Best Practices for Official Minutes of Public Meetings: Practical Solutions to Common Problems & Divergent Standards Under Applicable State Laws

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"The board speaks through its minutes."

Beyond that truism which is engrained into positive law in most states,[1] it is undeniable that county clerks, city clerks, recorders and other local government officials are often confronted with the problem of how best to memorialize official actions of the government board, council, or commission they serve.

This session will provide a practical perspective on the various standards that apply to preparation, recording, amendment and publication of official minutes, criteria used by the courts to ascertain whether minutes are a "full and accurate" record of official decisions, and developing trends in governmental access and transparency under state open records act. We will examine challenges facing governmental bodies as they navigate between post-9/11 legislation that has reflected the perceived need for anti-terrorism measures and demands of advocates of open government for accountability, accessibility, transparency and scrutiny of government decision-making.

The standards applicable to various aspects of official minutes may be liberal, moderate or conservative, with different approaches existing from state to state regarding the legal effect, modification, sufficiency and public accessibility of minutes. While there are often statutory, common law and other differences from one jurisdiction to another regarding minutes, there are also *best practices* that reflect common fundamentals and core considerations. We will conclude this presentation by assessing those "best practices" relevant to the digital age and central to the maintenance of the integrity of open government in this ever-developing democracy we call America.

Overview of Local Government Access & Transparency

All 50 states have open meetings laws, sometimes referred to as "sunshine laws," that mandate state and local government bodies to hold their meetings in public. While many state laws do not guarantee that members of the general public will always be allowed to address the

[1] "[A] Board of Supervisors can act only through its minutes. *Butler v. Board of Supervisors*, 659 So.2d 578, 582 (Miss.1995), which are "the exclusive evidence of what the board did, and … parol evidence is not admissible to show what actions the board took." *Myers v. Blair*, 611 So.2d 969, 972 (Miss.1992) (quoting *Noxubee County v. Long*, 141 Miss. 72, 106 So. 83, 86 (1925))." *Bolivar County, Mississippi v. Wal Mart Stores*, 797 So.2d 790 (Miss. 1999).

government body, they do ensure access to official meetings by the public and media, often in unmistakably strong terms: When the presiding officer of a city council or county board tells a citizen he may not hear the elected officials of the government body discuss certain business, "he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act."[2]

A city council or county board acts officially only through its official proceedings, as manifested in the minutes,[3] and any alleged verbal promise made by a member outside a meeting does not bind the council or board.[4]

Despite a requirement that minutes be taken, there may be exceptions, as in the case of closed session meetings pursuant to a state's open meetings act.[5] Every state allows public bodies to conduct certain discussions in closed or executive sessions, although formal action can only be taken in public or open session.[6]

The Need for Transparency in Government

One must never forget that at the core of public access is a very simple concept of transparency: every official serving on a governmental board, council or commission must always bear in mind that the spirit of Sunshine Laws or Open Meetings Acts is that a citizen

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[2] *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107 (Miss. 1989).

[3] *Ogden v. Premier Properties, USA, Inc*., 755 N.E.2d 661 (Ind. Ct. App. 2001); *Tupelo Redevelopment Agency v. Abernathy*, 913 So. 2d 278 (Miss. 2005); *Boyer v. City of Potosi*, 77 S.W.3d 62 (Mo. Ct. App. E.D. 2002); *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App. Austin 2005).

[4] *Ogden v. Premier Properties, USA, Inc*., 755 N.E.2d 661 (Ind. Ct. App. 2001).

[5] *Kleitman v. Superior Court*, 74 Cal. App. 4th 324, 87 Cal. Rptr. 2d 813 (6th Dist. 1999), as modified, (Sept. 9, 1999).

[6] *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107 (Miss. 1989) put some teeth in Mississippi's Open Meetings Act and clarified the five-step procedure for going into executive session: (1) The meeting must begin as an open meeting. (2) A member must make a motion in open meeting for the meeting to be closed in order to determine whether or not the Board should declare an executive session. The statute does not require a second to this motion, but the vote on this motion must be taken in open meeting. If a majority votes to close the meeting to make a determination on the question of executive session, the meeting is closed for this purpose. (3) No other business during this closed interim shall be considered until the vote has been taken on whether or not to declare an executive session. In order to go into executive session, a three-fifths majority of the Board must vote in favor of it. (4) The President of the Board must then reopen the meeting and announce publicly that the Board is going into executive session and give the reason for doing so, and this reason and the total vote on it must thereafter be recorded on the minutes of the meeting. (5) The vote to go into executive session applies only to that particular meeting on that particular day, and no other matter may be discussed at the executive session than the announced subject.

spectator, including the media, has as much right to attend public meetings and see and hear everything that is going on as has any official member of that governing body.

