when violation occurred. For example,

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[298] *Id*.

[299] *See, infra,* pp. 111.

[300] KAN. STAT. ANN. § 75-4320(a) (2008).

[301] OHIO REV. CODE ANN. § 212.22(I)(1) (2009).

[302] Citizen Advocacy Center, *supra* note 155, at 34, 65.

[303] *Id.; See also* 5 ILL. COMP. STAT. ANN. 120/3(b) (1)-(2) (2009); *See also* MICH. COMP. LAW SERV. § 15.270(A)(b) (2009).

[304] OHIO REV. CODE ANN. § 212.22(I)(1) (2009).

[305] Citizen Advocacy Center, *supra* note 155, at 34, 65.

Michigan[306] and Oregon[307] allow for actions to enforce the open meetings law to be brought within sixty days of the date when the minutes from the meetings became available. Michigan law requires that action related to the approval of a contract, acceptance of bids or issuance of bonds be brought within thirty days of action.[308] Five states—Indiana,[309] Iowa,[310] Michigan,[311] Missouri[312] and North Carolina[313]—also specify limits in the state's open meetings law for bringing action challenging violations related to bonds or indebtedness.

Several states place time limits beginning from when the person bringing the action knew or should have known about the violation. Indiana,[314] Montana[315] and Pennsylvania[316] require action to be brought within thirty days of the date on which the person bringing the action learned, or "reasonably should have learned" of the agency's decision. Indiana law further requires any action to declare null and void an action or to issue an injunction be commenced

[306] MICH. COMP. LAW SERV. § 15.270(A)(b) (2009).

[307] OR. REV. STAT. § 192.680(5) (2007).(stating that "any suit" for an alleged open meetings violation must be commenced within 60 days of the date the decision becomes public record.).

[308] MICH. COMP. LAW SERV. § 15.270(A)(b) (2009).

[309] IND. CODE ANN. § 5-14-1.5-7(b) (2009).

[310] IOWA CODE § 21.6(3)(c) (2008).

[311] MICH. COMP. LAW SERV. § 15.270(A)(b) (2009).

[312] MO. REV. STAT. § 610.027(5) (2009).

[313] N.C. GEN. STAT. § 143-318.16A(a) (2009).

[314] IND. CODE ANN. § 5-14-1.5-7(b)(2) (2009).

[315] MONT. CODE ANN. § 2-3-114 (2007).

[316] 65 PA. CONS. STAT. § 713 (2008).

"prior to the delivery of any warrants, notes, bonds, or obligations."[317] While requiring action to be filed within thirty days, Pennsylvania law further requires that "no legal challenge may be commenced more than one year from the date" of a meeting that occurred in violation of the law.[318] Alabama, Illinois and North Dakota require action to be brought within sixty days of when the person knew or should have known about the violation.[319] However, in North Dakota an action should also be brought within thirty days of the issuance of an attorney general's opinion on the alleged violation, whichever is later.[320] Ohio law requires that actions must be brought within two years of the alleged action that occurred in violation of the open meetings law.[321] According to Rhode Island law, "no complaint may be filed by the attorney general after one-hundred-and-eighty-days from the date of public approval of the minutes of the meetings at which the alleged violation occurred," or if the meetings was unannounced or improperly closed, one-hundred-and-eighty-days form the date the action became public.[322]

Litigation Priority

In addition, twelve states[323] have requirements in their laws for cases brought to enforce the open meetings law to have priority to be heard in a state court. Litigation priority helps

[317] IND. CODE ANN. § 5-14-1.5-7(b)(1) (2009).

[318] 65 PA. CONS. STAT. § 713 (2008).

[319] ALA. CODE § 36-25A-10 (2009); 5 ILL. COMP. STAT. ANN. 120/3(a) (2009) (stating that "[a]ny person" may bring an action "prior to or within" 60 days of a meeting alleged to be in violation of the Illinois' open meetings law, or within 60 days "of the discovery of a violation by any State's Attorney."); N.D. CENT. CODE, § 44-04-21.2(1) (2009).

[320] N.D. CENT. CODE, § 44-04-21.2(1) (2009).

[321] OHIO REV. CODE ANN. § 212.22(I)(1) (2009).

[322] R.I. GEN. LAWS § 42-46-8(b) (2009).

[323] ARK. CODE ANN. § 25-19-107(b) (2008); ALA. CODE § 36-25A-9(a) (2009); KAN. STAT. ANN. § 75-4320a(e) (2008); IND. CODE ANN. § 5-14-1.5-7 (2009); KY. REV. STAT. ANN. § 61.848(4) (2009); LA. REV. STAT. ANN. § 42:12(B) (2009); MASS. ANN. LAWS. Ch.30A §11A1/2 (2009); N.H. REV. STAT. ANN. § 91-A:7 (2009); N.C. GEN.

establish the priority of open meetings issues in the state's courts documents by statutorily mandating that open meetings cases be given precedence in state courts.[324]

For example, open meetings laws in Arkansas and Virginia require courts to address a petition in an action to enforce the open meetings law within seven days of the application.[325]

In Massachusetts an order of notice on a complaint filed in an action to enforce the open meetings law "shall be heard not later than 10 days after the filing." The court "shall" have "regard to the speediest possible determination of the cause consistent with the rights of the parties." However, after the initial compliant has been heard "orders with respect to any of the matters" related to enforcement of the open meetings law violation complained about "may be issued at any time."[326] In Alabama, the court "shall" hear the complaint no later than seventeen business days after its initial filing if there has been no response from the government. The court

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STAT. § 143-318.16C (2009); R.I. GEN. LAWS. § 42-46-8(f) (2009); VA. CODE ANN. § 2.2-3713(C) (2009); VT. STAT. ANN. tit. 1, § 314(b) (2009). The following thirty-eight states and the District of Columbia do not address litigation priority within the open meetings law: *See* ALASKA STAT. §§ 44.62.310-.312 (2009); ARIZ. REV. STAT. §§ 38-431 to -431.09 (2008); CAL. GOV'T CODE §§ 9027-9031 (2008); CAL. GOV'T CODE §§ 54950-54963 (2008); CAL. GOV'T CODE §§ 11120-11132 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); DEL. CODE ANN. tit. 29, §§ 10001-10005 (2009); FLA. STAT. ANN. §§ 286. 001-012 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); IOWA CODE §§ 21.1-.11 (2008); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MICH. COMP. LAWS. SERV. §§ 15.261-.275 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MO. REV. STAT. §§ 610.010- .035 (2009); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.M. STAT. ANN. §§ 10-15-1 to -4 (2008); N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.D. CENT. CODE §§ 44-04-19 to -21.3 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); 65 PA. CONS. STAT. §§ 701-716 (2008); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); W. VA. CODE §§ 6-9A-1 to -6 (2008); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[324] BLACK'S LAW DICTIONARY (4th ed. 2004).

[325] ARK. CODE ANN. § 25-19-107(b) (2008); VA. CODE ANN. § 2.2-3713(C) (2009).

[326] MASS. ANN. LAWS. Ch.30A §11A1/2 (2009).

"shall" issue a final order on the merits of the action within 60 days after the preliminary hearing "unless a longer period is consented to by all parties and the court."[327]

The remaining states requiring a priority for open meetings cases do not specify a time frame but instead call for open meetings cases to have some kind of priority in the courts. According to Rhode Island law, actions brought to enforce the open meetings law "may be advanced" on the court calendar "upon motion of the petitioner," or person bring the action.[328] Other states including Kansas,[329] Kentucky[330] and Vermont[331] call for such cases to "take precedence." While in New Hampshire, the law calls for open meetings cases to have "high priority."[332] According to Louisiana law, proceedings to enforce the open meetings law "shall be tried by preference and in a summary manner." Further, "any appellate court" to which proceedings for the enforcement of the open meetings law is brought "shall place it on its preferential docket, shall hear it without delay, and shall render a decision as soon as practicable."[333]According to Indiana law, a court "shall" expedite the hearing of an action filed to enforce the open meetings law.[334] According to North Carolina law, actions brought to

[327] ALA. CODE § 36-25A-9(a) (2009).

[328] R.I. GEN. LAWS. § 42-46-8(f) (2009).

[329] KAN. STAT. ANN. § 75-4320a(e) (2008).

[330] KY. REV. STAT. ANN. § 61.848(4) (2009) (stating that "except as otherwise provided by law," proceedings to enforce the open meetings law "take precedence" over all other cases and shall be assigned a hearing and trial at the earliest possible date.).

[331] VT. STAT. ANN. tit. 1, § 314(b) (2009) (stating that "except as to cases the court considers of greater importance, proceedings to enforce the open meetings law "take precedence" on the court docket "over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.").

[332] N.H. REV. STAT. ANN. § 91-A:7 (2009) (stating that state courts "shall" give proceedings brought to enforce the open meetings law "high priority on the court calendar.").

[333] LA. REV. STAT. ANN. § 42:12(B) (2009).

[334] IND. CODE ANN. § 5-14-1.5-7 (2009).

enforce the open meetings law "shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the trial and appellate courts."[335]

Burden of Proof

Fourteen states specify which party has the burden of proof in actions to enforce the open meetings law. While in some states' laws the issue of which party has the burden of proof is addressed in another part of the state's laws, this study focused only on burden of proof if specified in a state's open meetings law. Three states place the burden of proof on the plaintiff, while seven states place it on the public body or official, and in four states the burden of proof is first on the person bringing the suit against the government body or official to establish that there is sufficient cause for a case and then shifts to the defending public body or official. Table 2-7, located at the end of this chapter, contains a complete listing all states that specify who has the burden of proof in actions for violations of a state's open meetings law.[336]

[335] N.C. GEN. STAT. § 143-318.16C (2009).

[336] *See*, *infra*, pp. 112; The following thirty-six states and the District of Columbia do not address which party has the burden of proof in actions for violations of a state's open meetings law: *See* ALASKA STAT. §§ 44.62.310-.312 (2009); ARIZ. REV. STAT. §§ 38-431 to -431.09 (2008); ARK. CODE ANN. §§ 25-19-101 to -209 (2008); CAL. GOV'T CODE §§ 9027-9031 (2008); CAL. GOV'T CODE §§ 54950-54963 (2008); CAL. GOV'T CODE §§ 11120-11132 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); CONN. GEN. STAT. §§1-200 to 1-242 (2008); FLA. STAT. ANN. §§ 286. 001-012 (2009); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); 5 ILL. COMP. STAT. ANN. 120/1-/7 (2009); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); LA. REV. STAT. ANN. §§ 42:1-:13 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MINN. STAT. §§ 13D.01-.07 (2008); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MONT. CODE ANN. §§ 2-3-101 to -221 (2007); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.H. REV. STAT. ANN. §§ 91-A:1-:9 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009). N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.D. CENT. CODE §§ 44-04-19 to –21.3 (2009); OHIO REV. CODE ANN. § 121.22 (2009); OKLA. STAT. tit. 25, §§ 301-314 (2009); 65 PA. CONS. STAT. §§ 701-716 (2008); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); WASH. REV. CODE ANN. §§ 42.30.110-.210 (2009); W. VA. CODE §§ 6-9A-1 to -6 (2008); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

The four states with prima facie requirements are Alabama,[337] Iowa, [338] Missouri[339] and Oregon.[340] Alabama law requires the plaintiff to establish at a preliminary hearing by a "preponderance of evidence" that a meeting occurred and that each defendant, or person subject to the open meetings law, attended the meeting. Additionally, to establish a prima facie case the plaintiff "must present substantial evidence" of one or more of the following claims: 1) that the defendants disregarded the requirements for proper notice of the meeting; 2) that the defendants disregarded the open meetings law, other than during an executive session; 3) that the defendants voted to go into executive session and while in executive session discussed matters other than those subjects included in the motion to convene an executive session; and 4) that the public officials intentionally violated the state's open meetings law.[341] Similarly, according to Oregon law, the plaintiff, or person bring the action, "shall be required" to present prima facie evidence of a violation before the governing body "shall be required to prove that its acts in deliberately toward a decision complied with the law. When a plaintiff presents such evidence, the burden to prove that the open meetings law was complied with "shall be" on the governing body.[342]

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[337] ALA. CODE § 36-25A-9(b) (2009); IOWA CODE § 21.6(2) (2008) (stating that a party seeking enforcement of the open meetings law must first demonstrate that 1) the body in question is subject to the law and 2) that the body has held a closed session. After that, the burden of proof going forward "shall be on the body and its members to demonstrate compliance with the requirements of the law.").

[338] IOWA CODE § 21.6(2) (2008).

[339] MO. REV. STAT. § 610.027(2) (2009) (stating that a party seeking enforcement of the open meetings law must first demonstrate that 1) the body in question is subject to the law and 2) that the body has held a closed session. After that, the burden of proof going forward "shall be on the body and its members to demonstrate compliance with the requirements of the law.").

[340] OR. REV. STAT. § 192.695 (2007).

[341] ALA. CODE § 36-25A-9(b) (2009).

[342] OR. REV. STAT. § 192.695 (2007).

Maryland, Michigan and New Mexico place the burden of proof on the plaintiff to prove a violation occurred and that the public body is liable. For example, according to Maryland law, the public body is presumed not to have violated the law. The complainant has the burden of proving the violation.[343]

Unlike the previous states discussed, in the remaining seven states the burden of proof is on the public body.[344] According to Delaware law, "in any action" the burden of proof "shall be on the public body to justify" a failure to comply with the open meetings law or a decision to meet in executive session.[345] Massachusetts and Virginia law places the burden of proof "shall be" on the public body to show "by a preponderance of evidence" that the actions complained of were not in violation of the open meetings law.[346] Finally, both in Indiana and North Carolina, a person bringing an action for an open meetings violation "need not allege or prove special damage different from that suffered by the public at large."[347]

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[343] MD. CODE ANN. GOVERNMENT § 10-510(c) (2008); MICH. COMP. LAWS SERV. § 15.270(1) (2009) (stating that the decision of a public body "shall be presumed to have been in compliance with the requirements" of the open meetings law.); N.M. STAT. ANN. § 10-15-3(A) (2008) (stating that "every resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be presumed to have been taken or made at a meeting held" in according with the open meetings law.).

[344] *See generally* KAN. STAT. ANN. § 75-4320a(b) (2008) (stating that "the burden of proof shall be on the public body or agency to sustain its action."); R.I. GEN. LAWS § 42-46-14 (2009) (stating that in all action for enforcement of the open meetings law the burden of proof "shall be on the public body to demonstrate that the meeting in dispute was properly closed" or exempt from the law.); *See also* DEL. CODE ANN. tit. 29, §1005(c) (2009); IND. CODE ANN. §5-14-1.5-7 (2009); N.C. GEN. STAT. § 142-318.16(a) (2009); KAN. STAT. ANN. § 75-4320a(b) (2008); R.I. GEN. LAWS § 42-46-14 (2009); MASS. ANN. LAWS Ch. 30A, § 11A1/2 (2009); VA. CODE ANN. § 2.2-3713(F) (2009).

[345] DEL. CODE ANN. tit. 29, § 1005(c) (2009).

[346] MASS. ANN. LAWS. Ch. 30A, § 11A1/2 (2009); VA. CODE ANN. § 2.2-3713(F) (2009).

[347] IND. CODE ANN. § 5-14-1.5-7 (2009); N.C. GEN. STAT. § 143-318.16(a) (2009) (stating that a person bringing an action for an open meetings violation "need not allege or prove special damage different from that suffered by the public at large." Further, it is not a defense to such an action that there "is an adequate remedy at law" for the violation.).

Fees and Fines Assessed Against Plaintiff for Frivolous Suits

Fifteen states have statutes allowing for public officials or public bodies to recover attorneys' fees and costs if a court finds the suit was brought for the purpose of "harassment" and was "frivolous."[348] While in some states penalties for bringing frivolous lawsuits are specified in another part of the state's laws, this study focused only on penalties for brining frivolous lawsuits if it was addressed in a state's open meetings law. For example, according to New Hampshire law, a court "may award" attorneys' fees to a public body, agency, employee or member of a public body or agency for having to defend a lawsuit brought under the open meetings law that the court finds to have been "in bad faith, frivolous, unjust, vexatious, wanton, or oppressive."[349] Similarly, according to Louisiana law, a court "may" award attorneys' fees to

[348] ARK. CODE ANN. § 25-19-107(d) (2008); CAL GOV'T CODE §11130.5 (2008); CAL GOV'T CODE § 54960.5 (2008); CONN. GEN. STAT. § 1-206(A)(b)-(c) (2008); DEL. CODE ANN. tit. 29, § 10005(d) (2009); FLA. STAT. ANN. § 286.011(4) (2009); 5 ILL. COMP. STAT. ANN. 120/3(d) (2009); KAN. STAT. ANN. § 75-4320a(d) (2008); LA. REV. STAT. ANN. § 42:11(C) (2009); MINN. STAT. § 13D.06(4)(b) (2008); N.H. REV. STAT. ANN. § 91-A:8(I-a) (2009); N.M. STAT. ANN. § 10-15-3(C) (2008); OHIO REV. CODE ANN. § 121.22(I)(2)(b) (2009); 65 PA. CONS. STAT. § 714.1 (2008); WASH. REV. CODE ANN. § 42.30.120 (2009); W. VA. CODE § 6-9A-7(c) (2008). The following thirty-five states and the District of Columbia make no mention of penalties for bringing frivolous action under the state's open meetings law: *See* ALA. CODE §§ 36-25A-1 to -11 (2009); ALASKA STAT. §§ 44.62.310-.312 (2009); ARIZ. REV. STAT. §§ 38-431 to -431.09 (2008); COLO. REV. STAT. §§ 24-6-401 to 402 (2008); GA. CODE ANN. §§ 50-14-1 to -6 (2009); HAW. REV. STAT. §§ 92-1 to -13 (2009); IDAHO CODE ANN. §§ 67-2341 to -2347 (2008); IND. CODE ANN. §§ 5-14-1.5-1 to -8 (2009); IOWA CODE §§ 21.1-.11 (2008); KY. REV. STAT. ANN. §§ 61-800 to -850 (2009); ME. REV. STAT. ANN. tit.1, §§ 401-412 (2009); MD. CODE ANN. GOVERNMENT §§ 10-501 to -512 (2008); MASS. ANN. LAWS ch. 30 A, §§ 11A1-11A1/2 (2009); MICH. COMP. LAWS. SERV. §§ 15.261-.275 (2009); MISS. CODE ANN. §§ 25-41-1 to -17 (2008); MO. REV. STAT. §§ 610.010- .035 (2009); NEB. REV. STAT. ANN. §§ 84-1407 to -1414 (2009); NEV. REV. STAT. ANN. §§ 241.010 to -040 (2009); N.J. REV. STAT. §§ 10:4-6 to -21 (2009); N.Y. PUB. OFF. LAW §§ 100-107 (2009); N.C. GEN. STAT. §§ 143-318.9 to .18 (2009); N.D. CENT. CODE §§ 44-04-19 to –21.3 (2009); OKLA. STAT. tit. 25, §§ 301- 314 (2009); OR. REV. STAT. §§ 192.610-.710 (2007); R.I. GEN. LAWS. §§ 42-46-1 to -14 (2009); S.C. CODE ANN. §§ 30-4-10 to -110 (2008); S.D. CODIFIED LAWS § 1-25-1 (2009); TENN. CODE ANN. §§ 8-44-101 to -111 (2009); TEX. GOV'T CODE ANN. §§ 551.001-.146 (2007); UTAH CODE ANN. §§ 52-4-101 to -305 (2008); VT. STAT. ANN. tit. 1, §§ 310-314 (2009); VA. CODE ANN. §§ 2.2-3700 to -3713 (2009); WIS. STAT. §§ 19.81-.98 (2008); WYO. STAT. §§ 16-4-401 to -408 (2008); *See also* D.C. CODE ANN. § 1-207.42 (2009).

[349] *See* N.H. REV. STAT. ANN. § 91-A:8(I-a) (2009); *See also* ARK. CODE ANN. § 25-19-107(d) (2008) (stating that if a public body or agency subject to the open meetings law has "substantially prevailed" in an action, the court "may assess expenses" against the plaintiff, who brought the action, "only upon finding that the acting was initiated primarily for frivolous or dilatory purposes."); CAL GOV'T CODE §11130.5 (2008); CAL GOV'T CODE § 54960.5 (2008) (stating that for state agencies and for local agencies, a court may award court costs and "reasonably" attorneys' fees to defendant in any action brought where the defendant subject to the open meetings law has prevailed and a court finds the action was "clearly frivolous and totally lacking in merit."); COLO. REV. STAT. § 24-6-402(h)(9) (2008) (stating that a court "may award fees" to a prevailing plaintiff subject to the open meetings law if the court finds the action was "frivolous, vexatious, or groundless."); DEL. CODE ANN. tit. 29, § 10005(d) (2009)

a prevailing party if the court finds the suit was frivolous and brought without "substantial justification."[350] Allowing courts discretion to award attorneys' fees and costs to public bodies or public officials who were defendants in an open meetings case could potentially discourage members of the public from bringing suits to enforce the laws.[351] Allowing fees to be assessed against citizens could have a chilling effect and serve as a disincentive for members of the public who want to enforce the open meetings laws because of the potential that the citizen could incur large expenses for trying to enforce the open meetings laws. At least two studies done by open government advocates have recommended that states do away with provisions for assessing

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(stating that the court may award attorneys' fees and costs to a successful defendant, who is subject to the open meetings law, "only if a court finds that the action was frivolous or was brought solely for the purpose of harassment."); FLA. STAT. ANN. § 286.011(4) (2009) (stating that a court "may assess a reasonable" attorneys' fees against an individual filing an action under the open meetings law if a court finds the action was "filed in bad faith or was frivolous."); 5 ILL. COMP. STAT. ANN. 120/3(d) (2009) (stating that a court "may assess" "reasonable attorneys' fees and other litigation costs" against "any private party or parties" bringing an action under the open meetings law if the court determines that the action was "malicious or frivolous in nature."); KAN. STAT. ANN. § 75-4320a(d) (2008) (stating that a court "may" award court costs to a defendant subject to the open meetings law who prevails, if it finds that the plaintiff brought the action "frivolously, not in good faith or without a reasonably basis in fact or law."); MINN. STAT. § 13D.06(4)(b) (2008) (stating that a court "may" award costs and attorney fees to defendants subject to the open meetings law "only if" the court finds the action was frivolous and without merit.); WASH. REV. CODE ANN. § 42.30.120 (2009) (stating that "any public agency who prevails in any action in the courts" for a violation of the open meetings law "may be awarded reasonable expenses and attorneys' fees upon final judgment and written findings by the trial judge that the action as frivolous and advanced without reasonable cause."); W. VA. CODE § 6-9A-7(c) (2008) (a court "may require" a person who brought a complaint under the open meetings law to pay "the governing body's necessary attorneys' fees and expenses" if the court finds that the action was frivolous or commenced with "the primary intent of harassing" a governing body or any of its members.).

[350] LA. REV. STAT. ANN. § 42:11(C) (2009); *See also* N.M. STAT. ANN. § 10-15-3(C) (2008) (stating that "a public body defendant that prevails in a court action" brought under the open meetings law "shall be awarded" "reasonable" attorneys' fees from the plaintiff if the plaintiff brought the action "without sufficient information and belief that good grounds supported it."); OHIO REV. CODE ANN. § 121.22(I)(2)(b) (2009) (stating that if the court does not issue an injunction and determines that a suit was frivolous, the court "shall award" the public body all court costs and "reasonable" attorneys' fees as determined by the court.); 65 PA. CONS. STAT. § 714.1 (2008) (stating that if the court finds that an action brought under the open meetings law was "frivolous in nature or was brought with no substantial justification," the court "shall" award the prevailing party "reasonable" attorney fees and costs of litigation "or an appropriate portion of the fees and costs.").

[351] *See* Citizen Advocacy Center, *supra* note 155, at 103-104; *See also* Commission on Open Government Reform, Final Report, 141 (2009), http://www.flgov.com/pdfs/og_2009finalreport.pdf.

attorneys' fees and court costs to plaintiffs if a court decides the lawsuit was filed in bad faith or was frivolous.[352]

Discussion

This chapter reviewed penalties and remedies provided by state open meetings laws across the country. The study found that, while some states contain similar provisions to others, no two states provide for exactly the same penalties or remedies for violations of open meetings laws. Among the findings of note in this chapter are that twenty-two states currently provide for civil penalties to be levied against public bodies and/or public officials who are found to have violated the open meetings laws. Additionally, twenty-one states provided for criminal penalties for violations of the open meetings laws. Of those states that either provide for civil or criminal penalties, five states make available both types of penalties for violations of open meetings laws.[353] Also discussed in this chapter were remedies a court may use, including injunctions in

[352] Commission on Open Government Reform, *supra* note 351, at 141; *See also* Citizen Advocacy Center, *supra* note 155, at 103 (stating that "This provision has a severe chilling effect on the public and is inconsistent with the statute's emphasis on accessibility.").

[353] CONN. GEN. STAT. § 1-206(2) (2008) (stating that if the state's committee in charge of reviewing complaints for violations of the open meetings law finds that a violation has occurred, it may levy a civil penalty against the violating official of "not less" than $20 nor more than $1,000.); CONN. GEN. STAT. § 53a-42 (2008); CONN. GEN. STAT. § 53a-36 (2008); CONN. GEN. STAT. § 1-240 (2008) (Stating that any member of a public agency who fails to comply with an order from the state body responsible for enforcing the open meetings law is guilty of a Class B misdemeanor. A conviction for a Class B misdemeanor can carry a fine of "not to exceed" $1,000 and a jail term "not to exceed" 6 months.); FLA. STAT. ANN. § 286.0105(3)(a) (2009) (stating that "any public officer" who violates the state's open meetings law is guilty of space "noncriminal infractions," punishable by a fine "not exceeding" $500.); FLA. STAT. ANN. § 775.082(4)(b) (2009); FLA. STAT. ANN. § 286.011(3)(b)&(c) (2009); FLA. STAT. § 775.083(1)(e) (2009) (stating that any member of a public body "who knowingly violates" the state's open meetings law "by attending a meeting not held in accordance with the provisions" of the law is guilty of a misdemeanor of the second degree. Additionally, "conduct which occurs outside the state which would constitute a knowing violation" of the open meetings law is also a second degree misdemeanor. Any person convicted of a misdemeanor of the second degree faces a term of imprisonment "not exceeding 60 days." Additionally, a fine of "not to exceed" $500 may be assessed against a person convicted of a second degree misdemeanor. The fine may be assessed in addition to—or in lieu of—jail time.); GA. CODE ANN. §50-14-5 (2009) (stating that the state's attorney general "shall have the authority" and "discretion" to enforce the state's open meetings law "through either civil or criminal penalty."); GA. CODE ANN. § 50-14-6 (2009) (stating that under the state's open meetings law, "any person knowingly and willfully conducting or participating in a meeting" that violates the law "shall be" guilty of a misdemeanor and upon conviction "shall be" punished by a fine "not to exceed" $500.); MICH. COMP. LAWS. SERV. § 15.273(3) (2009) (stating that a person who "intentionally violates" the state's open meetings laws "shall be personally liable" for penalties in a civil court action "of not more" than $500, "plus court costs and actual attorney fees to the person or

thirty-four states, declaratory relief in fourteen states, writs of mandamus in thirteen states, invalidation in thirty-seven states and removal from office in five states. Additionally, of the fourteen states that specify which party has the burden of proof in legal action to remedy an open meetings law violation, in three states, Maryland, Michigan and New Mexico, the burden falls to plaintiffs bringing the claim to prove that a violation occurred. In four other states, Alabama, Iowa, Missouri and Oregon, the burden initially falls to plaintiffs to prove on first impression that a violation occurred and then shifts to the defendant, or public body, to prove otherwise. Finally, thirty-seven states address the return of attorneys' fees to prevailing parties in actions to enforce the open meetings law.

The following chapter will discuss states where lawmakers have changed criminal or civil penalty provisions in the state's open meetings law. Additionally, the chapter will explore what records, including open government audits and media reports, reveal about factors that may have created the impetus for changing penalty provisions, as well as the opinions of those who supported or opposed the changes to the penalty provisions and their reasons for doing so.

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group who brought the action."); MICH. COMP. LAW SERV. § 15.272 (2009) (stating that any public official "who intentionally violates" the state's open meetings law is guilty of a misdemeanor punishable by a fine of "not more than" $1,000 for the first offense. If the same official is convicted again for an open meetings law violation during the same term, the official "shall be" guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.); N.D. CENT. CODE, § 44-04-21.2 (2009) (for any "intentional or knowing" violations of the state's open meetings law, a court "may" award damages of $1,000 or "actual damages caused by the violation, whichever is greater."); N.D. CENT. CODE, § 44-04-21.3 (2009); N.D. CENT. CODE, § 12.1-32-01(5) (2009) (stating that under the state's open meetings law, "a public servant…who knowingly violates" the open meetings laws is guilty of a class A misdemeanor. Class A misdemeanors carry a maximum penalty of one year's imprisonment, a fine of $2,000, or a combination of both.).