While there are variations among the states, most permit meetings to be held for the purpose of discussing personnel matters, particularly involving hiring, firing or disciplining employees; collective bargaining sessions; pending or imminent litigation involving the government body or its officials; and purchase or sale of public property or assets.[7] Deficiencies in the maintenance of minutes do not provide grounds for invalidating action taken in closed or executive session;[8] however, state open meetings laws usually spell out with specificity the procedures that public officials must follow in order to hold a closed meeting or executive session, including casting votes in open session.[9]

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[7] The Open Meetings Act of Mississippi codifies the following grounds for executive session in Miss. Code Ann. §25-41-7(4):
(a) Transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.
(b) Strategy sessions or negotiations with respect to prospective litigation, litigation or issuance of an appealable order when an open meeting would have a detrimental effect on the litigation position of the public body.
(c) Transaction of business and discussion regarding the report, development or course of action regarding security personnel, plans or devices.
(d) Investigative proceedings by any public body regarding allegations of misconduct or violation of law.
(e) Any body of the Legislature which is meeting on matters within the jurisdiction of such body.
(f) Cases of extraordinary emergency which would pose immediate or irrevocable harm or damage to persons and/or property within the jurisdiction of such public body.
(g) Transaction of business and discussion regarding the prospective purchase, sale or leasing of lands.
(h) Discussion between a school Board and individual students which attend a school within the jurisdiction of such school Board or the parents or teachers of such students regarding problems of such students or their parents or teachers.
(i) Transaction of business and discussion concerning the preparation of tests for admission to practice in recognized professions.
(j) Transaction of business and discussions or negotiations regarding the location, relocation or expansion of a business or an industry.
(k) Transactions of business and discussions regarding employment or job performance of a person in a specific position or determination of an employee holding a specific position. The exemption provided by this paragraph includes the right to enter into executive session concerning a line item in a budget which might affect the termination of an employee or employees. All other budget items shall be considered in open meetings and final budgetary adoption shall not be taken in executive session.

[8] *Willis v. Deerfield Tp.*, 257 Mich. App. 541, 669 N.W.2d 279 (2003).

[9] *Hinds County Board of Supervisors v. Common Cause of Mississippi*, 551 So. 2d 107 (Miss.

One of the strengths of American government is the public's right to know and understand not only official actions of its elected representatives, but to know how and why those elected representatives reached a particular decision.

Many states require that full and accurate minutes contain sufficient information to permit the public to understand and appreciate the rationale behind the government body's board or council, as well as the motions and votes.[10] Moreover, where the minutes of a council or board meeting are recorded in the proper book or record by the officer whose duty it is to make and keep the records, they become in law a record and presumptively remain as such.[11] Most states require that minutes and official records of proceedings be made and maintained by a clerk or recorder or his or her deputy, and are usually authenticated by the signature of the presiding officer and attested by the clerk or deputy clerk.[12]

Consequences of Inaccurate or Insufficient Minutes

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Mandamus Action to Compel Preparation of Accurate Minutes

1989).

[10] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St. 3d 54, 2001 Ohio130, 748 N.E.2d 58 (2001).

[11] *Penton v. Brown-Crummer Inv. Co*., 222 Ala. 155, 131 So. 14 (1930).

[12] *In re Validation of Municipal Bonds of Natchez*, 188 Miss. 817, 196 So. 258 (1940); *Hawkins v. City of West Point*, 200 Miss. 616, 27 So. 2d 549 (1946).

[13] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St. 3d 54, 2001 Ohio130, 748 N.E.2d 58 (2001).

[14] *Penton v. Brown-Crummer Inv. Co*., 222 Ala. 155, 131 So. 14 (1930).

[15] *In re Validation of Municipal Bonds of Natchez*, 188 Miss. 817, 196 So. 258 (1940); *Hawkins v. City of West Point*, 200 Miss. 616, 27 So. 2d 549 (1946).

Failure to ensure that the official minutes are full and accurate can have dire consequences. Lawsuits against public officials are not the best occasion for those officials to learn Latin, especially the Latin word "mandamus."

Consider the reaction of the Ohio Supreme Court in *Long v. Council of the Village of Cardington*, 92 Ohio St. 3d 54; 2001 Ohio 130; 748 N.E.2d 58; 2001 Ohio LEXIS 1525 (Ohio 2001), when confronted with a village council's insufficient and inaccurate minutes of council meetings and committee meetings. The Court upheld issuance of a writ of mandamus to compel village officials to "prepare, file, and maintain full and accurate minutes and to conduct all meetings in public, except for properly called executive sessions." The rationale for the Court's sharp rebuke of the village officials rests on the right of the public to know and understand the actions of their elected representatives, as well as "the ways and means by which those decisions were reached."

> In analyzing these minutes, it is apparent that they do not provide a full and accurate record of council proceedings. The challenged minutes contain admitted inaccuracies that have never been corrected. For example, the minutes for the January 3 council meetings erroneously include Long's name in the roll call of council members even though she was no longer a council member on that date. In addition, the minutes do not include sufficient facts to understand and appreciate the rationale behind some of the village council's decisions. "Full and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision." ... The minutes of the January 3 work session, for example, state that future developers "must not have the same engineer as the village," but there is no recorded vote ordering this, nor is there any rationale offered to support this apparent council decision. And the minutes of the January 26 special session indicate that respondent Sherman was appointed council member but include no rationale for the appointment or a properly scheduled executive session under [state law].
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> In fact, respondents' minutes of finance and personnel committee meetings do not include motions and votes, much less the detail to meet the comprehensive requirements of [state law]…. For example, the minutes for the January 17 finance committee meeting state merely that "[a] brief meeting was held to sign off on all accounts" without specifying motions, votes, or details concerning the accounts. Similarly, the minutes of the February 22 finance committee meeting state that the committee "went over the budget page by page for the final reading at the next scheduled Council Meeting," without mentioning the budget items or any motions or votes.

Proof of official acts and decisions of a city or county may be supplied only by authenticated minutes of the meeting at which the action occurred, unless the minutes were lost or destroyed.[16] Technical omissions from minutes happen. Many states recognize that unrecorded but allegedly official proceedings cannot not be established without clear evidence, and a presumption exists that where a record of proceedings of a municipal council or county

[16] *Southern Disposal, Inc. v. City of Blossom,* 165 S.W.3d 887 (Tex. App. Texarkana 2005).

board does not exist, no proceeding took place.[17] While most states adhere to the rule that official acts of government bodies must be evidenced by orders, ordinances or resolutions duly entered upon their minutes and signed as required by law,[18] equitable estoppel may provide a means of avoiding a miscarriage of justice or harm to the public interest.

Equitable Estoppel to Cure Technical Omission from Minutes

For example, in *Community Extended Care Centers, Inc. v. Board of Supervisors of Humphreys County*, 756 So. 2d 798 (Miss. App. 1999), the Court invoked equitable estoppel to hold that a technical omission by the Board of Supervisors in having a lease contract simultaneously spread across the minute book and filed in the land records would not invalidate the lease contract. Execution of the lease contract was not an unauthorized act of the Board president, but the minutes of the Board throughout the thirteen year period the lease contract was in effect revealed sufficient evidence of the Board's intent to be bound by it. Those facts evidenced by the minutes included the following: (1) a resolution had been unanimously passed in 1983 authorizing the Board president to execute in duplicate the original of the lease, (2) the lease contract had been filed in the land records of the chancery clerk's office, (3) the Board had subsequently approved an amendment to the lease contract in 1990, (4) the amendment had been filed in the land records of the chancery clerk's office and (5) the amendment had been entered in the Board minutes. These acts were sufficient "to ensure that no individual member of the Board had bound the Board without the benefit of the consent of the Board as a whole by executing the lease contract between CECC and the Board of Supervisors of Humphreys County." After reaping the benefits of the lease for more than thirteen years, the County would not be excused from its obligations under the lease contract because of Center's failure to have the lease contract filed simultaneously in the minute book and in the land records of the chancery clerk's office.

Pragmatic Fairness in Evaluating Sufficiency of Minutes

Times change, and the common law changes with the times. Cases like *Community Extended Care Centers* indicate a willingness on the part of courts to recognize the need for pragmatic fairness in applying the minute book order rule and perhaps a relax the absolute requirement that the principal rights and obligations of the parties be ascertainable by reading the Board's minutes.

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[17] *Beverly Land Co. v. South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); State v. Baynes, 222 N.C. 425, 23 S.E.2d 344 (1942); *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N.W. 603 (1904); *Warren County Port Comm'n v. Farrell Constr. Co*., 395 F.2d 901 (5th Cir. 1968) (denial of payment to contractor who performed additional work orally ordered by engineer seeking payment from the board of supervisors); *Colle Towing Co. v. Harrison County*, 213 Miss. 442, 57 So. 2d 171 (1952) (denial of payment for two barges rented under oral contract); *Burt v. Calhoun*, 231 So. 2d 496 (Miss. 1970) (county engineer denied payment for services performed after contract had expired); *Martin v. Newell*, 198 Miss. 809, 23 So. 2d 796 (1945) (purchaser of county-owned property denied refund of purchase price when unrecorded deed created cloud on title).

[18] *Butler v. State*, 241 So. 2d 832, 835 (Miss. 1970).

Since a municipal council or county board can speak only through its records,[19] it should keep a correct record of its proceedings,[20] and, in order for it to transact the business of the public body, the action it takes should be properly entered in the minutes and records of its operations.[21]

Presumptions Arising from Official Minutes

The minutes and records of a municipal or county governing body import verity, ordinarily are not subject to collateral attack in the absence of fraud or mistake, are considered conclusive of the facts set forth in them and may be relied upon by third parties who deal in good faith with the government body. While courts often apply presumptions[22] in favor of the regularity and legality of action taken by such a body in order to cure obvious defects or technical omissions in its minutes, one should not presume, contrary to the record, that matters required to be recorded were recorded.[23]

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[19] *Carter v. Allen*, 631 N.E.2d 503 (Ind. Ct. App. 1st Dist. 1994).

[20]*Citizens Nat. Bank's Trustee v. Town of Loyall*, 262 Ky. 39, 88 S.W.2d 952 (1935).