Table 2-1. List of states with civil penalties and parameters for enforcing those penalties

States	Must be knowing or willful	Member is personally liable	Incremental for multiple occurrences
Alabama			X
Arizona	X	X	
Connecticut		X	
Florida			
Georgia			
Idaho	X	X	X
Iowa		X	
Kansas	X	X	
Louisiana	X	X	
Maine	X	X	
Maryland	X	X	
Michigan	X	X	
Minnesota	X	X	
Mississippi	X		
Missouri	X	X	
New Jersey	X		X
North Dakota	X		
Ohio			
Rhode Island	X	X	
Virginia	X	X	X
Washington	X	X	
Wisconsin	X	X	

Table 2-2. List of states with criminal penalties and parameters for enforcing those penalties

States	Must be knowing or willful	Incremental for multiple occurrences	Jail time	Fine
Arkansas				X
California	X		X	X
Connecticut			X	X
Florida	X		X	X
Georgia	X			X
Hawaii	X		X	X
Illinois			X	X
Michigan	X	X	X	X
Nebraska	X	X	X	X
Nevada	X		X	X
New Mexico				X
North Dakota	X		X	X
Oklahoma	X		X	X
Pennsylvania	X			X
South Carolina	X	X	X	X
South Dakota			X	
Texas	X		X	X
Utah	X		X	
Vermont	X			X
Washington				
West Virginia	X	X		X
Wyoming	X			X

Table 2-3. List of states with providing for invalidation and/or removal from office as a penalty

States	Invalidation	Removal from office
Alabama	X	
Alaska	X	
Arizona	X	X
California	X	
Colorado	X	
Connecticut	X	
Hawaii	X	X
Idaho	X	
Illinois	X	
Indiana	X	
Iowa	X	X
Kansas	X	
Kentucky	X	
Louisiana	X	
Maine	X	
Maryland	X	
Massachusetts	X	
Michigan	X	
Minnesota		X
Missouri	X	
Montana	X	
Nebraska	X	
Nevada	X	
New Hampshire	X	
New Jersey	X	
New Mexico	X	
New York	X	
North Carolina	X	
North Dakota	X	
Ohio	X	X
Oklahoma	X	
Oregon	X	
Pennsylvania	X	
Rhode Island	X	
Tennessee	X	
Texas	X	
West Virginia	X	
Wisconsin	X	

Table 2-4. Attorneys' fees and court costs to prevailing parties

States	To party that "substantially prevails"	To prevailing party	To plaintiff	All or part of fees	Public body must pay	Knowing or willful violation
Arizona						X
Arkansas	X					
California					X	
Colorado			X			
Delaware					X	
Florida					X	
Georgia					X	
Hawaii		X				
Illinois	X					
Indiana			X			
Iowa					X	
Kansas					X	
Kentucky						X
Louisiana				X		
Maryland		X				
Michigan			X			
Minnesota				X		
Missouri						X
Montana			X			
Nebraska			X			
Nevada			X			
New Hampshire					X	
New Mexico		X				
New York			X			
North Carolina						X
North Dakota			X			
Ohio					X	
Oregon					X	
Pennsylvania						X
Rhode Island			X			
South Carolina				X		
Texas	X					
Utah			X			
Virginia	X					
Washington			X			
West Virginia					X	
Wisconsin						

Table 2-5. Remedies courts may issue to enforce the open meetings law

States	Injunction	Declaratory relief	Writ of mandamus
Alabama		X	
Arizona	X		X
California	X	X	X
Colorado	X		
Delaware	X	X	X
Florida	X		
Georgia	X		
Illinois	X		X
Indiana	X	X	
Iowa	X	X	
Kansas	X		X
Kentucky	X		
Louisiana	X	X	X
Maryland	X		
Michigan	X		X
Missouri	X	X	
Nevada	X		
New Hampshire	X		
New Jersey	X		
New Mexico	X		X
New York	X	X	
North Carolina	X	X	
North Dakota	X	X	X
Ohio	X		
Pennsylvania	X	X	
Rhode Island	X		
South Carolina	X	X	
Tennessee	X		
Texas	X		X
Vermont	X	X	
Virginia	X		X
Washington	X		X
West Virginia	X		
Wisconsin	X	X	X

Table 2-6. Statute of limitations contained in open meetings laws

States	From time when minutes became public	From time when person knew or should have known of violation	From time when violation occurred
Alabama		60 days	
Alaska			180 days
Arkansas			
Connecticut			30 days
Delaware			60 days
Hawaii			
Idaho			180 days
Illinois		60 days	
Indiana		30 days	
Iowa			
Kansas			
Kentucky			60 days
Louisiana			
Maryland			
Michigan	60 days		
Missouri		1 year	
Montana		30 days	
Nebraska			
Nevada			120 days
New Jersey			
New York			4 months
North Carolina			45 days
North Dakota		60 days	
Ohio		2 years	
Oregon	60 days		
Pennsylvania		30 days (up to 1 year)	
Rhode Island		180 days	
South Carolina		1 year	
West Virginia			120 days

Table 2-7. Burden of Proof contained in open meetings laws

States	On plaintiff to establish prima facie case, then on defendant	On plaintiff	On defendant
Alabama	X		
Delaware			X
Indiana			X
Iowa	X		
Kansas			X
Maryland		X	
Massachusetts			X
Michigan		X	
Missouri	X		
New Mexico		X	
North Carolina			X
Oregon	X		
Rhode Island			X
Virginia			X

CHAPTER 3
STATES THAT HAVE CHANGED PENALTIES SINCE 1995

Since 1995, lawmakers in eleven states have changed the civil and criminal penalty provisions in their state's open meetings laws. In six states, the criminal and/or civil penalties were increased.[1] In two states—Arkansas and Alabama—the penalties were decreased. Mississippi and Wyoming added penalties to the states' open meetings law for the first time, while Georgia added a provision in an effort to make penalties for open meetings law violations harsher. This section will discuss the changes to penalty provisions in each of the eleven states' open meetings laws. Additionally, it will explore possible motivations lawmakers had to change penalties from what is revealed in non-legal published records including surveys, audits and newspaper articles.[2] The change in the penalty provisions and what published accounts reveal about the motivations for those changes will be discussed individually by state. That discussion will be followed by a discussion of the overall findings of the chapter.

Alabama

In 2005, penalties for violation Alabama's open meetings law were changed from criminal to civil. Before the 2005 change, Alabama's open meetings law provided that any person who violated the open meetings law "shall be" guilty of a misdemeanor punishable by a fine of "not less than $10 nor more than $500."[3] In the law's 89-year history, however, no one had been

[1] *See, supra*, Chapter One, pp. 13 (discussing that 1995 was chosen as a starting point for the analysis of states that have changed their penalties because Davis, Rivera-Sanchez and Chamberlin's study looked at everything up to that point; *See also* Charles N. Davis, et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 55 (1996) [hereinafter *Sunshine Laws*].

[2] *See, supra*, Chapter One, notes 118-124 and accompanying text (providing additional discussion on how information on changes to penalties and motivations for those changes was gathered.).

[3] ALA CODE § 13A-14-2(b) (2004).

prosecuted.[4] In one example of a blatant violation going unprosecuted, *The Birmingham News* reported on a city council's violation and the district attorney's refusal to bring charges.[5] According to the newspaper, in early 2005, four of the five members of the Leeds City Council met in the mayor's private home to discuss voting not to renew the city manager's contract at the next city meeting.[6] The fifth council member, who did not attend the meeting, was not invited to attend.[7] When pressed about the meeting, the mayor said the meeting had been held to brief a new council member on city appointments, operations and finances, which in itself is a violation of the law.[8] Alabama law requires that gatherings of a majority of members of a governmental body, committee or subcommittee shall be open to the public when issues are discussed that are expected to come before the body at a later date.[9] Despite the admission by the mayor about topics discussed at the meeting in his home, which violated the state's open meetings law, the Talladega district attorney declined to bring action because the witnesses to the violations would also be defendants in the case, making pursuing penalties too difficult, he said.[10]

Although it is not clear whether the Leeds City Council incident influenced lawmakers in enacting changes to the state's penalty provisions, later in 2005, a bill sponsored by State Senator Zeb Little changed the penalty for violating Alabama's open meetings law from criminal to civil. The new law allows for the open meetings law to be enforceable by civil action brought in the

[4] Bob Blalock, *A Day of Sunshine to Chase Away the Clouds*, BIRMINGHAM NEWS, Mar.11, 2007, at 2D.

[5] *An Open Invitation*, BIRMINGHAM NEWS, Oct. 1, 2005, at 16A.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] ALA. CODE § 36-25A-2(6)(a)(3) (2009).

[10] *Id*.

county where the public body's primary office is located.[11] According to the new law, for each meeting found to have been in violation of the law, the court "shall impose" a civil penalty not to exceed $1,000 or one half of the defendant's monthly salary for service on the governmental body, whichever is less.[12] In addition, the penalty provision now requires that penalties imposed against a member of a public body who has been found to have violated the law "shall not be paid by nor reimbursed to the member by the governmental body he or she serves."[13]

Alabama's penalty provision was successfully changed in 2005 after two failed attempts in 2003 and 2004. As early as 2001, newspapers were calling on Alabama's Attorney General and district attorneys to enforce the open meetings law, which was routinely being violated.[14] According to an editorial, which appeared in the summer of 2001 in *The Birmingham News*, an Alabama newspaper, despite the maximum penalty of $500 called for in the state's old law, "[i]n truth, the open-meetings law is a joke to many public officials, and they laugh it all the way into the back room."[15] The editorial detailed several flagrant violations of the law by public officials, including a luncheon hosted by the Alabama Supreme Court Chief Justice at the time, Roy Moore. At the closed-door luncheon, the Chief Justice invited lawmakers in charge of the state budget to discuss budget issues.[16] Ultimately only one lawmaker attended, but had more lawmakers attended, the luncheon would likely have been a violation of the state's open

[11] S.B. 101, 2005 Leg., Reg. Sess. (Ala. 2005).

[12] ALA. CODE § 36-25A-9(g) (2009).

[13] *Id*.

[14] *See e.g. No Joke Open-Meetings Law Needs to be Enforced* , BIRMINGHAM NEWS, July 12, 2001.

[15] *Id*.

[16] *Id*.

meetings law. Alabama law requires that gathering of a quorum of members of a governmental body, committee or subcommittee be open to the public when issues are discussed that are expected to come before the body at a later date be .[17] The editorial argued that "a few stiff fines" paid by the individual violators and not the taxpayers "would make officials think twice before sneaking off to conduct the public's business in private."[18]

Two years later, lawmakers made the first attempt to change the penalty provisions to allow for civil instead of criminal penalties for open meetings law violations. Proponents of the change argued that making the penalties civil would allow citizens to bring claims against violators in court without having to depend on a county attorney to bring criminal charges.[19] According to lawmakers who supported the bill, the $500 criminal penalty was "moderately strong" and "short" on enforcement.[20] The proposed bill would have done away with criminal penalties and instead allowed for a $500 civil fine per violation and allowed for judges to award attorneys' fees and cost to prevailing plaintiffs.[21] Blaine Galliher, a state representative at the time, told *The Birmingham News* that no one had ever been prosecuted under the $500 criminal

[17] ALA. CODE § 36-25A-2(6)(a)(3) (2009).

[18] *Id*.

[19] *See e.g*. Bob Johnson, *Bill Introduced to Clarify Alabama's Open Meeting Law*, ASSOCIATED PRESS, Mar. 3, 2004, *available at* LEXIS, News Library, State and Regional; *See also Recent editorials from Alabama newspapers*, ASSOCIATED PRESS, July 8, 2004, *available at* LEXIS, News Library, State and Regional; *See also* Bob Blalock, A Day of Sunshine to Chase Away the Clouds" BIRMINGHAM NEWS, Mar. 11, 2007, at 2D (stating that "the more people who know and understand sunshine laws, and who complain when their government flouts those laws, the more likely those public boards will be to follow the law. It is the best way to chase away the clouds of government secrecy.").

[20] *See e.g.* Bob Johnson, *Bill Introduced to Clarify Alabama's Open Meeting Law*, ASSOCIATED PRESS, Mar. 3, 2004, *available at* LEXIS, News Library, State and Regional.

[21] H.B. 501, 2003 Leg., Reg. Sess. (Ala. 2003); *See also Judiciary Panel Sets Hearing on Open Meetings Bill*, BIRMINGHAM NEWS, Apr. 19, 2003 (stating that because no prospect of returning attorneys' fees only well-financed individuals could pursue claims).

penalty available in the law at the time "because it's not worth the cost" of prosecution.[22] Well aware of this, some public officials remained "indifferent, defiant or ignorant of the law."[23] The attorney general at the time, Bill Pryor, supported the bill because he believed that the addition of civil penalties, attorneys' fees to prevailing plaintiffs and placing the burden of proof on the government body would provide the enforcement mechanism necessary to prosecute offenders.[24] Despite support from Pryor and the Alabama Press Association, the 2003 bill failed.[25]

In 2004, Galliher again introduced a bill that would make the penalty for violating the law civil and do away with criminal penalties.[26] Although the bill again failed, it was similar to the one that ultimately became law in 2005 because it required fines up to $1,000 for violations and required attorneys' fees and costs to be returned to prevailing plaintiffs.[27] Galliher told *The Associated Press* that his persistence in trying to change penalties for open meetings violation was because "[t]he buzz word around Montgomery these days is 'accountability' and I believe this bill makes a statement for true accountability."[28] However, the proposal was not without opponents. The vociferous opposition and lobbying efforts of the Association of County Commissions of Alabama killed the 2004 bill. The association argued that the bill had been developed by the attorney general's office and the Alabama Press Association without consulting

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[22] *Judiciary Panel Sets Hearing on Open Meetings Bill*, BIRMINGHAM NEWS, Apr. 19, 2003.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] Bob Johnson, *Bill Introduced to Clarify Alabama's Open Meeting Law*, ASSOCIATED PRESS, Mar. 3, 2004, *available at* LEXIS, News Library, State and Regional.

[27] *Id*.

[28] *Id*.

with the public officials who have to comply with law.[29] Additionally, the Association of County Commissions of Alabama were opposed to the possibility that officials found to have violated the law would have to pay the $1,000 fine out of pocket, pointing out that many public officials serve on a voluntary basis or do not make that amount monthly.[30] Some lawmakers agreed with the association. Howard Sanderford, a state representative at the time, expressed concern during a committee hearing that increasing the penalties would make it hard to encourage people to serve on public board.[31] The 2004 bill died in the Alabama House of Representatives.[32]

However, going into the 2005 legislative session, a poll conducted by *The Associated Press* found that a majority of legislators supported revising the open meetings law.[33] State Representative Howard Sanderford expressed the same concerns in opposing changing penalty provisions that he had during the 2004 legislative session.[34] Sanderford argued that the penalties would discourage people from serving in public office.[35] Ultimately, the 2005 bill was passed by the Senate 32-0 and the House 98-0.[36] Representative Blaine Galliher, who had sponsored the

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[29] Kendal Weaver, *State Newspapers Put Focus on Sunshine Law as New Measure Offered*, ASSOCIATED PRESS, Mar. 8, 2004, *available at* LEXIS, News Library, State and Regional.

[30] Phillip Rawls, *Open Meetings Bill Nearly Dead*, ASSOCIATED PRESS, Apr. 30, 2004, *available at* LEXIS, News Library, State and Regional; Bob Johnson, *Committee Hears Pros and Cons of Open Meetings Bill*, ASSOCIATED PRESS, Mar. 10, 2004, *available at* LEXIS, News Library, State and Regional.

[31] Bob Johnson, *Open Meetings Law Approved by House Committee*, ASSOCIATED PRESS, Apr. 30, 2004, *available at* LEXIS, News Library, State and Regional.

[32] H.B. 530, 2004 Leg., Reg. Sess. (Ala. 2004).

[33] Bob Johnson, *Let Sunshine In, Legislators Tell AP Survey*, ASSOCIATED PRESS, Jan. 30, 2005, *available at*, LEXIS, News Library, State and Regional.

[34] *Id*.

[35] *Id*. (quoting Alabama State Representative Howard Sanderford asking "if people know they can get sued, how are you going to get good people to serve in those positions?").

[36] Phillip Rawls, *Senate gives Final Passage to Rewrite of Open Meetings Bill*, ASSOCIATED PRESS, Mar. 10, 2005, *available at* LEXIS, News Library, State and Regional; *See also* S.B. 101, 2005 Leg., Reg. Sess. (Al. 2005).

2003 and 2004 bill lauded, the house passage of the 2005 bill as "the first real step toward accountability reform."[37] State Senator Zeb Little, who sponsored the bill in the state Senate, said it would help restore the public's faith in government.[38] The bill was lauded by newspaper editors, the Attorney General Troy King, and the Governor Bob Riley as a means to bring accountability to government.[39] Newspapers hailed the new penalties, which now allowed citizens to sue for open meetings violations, as providing a hope that public bodies would begin to follow the law.[40] But newspapers also noted that despite what was perceived as improvements to the law by changing criminal penalties to civil penalties, the law would only be as good as its enforcement.[41] *The Birmingham News* wrote: "At least the new law gives people the power to do what local and state prosecutors have refused to do. That, in itself, is great cause for hope."[42]

Arkansas

In Arkansas, penalties for violating open meetings laws were also lowered. In 2005, the Arkansas open meetings law was changed so that any person who "negligently violates" the provisions of the state's Freedom of Information Act "shall be" guilty of a Class C

[37] Bob Johnson, *House Passes Rewrite of Open Meetings Bill*, ASSOCIATED PRESS, Mar. 8, 2005, *available at* LEXIS, News Library, State and Regional.

[38] Bob Johnson, *Alabama Governments to Operate Under New 'Sunshine Law,'* ASSOCIATED PRESS, Mar. 10, 2005, *available at* LEXIS, News Library, State and Regional.

[39] *Id*.

[40] *Perfect Timing for Sunshine*, BIRMINGHAM NEWS, March 13, 2005, at 2B (stating that "[t]he new open-meetings law won't stop dishonest governments from hiding the public's business from the public. But if a citizen sues and wins a fine of up to $1,000—which the individual defendant and not the government body must pay—there is hope the overwhelming majority of governments will follow the law.").

[41] Bob Blalock, *New Open-Meetings Law Only as Good As Its Enforcement*, BIRMINGHAM NEWS, Oct. 2, 2005, at 2B.

[42] *Id*.; *See also* John Ehinger, *Sunshine of a New Day*, HUNTSVILLE TIMES, Oct. 4, 2005, at 4B (stating the new law providing for stiff penalties but not it must be enforced).

misdemeanor.[43] A person convicted of a Class C misdemeanor in Arkansas "may be sentenced" to pay a fine not exceeding $100.[44] Before the change, Arkansas law required that any person who "negligently violates" the law be guilty of a misdemeanor punishable by a fine of not more than $200 or 30 days in jail or both or "a sentence of appropriate public service or education or both."[45] The change to the state's open meetings law was buried in a bill enacting revisions to Arkansas' criminal code in 2005.[46] The change went virtually unnoticed receiving, no media attention that could be found in the year of the change or since. [47]

Georgia

In 1999, Georgia added a provision that could make holding illegally closed meetings a felony.[48] An addition to the law in the requirements for holding closed meetings stipulated that a person presiding over a closed meeting must file, along with official minutes of the meetings, a notarized affidavit stating under oath that the subject matter of the closed meeting was devoted to matters exempt from Georgia's open meetings law.[49] Filing a false affidavit is a felony punishable by up to five years in prison, which is significantly higher than the $500 fine in the state's open meetings law.[50] Georgia's criminal penalty for violating the state's open meetings

[43] ARK. CODE ANN. § 25-19-104 (2008); *See also* S.B. 984, 8th Gen. Assem., Reg. Sess. (Ark. 2005).

[44] ARK. CODE ANN. § 5-4-2001(b)(3) (2008).

[45] ARK. CODE ANN. § 25-19-104 (2003).

[46] S.B. 984, 8th Gen. Assem., Reg. Sess. (Ark. 2005).

[47] The search of the LexisNexis archive as described in Chapter 1 Methodology section revealed no coverage of the change to Arkansas law.

[48] H.B. 278, 1999- 2000 Leg., (Ga. 1999); GA. CODE ANN. § 50-14-4(b) (2009).

[49] GA. CODE ANN. § 50-14-4(b) (2009).

[50] Charles Walston, *House Approves Pair of Measures to Put 'Teeth' in the Sunshine Laws*, ATLANTA J. & CONST., Feb. 13, 1999, at F06.

law requires that a person who "knowingly and willfully" conducts or participates in a meeting in violation of the law be guilty of a misdemeanor, punishable by a fine of up to $500.[51] Georgia's First Amendment Foundation supported the measure, pointing out the lack of remedies in the state's open meetings law.[52] The foundation argued that the affidavit requirement would provide members of the public who had been excluded from meetings the chance to challenge the contents of the meetings.[53]

Supporters of adding the affidavit provision pointed to examples throughout the state of violations occurring in closed sessions. In one example of a violation, before the new law became effective, a Clayton County prosecutor declined to prosecute three county housing authority members who voted to go into executive session to discuss giving the director a $7,000 raise.[54] Although the prosecutor recognized that "there can be no doubt in the mind of any reasonable attorney that the spirit of the law and the letter of the Sunshine law was violated," he declined to prosecute because he found that the violation was not "knowingly and willfully" committed[55] and because the board members were acting on the advice of their attorney.[56] Open government advocates in Georgia, including the Common Cause of Georgia, argued that instead of prosecuting the violation as a misdemeanor under the state's open meetings law, the decision

[51] GA. CODE ANN. § 50-14-6 (2009).

[52] *Id*.

[53] Peggy Ussery and Jason B. Smith, *Barnes: Sunshine Laws Need Work*, AUG. CHRONICLE, June 4, 2000, at A18.

[54] Gary Hendricks, *Closed-Meeting Foes Back Decision on Private Vote*, ATLANTA J. & CONST, Apr. 15, 1999, at 3JI.

[55] GA. CODE ANN. § 50-14-6 (2009).

[56] *Id*.

to give the director of the housing authority a raise should be invalidated.[57] Invalidation is not specifically addressed as a remedy in Georgia's open meetings law.[58]

The new provision requiring affidavits to be signed could lead to additional penalties in the case of unlawful executive sessions, such as the one discussed above. Because filing a false affidavit is a felony, requiring officials to file an affidavit certifying that the discussion that took place within closed session was within the purview of the state's open meetings law would make it more difficult to have illegal discussion in closed meeting. The affidavit requirement would force official to report the illegal discussion or lie about it in an affidavit. The state's governor at the time, Roy Barnes, approved the measure with the intent of strengthening the state's open meetings law.[59] Lawmakers in favor of the provision lauded the measure as a way to "put teeth" in Georgia's open meetings law, stressing that it was not to put people in jail but to make them "think twice before they meet in secret."[60] According to the House floor leader at the time, Representative Charlie Smith, "[t]he governor believes very strongly that there needs to be a hammer that will fall if people doing public business decide to meet illegally behind closed doors."[61] Not all lawmakers were so enthusiastic, however. Representative Glenn Richardson balked that the "hammer is really a poleax and they're going to use it to chop off the head" of

[57] *Id*.

[58] GA. CODE ANN. §§ 50-14-1-50-14-6 (2009).

[59] Charles Walston, *House Approves Pair of Measures to Put 'Teeth' in the Sunshine Laws*, ATLANTA J. -CONST., Feb. 13, 1999, at F06.

[60] *Id*.

[61] *Id*.

local officials.[62] Richardson, who labeled the effort "feel-good legislation," was the lone dissenter in the House vote.[63]

The measure passed in the House 169-1 and faced no opposition in the Senate.[64] The news coverage of the measure revealed considerable pressure put on lawmakers to pass the legislation. On representative summed up the need to vote for the measure as "Are you for open government?"[65] The House Majority leader told the House members that this bill would not only make the governor happy, but it would also make them popular with the local newspapers and television stations.[66] The *Atlanta Journal-Constitution* wrote of the landslide vote in favor of passing the measure: "Almost nobody wanted to be counted on the wrong side of bringing the people's business out into the daylight."[67]

In the wake of the measure's passage, public officials echoed the concerns raised by Representative Glenn Richardson when the bill was being debated in the House. In opposing the bill, Richardson had argued that the bill had "so many teeth, it [would] chew [government agencies] up."[68] Richardson expressed concern that public agencies would have to consult their

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[62] *Id*.

[63] Albany Herald et al., How Much Open Government is There in Georgia? 15 (1999), http://www.nfoic.org/uploads/foi_pdfs/georgia-audit-1999.pdf .

[64] Charles Walston, *House Approves Pair of Measures to Put 'Teeth' in the Sunshine Laws*, ATLANTA J. & CONST., Feb. 13, 1999, at F06.

[65] *Id*.

[66] *Id*.

[67] *New Sunshine Laws Pack a Punch*, ATLANTA J. –CONST, July 1, 1999, at 18A.

[68] Suzanne F. Sturdivant, *Open and Public Meetings: Require that an Agency Holding a Meeting Make Available an Agenda of All Matters Expected to Be Discussed; Require the Agency to Post and Distribute its Agenda; Require the Chairperson of a Closed Meeting to Execute and File with the Minutes a Notarized Affidavit Stating Why the Meeting was Closed*, 16 GA. ST. U.L. REV. 256, 260-261 (1999).

lawyers more often and argued that compliance with the open meetings law could be improved by enforcing current penalties instead of adding the affidavit requirement.[69] Public officials complained that the new requirements and additional scrutiny placed an undue burden on their ability to fulfill their job requirements.[70] Some public officials said the concern that they could become felons because of filing incorrect affidavits led them not to seek re-election to their posts.[71] The director of the Association of County Commissioners of Georgia at the time, Jerry Griffin, expressed concern about public officials who were nervous about the new requirement. In an interview with the *Atlanta Journal-Constitution*, he told the reporter that "[t]he premise of our government is openness. But it would be much better if we didn't have to do it sometimes," referring to conducting public business in the open.[72]

In the most dramatic action taken as a result of the law, the chairman of the school board in Ben Hill County, who had been a member of the board for more than a decade, resigned, saying he feared the affidavit requirement.[73] As public officials began to talk about lobbying the following legislative session to make the law less severe, DuBose Porter, who at the time was the president of the Georgia Press Association, a member of the Georgia House of Representatives

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[69] *Id*.

[70] Alan Judd, *New Sunshine Laws Have Officials Feeling Exposed; Nervous State: Many Elected to Public Office Feel Unsure that They Won't Unintentionally Violate the New Mandate*, ATLANTA J. –CONST , July 9, 1999, at 2B.

[71] *Id*.

[72] *Id*.

[73] *Id*. (quoting former chairman of the Ben Hill County School Board, Harrison McNease, as saying "[n]ow it's gotten so complicated and political, I'm going to help in the soup kitchen. I can do that and not get locked up for being a felon.").

and the editor of the *Courier Herald*, warned that such efforts would backfire on the officials by making their constituents suspicious of their actions.[74]

In the wake of the passage of the measure requiring affidavits, news stories abounded that lauded the measure as a new era of openness and accountability.[75] The *Atlanta Journal-Constitution*'s editorial the day the law became effective stated: "If perceptive Georgians notice a surge of daylight and a rush of fresh air today, they can chalk it up to a new era of openness in state and local government that went into effect at 12:01 this morning."[76] In addition, an audit conducted in December 1999 by several Georgia newspapers found that compliance with the open meetings law in counties around the state was inconsistent, at best.[77] Further, the audit reported on a case in Evans County in which the county commission had apparently taken advantage of a gaping loophole in the new affidavit requirement.[78] While falsely swearing by filing an untruthful affidavit is a felony punishable by up to five years in prison in Georgia, a failure to sign an affidavit as required by the Georgia open meetings law is a misdemeanor violation of the open meetings law, punishable by a fine of up to $500.[79] Both failing to sign an affidavit and violating the open meetings laws are crimes. The misdemeanor penalty attached to

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[74] Alan Judd, *New Sunshine Laws Have Officials Feeling Exposed; Nervous State: Many Elected to Public Office Feel Unsure that They Won't Unintentionally Violate the New Mandate*, ATLANTA J. –CONST , July 9, 1999, at 2B. (quoting DuBose Porter "[h]ow does that sound to the people they represent—that their organization is going to the Legislature to try to keep the public from knowing the public's business.").

[75] *See* e.g. *New Sunshine Laws Pack a Punch*, ATLANTA J. –CONST, July 1, 1999, at 18A.

[76] *Id*.

[77] *Id*.

[78] *See generally* Albany Herald et al., *supra* note 63 (The audit was conducted by Albany Herald, Athens Daily News/Banner-Herald, Atlanta Journal-Constitution, Augusta Chronicle, Columbus Ledger-Enquirer, Community Newspapers (North Georgia), Gainesville Times, Macon Telegraph, Morgan County Citizen (Madison), Savannah Morning News, Thomson Newspapers (South Georgia), Georgia Associated Press, and the Georgia First Amendment Foundation).

[79] *Id*. at 15 (stating that "[i]t's a legal tightrope that Georgia's elected officials have walked since July.").

violations of the state's open meetings law of up to a $500 fine, however, is less severe that the penalty for committing a felony of filing a false affidavit, punishable by up to five years in prison.[80]

Mitchell Peace, who in 1999 was the editor of *The Claxton Enterprise*, was the first to test the effectiveness of the affidavits in challenging open meetings violations.[81] Peace sued the Evans County Commission for two closed meetings at which affidavits were not signed.[82] One meeting had been closed to discuss "possible pending litigation," but the county attorney was not present at the meeting. [83] The board later amended the reason for the meeting, saying it was to discuss personnel matters.[84] The other meeting had been closed to discuss personnel matters.[85] The first meeting was held July 1, 1999, but the minutes and affidavit identifying the reason for the closed meetings were not filed until August 3, 1999.[86] The second meeting was held July 6, 1999, and the meeting minutes and affidavit were also not filed until August 3, 1999.[87]

A district judge found that the first meeting closed to discuss pending litigation had violated the law, but the second meeting closed to discuss personnel matters had not violated the

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[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 16.