[21]*State ex rel. The Fairfield Leader v. Ricketts*, 56 Ohio St. 3d 97, 564 N.E.2d 486, 18 Media L. Rep. (BNA) 1825 (1990)

[22] The courts of many states are generally inclined to apply the maxim, *Ut res valeat quam pereat* (what ought to have been done was done). For example, where it was shown that the records of a city council had been destroyed or lost, it was presumed that an order of the council allowing the salary of a certain officer was made pursuant to a previous order conferring authority to make the allowance. Where no record of proceedings required to be recorded exists, the presumption was that none took place. Not all courts indulge in minutes-related presumptions, however. In one case it could not be presumed that the yeas and nays were recorded when by inspection of the record it appeared affirmatively that they were not recorded. In another, a two-thirds majority would not be presumed in favor of a resolution from a record showing its adoption, nor would a meeting be presumed to have been held from proof of an advertised call for it. See generally *Jones v. McAlpine*, 64 Ala. 511 (1879); *Beverly Land Co. v. South Sioux City*, 117 Neb. 47, 219 N.W. 385 (1928); Tracey v. People, 6 Colo. 151, 1882 WL 177 (1882); *Markham v. City of Anamosa*, 122 Iowa 689, 98 N.W. 493 (1904); *Kerr v. Shambaugh*, 86 S.W.2d 798 (Tex. Civ. App. Beaumont 1935); *In re City of Buffalo*, 78 N.Y. 362 (1879); *Parker v. Burgen*, 20 Ala. 251 (1852).

[23] *Crabb v. Uvalde Paving Co*., 23 S.W.2d 300 (Tex. Comm'n App. 1930); Baker v. Kelly, 226 Ky. 1, 10 S.W.2d 467 (1928); *Wass v. Impellezeri*, 122 N.J.L. 213, 4 A.2d 28 (N.J. Sup. Ct. 1939); *Loos v. City of New York*, 257 A.D. 219, 13 N.Y.S.2d 119 (2d Dep't 1939); Crabb v. Uvalde Paving Co., 23 S.W.2d 300 (Tex. Comm'n App. 1930); *Shaffer v. W. Farmington*, 82 Ohio App. 3d 579, 612 N.E.2d 1247 (11th Dist.Trumbull County 1992); *City of Monticello v. Ragan*, 258 Ky. 223, 79 S.W.2d 720 (1935).

Amendment of Minutes

If unauthorized and improper alterations are made in their records, they must be restored to their original and legitimate form and condition. Further, if the minutes and records are incomplete or incorrect, the governing board has the right, power and the duty to amend the record so as to speak the truth.[24]

The right of a municipal or county governing body to amend its minutes is very broad where through mere inadvertence or misapprehension, a record has been made up defectively, and some courts go so far as to hold that the strict and technical rules which apply to the correction of judicial records do not apply to the correction of such local government records.[25]

The power of a governing body to amend its minutes is not unlimited. Amendment of the minutes or records of a governing body will be denied if it affects vested rights or the intervening claims of third persons. When litigation arises involving the record, even while the amendment may still be made, it should not be made *ex parte* by the governing body, but on proper application to a court of competent jurisdiction, so that persons whose rights or claims will be affected may be represented.[26]

A governing body does not lose control of its minutes and records merely by the lapse of any definite time, although most courts hold that amendments should be made within a reasonable time. Ordinarily a correction may be made at the ensuing meeting of the county board or city council, or at any subsequent session; and, when they are corrected, the minutes and records speak as of the original date.[27]

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[24] *Arkansas Fuel Oil Co. v. City of Oxford*, 188 Miss. 455, 195 So. 316 (1940); *Harris v. Town of East Brewton*, 238 Ala. 402, 191 So. 216 (1939); *Golden State Milk Products Co. v. Southern Sierras Power Co.*, 117 Cal. App. 121, 3 P.2d 352 (1st Dist. 1931); *Ward v. Lester*, 235 Ky. 595, 31 S.W.2d 924 (1930); *State v. Baynes*, 222 N.C. 425, 23 S.E.2d 344 (1942); *Harris v. Thompson*, 29 Ala. App. 38, 191 So. 403 (1939).

[25] *Harris v. Thompson*, 29 Ala. App. 38, 191 So. 403 (1939); *Steiger v. City of Ste. Genevieve*, 235 Mo. App. 579, 141 S.W.2d 233 (1940); *State ex rel. William R. Compton Co. v. Walter*, 324 Mo. 290, 23 S.W.2d 167 (1929). A practical application of this concept can be found in *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (Miss. 1994), where the Court held that a school board's failure to record any notice of a special meeting, while a violation of the Open Meeting Act, did not void the actions of the school board taken at that special meeting. Technically, late signing of school board minutes was a violation of the statute governing signing of minutes, but it was not such an error as to invalidate actions of the school board taken at that meeting, the Court noting that "[s]trictness of action, like strictness of verbiage, should also not be required.").

[26] *Steiger v. City of Ste. Genevieve*, 235 Mo. App. 579, 141 S.W.2d 233 (1940);*Jeffers v. Wharton*, 29 Ala. App. 428, 197 So. 352 (1939), cert. granted, 240 Ala. 21, 197 So. 358 (1940);*Woods v. Eilers*, 7 Ky. L. Rptr. 824, 13 Ky. Op. 1124 (Ky. 1886).