[84] Georgia First Amendment Foundation, GFAF Resources and Links, http://www.gfaf.org/openMeetingsAct.html (last visited June 12, 2009).

[85] Albany Herald et al., *supra* note 63 at 16.

[86] Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 832 (Ga. Ct. App. 2001).

[87] Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 833 (Ga. Ct. App. 2001).

law.[88] The district court also awarded the newspaper $1,500 of the $9,699.88 in attorneys' fees it had sought. The full fees were not awarded because the court did not find the commission had acted in bad faith.[89] On appeal, the court of appeals of Georgia for the third division found that the first meeting had violated the law and that the affidavits and minutes were not filed in a timely manner, but vacated the award of attorneys' fees granted by the district court.[90] Under Georgia's open meetings law, attorneys' fees only can be awarded if a court finds the public body or official acted "without substantial justification."[91] The case was remanded to the district court for a determination on whether the public body acted without substantial justification, therefore allowing the newspaper to be reimbursed attorneys' fees.[92] On remand, the district court found that in fact the commission had acted without substantial justification and awarded the newspaper full attorneys' fees, which by then had climbed to $21,320.63.[93] The appellate court affirmed.[94]

The attention and coverage devoted to the affidavit provision waned in 2001. By the following year through 2009, no significant coverage could be found addressing the provision.[95]

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[88] Albany Herald et al., *supra* note 63 at 16

[89] Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 836-837 (Ga. Ct. App. 2001) .

[90] Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 835, 837 (Ga. Ct. App. 2001)

[91] Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 836-837 (Ga. Ct. App. 2001); *See also* GA. CODE ANN. § 50-14-5 (b) (2008).

[92] *Id*.

[93] Evans County Bd. of Comm'rs v. Claxton Enter., 255 Ga.App. 656, 399 (GA Ct. App. 2002).

[94] *Id* at 403.

[95] *See Senate Passes Bill Strengthening Open Meetings Law*, ASSOCIATED PRESS, Nov. 28, 2001, *available at* LEXIS, News Library, State and Regional (In 2001, Illinois passed a similar provision in its open meetings law that requires an officer presiding over an executive session to certify that the session did not cover topics that should be discussed publicly. The Illinois measure, however, did not change the penalties for violating the open meetings law and therefore did not fit the focus of the paper.); *See also* H.B. 3098, 92nd Gen. Assem., Reg. Sess., (Ill. 2001).

Idaho

In one of the most recent changes to penalty provisions for open meetings laws, Idaho's new penalty provisions went into effect July 1, 2009.[96] The new penalty provisions increase the penalty for knowing violations, add penalties for inadvertent violations and add a cure provision to the state's open meetings law. [97] Before the changes, Idaho law provided that any member of a governing body who knowingly conducted or participated in a meeting violating the act be subject to a civil penalty not to exceed $150 for a first violation and not to exceed $300 for each subsequent violation.[98] The new provisions require that any member of a governing body who participates in a meeting in violation of the open meetings law "be subject" to a civil penalty not to exceed $50.[99] The new law also contains a provisions requiring that any member of a governing body who is found to have violated the open meetings law for a subsequent time "be subject" to a civil fine of up to $500.[100] Additionally, any member of a governing body who knowingly violates the open meetings law shall be subject to a civil penalty not to exceed $500.[101] Finally, the new penalty provisions allow for a public body to cure a violation of the law within fourteen days of the violation occurring, which will bar the imposition of civil

[96] S.B. 1142, 60th Leg., Reg. Sess. (Idaho 2009).

[97] S.B. 1142, 60th Leg., Reg. Sess. (Idaho 2009).

[98] IDAHO CODE § 672347(2) (2008).

[99] S.B. 1142, 60th Leg., Reg. Sess. (Idaho 2009).

[100] *Id*.

[101] *Id*.

penalties.[102] To cure the violation, a public agency shall declare "all actions taken at or resulting from" the meeting that violated the law void.[103]

In committee, legislators debating the then-proposed penalty provisions expressed both support or opposition for the stiffer penalties. Deputy Attorney General Bill von Tagen argued that the cure provision, which would allow public bodies to correct a violation within fourteen days of the violation occurring without facing fines, would be sufficient to counteract fears of those who might be dissuaded from serving on a public body for fear of penalties. However, State Senator Monty Pearce argued the opposite, stating that the new laws might discourage "people from sticking their neck in the noose."[104] Newspapers had advocated for penalties for violations of the law regardless of whether the violations were inadvertent of willful.[105] The Spokesman Review, a newspaper in Spokane, Washington, likened the penalty for open meetings violation to fines for traffic violations, arguing that patrol officers never ask a motorist if they were aware of the law before they issue a citation for violating it.[106] The editorial chided the "feeble" $150 fine and argued that increasing the penalty would "demonstrate that lawmakers take seriously their own law on open government."[107]

Although in 2009 von Tagen supported the increased penalties, years before, in 2005, as a deputy district attorney, he had said that the fine was not as important a deterrent as the public

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[102] *Id*.

[103] *Id*.

[104] Nick Draper, *Open Season on Open Meeting Laws; A State Committee Approved a Bill that Would Make Several Changes to the Current Legation*, IDAHO FALLS POST REGISTER, Mar. 17, 2009, at A1.

[105] *See e.g.* The *Duh Defense; Our View: Idaho Officials Can Skirt Law by Claiming Ignorance,* SPOKESMAN REVIEW, Apr. 25, 2008, at B4.

[106] *Id*.

[107] *Id*.

humiliation of violating the open meetings law for public officials.[108] In 2005, Von Tagen was involved in the prosecution of Ada County commissioners who had allegedly held an illegal executive session and faced the possibility of being fined the $150 provided by Idaho's old law. Covering the Ada County commissioners, columnist Tom Henderson argued that the public embarrassment commissioners might feel from the media coverage of their violation would fade and was not enough for them to learn their lesson; neither was the slap-on-the-wrist $150 fine.[109] Henderson called for heavier penalties, more severe consequences imposed by the attorney general's office and the creation of an oversight office charged with investigating and enforcing open meetings violations. Henderson's frustration at persistent, unpunished violations of the open meetings laws was evident in his closing suggestion: "Tar and feathers come to mind, but that raises too many constitutional dilemmas."[110]

Mississippi

In 2003, Mississippi lawmakers for the first time added penalties to the state's 28-year-old open meetings law.[111] The state House of Representatives passed the measure in a 115-2 vote.[112] The penalties provided that a court "may impose" a civil penalty on a public body that has "willfully and knowingly" violated the state's open meetings law in an amount "not to exceed" $100, plus "all reasonable expenses incurred by the person or persons in bringing the suit."[113]

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[108] Tom Henderson, *Open Government Enforced with Slap on the Wrist*, LEWISTON MORNING TRIB., Oct. 2, 2005, at 1F.

[109] *Id*.

[110] *Id*.

[111] H.B. 454, 2003 Leg., Reg. Sess. (Miss. 2003); *See also* MISS. CODE ANN. § 25-41-15 (2008).

[112] Jack Elliott, Jr., *Miss. House Bill Installs Small Fine for Open Meetings Law Violations*, STATE-TIMES/MORNING ADVOCATE, Mar. 22, 2003.

[113] H.B. 454, 2003 Leg., Reg. Sess. (Miss. 2003); *See also* MISS. CODE ANN. § 25-41-15 (2008).

The Mississippi Center for Freedom of Information, the Mississippi Press Association, Common Cause, and state newspapers were among the open government advocates who lobbied for the penalties, arguing that with the availability of penalties as a repercussion for violating the law, public bodies and officials would be "a lot less likely to get in trouble, a lot less likely to be embarrassed."[114] While the new law may have been an improvement over having no penalties, open government advocates still expressed concern that the law did not provide for officials to be individually liable for violating the law.

In 2002, a year earlier, lawmakers had failed to pass a similar reform that would have also added penalties for open meetings violations.[115] The bill would have provided for penalties for open meetings violations and for the return of attorneys' fees and cost to prevailing plaintiffs. The bill died after the state House and the state Senate could not agree on awarding attorneys' fees.[116] The Senate had proposed adding a provision to cap the reimbursement of attorneys' fees and costs at $1,000, while the House rejected placing any limitation on the return of attorneys' fees and costs.[117] Ed Blackmun, a state representative at the time, had lobbied for the cap on attorneys' fees because he did not want to put small town public officials at risk of having to pay attorneys' fees, costs and a fine for an inadvertent violation of the law.[118] Hob Bryan, a state senator at the time, supported the legislation, arguing that unlike with open records violations, in

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[114] Jack Elliott, Jr., *Miss. House Bill Installs Small Fine for Open Meetings Law Violations*, STATE-TIMES/MORNING ADVOCATE, Mar. 22, 2003.

[115] Jack Elliott Jr., *Open Meetings Penalty Bill Dies in Dispute Over Attorney's Fees*, ASSOCIATED PRESS, Apr. 2, 2002, *available at* LEXIS, News Library, State and Regional.

[116] *Id*.

[117] Jack Elliott, Jr., *House, Senate Set Stage for Conference on Open Meetings*, ASSOCIATED PRESS, Mar. 6, 2003, *available at* LEXIS, News Library, State and Regional.

[118] Jack Elliott Jr., *Open Meetings Penalty Bill Dies in Dispute Over Attorney's Fees*, ASSOCIATED PRESS, Apr. 2, 2002, *available at* LEXIS, News Library, State and Regional.

which case it was possible to go back and undo a record denial by providing the record, with open meetings it would be impossible to "go back and undo things and go back in time and attend a meeting that was closed."[119] Although supportive of the legislation in 2002, Bryan led the subcommittee that had killed an attempt to add penalties to Mississippi's open meetings law in 2001. At the time, he had said that he had not heard from enough constituents and lawmakers who supported the bill to merit scheduling a hearing for the bill.[120]

At least since 2001,[121] open government advocates had lobbied for penalties to Mississippi's open meetings law, arguing that no penalties were essentially a disincentive for the media or members of the public to bring action against violators. Further, even if action was brought, nothing could be done so the disincentive was both on the part of media and public to bring action and on the part of public bodies and officials to comply with the open meetings laws.[122]

Missouri

In 2004, Missouri lawmakers added a penalty for a "knowing" violation and increased penalties for "purposeful" violations.[123] The law increased the civil penalty for a "purposeful" violation of the law from $500 to $5,000 and added a penalty for a "knowing" violation of

[119] Jack Elliott Jr., *Legislation Would Penalize Violators of Open Meetings Law*, Feb. 6, 2002, *available at* LEXIS, News Library, State and Regional.

[120] Emily Wagster, *Bills Seek Brighter Sunshine Laws*, ADVOCATE, Jan. 21, 2002, at 5B (quoting Mississippi State Senator Hob Bryan as stating that he had concerns that the bill did not "produce a situation where people are filing lawsuits over technical violations…I think what everyone wants to do is take the egregious situations and have some effective remedy against those who are just obstinate and refuse to comply with the law.").

[121] *See e.g.* Jack Elliott Jr., *Legislation Would Penalize Violators of Open Meetings Law*, ASSOCIATED PRESS, Feb. 6, 2002, *available at* LEXIS, News Library, State and Regional (stating that "Mississippi's open meetings law took effect Jan. 1, 1976. The law has been tinkered with over the years, such as strengthening sections dealing with definitions and executive sessions. The one elusive element has been enforcement.").

[122] *Id*. (quoting Steve Stewart, at the time editor and publisher of the *Clarksdale Press Register*.).

[123] S.B. 1020, 92nd Gen. Assem., 2nd Reg. Sess. (Mo. 2004); *See also* MO. REV. STAT. § 610.027(3)(4) (2009).

$1,000.[124] The state's open meetings law does not define what constitutes a "knowing" violation and what constitutes a "purposeful" violation. If a court finds that either type of violation took place, the court "may order" payments of "all costs and reasonable attorneys' fees.[125] Further, in both provisions, the law directs the courts to "determine the amount of the penalty by taking into account the size of the jurisdiction, the seriousness of the offense, and whether the public governmental body or member of a public governmental body" has previously violated the law.[126]

The 2004 development of the two-tiered system for penalties of knowing and purposeful violations was adopted by supporters of the increased penalties in the state legislature after their original proposal to lower the standard for penalties from purposeful to negligent violations met with strong opposition from groups representing public bodies and officials.[127]

Some state senators and the Missouri Municipal League opposed any change, arguing that the negligent standard for proving a violation occurred would be too low for public officials serving on volunteer boards.[128] The Missouri Municipal League argued that the lower standard could deter people from serving on the volunteer boards, because the negligent standard would make it easier to prove that violations, even unintentional ones, had occurred, exposing the board members to the possibility of more penalties.[129] However, in an unusual move, Jay Purcell, a

[124] MO. REV. STAT. § 610.027(3)(4) (2009).

[125] *Id*.

[126] *Id*.

[127] David A. Lieb, *Mo. Lawmakers Seek to Expand Sunshine Law Fines*, ASSOCIATED PRESS, Feb. 10, 2009, *available at* LEXIS, News Library, State and Regional.

[128] *Id*.

[129] *Id*; *Senate Passes Bill Changing Open Meetings Bill*, ASSOCIATED PRESS. May 2, 2001, *available at* LEXIS, News Library, State and Regional.

county commissioner for Cape Girardeau County who had sued his own commission for improperly holding a closed meeting, testified to the House committee looking into the legislation that the law lacked "teeth."[130] Purcell disagreed with colleagues who thought negligence was too low a standard for imposing penalties. According to Purcell, without "language that puts teeth and repercussions for public governmental bodies, they will not follow the law."[131] Purcell supported lowering the threshold for imposing penalties to negligence because it "sends a clear, clear message that ignorance of the Sunshine Law is not acceptable.[132] The bill ultimately passed with a knowing and purposeful standard and included no negligence standard.

Supporters of increasing penalties were disappointed with the result, arguing that either proving that a violation occurred purposefully or was committed knowingly was too difficult in court and would do little to improve the number of prosecutions under the open meetings law. The supporters of increased penalties would have preferred a requirement to prove that a violation was committed negligently in cases of open meetings law violations because that would be easier to prove in court.[133]

Lawmakers had introduced bills to increase penalties for open meetings violations in at least one other year before being successful in 2004. In 2001, lawmakers introduced a bill that would have increased penalties for purposefully violating the sunshine law from $500 to

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[130] David A. Lieb, *Mo. Lawmakers Seek to Expand Sunshine Law Fines*, ASSOCIATED PRESS, Feb. 10, 2009, *available at* LEXIS, News Library, State and Regional.

[131] *Id*.

[132] *Id*.

[133] Terry Ganey and Matt Franck, *Lawmakers OK Stiffer Penalties for Open Records Offenses*, ST. LOUIS POST DISPATCH, May 14, 2004, at 16.

$2,500.[134] The sponsoring representative, Representative Phil Smith, had originally supported lowering the burden of proof from purposeful and increasing the civil penalty to $25,000. He had to abandon both proposals after members of the state Senate committee were critical of the measure, arguing that the steep fine would discourage people from serving on local boards. One senator, Anita Yeckel, opposed the increased penalty and lower burden of proof, telling *The Associated Press* that she did not want to make people that "vulnerable." Supporters of the measure argued that no evidence existed that high penalties for open meetings violation dissuaded people from serving in public office.[135] Going further, the Missouri Press Association argued that even the $2,500 fine would be too small to encourage bodies to comply with the law.[136]

In 2009 a proposed bill would have defined "purposely violated" as having exhibited "a conscious design, intent, or plan to violate the law, and doing so with awareness of the probable consequences."[137] The bill would also have increasing required a penalty of $1,000 for a "knowing violation," instead of the current provision allowing for up to $1,000 in civil penalties, and increased penalties for a purposeful violation from $5,000 to $8,000.[138] The bill's sponsor, Representative Tim Jones, introduced the legislation because the definition for violating the law

[134] H.B. 237, 87th Gen. Assem., Reg. Sess. (Mo. 2001).

[135] Paul Sloca, *Senate Panel Hears Testimony on House Open Meetings Bill*, ASSOCIATED PRESS, Apr. 17, 2001, *available at* LEXIS, News Library, State and Regional (quoting Sponsoring State Representative Phil Smith as saying "I just don't think people pay attention" to penalties "I just don't buy that argument.").

[136] Paul Sloca, *Senate Panel Hears Testimony on House Open Meetings Bill*, ASSOCIATED PRESS Apr. 17, 2001, *available at* LEXIS, News Library, State and Regional.

[137] H.B. 316, 95th Gen. Assem., Reg. Sess. (Mo. 2009).

[138] H.B. 316, 95th Gen. Assem., Reg. Sess. (Mo. 2009).

purposefully or knowingly was "vague."[139] Jones told *The Associated Press* that with this bill, "[t]here's not going to be Sunshine law police that now run around the state and fine people," but "we now have some real teeth in the bill."[140] Jones described his bill as "strict liability for technical violations" of the Sunshine law, arguing that Missouri lawmakers had historically been reluctant to adopt such strict measures.[141] The bill, however, was not scheduled for a hearing and subsequently died. Citizens urged legislators to "strengthen" the open meetings law by increasing the penalties.[142] Local officials, however, protested the law, saying the bill went too far.[143]

North Dakota

In 1997, North Dakota lawmakers repealed criminal penalties for violations of the open meetings law and added civil penalties for violations of the law as part of a comprehensive overhaul of the law.[144] No one had ever been prosecuted under North Dakota's open meetings law, which required a criminal fine of up to $500 for a violation.[145] One columnist quipped that the fine was little more than a speeding ticket and nowhere near the seriousness of a misdemeanor.[146] At least one reason was because state attorneys had not prosecuted violations,

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[139] David A. Lieb, *Mo. Lawmakers Seek to Expand Sunshine Law Fines*, ASSOCIATED PRESS, Feb. 10, 2009, *available at* LEXIS, News Library, State and Regional.

[140] *Id*.

[141] *Id*.

[142] Virginia Young, *Sunshine Law Should Be Hotter, Missourians Say*, ST. LOUIS POST-DISPATCH, Feb. 11, 2009, at B5.

[143] *Id*.

[144] Matt Gouras, *Open Records Violations Could Be Criminal*, BISMARCK TRIB., Mar. 3, 2001, at 2B.

[145] *Open government: Two Steps Ahead, One Step Back*, BISMARCK TRIB., May 9, 1999, at 4B.

[146] *Id*.

arguing that it would be too difficult to prove a public body or official have deliberately violated the law.[147]

The civil penalties that were enacted in 1997 provided for an award in the amount of $1,000 or "actual damages caused by the violation, whoever is greater" for "intentional or knowing violations.[148] Additionally, the law contained a provision for complaining directly to the attorney general, and for the attorney general to issue opinions spelling out what the public agency must do to correct the violation.[149] The attorney general at the time, Heidi Heitkamp, told the House Government and Veterans Affairs Committee in a hearing on the bill that the criminal penalties available had not proven to be a deterrent to violations of open meetings laws because they had not been enforced.[150] However, opponents of the change worried the civil penalties would serve to weaken the enforcement of the law because it would leave enforcement up to citizens to bring actions.[151]

A year after civil penalties had been enacted and the law had been overhauled, evidence of improvements was tepid.[152] Citizens still argued that public officials and public bodies were doing little to be responsive to the laws or the opinions of the attorney general's office.[153]

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[147] Dale Wetzel, *Reviews of Law Positive; Some Question Whether Open Meetings, Records Law has Teeth*, BISMARCK TRIB., Mar. 9, 1998, 1B.

[148] S.B. 2228, 55th Leg. Assem., Reg. Sess. (N.D. 1997); N.D. CENT. CODE § 44-04-21.2(1) (2009).

[149] Dale Wetzel, *Reviews of Law Positive; Some Question Whether Open Meetings, Records Law has Teeth*, BISMARCK TRIB., Mar. 9, 1998, 1B.

[150] Kortny Rolston, *Lawmakers Still Clarifying What's Open to the Public*, BISMARCK TRIB., Mar. 14, 1997, at 1B.

[151] *Id*.

[152] Dale Wetzel, *Reviews of Law Positive; Some Question Whether Open Meetings, Records Law has Teeth*, BISMARCK TRIB., Mar. 9, 1998, 1B.

[153] *Id*.

However, Heitkamp, still the state attorney general at the time, maintained the new provisions had "been very useful" in opening dialogue with public bodies on compliance with the laws.[154] Jack McDonald, a Bismarck attorney who represented newspaper and broadcasters, also believed the legislation was working because it had led to quicker resolution over access disputes and helped citizens avoid long court battles for enforcement.[155]

In one example, an opinion from the attorney general's office directed the Board of Higher Education to hold a public meeting to discuss problems at the University of North Dakota that had been previously discussed at a wrongly closed meeting.[156] Journalists also lauded that the law, saying that while not being perfect, it had given citizens an avenue by which to seek quick opinions on public bodies' compliance.[157]

Although criminal penalties were replaced by civil penalties in 1997 because lawmakers argued criminal penalties had not been enforced and because of that were not a deterrent, in 2001, a similar argument that civil penalties had not been a sufficient deterrent was used as the reason to re-enact criminal penalties. Criminal penalties, added to the open meetings law in 2001, provide for "a public servant…who knowingly violates" the law to be guilty of a class A misdemeanor, which carries a penalty of a maximum of one year in prison, a fine of $2,000, or both.[158]

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[154] *Id*.

[155] *Id*.

[156] Dale Wetzel, *Reviews of Law Positive; Some Question Whether Open Meetings, Records Law has Teeth,* BISMARCK TRIB., Mar. 9, 1998, 1B.

[157] *Id*. (The article did not give exact figures, but the writer stated: "I looked at the log the staff lawyers keep, there were as many requests from ordinary North Dakotans as there were form journalists.").

[158] S.B. 2117, 57th Leg. Assem., Reg. Sess. (N.D. 2001); *See also* N.D. CENT. CODE § 44-04-21.3 (2009).

In adding criminal penalties back to the open meetings law in 2001, Jim Fleming, an assistant attorney general in North Dakota who supported the effort, argued that "the prospect of a fine and jail time should be deterrent to local officials who otherwise may not care" whether they violate the law.[159] For criminal penalties to be sought against violators, evidence that the official deliberately ignored the law would be necessary.[160] Fleming argued that criminal penalties were necessary because public officials operated under the assumption that no one was going to bring civil suit against them.[161]

However, Fleming also told the *Bismarck Tribune* in a separate interview that neither he nor Jack McDonald, an attorney for the North Dakota Newspaper Association, anticipated any cases being prosecuted under the criminal penalties.[162] Nevertheless, supporters of re-adding criminal penalties to the state's open meetings penalties argued that having the possibility of the attorney general investigating alleged violations and the possibility of jail time would help persuade to public officials to comply.[163]

As made evident by the published record, North Dakotans may still not be sure what remedy will work, if any. In 1997, lawmakers added civil penalties, and criminal penalties were re-established in 2001. In 1997, criminal penalties were abandoned in favor of civil penalties, arguing that it would improve enforcement and compliance with the laws. Although some evidence exists that access did improve after the civil penalties were enacted, in 2001, because of

[159] Matt Gouras, *Open Records Violations Could Be Criminal*, BISMARCK TRIB., Mar. 3, 2001, at 2B.

[160] *Id*.

[161] *Id*.

[162] Todd Dvorak, *Legislature Changes Rules on Open Meetings, Inmate Records*, BISMARCK TRIB., May 14, 2001, at 2C.

[163] *Id*. (quoting Fleming as saying "It's just another tool in the tool box, and that's not a bad idea for people who aren't afraid of the attorney general's opinion or the threat of being sued.").

a perception that penalties for violations were not stringent enough, criminal penalties were re-enacted. Criminal penalties had never been imposed until 2001[164] in North Dakota, and no evidence could be found in the published record that they had been imposed since.

Rhode Island

During the 1997-1998 legislative session, lawmakers in Rhode Island increased the civil penalty available for violations of open meetings laws five-fold, from up to $1,000 for willful violations to up to $5,000 for a willful or knowing violation.[165] The law also added provisions for awarding attorneys' fees and costs to prevailing plaintiffs.[166]

Rosemary Healey, an attorney who represented several public agencies in the state, told more than 130 local officials that "this is the kind of statute that you should avoid violations…It just takes a little bit of planning."[167] A search for published accounts of the change in the penalty provisions revealed little.

However, an account in the *Providence Journal-Bulletin* showed that support for the change in the open meetings law came from citizens and open government advocates frustrated at failed efforts to compel compliance and enforcement of the open meetings law, which, as in most other states, had been a problem in Rhode Island.[168] In a case involving an open meetings violation in 1996, the year before the lawmakers increase civil penalties for open meetings

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[164] *Open government: Two Steps Ahead, One Step Back*, BISMARCK TRIB., May 9, 1999, at 4B.

[165] H.B. 7911 Leg. Sess.1997-1998 (R.I. 1998); R.I. GEN. LAWS § 42-46-8 (2009).

[166] Edwards v. State, 677 A.2d 1347 (R.I. 1996).

[167] Bruce Landis, *Experts: Don't Go Afoul of Meetings Law; In a Seminar, Local Officials Learn that the Newly Amended Open Meetings Law is Stricter, with Steeper Fines—but, They're Told, If They are Careful There Should Be No Problem*, PROVIDENCE JOURNAL-BULLETIN, Feb. 7, 1999, at 4C.

[168] *See e.g.* S. Robert Chiappineli, *Court: No Penalty for Open-Meeting Violation*, PROVIDENCE JOURNAL-BULLETIN, June 19, 1996, at 1C.

violations, the Rhode Island Supreme Court affirmed a lower court ruling that the East Greenwich School Committee had violated the open meetings law in a 1990 meeting. The lower court had not issued penalties or invalidated the vote taken at the wrongly closed meeting.[169] In a 3-2 decision affirming the lower court's decision, the Rhode Island Supreme Court said the violation was "an innocent mistake" when the committee met in an unnoticed meeting to vote to opt out of an new early retirement law passed during that session in the legislature.[170]

Virginia

Since 1996, Virginia lawmakers have revised civil penalty provisions for "willfully and knowingly" violating the state's open meetings law three times.[171] In 1996, lawmakers added a provision that provided for a civil penalty of not less than $250 nor more than $1,000 for subsequent violations of the open meetings laws.[172] At the time, Virginia law allowed for a civil penalty of not less than $25 nor more than $1,000 to be levied against members of public bodies found to have violated the law, but did not address penalties for subsequent violations.[173]

Three years later in 1999, lawmakers increased the minimum civil penalty for violations from $25 to $100.[174] The new law provided for public officials found to have violated the open meetings law to be subject to a civil penalty of "not less than" $100 nor more than $1,000 for the first offense.[175] The revision doubled the minimum penalty for subsequent offenses from $250

[169] *Id*.

[170] *Id*.

[171] H.B. 933, 1996 Leg., (Va. 1996); S.B. 1023, 1999 Leg., (Va. 1999); H.B. 2086, 2003 Leg., (Va. 2003).

[172] H.B. 933, 1996 Leg., (Va. 1996).

[173] VA. CODE ANN. § 2.2-3714 (1995).

[174] S.B. 1023, 1999 Leg., (Va. 1999); *See also* VA. CODE ANN. § 2.2-3714 (1999).

[175] *Id*.

to $500 and more than doubled the highest amount from $1,000 to $2,500.[176] Most recently in 2003, lawmakers in Virginia again revised the civil penalties provisions, increasing to $250 from $100 the minimum penalty for a first time offense and increasing the minimum penalty for a subsequent offense from $500 to $1,000.[177] The current law provides for a civil penalty of not less than $250 and not more than $1,000 against public officials who "willfully and knowingly" violated the open meeting law and for a civil penalty of not less than $1,000 nor more than $2,500 for subsequent violations.[178]

Published records of the changes made to the penalty provisions reveal open government advocates' frustration at officials' persistent, and almost always unpunished, violations of the law, and of lawmakers attempting to correct the problem through increasing civil penalties. In 1998, an audit conducted by Virginia newspapers revealed flagrant violations of the law.[179] In one example reported in *The Virginia-Pilot*, in August 1998, the board of a publicly funded museum voted to eject a reporter from a meeting.[180] The board chairman initiated the vote to eject the reporter, asked of the other board members: "All those in favor of asking this news person to leave, and not having another headline in the paper, raise their hands."[181] The meeting

[176] *Id*.

[177] H.B. 2086, 2003 Leg., (Va. 2003); *See also* VA. CODE ANN. § 2.2-3714 (2004).

[178] *Id*.

[179] Jennifer Peter, *Government Meetings Regularly Held Behind Closed Doors*, VIRGINIAN-PILOT (Nov. 1, 1998) *available at* http://www.nfoic.org/uploads/foi_pdfs/vagovtmeetings.pdf.

[180] *Id*.

[181] *Id* (discussing that the reporter was ejected from the meeting. The article, however, did not explain what the meeting was closed for, what was discussed during the closed meeting, or even clarify if any other persons were ejected from the meeting.).

was illegally closed despite the fact that keeping headlines out of newspapers is not an exception to Virginia's open meetings law.[182]

In the same year, state Senator William Bolling, a member of the subcommittee reviewing the state's open government laws, told *The Virginian- Pilot* newspaper than many public officials were violating the open meetings law by going into executive session simply to avoid discussing an issue in public.[183]

Reports from the 1998 statewide audit also discussed the repeated violations of the Richmond City Council, which, at the time held all discussion at an afternoon meeting preceding the noticed city council meetings in the evening. According to the report, only actions—and not discussion—took place at the brief city council meetings.[184] After finding out about the unnoticed afternoon meetings of the city council, the resident took her complaint to the Virginia General Assembly's Freedom of Information study committee.[185] The Freedom of Information study committee told the resident she had been wronged. After the committee's finding, the city council began adding a one-line notice about the 3 p.m. meetings on the noticed agenda of the city council meetings.[186]

In a 1998 editorial, the year before the legislature increased penalties for a second time, *The Roanoke Times* complained that "Virginia's open-government law has been steadily eroded

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[182] *Id*.

[183] *Id*.

[184] Dick Hammerstrom, *Woman Wanted Agendas of Informal Meetings, Too*, FREE LANCE-STAR, (Oct. 31, 1998) *available at http://www.nfoic.org/uploads/foi_pdfs/vawomanwanted.pdf*.

[185] *Id*.

[186] *Id*.

over the years" and supported lawmakers giving the law more "teeth."[187] John Edwards, the editor and publisher of *The Smithfield Times* and a member of a subcommittee in the state's General Assembly reviewing the open government laws, told *The Roanoke Times* that the law had to be written for the worst cases of abuse.[188]

At the start of the 1999 legislative session, lawmakers believed the odds were against them and that efforts to increase penalties would meet tough opposition from local government, law enforcement and special interests.[189] Ultimately, changes to the law passed in 1999 that increased the minimum civil penalty for violations from $25 to $100.[190] The new law provided for public officials found to have violated the open meetings law to be subject to a civil penalty of "not less than" $100 nor more than $1,000 for the first offense.[191] The revision also doubled the minimum penalty for subsequent offenses from $250 to $500 and more than doubled the highest amount from $1,000 to $2,500.[192]

As discussed above, Virginia lawmakers would again increase penalties for open meetings violations in 2003. The current law provides for a civil penalty of not less than $250 and not more than $1,000 against public officials who "willfully and knowingly" violated the open

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[187] *Reversing the Trend of Closed Government*, ROANOKE TIMES, Dec. 23, 1998, at A18.

[188] C.S. Murphy, *Groups Seek to Close Loopholes in Virginia's FOI Act Sunshine Law Cloudy*, ROANOKE TIMES, Nov. 2, 1998, at A1.

[189] *Id*. (quoting State Senator Ed Houck, "[w]ithin the General Assembly, there is a serious lack of regard for the public's right to know.").

[190] S.B. 1023, 1999 Leg., (Va. 1999); *See also* VA. CODE ANN. § 2.2-3714 (1999).

[191] *Id*.

[192] *Id*.

meeting law and for a civil penalty of not less than $1,000 nor more than $2,500 for subsequent violations.[193]

More than three years after Virginia's last revision to its civil penalties in 2003, state newspapers covered two cases in which the courts applied the penalties established in Virginia's open meetings laws. In the first, the Virginia Supreme Court unanimously ruled that the Culpeper Board of Supervisors, the elected officials of the town of Culpeper, Virginia, violated the open meetings law when it discussed a school construction project behind closed doors.[194] According to *The Virginian-Pilot*, similar violations occurred "every Tuesday and Wednesday evening" when boards and councils across the state close the door to hold executive sessions that stretch the exemptions of the law. [195] But this time, the Virginia Supreme Court applied the rarely enforced open meetings law and required the board to pay more than $100,000 in attorneys' fees to the three newspapers who brought suit for what was usually a routine and unquestioned violation of the law. [196]

The following year, a district judge imposed a civil penalty for an open meetings violation, believed by *The Roanoke Times* to be the first time the penalty had been imposed.[197] The judge required the Madison County sheriff, Erik Weaver, to pay the civil penalty of $250 and to also pay legal fees for the citizen who brought the case forward. [198] Weaver had refused to provide a

[193] H.B. 2086, 2003 Leg., (Va. 2003); *See also* VA. CODE ANN. § 2.2-3714 (2004).

[194] *Tab for Illegal Meetings Just Went Up*, VIRGINIAN-PILOT, Sept. 25, 2006, at B10.

[195] *Id*.

[196] *Id*.

[197] *Punish Illegal Secrecy*, ROANOKE TIMES, Dec. 24, 2007, at B6.

[198] *Id*.

resident with the names of the people serving on his citizen advisory board.[199] *The Roanoke Times* praised the judge's decision, writing "no longer would officials be able to ignore the law with impunity.[200] The threat of real punishments would make them think twice before conducting public business out of the view of the public."[201] However, on review, Judge Jay Swett, presiding over Madison County Circuit Court, overturned the fine and reimbursement of attorneys' fees for the citizen who brought the suit, holding that the sheriff had not "willfully and knowingly" violated the law.[202]

West Virginia

In 1999, West Virginia lawmakers revised the state's penalty provision for violating the open meetings law. The new law removed a provision that any person found to have willfully and knowing violated the open meetings law "shall be" found guilty of a misdemeanor and "shall be fined" not less than $100 and not more than $500.[203] The law also removed a provision allowing for a member of a public body who is found guilty of violating the open meetings law to be jailed for up to ten days in addition to, or instead of, the fine.[204] The new law required that anyone found guilty of a misdemeanor violation of the open meetings law be fined not more than $500.[205] Additionally, the new law added a provision that members of a governing body

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[199] Don Richeson, *Madison Sheriff Wins Appeal Case,* (Apr. 22, 2009) *available at* *http://www.starexponent.com/cse/news/local/article/madison_sheriff_wins_appeal_case/34223/*.

[200] *Punish Illegal Secrecy*, ROANOKE TIMES, Dec. 24, 2007, at B6.

[201] *Id*.

[202] Don Richeson, *Madison Sheriff Wins Appeal Case,* (Apr. 22, 2009) *available at* *http://www.starexponent.com/cse/news/local/article/madison_sheriff_wins_appeal_case/34223/*.

[203] W. VA. CODE § 6-9A-7 (1991).

[204] W. VA. CODE § 6-9A-7 (1991).

[205] W. VA. CODE § 6-9A-7(a) (2008); H.B. 2005, 75th Leg., Reg. Sess. (WV 1999).

convicted of a second or subsequent offense should be found guilty of a misdemeanor and "shall be fined" not less than $100 nor more than $1,000.[206]

Published newspaper accounts provided evidence that changing penalties for open meetings violations had been debated for at least four years before the 1999 changes were made. Changes were a contentious issue between open government advocates calling for improvements for enforcement and public officials resisting the changes. Since at least 1996, the West Virginia Press Association has lobbied for increased penalties for open meetings violations and for penalties for repeat violators of the law. The press association has also lobbied to give the state Ethics Commission the power to resolve open meetings conflict.[207]

Three years before the 1999 changes, a 1996 bill failed that would have increased penalties for violating the open meetings law and provided for penalties to be applied to public officials who met informally before official meetings and who used meetings to "rubber-stamp" decisions that had been made earlier. [208] The bill failed, with several state senators expressing some concerns about "criminalizing being a public servant," referring to penalties for willfully violating the law.[209] One of the most oft-used scenarios was that the open meetings law would be violated if three officials were walking down the hall engaged in casual conversation. Jon Amores, who was a member of the senate committee that killed the bill at the time, answered those concerns by stating that casual conversation would not invoke the open meetings law, but

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[206] *Id*.

[207] *Right to Know*, CHARLESTON GAZETTE, Feb. 04, 1996, at 2B.

[208] Phil Kabler, *Future Bleak for Meetings Law Reform*, CHARLESTON GAZETTE, Mar. 07, 1996, at 2A.

[209] *Id*. (quoting Judiciary Committee chairman William Wooton, D-Raleigh); *See also* Phil Kabler, *Open Meetings Bill Dies in Committee*, CHARLESTON GAZETTE, Mar. 08, 1996, at 1A (quoting State Senator Tom Scott who tabled the bill in the Government Organization Committee effectively killing it); *See also Sunshine Senate Kills Good Bill*, CHARLESTON GAZETTE, Mar. 09, 1996, at 4A.

that "meeting somewhere in secret and transacting business" would.[210] The press associations' lobbyist at the time, Marc Harman, was quoted in *The Charleston Gazette* as saying "there's so much misinformation floating around about this bill that it's sickening." [211] Bill Childers, the executive director at the time of the West Virginia Press Association, told *The Charleston Gazette* after the bill failed that education was clearly necessary.[212]

In the latter part of 1997, changes to the law were again debated as part of an ad hoc open meetings law committee. The committee included attorneys representing public bodies, including one for the West Virginia School Boards Association, and open government advocates including the Society of Professional Journalists and the West Virginia Press Association.[213] The West Virginia Press Association supported doing away with the "willfully and knowingly" standard for imposing criminal penalties for violations, arguing that such a high burden of proof was almost impossible to meet and that it was partly responsible for preventing penalties from being enforced in the state for open meetings violations.[214] The press association instead supported changing penalty provisions so that they would provide for a minimal penalty for unknowing violations in executive sessions and stiffer penalties for knowing violations, but both would be considered misdemeanors.[215]

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[210] Phil Kabler, *Open Meetings Bill Dies in Committee*, CHARLESTON GAZETTE, Mar. 08, 1996, at 1A

[211] Phil Kabler, *Future Bleak for Meetings Law Reform*, CHARLESTON GAZETTE, Mar. 07, 1996, at 2A; *See also* Phil Kabler, *Open Meetings Bill Dies in Committee*, CHARLESTON GAZETTE, Mar. 08, 1996, at 1A (quoting State Senator Jon Amores, a sponsor of the bill saying, "I Don't think this bill died on its merits. It died because of a lack of information.).

[212] Phil Kabler, *Open Meetings Bill Dies in Committee*, CHARLESTON GAZETTE, Mar. 08, 1996, at 1A.

[213] Brian Bowling, *Penalties Draw Complaints, Group Is Considering Rewrite of State's Open Meetings Law*, CHARLESTON DAILY MAIL, Oct. 15, 1997, at 6B.

[214] *Id*.

[215] *Id*.

However, public officials across the state voiced opposition, arguing that adding penalties for unknowing violations in executive sessions could subject public officials to risk jail time virtually at every meeting. An attorney for the West Virginia School Boards Association argued that imposing penalties for unknowing violations would be inappropriate because no other statutes dealing with public officials imposed such penalties.[216] Additionally, the School Boards Association argued that, for example, adding such penalties could make the president of a school board subject to penalties for holding an improper executive session, even if it was another board member, and not the president, who brought up a subject not approved for discussion in executive session.[217]

Nearly a decade after the 1999 changes to the West Virginia penalty provisions were enacted, the media's assessment of compliance and enforcement with the state's open meetings law is dismal.[218] In a September 2008, an survey by *The Associated Press* found the members of the media believed West Virginia's law lacked enough penalties to compel public bodies and officials to comply with the laws.[219] According to the editors polled, the only significant method of enforcement at their, and the public's, disposal was through the editorial page. Andy Kinceley, president of daily newspapers for the West Virginia Press Association and publisher of the *Times West Virginian* in Fairmont, summed up West Virginia media's sentiment by telling

[216] *Id*.

[217] *Id*.

[218] *See e.g. West Virginia Newspapers Speak,* ASSOCIATED PRESS, Sept. 13, 2008, *available at* LEXIS, News Library, State and Regional.

[219] *Id*.

The Associated Press, "[r]eally, public opinion through the editorial page is the only real hammer we have short of taking them to court and paying heavy legal fees."[220]

Wyoming

In 2005, Wyoming lawmakers added penalties for the first time to the state's open meetings law.[221] The penalties make it a misdemeanor for "any member or members of an agency" to "knowingly and willfully" take or conspire to take action in violation of the law.[222] The penalty provisions also make it a misdemeanor for "any member of a governing body or agency" to attend or remain at a meeting where action is taken knowingly in violations of the state's open meetings law. Attending or remaining at such a meeting is a violation of the law unless minutes of the meeting show the member so ejected or the member's objections are made public at the next regular meeting and asks that the objections be recording in the minutes of the close meetings. [223] A misdemeanor violation of the open meetings law is punishable by a penalty of up to $750. [224]

The penalty change received much attention in the local media in 2005, the year the legislature passed the change. The proposal to create penalties was brought to legislators by the Wyoming Press Association and newspapers across the state lobbied in support of it. [225] The

[220] *West Virginia Newspapers Speak*, ASSOCIATED PRESS, September 13, 2008, *available at* LEXIS, News Library, State and Regional.

[221] H.B. 165, 58th Leg., Reg. Sess. (Wyo. 2005).

[222] WYO. STAT. § 16-4-408(a) (2008).

[223] WYO. STAT. § 16-4-408(a) (2008).

[224] WYO. STAT. § 16-4-408(a) (2008).

[225] Reed Eckhardt, *Finally, some teeth in the state's open meetings law*, WYO. TRIB. -EAGLE, June 25, 2005, at A8. Kelly Milner, *WPA Looks to Put Teeth in Open Meetings Law Media Group Hopes to Add Noncriminal Penalties to Keep Officials Operating in Public Eye*, WYO. TRIB. -EAGLE Jan. 5, 2005, at 8; (The League of Women Voters of Wyoming also supported adding the measure arguing that "[a] law with no penalty is very easily ineffective.").

supporters of the legislation argued that the only remedy available up to that point had been to take a public body to court and have the decision made at an illegally closed meeting void, and that remedy had not been an effective deterrent.[226] The supporters tried and failed to add civil penalties to the legislation.[227]

Nevertheless, newspapers supported the addition of criminal penalties, writing about repeated and unpenalized violations by public officials. The *Wyoming Tribune-Eagle* celebrated the addition to penalties and expressed hope that the possibility of being found guilty of a misdemeanor had given the law some "teeth" and might make officials think twice about violating the law.[228] The newspaper also called on district and county attorneys to "come down on the side of those who put them into office," citing concerns that district and state attorneys may not file charges against fellow public officials.[229] The editorial went further to call public officials' complaint that the penalties may hamper their ability to perform their duties as "a bunch of baloney."[230] In one example, in 2001, before the penalties were added to the law, the Laramie County School District Board of Trustees went into an executive session, despite warnings from the *Wyoming Tribune-Eagle* attorney present that doing so would violated the open meetings law.[231] The board went into executive session, set a policy related to members

[226] Kelly Milner, *WPA Looks to Put Teeth in Open Meetings Law Media Group Hopes to Add Noncriminal Penalties to Keep Officials Operating in Public Eye*, WYO. TRIB. -EAGLE, Jan. 5, 2005, at 8.

[227] *Id*.

[228] *Id*.

[229] *Id*.

[230] *Id*.

[231] Reed Eckhardt, *Finally, some teeth in the state's open meetings law,* WYO. TRIB. -EAGLE, June 25, 2005, at A8.

attending museum functions and never even took a public vote after the session. The violation went unpunished.[232]

Supporters of adding penalties argued that a penalty was necessary to get public officials' attention and spark their interest in complying with the state's open meetings law.[233] Pete Illoway, a state representative at the time, co-sponsored the bill because there had been poor enforcement of the law in the past and argued that "there's no stick; there's no hammer."[234] Jim Angell, then executive director of the Wyoming Press Association, argued that the bill was meant to be a deterrent and violators should be penalized seriously because every time a public official participates in an illegally closed meeting, "they have just embezzled my trust."[235] Angell argued that while the majority of problems could be solved with education, stiff penalties were necessary for the small percentage who willfully refused to comply with the open meetings laws.[236] Other supporters of adding penalties to the state's open meetings law also argued that the penalty was not too harsh because before penalties could be imposed by a judge, he or she would have to find beyond a reasonable doubt that the official knowingly and willfully violated the open meetings law.[237]

The provision in the 2005 law allowing for a member of the public body to stay at a meeting being held in violation of the law as long as the minutes reflected the member's

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[232] *Id*.

[233] *See e.g.* Curtis B. Wackerle, *Senate Approves Amended Open Meetings Bill*, ASSOCIATED PRESS, Feb. 15, 2005, *available at* LEXIS, News Library, State and Regional.

[234] Jessica Lowell, *Open Meetings Enforcement Bill Gets Committee Nod*, WYO. TRIB.-EAGLE, Jan. 19, 2005, A1.

[235] *Id*.

[236] Jessica Lowell, *Open Meetings Enforcement Bill Gets Committee Nod*, WYO. TRIB.-EAGLE, Jan. 19, 2005, A1.

[237] Jessica Lowell, *Open Meetings Bill Heads to Senate*, WYO. TRIB. -EAGLE, Jan. 26, 2005.

objection was added after state senators expressed concern that if a public official left an illegal meeting, that official would not be able to represent his or her constituents in whatever decisions was being made, albeit illegally.[238] Another state senator who had concerns about adding penalties to the state's open meetings law asked hypothetically if three commissioners were riding home in a car together and began talking about public business, if the third commissioner would be violating the law if he did not ask to be thrown out of the car.[239] Yet another state senator said she supported the penalties but wanted to add some protections to the law so that people would not harass public officials by making "an accusation that throws a good servant into the legal system without evidence and without due process."[240] The potential for an entire board to be taken out of office because of a violation committed by all the members seemed to be particularly troubling to opponents of the penalty provision.[241] The amendment adding the provisions for members to object on the record about a meeting passed on a 15-14 vote.[242]

Additionally, other senators who opposed adding penalties to Wyoming's open meetings law said that making violating the open meetings law a misdemeanor would criminalize people who volunteer for public office and those who worked on boards operating with less than a $750

[238] Ilene Olson, *Senate Approves Penalties for Open Meetings Violations on First Reading,* WYO. TRIB. -EAGLE, Feb. 16, 2005, at A7 (quoting then State Senator Curt Meier).

[239] *Id*. (quoting the State Senator Bruce Burns).

[240] *Id*. (quoting then State Senator Rae Lynn Job).

[241] Jennifer Franze, *Committee Debates Open Meetings*, WYO. TRIB. -EAGLE, Feb. 11, 2005, at A6

[242] Jennifer Franze, *Committee Debates Open Meetings*, WYO. TRIB. -EAGLE, Feb. 11, 2005, at A6 (quoting then State Senators Jayne Mockler, as saying that the measure was a good compromise and a good way to enforce the law because there would always be at least one person who would report the violation.); *See also* Ilene Olson, *Senate Approves Penalties for Open Meetings Violations on First Reading,* WYO. TRIB. -EAGLE, Feb. 16, 2005, at A7.

per month budget.[243] They worried that penalties would further diminish the already small pool of candidates willing to volunteer for public office and that the possibility of criminal penalties for even honest mistakes would dissuade many from running.[244] According to a report in the *Wyoming Tribune-Eagle* newspaper, even in larger cities, the open meetings law would be hard to follow because a public official who works all day may go between tasks that were supposed to be open or closed and not know it, therefore violating the law.[245]

The Wyoming County Commissioners Associations and the Wyoming Association of Municipalities lobbied to have the maximum fine for the violation reduced to $100, but were unsuccessful.[246] Jim Hageman, a state representative at the time, also tried twice to reduce the penalty and failed.[247] In his first proposal the fine would have been remove altogether.[248] In his second proposal, the fine would be limited to the public official's pay, which in many cases is either negligible or nothing in the case of volunteers.[249]

The Wyoming measure passed, creating misdemeanor criminal penalties of up to $750 for violating the open meetings law. As seen in other states where penalty provisions were changed,

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[243] Ilene Olson, *Senate Approves Penalties for Open Meetings Violations on First Reading,* WYO. TRIB. -EAGLE, Feb. 16, 2005, at A7 (quoting the State Senator Stan Cooper).

[244] Jessica Lowell, *Open Meetings Bill Heads to Senate,* WYO. TRIB. -EAGLE, Jan. 26, 2005; *See also* Jessica Lowell, *Meetings Bill Passes First House Reading,* WYO. TRIB. -EAGLE, Jan. 22, 2005, at A6; *See also* Jessica Lowell, *Open Meetings Enforcement Bill Gets Committee Nod,* WYO. TRIB.-EAGLE, Jan. 19, 2005, A1 (quoting a member of the Wyoming Association of Municipalities as saying that "[t]his bill may be a case when the cure is worse than the disease…The more obstacles you put up, the less and less people will want to run for office.").

[245] Jennifer Franze, *Committee Debates Open Meetings,* WYO. TRIB. -EAGLE, Feb. 11, 2005

[246] *Senate Committee Endorses Tougher Open Meetings Bill,* ASSOCIATED PRESS, Feb. 11, 2005, *available at* LEXIS, News Library, State and Regional.

[247] Jessica Lowell, *Open Meetings Bill Heads to Senate,* WYO. TRIB. -EAGLE, Jan. 26, 2005, *available at* LEXIS, News Library, State and Regional.

[248] *Id*.

[249] *Id*.

during the year in which the change was debated in the legislature it received much coverage in the media and the comments of both supporters and opponents to the change. In the years following the change in penalties for violating the open meetings law, however, little evidence exists that the interest in enforcing the open meetings law went beyond changing the law. No coverage reporting enforcement or effectiveness of the new penalty provisions could be found.

In all, eleven states have changed penalties for violating the open meetings law since 1995. The following section will discuss the overall themes that the research revealed, including reasons that supporters expressed as a motivation for seeking changes to penalties provisions and reasons opponents to the measure expressed for being concerned about changing or adding penalties to the open meetings laws, as revealed in published records.

Discussion

Since 1995, penalties for violating open meetings laws have either been changed or added in eleven states. In six states, the criminal and civil penalties were increased.[250] In two states, Arkansas and Alabama, the penalties were decreased. Mississippi and Wyoming added penalties to the states' open meetings law for the first time, while Georgia added a provision in an effort to make penalties for open meetings law violation harsher. In general, supporters and opponents of increased penalties for open meetings violations in the states discussed above expressed many of the same concerns.

Supporters of Increasing Penalties

In the states that either made changes to penalty provisions or added penalty provisions, a common idea among supporters of the change was an effort to "put teeth" into the laws and to

[250] *See, supra*, Chapter One, pp. 13 (discussing that 1995 was chosen as a starting point for the analysis of states that have changed their penalties because Davis, Rivera-Sanchez and Chamberlin's study looked at everything up to that point); *See also Sunshine Laws*, *supra* note 1, at 55.

make government officials and public bodies more accountable to their constituents. By giving the law "teeth," supporters of changes to penalty provisions meant to make the penalties for violating the law more severe, equating a more severe penalty with a more effective deterrent. More severe penalties included increasing monetary fines in civil and criminal penalties and increasing the maximum jail time allowed in criminal penalties. Additionally, supporters saw adding penalties for violations that were unintentional as making the laws more severe.

In the published non-legal record of the states discussed above, however, few supporters of increasing penalties, if any at all, equated giving the open meetings law more "teeth" with improving enforcement. The focus when the phrase "teeth" was used appeared to be more on the actual penalty, increasing the civil or criminal penalty, but not so much focusing on enforcement of the new or existing penalties. The general concept was that the threat of severe punishment would at least make public officials think twice before violating the open meetings law in their state. Despite few if any prosecutions under criminal penalties, in all states that increased criminal penalties or added criminal penalties, supporters argued that tougher criminal penalties would improve compliance with the open meetings laws. For example, in North Dakota, criminal penalties for open meetings violations were re-adopted in 2001 in an effort to make penalties more severe. A few years earlier, in 1997, the state had repealed the criminal penalties and instead added civil penalties for open meetings violations because no one had been prosecuted under the criminal penalties for open meetings violations. When lawmakers re-adopted criminal penalties, Jim Fleming, an assistant attorney general in North Dakota who supported adding criminal penalties, argued that the possibility of fines and jail time would be an effective deterrent.[251]

[251] Matt Gouras, *Open Records Violations Could Be Criminal*, BISMARCK TRIB., Mar. 3, 2001, at 2B.

Across the six states that increased penalties, newspapers, media associations and open government advocates were the most vociferous supporters and outspoken lobbyists for increasing penalties. Such organizations included the First Amendment foundations, Common Cause organizations and the press and newspaper associations in each state. Missouri was one of the few states where the effort of citizens in lobbying for increased penalties was discussed in the published record. In states including Wyoming and Mississippi, where lawmakers instituted fines for open meetings law violations for the first time, supporters of the penalties argued that the absence of penalties created a disincentive for media and public to bring complaints against violations of the open meetings law.

The published non-legal record suggests that support for increasing penalties for open meetings violation stemmed from the history of few to no prosecution for open meetings violations under the states' current open meetings law and penalties. Newspapers were among the most outspoken supporters, recounting in editorials persistent violations that had gone unpunished. Newspapers in several states likened existing penalty provisions to traffic tickets. In Idaho, for example, a state newspaper likened the penalty for open meetings violation to fines for traffic violations, arguing that a patrol officer never asks a motorist if he or she was aware of the law before the officer issues a citation for violating it.[252] Others, such as a columnist in North Dakota, used the analogy with a traffic ticket as a way to argue that open meetings penalties were trivial, easy to take care of and forget.[253] The paper advocated for penalties for violating the law regardless of whether the violation had been committed inadvertently or purposefully. In other

[252] *The Duh Defense; Our View: Idaho Officials Can Skirt Law by Claiming Ignorance*, SPOKESMAN REVIEW, Apr. 25, 2008, at B4.

[253] *Open government: Two Steps Ahead, One Step Back*, BISMARCK TRIB., May 9, 1999, at 4B.

states, including West Virginia, newspapers and press associations also supported penalties for violations even if inadvertent.[254]

Supporters throughout the states that increased their penalties expressed frustration at the poor enforcement, which they argued was at least partly to blame for continued violations of the open meetings laws. In Alabama, where the 2005 change to the law did away with criminal penalties and created civil penalties, the high cost and time-consuming nature of pursuing claims for small fines under the criminal penalties had been cited as a reason penalties had not been used during the law's history. The small fine was not worth the time or effort for district or county attorneys to prosecute and the minute possibility of prosecution lead officials who either did not know the law or just did not care about the open meetings law to ignore it without fear.[255]

Similar concerns were expressed in North Dakota when the state also created civil penalties, abandoning criminal penalties that had gone unenforced. Supporters of adding civil penalties argued that citizens would bring claims against violators if they did not have to depend on county attorneys, could be guaranteed attorneys' fees and did not have the burden of proof in the case. While civil penalties were hailed as an avenue for citizens to seek enforcement of open meetings laws, other supporters of increasing penalties worried that leaving enforcement in the hands of citizens, who might not have time or funds to pursue such claims, would only weaken the already paltry enforcement of open meetings laws.[256]

Newspapers argued that unenforced penalties for violating open meetings laws relegated the task of enforcing the laws to editorial pages, but that public embarrassment for the public

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[254] Brian Bowling, Penalties Draw Complaints, *Group is Considering Rewrite of State's Open Meetings Law*, CHARLESTON DAILY MAIL, Oct. 15, 1997, at 6B.

[255] Judiciary Panel Sets Hearing on Open Meetings Bill, BIRMINGHAM NEWS, Apr. 19, 2003.

[256] Kortny Rolston, *Lawmakers Still Clarifying What's Open to the Public*, BISMARCK TRIB., Mar. 14, 1997, at 1B.

officials who violated the law was not enough because the publicity and embarrassment of the editorial would fade, but the effects of the violations would still not be undone. In many ways, the published record reveals that publicity does fade. In most states, the published records reveal a sporadic and short attention span to enforcement of open meetings laws. A handful of newspapers noted that despite what was perceived as improvements to the law by changing criminal penalties to civil penalties, the law would only be as good as its enforcement.[257] However, in most of the states discussed above, published records were numerous in the years the penalties were being changed or the years that change was being debated, but little follow-up coverage exists in years after the change, so that the published record does not address whether the changes have been effective and are being enforced.

Opponents of Increasing Penalties

In general, the associations that represent public officials and public bodies and attorneys representing public officials and public bodies were the most vociferous opponents to increasing any penalties for open meetings violations. Arguments against increasing penalties included the notion that increasing penalties would make it more difficult to recruit people to serve in public office and that allowing for civil penalties would lead to an onslaught of frivolous lawsuits against public officials. In Alabama, the Association of County Commissions of Alabama opposed the bill creating civil penalties for open meetings violations because the bill had been written without consulting with the organization, which represents the public officials across the state that would have to apply the laws.[258]

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[257] Bob Blalock, *New Open-Meetings Law Only As Good As It's Enforcement*, BIRMINGHAM NEWS, Oct. 2, 2005,at 2B.

[258] Kendal Weaver, *State Newspapers Put Focus on Sunshine Law as New Measure Offered*, ASSOCIATED PRESS, Mar. 8, 2004, *available at* LEXIS, News Library, State and Regional.

The published record revealed that opponents to increasing penalties in almost every state argued that increasing penalties would make it more difficult to get people to serve in public office. In Georgia, where a law added in 1999 required public officials to sign affidavits certifying that the topic discussed in executive session was allowed by the state's open meetings law, public officials cited concern that they could become felons for inadvertently filing an incorrect affidavit. Such concerns had led at least one Georgia official not to seek re-election to his or her post.[259] As a result of the affidavit requirement, some opponents of the move argued that public agencies would have to consult their lawyers more often. Compliance with the open meetings law, they argued, could be improved, instead, by enforcing current penalties instead of adding the affidavit requirement.[260]

Opponents of increasing penalties often cited concern for public officials who served on a voluntary basis or for officials who served on public bodies that ran on budgets smaller than the maximum penalty set for violating the open meetings law. They argued that creating provisions requiring those public officials guilty of violating the law to be liable for paying their own fines would be unduly burdensome and would become a deterrent to seeking public office. In Wyoming, state senators who opposed adding penalties said that making violating the open meetings law a misdemeanor would criminalize people who volunteer for public office. In Mississippi, a state representative had lobbied for, but failed to win, caps on attorneys' fees. The

[259] Alan Judd, *New Sunshine Laws Have Officials Feeling Exposed; Nervous State: Many Elected to Public Office Feel Unsure That They Won't Unintentionally Violate the New Mandate*, ATLANTA J.- CONST., July 9, 1999, at 2B.