[27] *Penton v. Brown-Crummer Inv. Co.*, 222 Ala. 155, 131 So. 14 (1930).

Nunc Pro Tunc Orders

"*Nunc pro tunc*" means "now for then." It merely describes the inherent power of a judicial or other government body to make its records speak the truth, i.e., to record what is actually done but has not been recorded. A *nunc pro tunc* entry may be made on the minutes of a succeeding official meeting. In order for minutes to be amended *nunc pro tunc* the amendment must be based on written or other sufficient data of record, which must be such as itself to furnish evidence that the particular proceedings in fact took place. Courts have held that deficiencies in the records of the proceedings of a city council or county board may not be corrected by a *nunc pro tunc* order based on oral testimony or affidavits.[28]

The purpose of a *nunc pro tunc* order is to correctly evidence a previous action by the Board which, either through mistake or neglect, was not accurately recorded in the minutes.[29] In *Walters v. Validation of $3,750,000.00 School Bonds*, 364 So.2d 274, 276 (Miss.1978), for example, the Court recognized that a governing body may, at a subsequent meeting, amend the minutes of the prior meeting to reflect what actually occurred on the first occasion. In so holding, the Court noted that the rule that a governing body may amend its minutes to speak the truth is in accord with other jurisdictions.

Amendments Where No Intervening Rights Affected

The general rule as to the amendments of the minutes of council meetings is stated in *City of Guntersville v. Walls*, 252 Ala. 66, 39 So.2d 567 (1949):

> A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved. On the other hand, an erroneous record of the proceeding of a municipal council cannot be corrected or amended to the destruction of rights acquired under it in good faith, without notice of the error.

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[28] *Ricketts v. Hiawatha Oil & Gas Co*., 300 Ky. 548, 189 S.W.2d 858 (1945); *Jeffers v. Wharton*, 29 Ala. App. 428, 197 So. 352 (1939), cert. granted, 240 Ala. 21, 197 So. 358 (1940);*Hoskins v. Pitman*, 229 Ky. 260, 16 S.W.2d 1052 (1929).

[29] *Chaffin v. Chaffin*, 437 So. 2d 384 (Miss. 1983), citing *Green v. Myrick*, 177 Miss. 778, 171 So. 774 (1937)("Courts may by nunc pro tunc orders supply omissions in the record of what had previously been done, and by mistake or neglect not entered."). See *Oliphant v. Carthage Bank*, 80 So. 2d 63 (Miss. 1955); *Board of Supervisors of Lafayette County v. Parks*, 96 So. 466 (Miss. 1923). In these cases the Mississippi Supreme Court held that the Board of Supervisors has no authority to enter an Order *Nunc Pro Tunc* which attempts to give an order effect retroactively to a former term. See also *Huey Stockstill, Inc. v. Hales*, 730 So. 2d 539 (Miss. 1999) (proper application of the *nunc pro tu*nc concept in the context of a hotly contested bidding war, where county board's *nunc pro tunc* amendment of the meeting minutes related back to the date of the board's original meeting).

The *nunc pro tunc* doctrine has its limits, and changes or additions ordinarily may not be made in the minutes or records of the governing body without its authority, either expressly or by implication. It has also been held, however, that the clerk of a municipal corporation may amend its records according to his own knowledge of the truth, as long as he has the custody of them, and that it is not necessary that he should have some memorandum on which to base the amendment.[30]

Sunshine Law Violation Cured by Subsequent Open Vote

Curative action may come in another form, as in *Bassett v. Braddock*, 262 So.2d 425, 428-29 (Fla.1972), where the court concluded that a subsequent open, public vote cured, corrected, and rendered "sunshine bright" an initial violation of state law relating to the election of school board officers by secret written ballot). Similarly, in *Bruckner v. City of Dania Beach*, 823 So.2d 167, 171 (Fla. 4th DCA 2002), the court stated that a Sunshine Law violation "can be cured by independent final action completely in the Sunshine".

In *Grapski v. City of Alachua*, the City's approval of canvassing board minutes at an open public meeting after refusing a request from citizens to inspect and copy minutes prior to their approval violated the state open meetings law requirement that City open its official minutes to public inspection in a timely and reasonable manner. Since this violation resulted in a presumed prejudice to the citizens, they were entitled to a determination that City's approval of minutes was null and void *ab initio*.[31] Under the state open meetings law, a mere showing that the law has been violated constitutes an irreparable public injury, and no resolution, rule, or formal action could be considered binding except as taken or made pursuant to the open meeting requirements. This included even an unintended violation.

Addressing the City's failure to allow the citizens a timely opportunity to inspect and copy the subject minutes, the court in *Grapski* noted that the City held a subsequent meeting to approve the minutes, and up through that meeting its high-level employees informed the citizens that the City would not produce a copy of the minutes until approval at the next meeting. The court concluded that the City violated both the language and the purpose of the open meetings law by denying public access to its minutes until after approval, "or, stated flatly, after the minutes would have been useful to those seeking inspection."