[260] Suzanne F. Sturdivant, *Open and Public Meetings: Require that an Agency Holding a Meeting Make Available an Agenda of All Matters Expected to Be Discussed; Require the Agency to Post and Distribute its Agenda; Require the Chairperson of a Closed Meeting to Execute and File with the Minutes a Notarized Affidavit Stating Why the Meeting was Closed*, 16 GA. ST. U.L. REV. 256, 260-261 (1999).

representative argued that he did not want to put small town public officials at risk of having to pay attorneys' fees, costs and a fine for an inadvertent violation of the law.[261]

Public officials serving in full-time positions or in larger municipal areas also expressed concern that increased penalties placed additional scrutiny on their office and hampered their ability to fulfill their job requirements.[262] They argued that they should not have to worry about being liable for violating the open meetings laws in the course of their typical work day. The officials argued that in the course of a typical day they undertook many activities, and worrying about complying with the open meetings law before doing each of those activities would be an added burden on top of fulfilling their daily responsibilities in public office.

Opponents of increasing penalties in some states argued that public embarrassment as result of publicity resulting from an open meetings violation would be enough to punish offenders. In Massachusetts, where attempts to increase penalties for open meetings violations failed in 2006, 2007 and 2008, opposition groups such as the Massachusetts City Solicitors and Town Counsel Association, opposed establishing fines for individual violators of the open meetings law because "99 percent of mis-steps on the law are the result of a misunderstanding or a difference of opinion."[263] Because so many of those who serve in public office serve voluntarily, the group argued that public condemnation would be enough of a penalty for open meetings violations.[264]

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[261] Jack Elliott Jr., *Open Meetings Penalty Bill Dies in Dispute Over Attorney's Fees*, ASSOCIATED PRESS, Apr. 2, 2002, *available at* LEXIS, News Library, State and Regional.

[262] *See. e.g.* Alan Judd, *New Sunshine Laws Have Officials Feeling Exposed; Nervous State: Many Elected to Public Office Feel Unsure that They Won't Unintentionally Violate the New Mandate*, ATLANTA J. –CONST , July 9, 1999, at 2B.

[263] Dan Ring, *Meetings Law Ripe for Review*, REPUBLICAN, Mar. 16, 2008, at A1. (quoting James B. Lampke a lawyer and executive director of the Massachusetts City Solicitors and Town Counsel Association.).

[264] *Id*.

According to the published record, opponents of adding or increasing civil penalties worried that allowing citizens to bring actions for open meetings violations would lead to an onslaught of frivolous lawsuits. One Wyoming state senator worried that anyone could just "make an accusation that throws a good servant into the legal system without evidence and without due process."[265] In South Dakota, where a bill to create civil penalties failed, the chairman of the Local Government Committee Representative, Tom Hennies, opposed the bill because it created a potential for frivolous lawsuits because complaint did not require an investigation to take place beforehand. [266] According to Hennies "any person with 45 bucks in their pocket could walk into the court and file suit against you for violations of the open-meetings law." [267]

Despite concerns from the opposition, in states where changes to penalty provisions were successful, the published record revealed that increasing penalties was perceived to be the key to improving enforcement and compliance with the laws. Approval of the measure was seen as a way for legislators to show their constituents they supported an open government, regardless of whether they expected those penalties to be enforced. Next, this thesis will analyze the results of the survey on criminal and civil penalties conducted using the Marion Brechner Citizen Access Project. Finally, in the analysis and conclusion, this thesis will use the findings of the fifty-state study discussed in Chapter 2, the data discussed above related to states that have recently changed penalty provisions, and the results of the MBCAP study to develop suggestions for

[265] Ilene Olson, *Senate Approves Penalties for Open Meetings Violations on First Reading*, WYO. TRIB. -EAGLE, Feb. 16, 2005, at A7 (quoting then State Senator Rae Lynn Job).

[266] Andrew Nelson, *Open Meeting Bill Deadlocked*, ASSOCIATED PRESS, Feb. 8, 2003, *available at* LEXIS, News Library, State and Regional.

[267] *Id*.

improving the law and a model penalties and remedies statute that could provide a model for open meetings laws across the county.

CHAPTER 4
RESULTS OF CIVIL AND CRIMINAL PENALTIES SURVEY

Using the research on penalties and remedies provided in open meetings laws across the country and discussed in Chapter Two, the researcher conducted a survey using the methodology established by the Marion Brechner Citizen Access Project (MBCAP).[1] Nine members of the Sunshine Advisory Board (SAB) blind reviewed and rated the civil penalties and criminal penalties provided for in thirty-eight state's open meetings laws.[2]

The blind review process attempts to remove bias from the process of rating state laws.[3] The state laws the SAB is asked to review are in the form of "neutral statements" that contain no reference to the state names or agency names that could reveal to which state the law belongs.[4] Additionally, the board is instructed not to consult outside sources when completing a survey.[5]

All members serving on the SAB are considered among the nation's most important authorities on access. Members were chosen by the project's director because of their national reputations and knowledge of access laws.[6] The members represent a variety of professional backgrounds, organizations and regions of the country.[7] All members who serve on the board

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[1] *See, supra*, Chapter One, notes 118-124 and accompanying text for discussion on the methodology used by the MBCAP; *See also* MARION BRECHNER CITIZEN ACCESS PROJECT, http://www.citizenacces.org; *See also* Bill F. Chamberlin, et al., *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J.L. & PUB. POL'Y 415, 434, 433 (2008).

[2]The survey was sent to eleven members of the Sunshine Review Board (SAB) with nine members responding. *See* Chamberlin et al., *supra* note 1, at 431 (stating that "the project director set a goal of at least an 80% response rate from the SAB members surveyed at one time and so established a guideline that at least nine out of eleven SAB members sent a survey must send in their ratings for one category before it can be tabulated.").

[3]Chamberlin et al., *supra* note 1, at 429.

[4] *Id*.

[5] *Id*. at 431.

[6] *See id*. at n.72.

[7] *Id*.

and who responded to this survey are advocates of open government in their professions. Three members—Maria Everett, Pat Gleason and Eric Turner—are employed by government agencies.[8] All the members either work with open government issues on a daily basis or have studied them for decades. The nine members who responded to this survey included:

- Sandra Davidson is an associate professor of communications law at the Missouri School of Journalism and an adjunct professor at the University of Missouri School of Law. Davidson is also the attorney for the Columbia Missourian, the daily newspaper produced by the School of Journalism. She has served as a panelist for the Information Policy Taskforce of the National Conference of State Legislatures and the Texas Freedom of Information Coalition, among other groups.[9]

- Maria Everett is the executive director of the Virginia Freedom of Information Advisory Council, a state agency created to help resolve freedom of information disputes in the state.[10]

- Pat Gleason worked at the Florida Attorney Generate office for three decades. She has been described as a "guru on public records and meetings." Gleason now serves as Director of Cabinet Affairs & Special Counsel on Open Government in Florida in the office of current Florida Governor Charlie Crist. She is "widely recognized as one of Florida's top experts on public meetings and records." [11]

- Kevin Goldberg is special counsel at Fletcher, Heald & Hildreth, P.L.C., in the District of Columbia, where he specializes in First Amendment issues as well as other issues related to newspaper and Internet publishing. In 2006, he was inducted into the National Freedom of Information Hall of Fame and is the youngest of the 56 members in the hall.[12]

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[8] *See infra* notes 10, 11 and 19.

[9] Missouri School of Journalism, Sandy Davidson, http://www.journalism.missouri.edu/faculty/sandy-davidson.html (last visited June 14, 2009).

[10] Maria J.K. Everett, Maria Everett: Where is the Balance of Privacy and Government Transparency, Virginia Coalition for Open Government, http://www.opengovva.org/index.php?option=content&task=view&id=1070 (last visited June 14, 2009).

[11] Jim Saunders, Crist's Counsel is an Advocate for Open Government, http://www.fsne.org/sunshine/2009/profiles/gleason/ (last visited June 14, 2009) (quoting Gleason as stating "The public should be welcome at the door because they make government do a better job.").

[12]Fletcher, Heald & Hildreth, P.L.C., Kevin Goldberg, http://www.fhhlaw.com/attorney_k_goldberg.asp (last visted June 14, 2009).

- Harry Hammitt is the editor and publisher of Access Reports. Hammitt is a lawyer and journalist who has more than two decades of experience in freedom of information and privacy law issues. He has also served as president of the American Society of Access Professionals and is currently a board member of the Virginia Coalition for Open Government. In 2001, he was inducted into the Freedom of Information Hall of Fame.[13]

- Forrest "Frosty" Landon is the former executive director of the Virginia Coalition for Open Government. More than a decade ago, he helped to organize the non-profit organization that works to improve the state's Freedom of Information Act. [14] Landon dedicated his fifty-year long career to advocating for open government issues. He is a two-time president of the National Freedom of Information Coalition, headquartered at the Missouri School of Journalism.[15]

- Ian Marquand is a broadcast journalist who received the Society of Professional Journalists highest honor, the Wells Memorial Key in 2004. He also served a four-year term as the SPJ Freedom of Information chair. He produced Open Doors, one of the best know guides to Freedom of Information in the county and has traveled to around the world working on freedom of information issues.[16] Marquand has also chaired the Montana Freedom of Information Hotline, a project of the Montana School of Journalism.[17]

- Charles D. Tobin is a partner at Holland and Knight, L.L.P., where he chairs the national media practice team. His practice specializes in First Amendment and Freedom of Information issues, among others. Before joining Holland & Knight, he worked as in-house counsel at Gannett Co., Inc., and as a reporter for the News-Press newspaper in Ft. Myers, Florida.[18]

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[13] Access Reports, About Editor Harry Hammitt, http://www.accessreports.com/about.html (last visited June 14, 2009).

[14] Frosty Landon, Open Government: Va. FOI Law Thrives, But It Needs Improvements, Virginia Coalition for Open Government, http://www.opengovva.org/content/view/804/100/ (June 14, 2009).

[15] Missouri School of Journalism, Missouri Journalism Alumni, http://www.journalism.missouri.edu/alumni/frosty-landon-55.html (last visited June 14, 2009) (quoting David Poole, executive director of the Virginia Public Access Project as saying "[i]t's fair to say that, if not for Frosty's vision and hard work, the General Assembly would not have rewritten the state FOI (Freedom of Information) Act and citizens would not have a state agency that serves as a clearinghouse for access to open records.").

[16] Society of Professional Journalists, Marquand Awarded Wells Key, Society's Highest Honor, http://www.spj.org/news.asp?ref=387 (last visited June 14, 2009).

[17] *Longtime Journalism Ian Marquand Laid Off by KPAX*, ASSOCIATED PRESS (Jan. 6, 2009) *available at* http://www.abcmontana.com/news/state/37140989.html.

[18] Holland & Knight, Charles Tobin, http://www.hklaw.com/id77/extended1/biosCTOBIN/ (last visited June 14, 2009).

- Eric Turner is the associate general counsel and managing director of the Connecticut Freedom of Information Commission.[19]

In all, the board reviewed twenty-two states' civil penalties and twenty-two states' criminal penalties. Of those, five states—Connecticut, Florida, Georgia, Michigan and North Dakota—provided for both civil and criminal penalties. The SAB was asked to rate the penalty provisions to determine which states' penalties maximize openness for open meetings and which states' penalty provisions minimize openness.

Board members could assign state laws a score on a 7-point scale ranging from -3 to +3. The resulting scores are weighted on a ten-point weighting scale adopted by the board. The weight is applied to reflect that not all legal resources carry the same weight.[20] The following weights are applied to survey results based on the legal resource being rated: 9.6 points for state constitution, 8.84 points for state supreme court opinions, 7.62 points for state statutes, 7.28 points for federal appellate court opinions, 6.5 points for state appellate court opinions, 5.38 points for federal trial court opinions, 5.28 points for state administrative bodies with legal authority and 4.08 points for state attorney general opinions.[21] Thus the 7.62 weight was used in tabulating the results of the survey discussed in this chapter focusing on civil and criminal penalties provided for in state open meetings laws.[22] Because the weight affects the boards

[19] Freedom of Information Commission, Freedom of Information Commission Home Page, http://www.state.ct.us/FOI/about.htm (last visited June 14, 2009).

[20] Chamberlin et al., *supra* note 1, at 434, 433(Because the project's intended audience is members of the public, members of the media and of the legal community, not scholars, the project does not calculate agreement between reviewing board members using standard deviation on every survey. The project did, however, conduct a reliability analysis to determine general agreement between board members in reviewing the laws. The resulting Cronbach's alpha was .9675, and the standardized alpha coefficient was .9692, indicating a near perfect agreement among review board members at the time.").

[21] *Id*.

[22] *Id*.

original scores, this section will use the original, unweighted score given to each state's law by the SAB. Using the original scores given to each state's law by the board on the -3 to 3 scale—and not the weighted score—will provide a better picture of how board members rated the laws. The board's scores were not rounded up when placing states in categories of openness based on the results of the survey. Each score denotes more or less openness:[23]

- A weighted score of 7, or an unweighted score of 3, means completely open.
- A weighted score of 6, or an unweighted score of 2, means mostly open.
- A weighted score of 5 , or an unweighted score of 1, means partly open.
- A weighted score of 4, or an unweighted score of 0, means not more open or closed.
- A weighted rating of 3, or an unweighted score of -1, means partly closed.
- A weighted score of 2, or an unweighted score of -2, means mostly closed.
- A weighted score of 1, or an unweighted score of -3, means completely closed.

The following section will discuss the findings of the survey related to civil penalties. The discussion on the survey's findings related to criminal penalties will follow.

Civil Penalties

The SAB rated the civil penalty provisions provided for in the open meetings laws of twenty-two states.[24] No civil penalty received either the highest or second highest rating, which means that no state's civil penalty provision was considered by the SAB to be either completely open or mostly open. The ratings and the fact that no state received the highest rating of completely open indicated that the SAB saw room for improvement in every state. Table 4-1 located at the end of the chapter contains a complete listing of all states with civil penalties and the unweighted scores the board assigned to each state's penalty provision.[25]

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[23] *Id*. at 435.

[24] *See, supra,* Chapter Two, notes 21-70 and accompanying text (discussing civil penalties available in those twenty-two states).

[25] *See infra,* pp. 181-182.

The four states that received the highest unweighted mean scores by the board were Alabama, 1.500; Michigan, 1.375; Missouri and Virginia, 1.250. Those ratings place all four states in the partly open category, according to the MBCAP methodology. In addition, one other state, Florida, was rated by the board as being partly open with a score of 1.000. Sixteen states were rated as being neither more open nor more closed with ratings between 0.875 and -0.125. Finally, Georgia was rated the lowest, earning a rating of -1.125 and placing it in the partly closed category. States with no civil penalty were rated the lowest as being most closed, or providing for the least amount of openness, by the board, with a rating of -2.875.

The penalty provisions in each of the two top rated states, Alabama and Michigan, require that the member of the public body found to have violated the law be personally liable for the civil penalty. The states did not necessarily provide for the highest civil penalty to be imposed against a person found to have violated the law, but both made the individual, not the public body, liable for the penalty. The Alabama law requires that for each violation of the state's open meetings law, the penalty "shall not exceed" $1,000 or one-half of the defendant's monthly salary for service on the governmental body, whichever is less. Further, the penalty shall not be paid by the governmental body of which the official is a member nor reimbursed to the official by that body.[26]

While Michigan law does not carry as high a potential penalty, it does build into the penalty attorneys' fees for the group bringing the suit, which could significantly increase the costs of the violation. According to Michigan law, a person who "intentionally violates" the state's open meetings laws "shall be personally liable" for penalties in a civil court action "of not

[26] ALA. CODE § 36-25A-9(e)&(g) (2009).

more" than $500, "plus court costs and actual attorney fees to the person or group who brought the action."[27]

Two other states surveyed, Washington and Louisiana, also provide for the member to be personally liable for penalties. However, both states were rated as being neither more open nor more closed, which is significantly lower than the rating the board assigned to Alabama and Michigan. Although it is impossible to know the exact reasoning behind each member of the SAB's ratings, the difference in ratings between Alabama and Michigan and Louisiana and Washington may at least be partly attributable to Louisiana and Washington's significantly lower fines. In both Louisiana and Washington the maximum penalty is $100.[28]

Both Virginia and Missouri received an unweighted scored of 1.250, making both states the third best rated civil penalties after Alabama and Michigan, according to the SAB. The rating places both states in the partly open category. Virginia is one of three states that provides for penalties for first violations and also for subsequent violations of open meetings laws. Under Virginia's open meetings law, if a court "finds that a violation was willfully and knowingly made," the court "shall" impose upon the violating member of the public body a civil penalty of not less than $ 250 nor more than $1,000. For subsequent violations of the open meetings law, the civil penalty shall be not less than $ 1,000 nor more than $ 2,500.[29]

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[27] MICH. COMP. LAWS. SERV. § 15.273(3) (2009).

[28] *See* LA. REV. STAT. ANN. § 42:13 (2009) (stating that any member of a public body who "knowingly and willfully" participates in a meeting conducted in violation of the state's open meetings laws "shall be" subject to a civil penalty not to exceed $100 per violation. The member is "personally liable" to pay the penalty for any violation.); *See also* WASH. REV. CODE ANN. § 42.30.120(1) (2009) (stating that each member of a governing body who attends a meeting where "action" is taken in violation of the state's open meetings law, with "knowledge of the fact that the meeting is in violation" of the law "shall be" personally liable for a civil penalty in the amount of $100.).

[29] VA. CODE ANN. § 2.2-3714 (2009).

According to Missouri law, if a court finds that a government body or member of that government body "knowingly violated" the open meetings law that member or body "shall be" subject to a civil penalty in an "amount up to" $1000. Further, if a member of a government body is found to have "purposely" violated the open meetings law that member or body "shall be subject to a civil penalty" of up to $5,000.[30] In assessing any such civil penalty, a court "shall determine" the amount of the penalty by taking into account: 1) the size of the agency's jurisdiction; 2) the "seriousness" of the offense; and 3) whether the public governmental body or member of the body has "previously violated the law."[31]

In addition to Virginia, two other states rated by the board, Idaho and New Jersey, have penalties for first violations and penalties for subsequent violations. Both Idaho and New Jersey were rated within the neither more open nor more closed category. In New Jersey, which received a rating of 0.875, the state's penalty provision requires that any person who "knowingly" violates the state's open meetings law "shall be fined" $100 for the first offense and "no less" than $100 nor more than $500 for any subsequent offense.[32] In Idaho, which received a rating of 0.750 by the board, the state's penalty provision requires that any member of a governing body "who knowingly conducts or participates in a meeting" that violates the open meetings laws "shall be" subject to a "civil penalty" not to exceed $150 for the first violation and not to exceed $300 for each subsequent violation.[33] Neither Idaho nor New Jersey require penalties as high as Virginia's law, but the three states limit the imposition of civil penalties to

[30] MO. REV. STAT. § 610. 027(3) (2009).

[31] MO. REV. STAT. § 610. 027(4) (2009).

[32] N.J. REV. STAT. § 10:4-17 (2009).

[33] IDAHO CODE ANN. § 67-2346 (2) (2008).

knowing violations. Additionally, the three states were the only ones to provide for increasingly severe civil penalties for the first violations and also provide for higher penalties for subsequent violations.

The board rated only one state's law as partly closed. With a rating of -1.125, the board gave Georgia's law the lowest rating. Georgia's law is the least specific of all the states providing for civil penalties. Georgia's law provides that the state's attorney general "shall have the authority" and "discretion" to enforce the state's open meetings law "through either civil or criminal penalty."[34] The law does not specify a monetary penalty to be levied against violators, instead relegating enforcement to the sole discretion of the state's attorney general.

The ratings of civil penalties by the SAB provide useful insight into what experts in open government consider important factors in a law's ability to guarantee openness. Among the SAB's top-rated civil penalty provisions, several features are evident. The two highest-rated laws specify that individual officials are liable for paying civil fines assessed for their open meetings violations. Alabama law, which the board rated the highest, is unique among other states' civil penalties in that it allows for two alternatives, either a $1,000 penalty or a penalty of half of the defendant's monthly salary. Tying the penalty to the defendant's monthly salary could be useful in addressing concerns expressed by some opponents of increasing penalties discussed in Chapter Three, who argued that some public officials serving in small municipalities do not make $1,000 per month for their service. It would, however, not address similar concerns with public officials who volunteer to serve on boards or other public bodies.

Michigan law, rated second highest by the board, was the only law incorporating the attorneys' fees for bringing the action against a public official into the civil penalty available for

[34] GA. CODE ANN. §50-14-5 (2009).

violations. For willful violations, Virginia law, rated third highest by the board, provides for penalties of increasing severity for subsequent violations of the law. Finally, Missouri law, which received the same rating as Virginia law, does not have penalties of increasing severity for subsequent violations, but it does distinguish—and has increasingly severe penalties—for violations committed knowingly and violations committed purposely.

While it is evident by the boards' ratings that the monetary amount of the penalty alone was not the most important factor in how the laws were rated, it is clear that it played a role. The four highest rated states had penalties ranging from not less than $250 to not more than $2,500. Among the lowest rated penalty laws by the board were states with penalties of not more than $100 per violation. Georgia, which leaves enforcement of civil penalties to the state attorney and does not specify a monetary amount for the civil penalty within its law, received the lowest rating by the board.

Criminal Penalties

The SAB rated the criminal penalty provisions provided for in the open meetings laws of twenty-two states.[35] Like civil penalties, no criminal penalty received either the highest or second highest rating, which means that no state's criminal penalty provision was considered by the SAB to be in either the completely open or the mostly open categories. The ratings and the fact that no state received the highest rating of completely open indicated that the SAB saw room for improvement in every state in both civil and criminal penalties. Table 4-2 located at the end of this chapter contains a complete listing of all states with criminal penalties and the ratings the board assigned to each state's penalty provision.[36]

[35] *See, supra,* Chapter Two notes 71-111 and accompanying text (discussing criminal penalties available in those twenty-two states).

[36] *See, infra,* pp. 183-185.

Six states received the three highest scores by the board. They were Oklahoma, 1.625; Michigan and Texas, 1.500; and Illinois, North Dakota and South Carolina, 1.375. Those ratings place all six states in the partly open category according to the MBCAP methodology. In addition, six other states were rated by the board as being partly open, with ratings between 1.250 and 1.000, as related to how their criminal penalty provision maximizes openness to meetings. Nine states were rated as neither more open nor more closed with ratings between 0.875 and 0.125. Finally, Washington was rated the lowest, earning a rating of -2.750 and placing it in the mostly closed category. States with no criminal penalty were rated the lowest as being mostly closed or providing for the least amount of openness, by the board with a rating of -2.875.

Additionally, of the five states that provide for both civil and criminal penalties for open meetings violations, three states—Connecticut, Georgia and North Dakota—provided for criminal penalties that were rated higher than the states' civil penalties. In two states—Florida and Michigan—both the states' civil and criminal penalties were rated as being partly open.

Oklahoma's rating of 1.625 was the highest rating by the board for criminal penalties. According to the state's law "any person or persons willfully violating" any of the provisions of the state's open meetings law "shall be" guilty of a misdemeanor punishable by a fine "not exceeding" $500 or by imprisonment in the county jail for a period "not exceeding" one year or by a combination of such fines and imprisonment terms.[37] Oklahoma's law did not require the highest fine, but it was among the states with the longest available jail sentences.

Michigan and Texas received the second highest ratings by the SAB, with a rating of 1.500. Although the laws received the same rating, the provisions in each state are very

[37] OKLA. STAT. tit. 25, § 314 (2009).

different. Michigan law provides for both civil and criminal penalties for violations of open meetings laws. The SAB gave Michigan's laws in both the civil penalties survey and the criminal penalties survey the second highest rating. According to Michigan's criminal penalties, any public official "who intentionally violates" the state's open meetings law is guilty of a misdemeanor punishable by a fine of "not more than" $1,000 for the first offense. If the same official is convicted again for an open meetings law violation during the same term, the official "shall be" guilty of a misdemeanor "and shall be fined not more than" $2,000 and/or imprisoned for "not more than" one year.[38]

Texas received the same rating as Michigan. While Texas law does not provide for penalties as high or for jail terms as long as Michigan, Texas law allows for penalties to be levied against a person who aids in the violation of the state's open meetings law. According to Texas law, any member of a governmental body who "knowingly" "calls, aids or participates" in a meeting in violation of the state's open meetings laws commits a misdemeanor. A misdemeanor violation of Texas' open meetings law is punishable by a fine of "not less than" $100 and "not more than" $500, confinement in county jail for not less than one month or more than six months, or a combination of both monetary fines and jail time.[39] Vermont is the other state that also provides for criminal penalties to be applied to a person who aids in the violation of the open meetings law. The board gave Vermont's law a 0.375 rating, placing it in the neither more open nor more closed category. However, Vermont law limits its penalty to a misdemeanor punishable by a fine of not more than $500 for knowingly or intentionally

[38] MICH. COMP. LAW SERV. § 15.272 (2009).

[39] TEX. GOV'T CODE § 551.144 (2007).

committing a violation or knowingly or intentionally aiding a violation of the state's open meetings law.[40]

Illinois, North Dakota and South Carolina were all given the third highest rating by the SAB rating criminal penalties, with a rating of 1.500. Each state's provisions, while different from each other, contain aspects that may have earned the states the third highest rating given by the board to criminal penalties. Illinois and North Dakota laws have similar criminal provisions for open meetings violations, requiring that a violation be considered a misdemeanor punishable by a fine in the thousands and/or a jail term.[41] However, North Dakota has a higher fine and possible jail sentence, but the state limits the imposition of penalties to knowing violations. In Illinois, a violation of the open meetings law is a misdemeanor punishable by a fine of not more than $1,500 or not more than thirty days in jail.[42] In North Dakota, a knowing violation of the state's open meetings law is a misdemeanor punishable by a fine of not more than $2,000, a term of not more than one year in jail, or by both fine and jail.[43]

Similar to Michigan's criminal penalties, South Carolina's criminal penalties specifies penalties with increasing severity for up to three violations of the state's open meetings law. According to South Carolina law, any person who "willfully" violates the state's open meetings

[40] VT. STAT. ANN. tit. 1, § 314 (2009) (stating that any member of a public body "who knowingly and intentionally violates" the state's open meetings law or "who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting" "shall be" guilty of a misdemeanor and "shall be" fined not more than $ 500.).

[41] *See* 5 ILL. COMP. STAT. ANN. 120/4 (2009); *See also* 730 ILL. COMP. STAT. ANN.5/5-9-1(3) (2009); *See also* 730 ILL. COMP. STAT. ANN. 5/5-8-3(3) (2009) (stating that any person who violates the state's open meetings law is guilty of a Class C misdemeanor. Penalties for anyone convicted of a Class C misdemeanor "shall not exceed" a $1,500 fine or a jail sentence of "not more than" 30 days.); *See* N.D. CENT. CODE § 44-04-21.3 (2009); *See also* N.D. CENT. CODE § 12.1-32-01(5) (2009) (stating that under the state's open meetings law, "a public servant…who knowingly violates" the open meetings laws is guilty of a class A misdemeanor. Class A misdemeanors carry a maximum penalty of one year's imprisonment, a fine of $2,000, or a combination of both.).

[42] 5 ILL. COMP. STAT. ANN. 120/4 (2009); 730 ILL. COMP. STAT. ANN. 5/5-9-1(3) (2009); 730 ILL. COMP. STAT. ANN. 5/5-8-3(3) (2009).

[43] N.D. CENT. CODE, § 44-04-21.3 (2009); N.D. CENT. CODE, § 12.1-32-01(5) (2009).

law "shall be deemed guilty of a misdemeanor and upon conviction “shall be fined:" 1) not more than $100 or imprisoned for not more than 30 days for a first offense; 2) not more than $200 and not more than 60 days for a second offense; and 3) not more than $300 or imprisoned for more than ninety days for a third and any subsequent offense.[44] In contrast, Michigan’s law provides penalties for a first offense and then for subsequent offenses.[45] Additionally, as discussed above, Michigan’s laws provide for higher penalties than South Carolina, with penalties in the thousands and up to one year imprisonment.[46]

While differing in the amount of penalties, Nebraska and West Virginia also provide for criminal penalties that increase in severity with multiple violations. Nebraska[47] earned a rating of 1.125 , placing the state in the partly open category, and West Virginia[48] earned a rating of 0.625, placing it in the neither more open nor more closed.

The SAB rated nine states—Arkansas,[49] California,[50] Connecticut,[51] Georgia, [52] New Mexico, [53] Pennsylvania, [54] Vermont,[55]West Virginia, and Wyoming[56]—as being neither more

[44] S.C. CODE ANN. § 30-4-110 (2008).

[45] MICH. COMP. LAW SERV. § 15.272 (2009).

[46] *Id*.

[47] *See* NEB. REV. STAT. ANN. § 84-1414 (2009); *See also* NEB. REV. STAT. ANN. § 28-106 (2009) (stating that under the state’s open meetings laws, any member of a public body who “knowingly violates or conspires to violate or who attends or remains at a meeting knowing that the public body is in violation” of the law “shall be” guilty of a Class IV misdemeanor for the first offense and a Class III misdemeanor for a second or subsequent offense. Under the state’s law, A Class IV misdemeanor is punishable by a maximum penalty of a $500 fine and a minimum penalty of $100. A Class III misdemeanor is punishable by a maximum term of three months imprisonment, or a $500 fine, or a combination of both. Class III misdemeanors also carry minimum penalties of neither jail time nor any fine.).

[48] W. VA. CODE § 6-9A-7(a) (2008) (any member of governmental body “who willfully and knowingly violates” the state’s open meetings law is guilty of a misdemeanor and “shall be” fined not more than $500. A member of a governmental body who is convicted of a second or subsequent violation of the state’s open meetings law is guilty of a misdemeanor and “shall be” fined not less than $100 nor more than $1,000.).

[49] ARK. CODE. ANN. § 25-19-104 (2008); ARK. CODE ANN. § 5-4-201(b)(3) (2008).

[50] CAL GOV CODE § 11130.7 (2008); CAL GOV CODE § 54959 (2008); CAL PEN CODE § 19 (2008).

open nor more closed. The ratings in this category ranged from Connecticut's law, which received a rating of 0.875,[57] to Pennsylvania, which was the lowest rated within the states in the neither more open nor more closed category and received a rating of 0.125.[58] Only Connecticut[59] and California,[60] the two highest rated in the neither more open nor more closed category, provided for jail sentences to be imposed as part of the misdemeanor penalty for violating states' open meetings laws. Additionally, three of the states—Georgia,[61] Vermont[62] and Wyoming[63]—limit the imposition of penalties to knowing violations. Arkansas and Pennsylvania provide for penalties of up to $100 per violation. However, Arkansas' score of 0.250 may have been slightly higher than Pennsylvania's score of 0.125 because Arkansas law allows the penalty to be imposed for negligent violations, while Pennsylvania limits the

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[51] CONN. GEN. STAT. § 53a-42 (2008); CONN. GEN. STAT. § 53a-36 (2008); CONN. GEN. STAT. § 1-240 (2008).

[52] GA. CODE ANN. § 50-14-6 (2009).

[53] CONN. GEN. STAT. § 53a-42 (2008); CONN. GEN. STAT. § 53a-36 (2008); CONN. GEN. STAT. § 1-240 (2008).

[54] 65 PA. CONS. STAT. § 714 (2008).

[55] VT. STAT. ANN. tit. 1, § 314 (2009).

[56] WYO. STAT. § 16-4-408(a) (2008).

[57] N.M. STAT. ANN. § 10-15-4 (2008).

[58] 65 PA. CONS. STAT. § 714 (2008).

[59] CONN. GEN. STAT. § 53a-42 (2008); CONN. GEN. STAT. § 53a-36 (2008); CONN. GEN. STAT. § 1-240 (2008).

[60] CAL GOV CODE § 11130.7 (2008); CAL GOV CODE § 54959 (2008); CAL PEN CODE § 19 (2008).

[61] GA. CODE ANN. § 50-14-6 (2009).

[62] VT. STAT. ANN. tit. 1, § 314 (2009).

[63] WYO. STAT. § 16-4-408(a) (2008).

imposition of the penalties to intentional violations.[64] According to Pennsylvania law, any member of any agency found guilty of "participating" in a meeting with "the intent and purpose" to violate the state's open meetings law "shall be" sentenced to pay a fine not exceeding $100 plus the state's costs in prosecuting the case.[65]

Finally, Washington received the lowest rating, -2.750, or mostly closed rating. Washington law specifically provides that violation of the open meetings law "does not constitute a crime." Further, any assessment of a civil penalty for a violation of the open meetings law "shall not give rise to any disability or legal disadvantage" of a criminal conviction.[66]

The results of the survey on criminal penalties reveal that the SAB gave higher ratings to laws that provided for the possibility of higher fines and longer jail terms. Three of the six states that earned the highest ratings provided for jail sentences of up to one year. Additionally, five of the six top rated criminal penalties allowed for either fines or jail or both to be imposed upon those found to have violated the open meetings law. Finally, the board rated within the partly open category the highest category any criminal penalty received, all but one of the four states that have criminal penalties providing for increasingly severe penalties for subsequent violations.

Conclusion

Ultimately, the survey results are the opinion of the nine open government experts who rated the law. Additionally, the board does not provide any explanation for why they chose the ratings they did for any state's law. The large number of laws being rated—forty-four in all—

[64] ARK. CODE. ANN. § 25-19-104 (2008); ARK. CODE ANN. § 5-4-201(b)(3) (2008).

[65] 65 PA. CONS. STAT. § 714 (2008).

[66] WASH. REV. CODE ANN. § 42.30.120(1) (2009).

makes providing such explanations for each state very difficult for the volunteer board. Despite the absence of explanations by the board for their ratings, the survey results do allow for the identification of common features in laws rated similarly as providing more or less openness in state open meetings laws. While in part subjective, the survey results are useful for gaining insight into what open government experts deem to be important aspects of the law and aspects that help maximize access. [67] In both the survey for civil penalties and for criminal penalties, the SAB, which rated the laws without knowing to which state the particular law belonged, agreed on several aspects provided for in some civil or criminal penalties that maximize access to meetings. The ratings of the SAB and the factors the SAB identified as important, by giving the laws a higher rating than others, will be useful in the development of recommendations and a model law.

The next, and final, chapter will discuss and analyze the overall findings discussed in the previous chapters and conclude with recommendations for improvement to open meetings laws and a model law that could help improve enforcement of open meetings laws across the country.

[67] *See generally* Chamberlin, *supra* note 1, at 443-445.

Table 4-1. List of states with civil penalties and unweighted mean ratings from MBCAP survey

States	Mean rating	Result	Penalty
Alabama	1.500	Partly open	For each violation; a member of public body is personally liable; not more than $1,000 or half of defendant's monthly salary
Michigan	1.375	Partly open	A person is personally liable; intentional violation; not more than $500 plus court costs and attorney fees of person or group who brought action
Virginia	1.250	Partly open	Member or public body; willful and knowing violation; fine against violating members; not less than $250 nor more than $1,000 for first violation; not less than $1,00 nor more than $2,500 for subsequent violation
Missouri	1.250	Partly open	Not more than $1,000 for knowing violations; not more than $5,000 for purposeful violation; orders for court in assessing penalty
Florida	1.000	Partly open	Any public officer; not more than $500
Ohio	0.875	Neither more open nor more closed	If injunction issued by court; public body shall pay; $500 to party that sought injunction
New Jersey	0.875	Neither more open nor more closed	Any person; knowing violations; amount of $100 for first violation; no less than $100 nor more than $500 for subsequent violations
Idaho	0.750	Neither more open nor more closed	Any member; willful violations; not to exceed $100 for first violation; not to exceed $300 for subsequent violations
Maine	0.750	Neither more open nor more closed	Agency or officer; willful violation; not more than $500
Iowa	0.750	Neither more open nor more closed	Each member; no less than $100 nor more than $500; situations in which penalties shall not be levied

Table 4-1. Continued

States	Mean rating	Result	Penalty
Kansas	0.625	Neither more open nor more closed	Any member; knowing violation; not more than $500 per violation
Louisiana	0.500	Neither more open nor more closed	Any member is personally liable; willful and knowing violations; not to exceed $100
Minnesota	0.500	Neither more open nor more closed	Any person; intentional violations; not more than $300 for each violation; not to be paid by public body
North Dakota	0.500	Neither more open nor more closed	Intentional or knowing violations; not more than $1,000 or "actual damages caused by the violation, whichever is greater"
Arizona	0.250	Neither more open nor more closed	Any person; for violation or knowingly aiding a violation; not more than $500
Connecticut	0.250	Neither more open nor more closed	Member of public body; FOI Commission may levy penalty not less than $20 nor more than $1,000
Rhode Island	0.250	Neither more open nor more closed	Public body or any of its members; willful or knowing; not more than $5,000
Washington	0.125	Neither more open nor more closed	Each member is personally liable; willful violations; amount of $100
Wisconsin	0.125	Neither more open nor more closed	Any member; for knowing violations; not less than $25 nor more than $300
Maryland	-0.125	Neither more open nor more closed	Any member; willful violations; not to exceed $100
Mississippi	-0.125	Neither more open nor more closed	Any member; knowing and willful violations; not to exceed $100
Georgia	-1.125	Partly closed	State attorney general has discretion to enforce law through either civil or criminal penalty
No civil penalty	-2.875	Most closed	

Table 4-2. List of states with criminal penalties and unweighted mean ratings from MBCAP survey

States	Mean rating	Result	Penalty
Oklahoma	1.625	Partly open	Any person; willful violation; misdemeanor; not more than $500; not more than one year in jail; or a combination of jail and fine
Michigan	1.500	Partly open	Any public official; intentional violation; misdemeanor; not more than $1,000 for first offense; if convicted a second time during same term fine of not more than $2,000 and/or imprisonment for not more than one year
Texas	1.500	Partly open	Any member of a public body; knowing violation or aids in a violation; misdemeanor; not less than $100 and not more than $500, jail for not less than one month and not more than six months, or both fine and jail time.
Illinois	1.375	Partly open	Any person; Class C misdemeanor; not more than $1,500 or not more than 30 days in jail.
North Dakota	1.375	Partly open	A member of a public body; knowing violation; guilty of Class A misdemeanor; not more than 1 year in jail; $2,000 fine, or both jail and fine
South Carolina	1.375	Partly open	Any person; willful violation; misdemeanor; not more than $100 or not more than 30 days imprisonment for first violations; not more than $200 or not more than 60 days for second offense; not more than $300 or not more than 90 days in jail for subsequent offense

Table 4-2. Continued

States	Mean rating	Result	Penalty
Nevada	1.250	Partly open	Each member of a public body; knowing violation; misdemeanor; jail not more than 6 moths; not more than $1,000; by both fine and imprisonment; or community service
Florida	1.125	Partly open	Any member of a public body; knowing violation; misdemeanor of the second degree; not more than 60 days in jail; and/or not more than $500 fine; includes conduct outside the state
Nebraska	1.125	Partly open	Any member of a public body; knowing violation; Class IV misdemeanor for first offense punishable by not more than $500 and not less than $100 fine; Class III misdemeanor for subsequent offense punishable by not more than 3 months in jail or a $500 fine or both or neither jail time nor fine.
Hawaii	1.000	Partly open	Any person; willful violation; misdemeanor; may be removed from office; not more than $2,000; not more than 1 year in jail or probation; direction for court in imposing sentence
South Dakota	1.000	Partly open	Any person; Class 2 misdemeanor; 30 days or less imprisonment
Utah	1.000	Partly open	A member of a public body; knowing or intentional violation; Class B misdemeanor; not more than 6 months in jail
Connecticut	0.875	Neither more open nor more closed	Any member of a public body who fails to comply with an order from the FOI Commission; Class B misdemeanor; not more than $1,000 and not more than 6 months in jail

Table 4-2. Continued

States	Mean rating	Result	Penalty
California	0.625	Neither more open nor more closed	Any member of a public body; misdemeanor; not more than 6 months in jail; not more than $1,000; or both jail and fine
West Virginia	0.625	Neither more open nor more closed	Any person; knowing and willful violation; not more than $500 for first violation; not less than $100 nor more than $1,000 for subsequent violations
New Mexico	0.500	Neither more open nor more closed	Any person; misdemeanor; not more than $500 for each offense
Vermont	0.375	Neither more open nor more closed	Any member of a public body; knowing and intentional violation or knowingly and intentionally aids a violation; misdemeanor; not more than $500
Wyoming	0.375	Neither more open nor more closed	Any member of a public body; knowing and willful violation; misdemeanor; not more than $750; instances when members who stay in illegal executive session not guilty
Arkansas	0.250	Neither more open nor more closed	Any person; negligent violation; Class C misdemeanor; fine of not more than $100
Georgia	0.250	Neither more open nor more closed	Any person; knowing and willful violation; misdemeanor; not more than $500
Pennsylvania	0.125	Neither more open nor more closed	Any person; violation made with “intent” and “purpose;” fine not more than $100 plus cost of prosecution
Washington	-2.750	Mostly closed	A violation of the open meetings law “does not constitute a crime”
No penalty	-2.875	Mostly closed	

CHAPTER 5
ANALYSIS, RECOMMENDATIONS AND CONCLUSION

This thesis analyzed the penalties and remedies currently available for open meetings law violations, and used a survey to gauge how experts in open government perceive penalties available in some state's laws for open meetings violations. Additionally, this thesis looked at changes to penalty provisions for open meetings law violations that have been made in some states since 1995 and what non-legal publications revealed about lawmakers' motivations for enacting such changes. Overall the research in this thesis made evident that room for improving penalty and remedy provisions in state open meetings laws exists. To that end, this thesis proposes several recommendations for improving open meetings laws across the country and a model law, both developed by the researcher based on the findings in the five research questions posed in this thesis.

In analyzing the penalty and remedy provisions available in open meetings laws across the county, this thesis posed five research questions: **(RQ1)** To what extent do statutes in the fifty states and the District of Columbia, provide for civil penalties, criminal penalties and remedies to be applied against public bodies and public officers violating state open meetings laws? **(RQ2)** In states where penalty provisions for open meetings violations have been changed since 1995, what changes have lawmakers made to civil and/or criminal penalties for violating the state's open meetings laws? **(RQ3)** In states where lawmakers have changed penalty provisions for open meetings violations since 1995, what do newspaper accounts, FOI audits and surveys from open government organizations including the Indiana Coalition for Open Government and the Citizen Advocacy Center reveal about lawmakers' motivations to change the laws? **(RQ4)** How do states' statutes relating to penalties for violations of open meetings requirements rate on the scale developed by the Marion Brechner Citizen Access Project? **(RQ5)** Based on the findings

from questions one, two, three and four, what suggestions can the researcher make on how current state laws providing for penalties for open meetings violations could be changed or amended to help encourage enforcement and compliance with state open meetings laws in the future?

Research Question 1: Penalties and Remedies Available in State Open Meetings Laws

In Chapter Two, this thesis identified penalty and remedy provisions currently available in the open meetings laws of the fifty states and the District of Columbia. In all, the study yielded fourteen different categories addressed by at least one statute. While some states laws contained similar provisions to those of other state laws, no two states' laws were exactly alike.

Penalties for Open Meetings Violations

Penalties available in state open meetings laws across the country, identified by this study included civil penalties; criminal penalties; invalidation and cures; removal from office; awarding of attorneys' fees and court costs; and who pays attorneys' fees, court costs and penalties. The District of Columbia, however, makes no mention of remedies in its open meetings law.

In all, thirty-eight states provide for either civil or criminal penalties, or both, for violations of the open meetings law. [1] Five states—Connecticut, Florida, Georgia, Michigan and North Dakota—provide for both civil and criminal penalties in the state open meetings laws.[2]

Open meetings laws in twenty-two states contained provisions for civil penalties to be imposed on public officials found guilty of violating a state's open meetings law.[3] Of those,

[1] *See supra*, Chapter Two, pp. 41.

[2] *Id*.

[3] *See supra*, Chapter Two, notes 21-70 and accompanying text .

laws in sixteen states limit the imposition of penalties to "knowing" or "willful" violations.[4] Civil penalties available varied widely, with fines in the twenty-two states ranging from not less than $25 to not more than $5,000.[5]

In addition, twenty-one states contain provisions for criminal penalties to be imposed against someone found to have violated a state's open meetings law.[6] Criminal penalties for open meetings violations included either fines, jail time or both. In all states, a violation of the open meetings law was a misdemeanor.[7] Seventeen states restricted the imposition of criminal penalties to "knowing" or "willful" violations.[8] Fines ranged from not more than $100 to not more than $2,000 and jail time ranged from thirty days to one year imprisonment.[9] In Washington, the state's open meetings law specifically states that a violation "does not constitute a crime."[10]

Invalidation, which declares null and void action taken at a meeting that violated the law, was provided for in the laws of thirty-seven states' open meetings laws.[11] Some states' open meetings laws contain additional requirements before an action taken in violation of the open meetings law can be voided. For example, Alabama law requires that an action not be invalidated

[4] *See supra*, Chapter Two, note 34 and accompanying text.

[5] *See supra*, Chapter Two, notes 35-37 and accompanying text.

[6] *See supra*, Chapter Two, note 71 and accompanying text.

[7] *See supra*, Chapter Two, notes 78-79 and accompanying text.

[8] *See supra*, Chapter Two, note 79 and accompanying text.

[9] *See supra*, Chapter Two, notes 86-87 and accompanying text.

[10] *See supra*, Chapter Two, notes 81 and accompanying text.

[11] *See supra*, Chapter Two, notes 112-178 and accompanying text.

if it is found to be "the result of mistake, inadvertence, or excusable neglect." [12] Other states—Alaska, Iowa and Missouri—require that the courts invalidate an action only if the court finds that "the public interest" in enforcement outweighs the harm to the public interest and to the public entity by voiding that action.[13]

Invalidation can be corrected by curing the violation, effectively removing the violation and in most cases eliminating the need for penalties or other remedies.[14] Nine states contained provisions for a public body to cure a violation of the open meetings law. Cure provisions allow a public body to correct a violation of the open meetings law, usually by rescinding the action taken at a meeting that was held in violation of the law.[15] Idaho became the latest state to enact a cure provision for open meetings law violations.[16] Idaho's cure provision was signed into law April 13, 2009, and became effective July 1, 2009.[17] Additionally, five states—Arizona, Hawaii, Iowa, Minnesota and Ohio—contain provisions within the state's open meetings laws for removing an official found to have violated the law from office.[18]

Finally, thirty-seven states addressed the return of attorneys' fees, which can serve as both a penalty to the person found to have violated the law and as an incentive to the other party to

[12] *See supra*, Chapter Two, note 129 and accompanying text.

[13] *See supra*, Chapter Two, notes 131-133 and accompanying text.

[14] *See supra*, Chapter Two, note 156 and accompanying text.

[15] *See supra*, Chapter Two, note 157-158 and accompanying text; *See also* BLACK'S LAW DICTIONARY (4th ed. 2004) (defining cure as "[t]o remove legal defects or correct legal errors.").

[16] *See supra*, Chapter Two, notes 170-175 and accompanying text*; See also* .S.B.1142, 60th Leg., 1st Reg. Sess. (Id. 2009).

[17] *Id*.

[18] *See supra*, Chapter Two, notes 179-187 and accompanying text.

bring action to enforce the law. [19] Some states limit provisions for reimbursing attorneys' fees to persons substantially prevailing in an action.[20] Other states allowed for the return of fees to either prevailing party, [21] instead of stipulating the return of fees only for persons bringing actions against public bodies or officials. [22]

Additionally, five states require the violation to have been found to have been "willful" or "knowing" to allow for the return of attorneys' fees.[23] Eleven states specify instances in which public officials or public bodies found to have violated the open meetings law are liable for payment of any fines, attorneys' fees or court costs associated with the enforcement of the law.[24] Of these, only Alabama does not have a provision for returning attorneys' fees. While Alabama's open meetings law does not specifically address the return of attorneys' fees, a provision in the state's open meetings law does require the public official found to have violated the law be liable for any penalties or costs associated with prosecution. [25]

Judicial Tools for Remedying Open Meetings Violations

All state open meetings laws addressed some type of remedies available via a state court system for open meetings violations.[26] The District of Columbia, however, makes no mention of

[19] *See supra*, Chapter Two, notes 188-243 and accompanying text.

[20] *See supra*, Chapter Two, notes 202-212 and accompanying text.

[21] *See supra*, Chapter Two, notes 223-225 and accompanying text.

[22] *See supra*, Chapter Two, notes 213-222 and accompanying text.

[23] *See supra*, Chapter Two, note 226 and accompanying text.

[24] *See supra*, Chapter Two, notes 244-254 and accompanying text.

[25] *See supra*, Chapter Two, note 245 and accompanying text.

[26] *See supra*, Chapter Two, pp. 84-85.

remedies in its open meetings law. [27] The remedies discussed in state laws across the county included: Injunctions, declaratory relief and writs of mandamus. Injunctions, which halt continuing, threatened or future violations of the law, were authorized in the open meetings laws of thirty-three states.[28] Declaratory relief, which enables public bodies to obtain clarification from a court whether a proposed action will violate the law, was authorized in the open meetings law of fourteen states.[29] Finally, writs of mandamus, which compel a public official to comply with the law, were provided for in thirteen state's open meetings laws.[30]

Procedural Controls

In addition to penalties, remedies, or both, many states' open meetings laws also contain provisions addressing procedural controls in cases where action is brought before a court to enforce the open meetings law. These provisions include: l) specifications on who can bring actions to enforce a state's open meetings law; 2) provisions limiting the amount of time after a violation has occurred in which a person can bring action to enforce the open meetings law; 3) specifications directing a state court to give priority in court to open meetings cases; 4) specifications on whether a person bringing the suit to enforce the law or the public body or official have the burden of proof in an open meetings action; and 5) provisions allowing for fees and fines to be assessed against persons bringing frivolous suits.

The five procedural controls most commonly addressed in state open meetings laws and discussed in Chapter Two included: 1) who can bring actions to enforce laws; 2) time limitations

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[27] *Id*.

[28] *See supra*, Chapter Two, note 266 and accompanying text.

[29] *See supra*, Chapter Two, note 282 and accompanying text.

[30] *See supra*, Chapter Two, note 287 and accompanying text.

for bringing actions; 3) litigation priority for open meetings cases; 4) which party has the burden of proof in an open meetings case; and 5) penalties for frivolous lawsuits.[31]

In all, forty-one states address who can bring actions to enforce the open meetings law. The majority of states specify that either one, or all, of the following may bring actions to enforce the open meetings laws: Any person or aggrieved citizen, the state attorney general and the county and district attorneys.[32]

Additionally, open meetings laws in twenty-nine states specify time limitations for bringing open meetings claims.[33] Such limitations for bringing actions are designed to "require diligent prosecution" and to ensure that the claims will be addressed while the evidence is still available.[34] The time limits range from within twenty-one days of the meeting taking place in Kansas[35] to within two years of the meeting occurring in Ohio.[36]

Another procedural control designed to ensure diligence in open meetings cases is litigation priority. Twelve states[37] have requirements in their laws for cases brought to enforce the open meetings law to have priority to be heard in a state court. Litigation priority helps establish the priority of open meetings issues in the states addressing litigation priority in their

[31] *See supra*, Chapter Two, pp. 91-104.

[32] *See supra*, Chapter Two, note 292 and accompanying text.

[33] *See supra*, Chapter Two, note 295 and accompanying text.

[34] *See supra*, Chapter Two, note 298 and accompanying text; *See also* BLACK'S LAW DICTIONARY (4th ed. 2004).

[35] *See supra*, Chapter Two, note 300 and accompanying text; *See also* KAN. STAT. ANN. § 75-4320(a) (2008).

[36] *See supra*, Chapter Two, note 301 and accompanying text; *See also* OHIO REV. CODE ANN. § 212.22(I)(1) (2009).

[37] *See supra*, Chapter Two, note 323 and accompanying text.

open meetings laws by statutorily mandating that open meetings cases be given precedence in state courts.[38]

Another procedural control provided for in fourteen states' open meetings laws specify which party has the burden of proof in actions to enforce the open meetings law. Three states place the burden of proof on the plaintiff, [39] while seven states place it on the public body or official.[40] In four states the burden of proof is first on the person bringing the suit against the government body, or on prosecutor trying to establish there is sufficient cause for a case, and then shifts to the defending public body or official. [41]

The final provision addressed in this section was penalties that may be assessed against a person bringing a frivolous lawsuit under state open meetings laws. Laws in fifteen states contain provisions for public officials or public bodies to recover attorneys' fees and costs if a court finds the suit was brought for the purpose of "harassment" and was "frivolous."[42]

Research Questions 2 and 3: States that Have Changed Penalties Since 1995 and Possible Motivations for Changes

Since 1995, eleven states have made changes to penalty provisions for violating the state's open meetings laws. As previously addressed, the year 1995 was chosen as a starting point because in their 1996 article, Davis et al., looked at remedies provided for open meetings violations and enforcement of those remedies across the country up to that point.[43] The eleven

[38] *See supra*, Chapter Two, note 324 and accompanying text.

[39] *See supra*, Chapter Two, note 336 and accompanying text.

[40] *Id*.

[41] *Id*.

[42] *See supra*, Chapter Two, notes 348-352 and accompanying text.

[43]*See supra*, Chapter One, pp. 13(discussing that 1995 was chosen as a starting point for the analysis of states that have changed their penalties because Davis, Rivera-Sanchez and Chamberlin's study looked at everything up to that

states found to have made changes were Alabama, Arkansas, Georgia, Idaho, Mississippi, Missouri, North Dakota, Rhode Island, Virginia, West Virginia and Wyoming.[44] In six states, the criminal and/or civil penalties were increased. In two states—Arkansas and Alabama—the penalties were decreased. Mississippi and Wyoming added penalties to the states' open meetings law for the first time, while Georgia added a provision in efforts to make penalties for open meetings law violations harsher. [45]

In 2005, Arkansas changed the state's criminal penalty for violating the open meetings law so that any person "who negligently" violates the open meetings law "may be sentenced to a fine not to exceed $100.[46] Before the 2005 change the law allowed for any person who "negligently" violated the law to be guilty of a misdemeanor punishable by a fine of not more than $200 or thirty days in jail or both, or a sentence of public service, education or both.[47] The change received little attention in 2005 or since. [48]

In Alabama and North Dakota, where criminal penalties for open meetings violations had never been enforced, lawmakers in both states repealed criminal penalties and instead enacted civil penalties. In both states the change was lauded as giving citizens a way to enforce open government. [49] Open government advocates and the media argued that because the criminal

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point; *See also* Charles N. Davis, et al., *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41 (1996) [hereinafter *Sunshine Laws*].

[44] *See, supra,* Chapter Three, pp. 109.

[45] *Id*.

[46] *See supra,* Chapter Three, note 44 and accompanying text; *See also* ARK. CODE ANN. § 25-19-104 (2008); *See also* S.B. 984, 8th Gen. Assem., Reg. Sess. (Ark. 2005).

[47] *See supra,* Chapter Three, note 46 and accompanying text.

[48] *See supra,* Chapter Three, note 47 and accompanying text.

[49] *See supra,* Chapter Three, notes 4, 37, 144-145, 158 and accompanying text.

penalties were never enforced, the penalties had been little deterrent to public officials. Supporters argued that civil penalties would improve compliance and improve enforcement because members of the public could begin civil action for violations of the open meetings law.[50] The 2005 switch to civil penalty in Alabama allowed courts to impose penalties not to exceed $1,000 or one-half of a defendant's monthly salary, whichever is less. The law also provides for the member of the public body to be personally liable for paying the fine. Additionally, the new law allows for the return of attorneys' fees to a prevailing plaintiff. [51]

Similarly, in North Dakota, the state repealed criminal penalties and added civil penalties for violations as part of a comprehensive overhaul of the state's open meetings law in 1997. As in Alabama, no one had been prosecuted under the state's criminal penalties provisions. The civil penalty provided for an award in the amount of $1,000 or "actual damages caused by the violation, whoever is greater" for "intentional or knowing violations.[52] The new law also contained a provision for complaining directly to the attorney general and for the attorney general to issue opinions spelling out what the public agency must do to correct the violation.[53] However, four years later, in 2001, citing little improvement in enforcement or compliance with open meetings laws, North Dakota lawmakers re-enacted criminal penalties to provide for "a public servant…who knowingly violates" the law to be guilty of a misdemeanor punishable by a maximum of one year in prison, a fine of $2,000, or both.[54] Both the addition of the civil

[50] *See supra,* Chapter Three, notes 39-40 and accompanying text.

[51] *See supra,* Chapter Three, 11-13 and accompanying text; *See also* ALA. CODE § 36-25A-9 (2009).

[52] *See supra,* Chapter Three, notes 144-149 and accompanying text; *See also* S.B. 2228 North Dakota 55th Legislative Assembly; *See also* N.D. CENT. CODE § 44-04-21.2(1) (2009).

[53] *Id.*

[54] *See, supra,* Chapter Three, note 158 and accompanying text; *See also* S.B. 2117, 57th Leg. Assem., Reg. Sess. (N.D. 2001); *See also* N.D. CENT. CODE § 44-04-21.3 (2009).

penalties and the re-addition of the criminal penalties were hailed as necessary to improve compliance. [55]

Mississippi and Wyoming were the only two states of the eleven which added penalties to the state's open meetings law for the first time. [56] The 2003 addition of civil penalties to Mississippi's law allows for a court to impose a civil penalty on a public body that has "willfully and knowingly" violated the state's open meetings law in an amount "not to exceed" $100. [57] In addition, the court can assign to the agency convicted all "reasonable" expenses incurred by the person or persons bringing the suit. Open government advocates and members of the media argued that adding penalties to the law would make officials "a lot less likely to get in trouble, a lot less likely to be embarrassed."[58]

The penalties added to Wyoming's law in 2005 make it a misdemeanor punishable by up to a $750 fine for "any member or members of an agency" to "knowingly and willfully" take or conspire to take action in violation of the law, or to attend or remain at a meeting were action is knowingly being taken in violation of the law.[59] The proposal to create penalties was brought to legislators by the Wyoming Press Association and newspapers across the state lobbied in support of it. [60] The supporters introduced the legislation, arguing that the only remedy available up to that point had been to seek an action taken in violation of the law be invalidated by a court and

[55] *See supra*, Chapter Three, note 161 and accompanying text.

[56] *See supra*, Chapter Three, notes 111, 221 and accompanying text.

[57] *See supra*, Chapter Three, notes 57-113 and accompanying text; *See also* MISS. CODE ANN. § 25-41-15 (2008).

[58] *See supra*, Chapter Three, note 114 and accompanying text.

[59] *See supra*, Chapter Three, 222-226 and accompanying text; *See also* WYO. STAT. § 16-4-408 (a) (2008).