Clerk's ministerial duty to record official proceedings of government body

The Colorado Court of Appeals addressed the consequences of a clerk being unavailable to attend official meetings or record the minutes of proceedings in *Board of County Comm'rs of Fremont County v. Hatfield*, 39 Colo.App. 548, 570 P.2d 1091 (Colo. App. 1977). The county clerk in this case was notified of an official board meeting, failed to attend apparently because

[30] *State ex rel. Great Falls Housing Authority v. City of Great Falls*, 110 Mont. 318, 100 P.2d 915 (1940);*People ex rel. Harper v. Irvin*, 325 Ill. 497, 156 N.E. 292 (1927);*State ex rel. William R. Compton Co. v. Walter*, 324 Mo. 290, 23 S.W.2d 167 (1929);*State ex rel. William R. Compton Co. v. Walter*, 324 Mo. 290, 23 S.W.2d 167 (1929).

[31] *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. Dist. Ct. App. 1st Dist. 2010).

she was too busy or otherwise unable to provide a deputy clerk to attend in her place, and asserted that she was not required to record the Board's minutes because lack of public notice of the subject meeting rendered that meeting invalid. The Court disagreed, holding that the clerk had ministerial duty to attend the meeting and take the minutes:

> [I]t is apparent that the clerk is required to attend the board meetings, take the minutes of those proceedings, and then record those minutes in the book kept for that purpose. By necessary implication, the board must notify the clerk of its meetings in order that she may comply with her duties. However, upon receiving notice from the board, the clerk has the constitutional and statutory duty to attend the board's meetings, and she must respond immediately if such is the request of the board. The clerk may not shirk her duty by contending that she or her deputies do not find it convenient to attend, or because other business allegedly prevents their attending. While it may be better practice for the board to give the clerk more timely notice than occurred here, the responsibilities of the position to which she was elected includes either being available, or having a deputy available, during regular business hours to perform her constitutional and statutory functions. To rule otherwise would allow an "unavailable" clerk to paralyze the legitimate functioning of the board.
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> Furthermore, where, as here, the clerk is notified of a meeting of the board and fails to attend, the board necessarily has authority to record its own proceedings and thereafter approve those minutes. And, upon being tendered such minutes, the clerk must record them in the proper book regardless of the fact that neither she nor her deputies actually recorded the proceedings. In this regard the clerk is performing only the ministerial duty of recording "all proceedings of the board." …
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> Nevertheless, here the Clerk asserts that she was not required to record the Board's minutes because lack of public notice of the meeting in question rendered that meeting invalid. The brief response to this contention is that she lacks standing to question the validity of the meeting, for it has nothing to do with her ministerial duty of recording the Board's proceedings. …

The Court in *Board of County Com'rs of Fremont County v. Hatfield* also disagreed with the position taken by the Colorado State Association of County Clerks and Recorders, which in its amicus curiae brief argued that the Clerk should be allowed to add an elaborate disclaimer to the minutes of the Board she records. Rejecting this argument, the Court concluded that

> the Clerk need not sign or approve the minutes, but that she must furnish the Board with a certified copy of the resolution passed by it at its meeting. And, the certification that the Clerk makes of such records is only that the certified copy is a true copy of the resolution as it appears, and not that what appears therein is in fact the truth. In this regard, she has no different function than in certifying a deed or other instrument recorded with her in her capacity as recorder of deeds."

Publication of minutes

Many states require publication of the official minutes of meetings of government bodies in a newspaper having general circulation in the subject jurisdiction.[32] In *Arizona Newspapers Association v. Superior Court*, 143 Ariz. 560, 694 P.2d 1174 (Az. 1985), the Court focused on an amendment to the state statute governing publication of official minutes of county boards in a newspaper of general circulation. This amendment was interpreted by the county board as sanctioning a more limited manner of publication. The county board decided to discontinue publishing the minutes of its proceedings in the newspaper of general circulation, and instead "publish" its proceedings in a minute book of the board and make the minutes available to the public one month after each meeting. In holding that publication of the minutes in the newspaper was not optional, the Arizona Supreme Court reasoned:

> Historically, this state has always favored open government and an informed citizenry. Until the current challenge to the statute anyone interested in learning about the business of county government could do so by reading the minutes of the board as published in a newspaper. The actions of the respondents would severely limit public access to information about the business of county government.

Public Records in Private Hands

It should come as no surprise that private entities generally seek to avoid giving state or local government possession, custody or control of their private records. They do so in order to avoid public disclosure. Welcome to the digital age! At least 16 states now define public records as including materials made or received during the course of public business, and 13 other states broadly define public records to include any materials used for public business, without reference to receipt of those materials.[33]

Florida's Public Records Act was recently construed to reach documents as "public records" even when they were never actually in the physical possession or custody of a government entity. In *National Collegiate Athletic Association v. Associated Press,* a Florida court applied the state public records law to NCAA documents that could be viewed only on the NCAA's private website. During the appeal from sanctions imposed by the NCAA's Committee on Infractions, Florida State University's outside counsel were given password-protected access to the NCAA's secure website, providing access to the transcript of an October 2008 hearing on honor code violations involving an FSU basketball player.

As part of its effort to protect confidential sources of information from public disclosure during the appeal process, the NCAA used a procedure that required the attorneys to sign a confidentiality agreement stating they would not copy of disclose any of the information or

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[32]Many states have statutes similar to Mississippi's relating to publication of proceedings. County Boards are required to either publish its proceedings each month in a newspaper published in the county under Miss. Code Ann. §19-3-33 (1972), or a synopsis of the proceedings in the form of an abstract or summary of the minutes, under the cumulative method authorized by Miss. Code Ann. §19-3-35 (Supp. 1980).

[33] *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1212-13 (Fla. Dist. Ct. App. 2009), cert. denied, 37 So. 3d 848 (Fla. 2010).

materials that were relevant to the appeal. The news media filed requests with FSU, its outside counsel and the NCAA for copies of all documents provided by the NCAA to FSU, including the documents posted on the NCAA's secure website. FSU and its attorneys asserted that they did not have custody of the documents and for that reason could not comply with the public records act request. The NCAA argued that the documents on its private website were not public records. The Florida Court of Appeals held that the documents on the NCAA's secure website were public records. In effect, private website documents were declared to be public records.

Read-Only Digital Document as Public Record

The implications of *NCAA v. AP* were recently analyzed in an excellent article written by Martha Harrell Chumbler, entitled "Public Records in Private Hands – National Collegiate Athletic Association v. Associated Press," 34 ABA State & Local Law News, No. 2 (Winter 2011). According to Chumbler, the decision did not create new precedent in holding that documents could be public records even if available to FSU or its agents only in electronic form. The decision does venture into new ground in extending the Florida Public Records Act to electronic documents that are accessible only to the government itself in a limited "read-only" format. The Florida Constitution insures the public's right of access to public records, providing in Fla. Const. art. I, §24(a) that "[e]very person has the right to inspect or copy any public record made or *received* in connection with the official business of any public body…." The Florida court broadly construed "received" with respect to electronic documents in a manner that, according to Chumbler, has the broadest possible impact. In a thorough analysis of the potential impact of this decision, Chumbler notes that with respect to the materials made available to FSU in a read-only fashion, FSU or its agents did not take possession of the documents. What the Florida court did was to render government custody unnecessary, and mere examination of the materials for a public purpose was sufficient to constitute receipt. This is "the first instance in which a government neither had a role in making the documents nor took physical custody of them - even through an agent. … The mere review of the posted materials by FSU's outside counsel for a purpose relating to official FSU business was deemed by the court to be synonymous with receipt. As a consequence, the materials fell within the definition of public records."

Access to Public Records and Information in Digital Format

Courts have now begun to acknowledge that there is little, if any, distinction between public information entered into a computer and similar information recorded in a traditional "hardcopy" format, as with written minutes of a board meeting.[34] The Tennessee Supreme Court

[34] See generally Access to Government In the Computer Age – An Examination of State Public Records Laws (Martha Harrell Chumbler, Editor, ABA Section of State & Local Government Law 2007). A recent example of private communications morphing into a public record flowed from a mayor's memo declaring that e-mails and other electronic communications were public records. The memo was deemed a valid policy, even though the memo was dated two years before Kwame Kilpatrick became Mayor of Detroit and long before his text messages became front page news and the subject of an indictment See generally http://www.scribd.com/doc/33472401/United-States-v-KWAME-M-KILPATRICK

put it this way in *The Tennessean v. Electric Power Board of Nashville*, 979 S.W. 297 (Tenn. 1998): "it makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record."

In *Seigle v. Barry*, 422 So. 2d 62 (Fla. Dist. Ct. App. 1982), the Florida court identified four circumstances that would justify a government body customizing data that it provides in response to a public records request:

First, available programs do not access all of the public records that have been stored in the computer's data banks or server.

Second, the information on the computer accessed by using available programs would include exempt information, necessitating a special program to delete such exempt items.

Third, the form in which the information is proffered does not fairly and meaningfully represent the records.

Fourth, the court determines that exceptional circumstances warrant this special remedy.[35]

Best Practices for Holding Public Meetings

Granicus, Inc., founded in 1999, promotes open government, public access, building innovative technology and government accountability. In its online White Paper: Transparency, accessible at http://www.granicus.com/Transparency/Transparency-White-Paper-3.aspx, Granicus notes that Roberts Rules of Order, parliamentary procedure, and other best practices for organizing and holding public meetings outdate our constitution. Granicus then identifies "best

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http://www.freep.com/apps/pbcs.dll/article?AID=/20080926/NEWS01/809260366/1003/NEWS;http://blog.lib.umn.edu/cla/discoveries/2009/10/detroit_newspapers_sue_for_rel.html; http://www.firstamendmentcenter.org/news.aspx?id=19958 ("When Detroit Mayor Kwame Kilpatrick began having an affair with his chief of staff, Christine Beatty, he probably never expected their explicit text messages to be published in the Detroit Free Press. The Free Press published some of those messages in January 2008, unfolding a scandal that has dominated Detroit headlines. Calls for Kilpatrick's resignation have accompanied 12 official charges against him and Beatty of perjury, obstruction of justice, misconduct and conspiracy, filed by Wayne County prosecutor Kym Worthy on March 24. The Kilpatrick story has brought to light a freedom-of-information issue courts have not had to address in the past. While government officials communicate electronically more frequently and through more media than ever before, e-mails, text messages, chat rooms, instant messages and video conferences all remain virtually unmentioned in FOI laws.") http://www.freep.com/apps/pbcs.dll/article?AID=/20080926/NEWS01/809260366/1003/NEWS