[60] *See supra*, Chapter Three, 225-226 and accompanying text.

that had not proved an effective deterrent.[61] Supporters argued that adding penalties would create an incentive for officials to comply with the requirements of the law. However, groups and legislators opposing the addition of the penalties argued they would unfairly criminalize volunteers who inadvertently violate the open meetings law. For example, the Wyoming County Commissioners Associations and the Wyoming Association of Municipalities lobbied to have the maximum fine for the violation reduced to $100, but were unsuccessful.[62]

Four states—Idaho,[63] Missouri,[64] Virginia[65] and West Virginia[66]--increased penalties for knowing or purposeful violations of the law. Idaho made one of the most recent changes to the penalties for open meetings violations.[67] The changes, which went into effect July 1, 2009, increase the penalty for knowing violations, add penalties for inadvertent violations and add a cure provision.[68] Any member of a governing body who participates in a meeting in violation of the law could "be subject" to a civil penalty not to exceed $50.[69] Additionally, any member who knowingly violates the law shall be subject to a civil penalty not to exceed $500.[70] A member

[61] *Id*.

[62] *See supra*, Chapter Three, 233-237 and accompanying text

[63] *See supra*, Chapter Three, notes 96-110 and accompanying text.

[64] *See supra*, Chapter Three, notes 123-143 and accompanying text.

[65] *See supra*, Chapter Three, notes 171-202 and accompanying text.

[66] *See supra*, Chapter Three, notes 203-220 and accompanying text.

[67] *See supra*, Chapter Three, note 96 and accompanying text.

[68] *See supra*, Chapter Three, note 97 and accompanying text; *See also* IDAHO CODE § 67-2347(2) (2008).

[69] *See supra*, Chapter Three, note 99 and accompanying text.

[70] *See supra*, Chapter Three, note 100 and accompanying text.

who subsequently violates the open meetings law shall be subject to a civil fine of up to $500.[71] During the process of making the changes, open government advocates, lawmakers and members of the media had expressed support for harsher penalties to penalize violations.[72]

In 2004, Missouri lawmakers added a penalty for a "knowing" violation and increased penalties for "purposeful" violations.[73] The law increased the civil penalty for a "purposeful" violation of the law from $500 to $5,000 and added a penalty for a "knowing" violation of $1,000.[74] Additionally, the law allows a court to order payment of all costs and reasonable attorneys' fees if it finds a violation. One commissioner, who had sued the county commission he served on for improperly holding a closed session, testified to the state House committee that the law needed "teeth."[75]

Since 1996, Virginia lawmakers have revised civil penalty provisions for "willfully and knowingly" violating the state's open meetings law three times.[76] In 1996 a penalty for subsequent violations was added and the following revisions in 1999 and 2003 increased the monetary amount of the penalty.[77] The 1999 additions may have at least in part been spurred by an audit conducted by Virginia newspapers that found poor compliance with the law.[78]

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[71] *See supra*, Chapter Three, note 102 and accompanying text.

[72] *See supra*, Chapter Three, note 104-107 and accompanying text.

[73] *See supra*, Chapter Three, note 123 and accompanying text; *See also* S.B. 1020, 92nd Gen. Assem., 2nd Reg. Sess. (2004); *See also* MO. REV. STAT. § 610.027(3)(4) (2009).

[74] *See supra*, Chapter Three, note 124 and accompanying text

[75] *See supra*, Chapter Three, notes 130-132 and accompanying text.

[76] *See supra*, Chapter Three, note 171 and accompanying text.

[77] *See supra*, Chapter Three, notes 172-178 and accompanying text; *See also* H.B. 933, 1996 Leg., (Va. 1996); *See also* S.B. 1023, 1999 Leg., (Va. 1999); *See also* H.B. 2086, 2003 Leg., (Va. 2003).

[78] *See supra*, Chapter Three, 179-182 and accompanying text.

According to lawmakers and supporters of the measures quoted or cited in newspapers, the measures were all intended to help give the laws more teeth. In between each revision, open government advocates complained about the blatantly poor compliance with open meetings laws in the state.[79] In 2003, however, Virginia courts did enforce penalties on a public body found to have violated the law of more than $100,000 and on a public official found to have violated the law of $250.[80]

In 1999 West Virginia lawmakers revised the state's penalty provision for violating the open meetings law.[81] The new law removed a provision that any person found to have willfully and knowing violated the open meetings law "shall be" found guilty of a misdemeanor and "shall be fined" not less than $100 and not more than $500.[82] The law also removed a provision allowing for a member of a public body who is found guilty of violating the open meetings law to be jailed for up to ten days in addition to, or instead of, the fine.[83] The new law required that anyone found guilty of a misdemeanor violation of the open meetings law be fined not more than $500.[84] Additionally, the new law added a provision that members of a governing body convicted of a second or subsequent offense should be found guilty of a misdemeanor and "shall be fined" not less than $100 nor more than $1,000.[85]

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[79] *See supra*, Chapter Three, pp. 179-193 and accompanying text.

[80] *See supra* Chapter Three, notes 194-202 and accompanying text.

[81] *See supra*, Chapter Three, notes 2003-2006 and accompanying text; *See also* W. VA. CODE § 6-9A-7(a) (2008);*See also* H.B. 2005, 75th Leg., Reg. Sess. (W.V. 1999).

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

According to published reports, the changes were heavily debated for at least four years before they took place. Although in most states little coverage could be found in the years following the penalty change discussing if and how the penalties for open meetings violations had been assessed, West Virginia is the exception.[86] A September 2008 survey by *The Associated Press* found that members of the media in West Virginia believed the state's law lacked enough penalties to compel public bodies and officials to comply with the laws.[87] According to the editors polled, the only significant method of enforcement at their, and the public's disposal, was through the editorial page. [88]

Finally, changes in two states, Georgia and Rhode Island, were aimed at making penalties for violating open meetings laws more severe, but differed from the other ten states which increased penalties since 1995. Georgia adding a provision that could indirectly make a violation of an open meetings law a felony. [89] The law requires that a person presiding over a closed meeting file, along with official minutes of the meetings, a notarized affidavit stating under oath that the subject matter of the closed meeting was devoted to matters exempt from Georgia's open meetings law.[90] Filing a false affidavit is a felony punishable by up to five years in prison, which is significantly more severe than the $500 fine in the state's open meetings law. [91]

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[86] *See, supra* Chapter Three, notes 207-217 and accompanying text.

[87] *See, supra* Chapter Three, notes 218-220 and accompanying text.

[88] *Id*.

[89] *See supra*, Chapter Three, note 48 and accompanying text.

[90] *See supra*, Chapter Three, note 49 and accompanying text; *See also* H.B. 278, 1999- 2000 Leg., (Ga. 1999); *See also* GA. CODE ANN. § 50-14-4(b) (2009).

[91] *See supra*, Chapter Three, note 50 and accompanying text.

Open government advocates supported the addition.[92] Opponents argued that the law was too severe and could potentially make felons out of public officials, many who volunteer for the post.[93] However, a few months after the legislation passed, a suit to enforce the affidavit provision brought by a Georgia newspaper editor made evident that, in at least one county, public officials had already found a way around the provision by simply not signing an affidavit after an executive session.[94] Failure to sign an affidavit is a violation of the open meetings law punishable by up to a $500 fine, compared to the felony charge of filing a false affidavit.[95]

In 1998, lawmakers in Rhode Island increased the civil penalty available for violations of open meetings laws five-fold from up to $1,000 for willful violations to up to $5,000 for a willful or knowing violation.[96] Supporters of the law and attorneys for public officials argued that the increased penalties would help encourage the law being taken more seriously.[97] However, if the law was in fact taken more seriously after the change is difficult to determine as little evidence exists that enforcement was discussed in the Rhode Island media in the years following the penalty change.[98]

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[92] *See supra*, Chapter Three, notes 54-61 and accompanying text.

[93] *See supra*, Chapter Three, notes 62-63, 68-72 and accompanying text.

[94] *See supra*, Chapter Three, notes 81-94 and accompanying text; *See also* Claxton Enter. v. Evans County Bd. of Comm'rs, 249 Ga. App. 870, 832 (Ga. Ct. App. 2001); *See also* Evans County Bd. of Comm'rs v. Claxton Enter., 255 Ga. App. 656, 399 (GA Ct. App. 2002).

[95] *Id*.

[96] *See supra*, Chapter Three, notes 165-166 and accompanying text; *See also* 1998 H.B. 7911 Rhode Island 1997-1998 Legislative Session; *See also* R.I. GEN. LAWS § 42-46-8 (2009).

[97] *See supra*, Chapter Three, notes 167-169 and accompanying text.

[98] *See supra*, Chapter Three, note 170 and accompanying text.

Archived non-legal publication records in states where changes have occurred—including media reports, editorials and audits--provide a glimpse into the factors that may have motivated open government advocates, citizen and lawmakers to support making penalties more severe.[99] In the states where the civil and/or criminal penalty provisions for open meetings violations have changed since 1995, a clear preference was evident for increasing fines as a way to make the laws more severe.[100] Supporters of adding or increasing penalties were generally newspapers, media associations, open government advocates, and in some cases public officials. In every state, it appears the greatest momentum for making penalties more severe arose from frustration with a history of no enforcement under previous penalties or remedies.[101] Supporters of penalties expressed a need to "put teeth" into the laws and seemed to equate a more severe penalty in terms of maximum fine or jail time with a more effective deterrent and a way to increase compliance. [102] The discussion focused on adding penalties but seldom called for enforcement of existing penalties in states where open meetings laws provided for some type of penalty. [103]

Opponents of measures to add or increase penalties for open meetings violations were generally public officials and the associations and attorneys representing public officials and public bodies. [104] The most common concerns relied on were that increased penalties would

[99] What was not available for the purposes of this study was any legislative history in individual state archives or interviews with people directly involved in developing the legislation. Both of these resources were practically beyond the ability of this scholar.

[100] *See supra,* Chapter Three, pp. 155-159.

[101] *Id*.

[102] *Id*.

[103] *Id*.

[104] *See supra,* Chapter Three, pp. 159-163.

discourage people from serving in public office and that adding or increasing criminal penalties would unfairly criminalize people who volunteer to serve in public office. [105] Additionally, opponents of measures to increase penalties also expressed concern that increasing penalties would increase frivolous lawsuits against public officials and public bodies. [106] While at least one official in Georgia did leave his post on the school board as a result of Georgia's affidavit provision, reports of many officials leaving were not found. [107] Additionally, officials who expressed concern about frivolous lawsuits did not provide evidence that such would occur, or had occurred in the past. [108]

In looking at changes made to penalty provisions in the eleven states that have made them since 1995, and what published records reveal about motivations and enforcement of new penalties, one issue that was seldom addressed was evidence that stronger penalties were effective. [109] In most states, the year any change was debated in the legislature, the penalty provisions received much coverage in the media, including comments of both supporters and opponents to the change. [110] In the years following the change in penalties, however, little evidence exists in published records that the interest in enforcing the open meetings law went beyond changing the law. [111] The only follow-up that could be located was the 2008 audit in

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[105] *Id*.

[106] *Id*.

[107] *Id*.*; See also supra,* Chapter Three, note 73 and accompanying text.

[108] *See supra,* Chapter Three, pp. 159-163.

[109] *See supra,* Chapter Three, pp. 155-159.

[110] *Id*.

[111] *Id*.

West Virginia that found that editors polled in the survey believed little had changed in enforcement or compliance despite the increased penalties. [112]

Research Question 4: Results of Marion Brechner Citizen Access Project Survey

The Marion Brechner Citizen Access Project (MBCAP) was started in 1998 and is the first study to "rank all state public records and open meeting laws in their entirety."[113] A survey, using the data gathered on civil and criminal penalties across the country and the methodology established by MBCAP, was sent to open government experts who serve on the project's Sunshine Advisory Board.[114] Nine members of the Sunshine Advisory Board (SAB) reviewed and rated the civil penalties and criminal penalties provided for in thirty-eight state's open meetings laws.[115] The board members represent a variety of organizations and professional backgrounds, including professors and attorneys. All specialize in access to government issues in their careers, or are persons who have years of experience in studying, researching or teaching access issues.[116]

Those surveyed were asked to rate the laws of the twenty-two states providing for civil penalties and the twenty-two states addressing criminal penalties on a scale of one to seven, seven representing a law perceived to maximize openness, and one representing a state's law that

[112] *See supra,* Chapter Three, notes 218-220 and accompanying text.

[113] Bill F. Chamberlin, Cristina Popescu, Michael F. Weigold & Nissa Laughner, *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J.L. & PUB. POL'Y 415, 416 (2008).

[114] *See supra,* Chapter Four, notes 1-19 and accompanying text.

[115] *Id.;* The survey was sent to eleven members of the Sunshine Review Board (SAB) with nine members responding. *See* Chamberlin et al., *supra* note 1, at 431 (stating that "the project director set a goal of at least an 80% response rate from the SAB members surveyed at one time and so established a guideline that at least nine out of eleven SAB members sent a survey must send in their ratings for one category before it can be tabulated."

[116] *See supra,* Chapter Four, notes 1-19 and accompanying text.

minimizes openness. [117] The survey was useful in providing insight into how open government experts perceive penalties. The results helped identify factors that many experts in this field may give weight to in determining which states' penalties promote citizen access to government information. [118]

No civil or criminal penalty was given the highest or second highest rating by the board. This may be indicative that access professionals, whether working for the government or the private sector, see room for improvement. [119]

Civil Penalties

The civil penalties of four states—Alabama, Michigan, Missouri and Virginia—received the highest rating by the board, falling into the partly open category, while Georgia received the lowest rating, falling into the partly closed category. [120] The results of the survey show that the amount of the fine alone was not the most important factor in the board's rating, but that it did play a role. This was evident from the fact that the lowest rated states tended to have the lowest maximum fines for violations. [121] The two top rated states, Alabama and Michigan, did not necessarily mandate the highest monetary fine be assessed against a violator. [122] However, each state's law contained a provision requiring individuals, not the public, be liable for fines. Further, Alabama, which received the highest rating, ties the amount of the penalty to a

[117] *See supra,* Chapter Four, notes 20-23 and accompanying text.

[118] *See supra,* Chapter Four, pp. 179-180.

[119] *See supra,* Chapter Four, notes 24-25, 35-36 and accompanying text.

[120] *See supra,* Chapter Four, pp. 168.

[121] *See, supra,* Chapter Four, pp. 168-173.

[122] *Id*.

defendant's monthly salary for service on the public body. [123] Michigan was the only state to incorporate attorneys' fees into the penalty. [124]

Missouri and Virginia received the same rating, placing both states in the top three among state civil penalties. [125] Both states contain provisions that differentiated them from the majority of state laws. [126] Virginia's law contained provisions for increasing monetary fines for subsequent willful violations of the state's open meetings law, while Missouri law provides for establishing two levels of monetary fines on the basis of whether the violations were "knowing" or "purposeful." [127]

Georgia's law received the lowest rating. One reason may be the vagueness of the law which only specifies that the state's attorney general has "discretion" to enforce the open meetings law either through civil or criminal penalties. [128]

Criminal Penalties

The criminal penalties of six states—Oklahoma, Michigan, Texas, Illinois, North Dakota and South Carolina—received the top three rating by the board. The highest ratings were given to the states that provide for the highest fines and/or the longest jail terms. [129] Additionally, three states ranked in the partly open category, the highest category given to any state's criminal

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[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *See supra,* Chapter Four, pp. 168.

[129] See supra, Chapter Four, pp. 173-179.

penalties, provided for penalties with increasing severity for subsequent violations. [130] Oklahoma, which received the highest rating, does not provide for the highest fine but provides for one of the longest possible jail sentences, up to one year. [131] Two of the six states that received the top three ratings by the board—Michigan and South Carolina—contained provisions for penalties with increasing severity in terms of fine and jail time for subsequent violations. [132] Texas also allowed for penalties to be imposed on persons who aid in the violation of the law, while Illinois and North Dakota each allowed for a fine, of up to $1,000 and/or imprisonment for up to 30 days in Illinois, and up to one year in North Dakota. [133]

Finally, Pennsylvania and Washington received the lowest ratings by the board. [134] Under Pennsylvania law, any member of a public body found to have participated in a meeting with "the intent and purpose" to violate the law can be fined up to $100 plus the state's cost in prosecuting the case. Pennsylvania's rating placed the state in the "neither more open nor more closed" category. Washington's law states that a violation of the open meetings law "does not constitute a crime." [135] Washington's rating placed the state in the category of "mostly closed." [136]

While ultimately the survey results are the opinion of the members of the board who were surveyed, their ratings provide useful insight into what provisions in a penalties law open

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[130] *Id*.

[131] *Id*.

[132] *See supra*, Chapter Four, pp. 172-176.

[133] *Id*.

[134] See supra, Chapter Four, pp.176-177

[135] *Id*.

[136] *Id*.

government experts perceive to be most or least conducive to providing openness in government.[137] The results of the survey, along with the results of the three other research questions discussed above, aided in the development of suggestions for improvements to open meetings penalties and in the development of a model law.

Research Question 5: Suggestions for Improving Penalties and Model Law

Based on the research gathered and analyzed in answering **RQ 1**, **RQ2**, **RQ3** and **RQ4**, discussed above, the researcher developed seven recommendations for improvements that could be made to penalty provisions of open meetings laws. Based on these recommendations, the researcher developed a model law that could be used as a guide in future revisions of penalty provisions in open meetings laws across the country.

Recommendation 1: All States' Open Meetings Laws Should Provide for Penalties and Remedies for Violations of Open Meetings Laws

Discussing the problem of repeated and unpunished violations, one newspaper wrote: "A law that carries no penalty is not really a law; it is a suggested code of conduct that a person can disregard without fear of personal cost. No penalty. No fine. No problem." [138]

Based on the research collected and analyzed for this thesis, several suggestions have emerged for ways penalty provisions can be revised to allow for the most possibilities for effective enforcement for, what after all our laws, as well as remedies to violations, and ways too prevent violations in the first place. The research in this thesis revealed that while many open government advocates and lawmakers have called for increased penalties as a solution, others have worried that high penalties would discourage people from serving in public office.[139]

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[137] *See supra*, Chapter Four, pp. 179-180.

[138] *You Broke the Law and Don't Do It Again*, REPUBLICAN, June 21, 200, at A12.

[139] *See generally, supra*, Chapter Three.

However, no one that this researcher has found, other than government officials themselves, have argued that a lack of penalties or remedies is the answer when the lack of enforcement appears to abound.[140] In any case, many observers call for more attention to be given to the laws, which can come by penalties and remedies and the discussion of penalties and remedies. There should be no mistake, however, that at least in some states, penalties and remedies are used.[141]

All states should provide for both civil and criminal penalties for open meetings violations. Currently, thirty-eight states provide for civil penalties, criminal penalties, or both.[142] Civil penalties allow for citizens to bring claims for enforcing the open meetings law when alleged violations occur.[143] Civil penalties are typically less harsh than criminal penalties, and limiting the imposition of such penalties to "knowing" violations without limiting how many times public officials can use the "good faith" excuse to get out of the violation could serve to potentially weaken the possibility of using such provisions to enforce compliance. One possible solution that will be discussed in Recommendation Three below is to require public officials to attend open meetings training upon election and also attend training as a remedy for a first violation of the open meetings law.[144] Providing several opportunities for public officials to learn about the law could limit the abuses and the use of "good faith" excuses when repeated violations occur.

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[140] *See generally, supra,* Chapter Three; *See also, supra,* Chapter 1, pp. 24-32.

[141] *See e.g.*, The Brechner Center for Freedom of Information, Florida Public Records and Open Meetings Laws Prosecution Database, http://brechner.org/db_prosecutions.asp (last visited June 16, 2009) (containing the "Florida Public Records and Open Meetings Laws Prosecution Database" cataloging prosecutions for violations of the Florida public records and open meetings laws.).

[142] *See supra,* Chapter Two, notes 21-111 and accompanying text

[143] *See supra,* Chapter 2, notes 24-27 and accompanying text.

[144] *See infra,* notes 164-176 and accompanying text.

Criminal penalties allow for district or state prosecutors to pursue misdemeanor penalties and bring action for violations against repeat offenders.[145] Twenty-one states were found to provide for criminal penalties for open meetings violations.[146]

This study identified five states—Connecticut, Florida, Georgia, Michigan and North Dakota—that provide for both civil and criminal penalties.[147] Three states out of the five—Connecticut, Florida and Georgia—do not specify that a violation must have been committed knowingly for civil penalties, but four—Florida, Georgia, Michigan and North Dakota—specify that the violations must have been committed knowingly and with intent to violate the laws for criminal penalties to apply.[148]

Additionally, all states—whether allowing for civil or criminal penalties to be applied for open meetings violations—should guarantee plaintiffs the return of attorneys' fees and costs in the penalty and remedy provisions of the open meetings laws. In all, thirty-seven states address the return of attorneys' fees to prevailing parties.[149] The possibility that plaintiff could recover attorneys' fees even without being the prevailing party may be helpful in encouraging citizens and watchdog groups to come forward to prosecute legitimate open meetings violations despite the high cost of bringing an action in court. High costs of prosecution can be a significant deterrent to many citizens who may not have the money to bring action to remedy violations. Providing for the return of attorneys' fees would at least give citizens the possibility of

[145] *See supra,* Chapter 2, notes 75-79 and accompanying text.

[146] *See supra,* Chapter 2, note 71, and accompanying text.

[147] *See supra,* Chapter 2, notes 4-8 and accompanying text.

[148] *See supra,* Chapter Two, note 353 and accompanying text.

[149] *See supra,* Chapter Two, note 188 and accompanying text.

reimbursement for bringing open meetings claims and may make it easier for them to secure counsel.[150]

Further, the results of the MBCAP survey also may indicate that attorneys' fees are an important aspect of maximizing openness. In the survey, the Sunshine Advisory Board gave Michigan's civil penalty the second highest rating of all civil penalties rated.[151] Michigan law does not carry as high a potential penalty as Alabama, which was rated the highest by the board.[152] However, Michigan does build into the penalty attorneys' fees for a group bringing the suit, which could significantly increase the penalty.[153] Additionally, requiring the return of attorneys' fees and costs in criminal cases could remove some of the burden taxpayers must bear if the state must prosecute willful violators of the law.

Additionally, all states should adopt civil and criminal penalties that contain provisions with increasingly severe penalties for subsequent violations. The fifty-state study of penalties and remedies discussed in Chapter Two found that four states—Idaho, New Jersey South Carolina and Virginia—provide for increasingly severe civil penalties for subsequent open meetings violations.[154] Additionally, the study found that four states—Michigan, Nebraska, South Carolina and West Virginia—provide for increasingly severe civil penalties for subsequent open meetings violations.[155] The panel of experts rating civil and criminal penalties also

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[150] *See supra,* Chapter Two, notes 195-199 and accompanying text.

[151] *See, supra,* Chapter Four, note 27 and accompanying text.

[152] *Id*.

[153] *Id*.

[154] *See supra,* Chapter Two, notes 42-45 and accompanying text.

[155] *See supra,* Chapter Two, notes 110-111 and accompanying text.

consistently gave higher ratings to states that have civil or criminal penalties with increasing severity.[156]

Further, public officials found to have violated the open meetings law whether unintentionally or with intent should be liable to pay their own penalties. The participants in the MBCAP survey rated Alabama's and Michigan's civil penalties the highest and second highest, respectively, out of all civil penalties rated. Both states specify that a member shall be personally liable for penalties assessed as a result of a violation.[157] Louisiana and Washington also require that a person found to have violated the open meetings law be personally liable for fines, but both states were rated significantly lower than Alabama or Michigan because both states limit the imposition of civil penalties to knowing violations and require fines not to exceed $100.[158] While being personally liable may indeed scare some people away from office, it will help ensure that those who do represent the public take seriously their responsibility.

Adding multiple penalties to account for repeated violations could be effective in accounting for unintentional first-time violations as well as for repeated and willful violations. In its assessment of Florida's open meetings and open records laws, the Florida Commission on Open Government recommended that the state amend its laws to account for additional penalties to be assessed against an agency after it has been determined that the agency intentionally disregarded access laws, or if the court finds a pattern of abuse. [159]

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[156] *See supra,* Chapter Four, pp. 152, 177.

[157] *See supra,* Chapter Four, pp. 168-169.

[158] *Id*.

[159] Commission on Open Government Reform, Final Report, 17, 33 (2009), http://www.flgov.com/pdfs/og_2009finalreport.pdf. (stating that "the penalty provisions in Florida's open meetings and public records laws are inconsistent. They do not address the issue of an agency's willful and repeated violation of the law or an agency's intentional disregard for the public's constitutional right of access.").

In one example, in New Mexico where a 2005[160] bill to increase penalties failed, Bob Johnson, executive director of the New Mexico Foundation for Open Government, said that school board members who had been charged with misdemeanors for violating the open meetings law did not take the charges seriously because they did not have to pay their own fines.[161]

Recommendation 2: All States' Open Meetings Laws Should Contain a Provision Setting a Timeframe for When Penalties Should Be Reviewed

This study found that in many cases, states had not reviewed or revised penalty provisions for open meetings laws in decades. In just one example, Washington's penalty provision has not been revised since it was enacted in 1971.[162] In many cases, penalty provisions that are not revised in decades could become more ineffective.[163]

States should include a provision requiring penalties for violations of open meetings laws to be reviewed, and if necessary revised, at least every ten years. Requiring that penalty provisions be reviewed would require lawmakers and open government advocates to look into whether existing penalties have been effective in deterring violations and enforced against

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[160] H.B. 708, 2005 Leg., Reg. Sess. (N.M. 2005).The bill would have created a new civil penalty for member of public bodies who "willfully and knowingly" violate the law up to $1,000 or the costs of correcting the action taken in violation of the law, whichever is greater. The bill would also have increased misdemeanor fine for violating the law from a maximum of $500 to a maximum of $1,000.

[161] David Miles, *New Open Meetings Act Penalties Proposed*, Feb. 27, 2005, ALBUQUERQUE JOURNAL, at B5 (stating that the sponsor of the New Mexico bill was encouraged to do so after a 2002 court ruling that five former Las Cruces school board members had violated the law. The board members gave the superintendent perks in closed door meetings between 2001-2002. The bill's sponsor said the board members used taxpayer money to pay their fines).

[162] *See supra* Chapter 1 note 15 and accompanying text; *See* WASH. REV. CODE ANN. § 42.30.120(1) (2009).

[163] *See also* TheNewsTribune.com, House Bill Boosts Penalty for Officials Who Do Public's Business in Private (When They Shouldn't), http://blogs.thenewstribune.com/politics/2008/02/14/house_bill_boosts_penalty_for_officials_ (last visited Dec. 6, 2008) (stating that adjusted for inflation Washington's $100 fine established in 1971 would be equivalent to $539 today.).

violators. Such inquiry could prompt revisions to penalty provisions that may improve the effectiveness of the laws. The attention given to the potential revisions could also raise awareness of the issues and laws in general.

Recommendation 3: All States' Open Meetings Laws Should Require All Public Officials to Attend Mandatory Training Upon Election and as a First Remedy to Unintentional Violations

This thesis research found that lack of education on compliance with open meetings laws is a persistent problem commonly cited by experts across the country as one reason for chronic violation of open meetings laws.[164]

Violations are commonplace, and the problem is not just about enforceability of the law but also about public officials who do not understand the requirements of the law.[165] Compliance could perhaps be improved with more uniform training on the requirements of the laws.[166] That training should include not only the fact that complying with these laws is part of officials' public duties but also explaining the reasons for the laws—the need for the public to be informed about public issues and the role of the public in the governing system of the country. That education also needs to include a sensitivity to citizen interests in problems that affect them, such as hazardous wastes, quality of schools, and operation of utilities. Open government advocates have argued that training and education could be the key to lessening the number of

[164] *See Guardians of Access: Local Prosecutors and Open Meetings Laws*, 3 COMM. L. & POL'Y 35, 36 (1998) [hereinafter *Guardians of Access*]; *See also* Michele Bush Kimball, Law Enforcement Records Custodians' Perceptions and Decision-Making Behaviors in Response to Florida's Public Records Law (2001) (unpublished thesis, University of Florida) (on file with George A. Smathers Libraries, University of Florida

[165] *See e.g.* Mari A. Schaefer, *Haverford Was in the Dark About Sunshine Act; The Grand Jury Alleged Many Violations of Public-Access Laws, Current Commissioners Say They Now Operate By the Rules*, PHILADELPHIA INQUIRER, Apr. 7, 2007, at B01; *See also supra* Chapter 3 notes 10, 164-172, 185, 213-214 and accompanying text.

[166] Commission on Open Government Reform, *supra* note 159, at 17.

unintentional violations that occur because an official is unaware of the requirements of the law.[167]

For example, in Indiana, a failed bill would have increased penalties but also would have created an education fund for a program administered by the state's Public Access Counselor to educate the public and public agencies on compliance with the state's open meetings law. [168]

Although not a mandatory program, the Florida Attorney General's office Web Site MyFLSunshine.com could provide a useful model.[169] The Web site contains five training videos on complying with Florida's open government laws, a searchable database of attorney general opinions on open government and a list of frequently asked questions.[170] The Web site is designed to help public officials, local governments and members of the public to learn about the state's open records and open meetings laws.[171]

Among supporters of mandating open government training are the Citizen Advocacy Center, and Florida's Commission on Open Government Reform.[172] The Citizen Advocacy Center, a non-profit organization that advocates for self government issues including open

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[167] *See e.g. Id*.