[35] See also *Office of Health Care Access v. Freedom of Information Commission*, 2005 W.L. 1096361 (Conn. Super. Ct. 2005)

practices online" for organizing and holding public meetings, practices that have been "established through nearly a decade of work with hundreds of government agencies to create unprecedented transparency at the state and local level."

The best practices online identified by Granicus include the following:

1. *Real Time* - All government proceedings, meetings and hearings should be available through a live webcast. The ability to see and hear these meetings in real time is essential.

2. *On Demand* - In order to improve convenience for citizens who cannot view meetings live, all proceedings should be archived within twelve hours of the conclusion of any meeting. In order to achieve a twelve-hour or shorter turn-around time, it is important to provide real time encoding in a streaming audio/video format with automated Web publishing. This automation not only decreases the turn-around time, it also decreases the manual costs related to managing the digital records.

3. *Integrated Public Records* - Because public meetings and government proceedings can be very lengthy, the usefulness of the content depends largely on the granularity and quality of the meta data. A best practice has been established for public meetings called an integrated public record, which is comprised of agendas, minutes, audio/video recordings, and any related digital documents all archived, cross-linked, and searchable by keyword.

4. *ADA Compliance and Closed Captioning* - Accessibility for all citizens is critical when considering government transparency. All audio/video content should be closed caption at 98% or greater accuracy level and all Web applications must meet ADA compliance standards. In addition, closed captioning should be utilized to allow transcript searches for all content mentioned in the meeting.

5. *Searchable* - All records should be as searchable as possible, including all of the metadata in the public record as well as meeting transcripts or closed captioning.

6. *Downloading and / or Syndication* - The ability for citizens to download and store any and all of the integrated public record elements and the ability to subscribe to these items through RSS feeds so they will be delivered to them automatically is easy to implement and critical in providing the best possible transparency services to the public.

7. *Sharing* - The ability for citizens to quickly and easily share elements of the integrated public record with others, including through their preferred social networks such as Facebook.

8. *Protected and Authenticated Records* - It is Important that government agencies publish and store their meeting records on their own websites in order to ensure a protected and authentic record. Sites like YouTube can be used as powerful secondary distribution option to reach greater audiences, but should not be the only location content is published. In addition, it is important that government agencies ensure that citizen participation data like polls are protected and not manipulated by special interests.

9. *Formats and Data Standards* - The government should be cautious when trying to dictate video formats because technology innovation moves more quickly than government legislation or mandates can be updated. For example, the webcasting standards for the State of New York Executive Order 3 lists Windows Media Player and Real Player• with no mention of Flash or other popular webcasting technologies. It is important, however, to set open data standards and requirements for widely used, non-proprietary formats.

10. *Free* - Unprecedented transparency is created by increasing convenience for citizens. Anytime those public records are only available through paid services, convenience and access are dramatically decreased.

Post-9/11 State Legislative Scrutiny of Freedom of Information and Sunshine Law

Following the September 11, 2001 terrorist attacks on America, many state legislatures placed freedom of information laws, sunshine laws and open records laws under scrutiny, motivated by concerns that terrorists could use even routine information to plan attacks or escape detection and capture. According to statistics provided by the National Conference of State Legislatures, a number of states enacted legislation that would withhold from public disclosure and declare confidential and exempt documents ranging from evacuation plans, emergency response plans, and security measures to emergency health procedures, disaster preparedness plans. Post 9/11 legislation addressing the issue of open records and implementing sweeping approaches to anti-terrorism measures necessarily comes into tension with public scrutiny of government and advocates of open-government, accessibility and transparency.

50-State Summary of Open Meetings Laws

The Citizen Media Law Project provides a convenient and informative summary of Open Meetings Laws in all 50 states, accessible at http://www.citmedialaw.org/legal-guide.
The Citizen Media Law Project's Legal Guide "is intended for use by citizen media creators with or without formal legal training, as well as others with an interest in these issues. You can search by keyword, browse by state, browse by section, or simply jump right in." This online resource contains supplemental authority and guidance from attorneys general and stakeholders, as well as detailed hyperlinked indices for the A through Z of open meetings laws.

Conclusion

Following the September 11, 2001 terrorist attacks on America, many state legislatures placed freedom of information laws, sunshine laws and open records laws under scrutiny, motivated by concerns that terrorists could use even routine information to plan attacks or escape detection and capture. According to statistics provided by the National Conference of State Legislatures, a number of states enacted legislation that would withhold from public disclosure and declare confidential and exempt documents ranging from evacuation plans, emergency response plans, and security measures to emergency health procedures, disaster preparedness plans. Post 9/11

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