[168] S.B. 0232, 2009 Reg. Sess. (Ind. 2009); *See also supra* Chapter 1 notes 21-26 and accompanying text.

[169] Office of the Attorney General of Florida, Government in the Sunshine Home Page, http://myflsunshine.com/ (last visited June 16, 2009).

[170] Press Release, McCollum Unveils Sunshine Training Resources for Local Governments, Law Enforcement and Others (Mar. 17, 2009), *available at* http://www.myflsunshine.com/newsrel.nsf/sunreleases/313C00A29D9AFB0C8525757C005078F3 (last visited May 11, 2009).

[171] *Id; See also* John Scott Dailey Florida Institute of Government, The John Scott Dailey Florida Institute of Government Home Page, http://web1.cas.usf.edu/iog/courseDetail.cfm?CourseID=26 (last visited June 16, 2009).

[172] *See e.g.* Citizen Advocacy Center, Accessing Government: How Difficult Is It? 17 (2008), http://www.citizenadvocacycenter.org/OpenGovt/CAC_GovReports_Full_Digital.pdf.

government, recommended mandating training for public officials and issuing certification.[173] Certification would guarantee that, similar to a driving course or traffic school, the official has completed training.

All states should institute a mandatory training program for all newly elected public officials. Requiring that officials complete a course would at least ensure that all public officials have been introduced to the requirements of the state's open meetings law.

Additionally, education could prove a more effective remedy to first-time unintentional violations of open meetings laws than assessing criminal or civil penalties. In Chapter Three, this study discussed states that have recently changed penalty provisions and what non-legal publications revealed about lawmakers' motivations for such changes, as well as the opinions of supporters and opponents of changing the laws. One of the most often cited concerns from opponents of increasing penalties for unknowing or unintentional violations, especially those of volunteers, was that such penalties would discourage public officials from serving.[174] A better understanding of their jobs and what indeed could get them in trouble should encourage rather than discourage them from wanting to serve.

To address unintentional violations, states should require first time offenders, whether paid public officials or volunteers, who are found to have committed a violation without knowledge, purpose, or intent to attend a course on compliance with the state's open government laws.[175] Even if the suggestion was adopted and officials attended a course upon election, they could

[173] *Id*. at 64.

[174] *See supra*, Chapter Three, pp. 128-129, 243-244, 261 and accompanying text.

[175] *See e.g.*, Brechner Center for Freedom of Information, *supra* note 141 (containing information in the center's Florida Pubic Records and Open Meetings Laws Prosecutions Database for 2003 on a city commissioner in Florida, Bob Jackson, who pled no contest to violating the Open Meetings Law. He plead no contest, paid $250 in fines and was required to take a Sunshine Law class.).

attend a different course if it is found that they violated the open meetings law. Adding such a provision would also address the concerns of some scholars that the use of the "good faith" excuse may be abused by some officials who violate the law and then claim ignorance.[176] In this way, the use of the "good faith" excuse may be limited because one violation could have occurred in good faith, but after education, a violation would more likely be negligent or willful.

Recommendation 4: Enforcement of All States' Open Meetings Laws Should Be Improved

Penalties and remedies for open meetings violations are only as good as the enforcement behind them, and enforcement has proven to be sporadic at best. A local paper in Pennsylvania, *The Lebanon Daily News*, summed up problems with rare enforcement and small penalties in the wake of a highly publicized open meetings violation by the commissioners of Lancaster County, Pennsylvania. In December 2006, the commissioners plead guilty to five open meetings violations and paid $100 per violation.[177] The commissioner's plea shocked open government advocates in Pennsylvania who could not remember another time public officials had been prosecuted under the 1986 law, which requires a $100 criminal fine per violations.[178] Expressing the dissatisfaction of the newspaper's editorial board and of its readers, *The Lebanon Daily News* quipped: "Municipal governments routinely ignore the Sunshine Law because it has fangs like a garden snail."[179]

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[176] *See supra*, Chapter One, note 82 and accompanying text.

[177] Jack Brubaker, *Will Open-Meetings Law Ever Be Revived? Tougher State Sunshine Act, Fueled By Local Conestoga View Controversy, Fizzles In House Committees*, LANCASTER NEW ERA, Nov. 24, 2008.

[178] *See e.g.* Jed Kensinger, *Successful Prosecution of Sunshine Violations Rare*, INTELLIGENCER JOURNAL, Dec. 15, 2006, at A6; *See also The People's Bill*, INTELLIGENCER JOURNAL, Feb. 21, 2007, at A8; *See also Our Sad State of Affairs*, SUNDAY NEWS, Mar. 12, 2006, at 02 (stating that Pennsylvania's penalties "are so minimal, they're laughable").

[179] *Sunshinola*, LEBANON DAILY NEWS, Mar. 1, 2006 (stating that although newspapers watch and bring to light violations, the fact that prosecutions for open meetings violations are rare, public officials continue to violate the law with impunity.).

Statutes that have aggressive punitive measures that are rarely, if ever, implemented, do little to improve compliance with and enforcement of the laws.[180] In its survey of five Midwestern states, the Citizen Advocacy Center found that penalties for open meetings violations were rarely enforced.[181] In Michigan, the study found that prosecuting attorneys routinely failed to pursue criminal action against violations or the state's open meetings law.[182] Additionally, the Citizen Advocacy Center found that "the courts never assess criminal penalties regardless of the egregious nature of the violation."[183] While they may not be enforced, Michigan's civil and criminal penalties were both highly rated in the MBCAP survey. In both civil and criminal penalties, the state's law was given the second highest rating, placing it in the partly open category.[184]

Evidence of persistent, unenforced penalties has lead the Citizen Advocacy Center to argue that the persistent failure of state prosecutors and state courts to enforce the punitive provisions within the open meetings laws has "entirely nullified and rendered meaningless" any deterrence the penalty provisions might have provided.[185] This creates a culture in state and local governments that violating the open meetings laws is not a crime, despite the punitive nature of laws.[186]

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[180] Citizen Advocacy Center, *supra* note 172, at 64.

[181] *Id*.

[182] *Id*.

[183] *Id*.

[184] *See supra,* Chapter Four, pp. 165-166, 170-171.

[185] Citizen Advocacy Center, *supra* note 172, at 64.

[186] Robert Tanner, *AP Enterprise: On Sunshine Laws, Governments Talk Loud but Stick is Very Rarely Used*, ASSOCIATED PRESS, Mar. 10, 2007, *available at* LEXIS, News Library, State and Regional (quoting Bill Chamberlin

Prosecutorial discretion plays an important role in the enforcement of open meetings laws because state and local prosecutors are often the ones charged with investigating and enforcing open meetings laws. [187] However, prosecutors are often linked politically to, or hired by, the officials they might be called on to investigate for violations. [188] This may create conflicts of interest, leading some critics to believe criminal charges will rarely be brought against many officials. [189]

Judicial and prosecutorial discretion were at the heart of a 1998 study by professors Charles N. Davis, Sandra F. Chance and Bill F. Chamberlin, in which the researchers surveyed almost 600 officials responsible for enforcement of open meetings laws around the country. [190] It is the only study of its kind. The survey found that investigations of open meeting complaints were rare. [191] The survey revealed that "enforcement efforts are sporadic at best and nonexistent at worst." [192] Despite finding weak enforcement, the survey also found that prosecutors support the principles of open meetings, leading the researchers to conclude that education and deterrence would improve compliance with the laws. [193] The respondents said that open meetings laws should be enforced primarily to "deter future violations" and to "educate public officials on

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as stating that "[t]here is largely a culture in state and local government that violating public meetings and open records laws is not the same as committing a crime… It's largely treated as a nuisance rather than a law.").

[187] *Guardians of Access*, *supra* note 164, at 38.

[188] *Id*.

[189] *Id*.

[190] *Id*.

[191] *Id*. at 44.

[192] *Id*.

[193] *Id*. at 54.

the open meetings laws."[194] The survey concluded that current enforcement provisions were not effective remedies to open meetings violations.[195]

Without enforcement, the open meetings laws become suggestions for how to proceed. According to Bill Chamberlin, professor and former director of the Marion Brechner Citizen Access Project, if open meetings laws are at least occasionally prosecuted, that will send a message to public officials that penalties enforcement.[196] That is a necessary message considering that prosecutors in most states have never brought action for open meetings violations. In South Dakota, for example, no one has been prosecuted for violating South Dakota's open meetings law in its thirty-five-year existence.[197] Dave Bordewyk, the general manager of the South Dakota Newspaper Association, attributed that to the fact that the maximum penalty under the law was only $200.[198]

Aside from the amount of the penalty, if state open meetings laws are enforced at least some of the time, that could be enough to demonstrate to officials that prosecutors are willing to enforce state open meetings laws and that courts are willing to assess penalties for violators.

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[194] *Id*. at 47, 49 (explaining that the respondents stated that a majority of violations happened because of ignorance and were not purposeful).

[195] *Id*. at 50, 54 (stating that "enforcement of open meetings laws is a rare occurrence, and most prosecutors do not view criminal prosecution as a remedy for the majority of open meetings violations.").

[196] Robert Tanner, *AP Enterprise: On Sunshine Laws, Governments Talk Loud but Stick is Very Rarely Used*, ASSOCIATED PRESS, Mar. 10, 2007, *available at* LEXIS, News Library, State and Regional *(*quoting Bill Chamberlin, director of the Marion Brechner Citizen Access Project from 1998-2008).

[197] Joe Kafka, *Governor's Candidates Differ on Public Records, Meetings*, ASSOCIATED PRESS, Aug. 3, 2002, *available at* LEXIS, News Library, State and Regional.

[198] *Id*.

Florida, which has a national reputation as a leader in open government,[199] may provide a good example of this.

The Brechner Center for Freedom of Information, a non-profit center dedicated to open government and other First Amendment issues, maintains a prosecution database of known open meetings and open records cases in Florida since 1977.[200] One example discussed in the Brechner Center's database, as well as in its publication *The Brechner Report*, concerns former Florida State Senator and then Escambia County Commissioner W.D. Childers who in 2003 was found guilty of one count of violating the open meetings law for discussing public business behind closed doors on four occasions.[201] He was sentenced to 60 days in jail, the maximum penalty available under the criminal penalties available for open meetings violations under Florida's open meetings law.[202] Childers, the first person in Florida to be sentenced to jail for a Sunshine Law violation, was released from jail on an appeals bond after serving all but two weeks of the sixty- day sentence.[203] He also pled no contest to a second count of a misdemeanor violation of Florida's open meetings law for speaking to two commissioners about county building projects.[204] For that count, Childers was ordered to pay a $500 fine, $376 for court costs and $3,227.85 for the state's cost in investigating and prosecuting the case.[205]

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[199] Commission on Open Government Reform, *supra* note 159, at 1.

[200] *See generally* Brechner Center for Freedom of Information, *supra* note 141.

[201] Bill Kaczor, *Childers Wins Freedom Pending Appeal of Jail, Prison Sentences*, ASSOCIATED PRESS, June 19, 2003, *available at* LEXIS, News Library, State and Regional.

[202] *Id*.

[203] *Id*.

[204] Bill Kaczor, *Ex-President of Florida Senate Jailed*, ASSOCIATED PRESS, May 13, 2003, *available at* LEXIS, News Library, State and Regional.

[205] *Id*.

The year before, in 2002, Childers, along with three other Escambia County commissioners, had been suspended by then Florida Governor Jeb Bush after they were arrested on charges of bribery, racketeering, theft and Sunshine Law violations.[206] The four county commissioners were found guilty of multiple misdemeanor violations of Florida's open meetings law.[207] Another commissioner avoided jail time but was sentenced to pay $4,143.69 in costs after being found guilty of two Sunshine Law violations.[208]

Recommendation 5: Better Record-Keeping of Complaints, Penalties and Resolutions

Only a handful of states maintain records of complaints, violations and penalties.[209] Poor record keeping makes it nearly impossible to form an accurate picture of how, or if, a state's penalty provisions are being applied.[210] One notable exception to this might be in Florida, where the Brechner Center for Freedom of Information, discussed previously, maintains a database of known open meetings and open records cases in Florida since 1977.[211]

In states where penalty provisions have changed since 1995, the motivation expressed in published records by many supporters of increased penalties was that increasing penalties would improve compliance with the laws and enforcement of the laws. However, in most states, no

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[206] Bill Kaczor, *Childers Sentenced to 60 Days for 'Sunshine' Violations*, ASSOCIATED PRESS, May 12, 2003, *available at* LEXIS, News Library, State and Regional.

[207] *Id*.

[208] *Id*.

[209] *See Sunshine Laws*, *supra note* 43, at 42; *See also* Robert Tanner, *Few Penalties Levied for Failure to Heed Open Government Laws*, USA TODAY, Mar. 10, 2007, http://www.usatoday.com/news/nation/2007-03-10-sunshinelaws_N.htm (stating that fewer than ten states even track open meetings violation complaints.).

[210] *See e.g. supra* Chapter Three (finding that in most of the states non-legal published records were numerous in the years the penalties were being changed or years that change was being debated, but little follow-up coverage exists in year after the change addressing whether the changes have been effective and are being enforced.).

[211] Brechner Center for Freedom of Information, *supra* note 141.

records of whether, or how, those laws were applied before, or after, the change of penalties exist, making it very difficult to discern if in fact increasing penalties had improved enforcement of open meetings laws, no systematic records were available from any source other than press and open government experts in the state who may have some information on enforcement. Ideally, such records could be maintained by independent oversight agencies established in some states to investigate open records and open meetings complaints. Such records could also be maintained by the offices of state attorneys general in states where oversight agencies have not been established.

Recommendation 6: All States' Open Meetings Laws Should Increase the Statute of Limitations for Bringing Actions to Enforce Open Meetings Laws

Open meetings laws in twenty-nine states specify time limitations for bringing open meetings claims.[212] The statute of limitations range from within twenty-one days of the meeting taking place in Kansas[213] to within two years of when a person knew or should have known about the violation in Ohio.[214] Such limitations for bringing actions are designed to "require diligent prosecution" and to ensure that the claims will be addressed while the evidence is still available.[215] Short statutes of limitations, however, can make it nearly impossible for citizens to bring claims to enforce open meetings laws because it can be difficult for a citizen to decide how

[212] *See supra*, Chapter Two, note 295 and accompanying text.

[213] *See supra*, Chapter Two, note 300-301 and accompanying text; *see also* KAN. STAT. ANN. § 75-4320(a) (2008).

[214] *See supra*, Chapter Two, note 300-301 and accompanying text; CODE OF ALA. § 36-25A-10 (2009);OHIO REV. CODE ANN. § 212.22(I)(1) (2009).

[215] *See supra*, Chapter Two, note 296-297 and accompanying text;

to figure out the law, find an attorney, bring suit, find funds for attorneys' fees and cost and file a complaint in a two-month period. [216]

Short statutes of limitations can become a disincentive for citizens to file action to enforce open meetings laws because of the reduced time available to deal with an issue he or she has perhaps never before thought about—filing a complaint in court about an issue of law he or she is unfamiliar with. Additionally, if a citizen would prefer attempting to resolve the alleged violation through discussion with the public body or by bringing attention of the issue to the community, short statutes of limitations limit the time citizens have to explore such alternatives.[217] States should adopt the recommendation of the Citizen Advocacy Center of allowing for two years from when the violation occurred, or was discovered, to bring action to enforce the open meetings laws.[218]

Recommendation 7: Explore Alternatives for Enforcement

In searching for alternative ways to improve enforcement to have many states have created independent state agencies focused on open government issues and examined the possibility of mediating open government disputes. An independent state agency focused on handling questions and complaints about open meetings violations could expedite the review time for complaints and could also improve enforcement of the laws.[219] An agency with investigative and enforcement power over open meetings laws could improve the effectiveness of the laws and

[216] Citizen Advocacy Center, *supra* note 172, at 34, 65*; See also* 5 ILL. COMP. STAT. ANN. 120/3 (b) (1)-(2) (2009); *See also* MICH. COMP. LAW SERV. § 15.270(A)(b) (2009).

[217] Citizen Advocacy Center, *supra* note 172, at 34.

[218] *Id*. at 34, 65.

[219] *Id*. at 63.

save taxpayer money in enforcement.[220] Administrative offices dedicated to the investigation and enforcement of open meetings or access provisions in state laws could potentially provide a less complicated and less expensive means by which citizens can file complaints.[221] The Citizen Advocacy Center and Florida's Commission on Open Government Reform have supported statutorily creating an open government agency that would have investigative and enforcement powers.[222]

As of 2008, sixteen states had established some kind of agency or counselor to review access-related complaints.[223] Of those, Connecticut is the only state with an open government agency that has enforcement power. [224] In other states that have some type of agency of public official in charge of fielding open government questions, that person or body can issue opinions or use moral persuasion by calling the violating body to inform them of the violation. Ultimately, without enforcement power, such an agency or public officials must refer a violation to county or state attorneys to bring legal action to enforce the laws or depend on citizens to enforce the laws. However, some officials with very little enforcement power have made major impacts on the behavior of officials in their states.[225]

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[220] *Id*. *at* 63- 64.

[221] Meri K. Christensen, *Opening the Doors to Access: A Proposal for Enforcement of Georgia's Open Meetings and Open Records Laws*, 15 Ga. St. U. L. Rev. 1075, 1076 (1999); (stating that anyone filing a complaint for an open meetings violation will have to pay filing fees and attorneys fees.).

[222] Citizen Advocacy Center, *supra* note 172 at 64; *See also* Commission on Open Government Reform, *supra* note 159, at 17 (stating that Florida does not have a central office with authority to assure statewide compliance with the state's open government laws and to provide training and guidance on open government requirements to the public.").

[223] Yunjuan Luo & Anthony L. Fargo, Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study 5-6 (2008), http://indianacog.org/files/PAC_final2.pdf.

[224] *Id*.

[225] *See e.g.* Art Levy, *Attorney: Open Government Laws Go Beyond the Computer,* FLORIDA TREND, Nov. 1, 2008.

In 1998 Indiana lawmakers created the Public Access Counselor (PAC) in response to a survey by state newspapers that found widespread violations.[226] The PAC is appointed to four-year terms and provides advice, education and assistance to the public and government officials about the applicability of the state's open records and open meetings laws.[227] The Indiana Coalition for Open Government conducted a survey of all persons who had filed a complaint related to records or meetings with the state's public access counselor between July 1, 2005 and June 30, 2007.[228] The study found that of the 120 people who had filed complaints after being denied access, 91% believed the PAC should have power to assess fines or take other enforcement actions.[229] Additionally, the survey found that 69 percent of those surveyed said the PAC had advised them they should have access to government meetings and records and could pursue legal action to obtain it, but only 19 percent said they had pursued further action.[230] An agency that would have the power to bring court actions could pursue cases where possible violations have surfaced.

Other states also have instituted mediation programs that aim to resolve open meetings or open records disputes in an effort to eliminate the need for litigation. For example, in Florida a voluntary mediation program is run through the Florida Attorney General's office.[231] The goal

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[226] Ken Kusmer, *Survey Finds User Support for Stronger Access Counsel*, ASSOCIATED PRESS, Jan. 2, 2008, *available at* LEXIS, News Library, State and Regional.

[227] Luo and Fargo, *supra* note 223, at 6.

[228] *Id*. at 3.

[229] *Id*.

[230] *Id*. (stating that Indiana's open meetings law requires that people file complaints with the PAC first and then after can file lawsuits).

[231] Office of the Attorney General of Florida Bill McCollum, Open Government Mediation, http://myfloridalegal.com/pages.nsf/main/d99b17eb63c2f12085256cc7000be171!OpenDocument, (last visited June 16, 2009).

of the mediation program is to resolve access disputes through negotiation, when both parties are willing to negotiate. [232] Successful mediation could save both sides the cost of litigation. [233] According to the Florida Attorney General's office, successful mediation could result "in a cost savings to the governmental agencies and helps the public to secure access to public records and meetings." [234]

Model Penalties and Remedies Law for Open Meetings Violations

The recommendations for improving penalties for violations of open meetings laws, discussed above, and the model law, below, were developed based on the researcher's analysis of the data gathered and discussed in this thesis. The following model law incorporates many of the recommendations discussed above:

(A) The court shall impose upon any member of a public body who is found to have violated the provisions of the open meetings laws the following civil penalties:

(a) For a first violation: Any member of a public body, whether paid or volunteer, found for the first time in his or her term of office to have violated the open meetings law shall be required to complete a training course on compliance with the state's open meetings law administered by (the FOI office or the state attorney general's office, whichever is available in that state).

(b) For a second violation: A court shall assess any paid member of a public body found to have violated the open meetings law a second time during his or her term of office a penalty equal to half of the defendant's monthly salary for service on the public body. Any member of a public body who serves without pay and who is found to have violated the open meetings law for a second time during his or her term in office shall be required to meet with the city or county attorney to review the violation, review the requirements of the state's open meetings law and speak directly to the issue of how the violation is to be avoided in the future.

(c) For a third or subsequent violation: Any paid member of a public body found to have violated the open meetings law a third time during his or her term of office shall be removed from office. Further, that member shall be barred from serving in public office for a period of no less than one term after the term in which the member was removed from office. Any member of a public body who serves without pay and who is found to

[232] *Id*.

[233] *Id*.

[234] *Id*.

have violated the open meetings law for a third time during his or her term in office shall be removed from office.

(d) Any member found to have violated the open meetings law shall be personally liable for payment of any fines or fees. The fines and fees shall not be paid by, nor reimbursed to, the member by the public body he or she serves.

(B) Any member of a public body found to have violated the open meetings law knowingly and with intent shall be guilty of a misdemeanor. The court shall impose upon any member of a public body who is found to have willfully violated the open meetings law the following criminal penalties:

(a) For a first violation: Any paid member of a public body found for the first time in his or her term of office to have committed a knowing and willful violation of the open meetings law shall be fined not less than $100 and not more than $500. Any member of public body who serves without pay and who is found to have committed a knowing and willful violation of the open meetings law shall be removed from office.

(b) For second violation: Any paid member of a public body found for the second time in his or her term of office to have committed a knowing and willful violation of the open meetings law shall be fined not less than $500 nor more than $1,000, sentenced to a term of up to six months in jail, or both, a fine and jail time. In addition to, or in lieu of, fines and/or jail time, any member of a public body found for the second time during a term of office to have committed a knowing and willful violation shall be removed from office.

(C) Any person may apply to the appropriate court to enforce the provisions of the open meetings law seeking:

(a) injunctive relief

(b) declaratory relief

(c) writs of mandamus

(d) invalidation of an action taken at a meeting in violation of the provisions of the open meetings law

(1) After an action has been invalidated, the public body shall hold another meeting in compliance with the provisions of the open meetings law where the issue may be reconsidered and reenacted. Adequate notice must be given for the second meeting and citizens with specific interests in the issue before the board should be asked to address the public body.

(e) Issuance of relief in (a)-(d) shall not bar the imposition of civil and/or criminal penalties.

(f) The court shall give such petitions priority on the court docket.

(D) A plaintiff who prevails in an action to require compliance with the open meetings law or to penalize violations of the law shall recover reasonable attorneys' fees and court costs for the action. The fees shall be assessed to the defendant as part of any penalty assessed for violations of the open meetings law and shall not be paid by, nor reimbursed to, the defendant by the public body he or she serves.

(E) A plaintiff who does not prevail in an action to require compliance with the open meetings law shall not be liable for the attorneys' fees or costs incurred by the defendant member of a public body or of a public body.

(F) This statute, and the penalties and remedies specified within, shall be reviewed, revised if necessary, and reenacted every ten years.

Conclusion

This thesis looked at penalties and remedies available for open meetings violations in the fifty states and the District of Columbia in an effort to try to improve enforcement of open meetings laws. A comprehensive review of penalties available across the country had not been done in more than fourteen years.[235] This thesis, however, did look at how appellate courts across the country have interpreted such laws or applied penalties for open meetings violations available in some states. Such an assessment was beyond the scope of this thesis.

Additionally, this thesis added to existing literature on open meetings laws by looking at states that have changed or added penalty provisions since the Davis, et al., study *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*.[236] In looking at states that have changed penalties, this study used non-legal publications available in those states, including surveys, audits and newspaper accounts, to identify possible motivations lawmakers had for enacting such changes and reasons why the public, media and open government advocates, among others, supported the changes. Looking at such records also provided insight into concerns opponents of the changes expressed. This thesis, however, did not look at legislative histories, or conducted individual state archives or interviews with people directly involved in developing the legislation, all of which were beyond the reach of this scholar.

Finally, this thesis was the first study to use the methodology created by the Marion Brechner Citizen Access Project as a component in developing suggestions for improving

[235] *See Sunshine Laws, supra* note 43.

[236] *Id*.

existing penalties and remedies provisions and developing a model law.[237] Using MBCAP provided a unique opportunity to incorporate the project's ratings system into the development of a model law. Using the MBCAP methodology allowed for open government experts to blind review and rate the civil and criminal penalty provisions currently available in thirty-eight states.

In looking at penalties across the country, developing recommendations for improving the laws and developing a model law, this thesis worked to contribute to the discussion on finding ways to effectively enforce open meetings laws. This study, however, had several limitations. This study focused on the language in the statutes and provisions for penalties and remedies for open meetings violations provided for in state statutes. Because of sporadic and limited record-keeping of enforcement across the country, little is know about how each state's open meetings law is enforced if at all. Likewise, although a statute may specify penalties for violations of open meetings laws, those penalties may or may not be sought by county and district attorneys or assessed in court by judges. While a state's penalty provision could have been rated highly by the review board surveyed as maximizing openness, or supported by open government experts in a state as a strong law, if the penalties are not enforced the laws may not be taken seriously.[238] In several states discussed, no evidence of penalties being enforced existed.[239] Indeed, it is difficult to know in which state penalty laws are being consistently enforced. Further, because this study focused on provisions contained with state open meetings laws, it did not included provisions that may affect enforcement of open meetings laws contained within other sections of state statutes outside of open meetings laws. For example, in some states, burden of proof and

[237] *See supra,* Chapter Four.

[238] *See generally supra* Chapters Three and Four.

[239] *See generally supra* Chapter Three.

statute of limitations are addressed for all cases in one general statute for the state, therefore it may not specifically be addressed in the state's open meetings law. If it was not specifically addressed in a state's open meetings law, it was not focused on in this study.

Another limitation of the study is that the board members who rated civil and criminal penalties for open meetings law violations using the MBCAP survey are nationally known open government experts who deal with state laws regularly in their professions. Because of their knowledge in the field, the board members may have an idea from which state a law being rated belongs, despite the fact that the survey contains to state identifying information. Although no evidence exists that such knowledge influenced the board members in their ratings, there is no way to know for certain.

Much remains to be done in looking at penalties and remedies for open meetings laws. Further research related to penalties for violations of open meetings law could analyze case law to determine if and how state appellate courts across the country have applied penalty laws in enforcing open meetings laws. Additionally, more work remains to be done on how prosecutorial discretion affects enforcement of open meetings laws. To date, the most complete study on prosecutorial discretion was conducted by professors Charles N. Davis, Bill F. Chamberlin and Sandra F. Chance in 1998.[240]

Additionally, future research could look at the effectiveness of administrative offices in mediating open meetings disputes, aiding in compliance with the laws and obtaining enforcement of penalties against violators through the state courts. Both appellate case law and oversight entities were beyond the scope of this thesis, but the study of them could yield insight

[240] *See Guardians of Access*, *supra* note 164.

into how penalties and remedies for open meetings violations have worked and whether they could be improved in the future.

Another area where future research could be conducted is looking at any correlation that exists between high fines, level of enforcement and the behavior of public officials. The non-legal publications discussed in Chapter Three provide evidence that supporters of increasing penalties in states that have changed penalty provisions since 1995 discussed a belief there is a correlation between higher penalties, enforcement and behavior.[241] However, no research could be located specifically addressing this point. Additionally, while this thesis did not look at legislative histories, individual state archives or conduct interviews with people directly involved in developing the legislation, collecting such information in the future could shed more light on the reasons behind changes to penalty provisions made in some states.

The research and analysis in this thesis made evident that no state has identified a clear solution to the problem of enforcing open meetings laws. However, if at some point an effective penalty and remedy provision was developed, it could lead to few or no violations, which would mean that there was no need for enforcement of penalties or remedies. While the findings of this thesis suggest that much remains to be done before that point is reached, more research remains to be done on the level of compliance with open meetings laws across the country. One way to get a better picture of compliance would be to conduct state-by-state audits of open meetings. While several audits on open records exist across the country where volunteers or members of the media personally test compliance by requesting a public record from a local or state agency, few audits purely focusing on open meetings could be found.[242] Further, this thesis yielded very

[241] *See supra,* Chapter Three.

[242] National Freedom of Information Coalition, Audits and Open Records Surveys, National Freedom of Information Coalition, http://www.nfoic.org/audits-and-open-records-surveys (last visited June 16, 2009).

little evidence that penalties currently available are effective. Even though the results in this thesis have shown that no clear solution exists, maintaining access is harder if no penalties are available for violations of open meetings laws.

A review of penalty and remedy provisions across the country reveal that no two states are alike when it comes to enforcement of open meetings laws. Lawmakers and open government experts in the eleven states that have changed penalty provisions since 1995 most often cited little to no enforcement as a motivation for supporting increased penalties. Further, the results of the MBCAP survey indicate that the board of open government experts saw room for improvement in the thirty-eight states that provide for civil and/or criminal penalties for open meetings violations. The recommendations and model law developed in this research in this thesis were created with the purpose of adding to the discussion on how open meetings laws across the country might be improved to preserve and uphold the values of open government.

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