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More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act

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# More Sunshine in the Mountain State: The 1999 Amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act

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I. INTRODUCTION

"Light is the only thing that can sweeten our political atmosphere [and] open to view the innermost chambers of government."\(^1\)

Laws requiring governmental bodies to open their doors to public scrutiny have been widely adopted in America.\(^2\) Governmental openness produces intelligent, well-informed citizens who are the foundation of representative democracy.\(^3\) A quarter-century ago, West Virginia embraced this ideal through enactment of the Open Governmental Proceedings Act (hereafter the "Open Meetings Act").\(^4\) In 1982, the Legislature extended its commitment to openness to publicly funded hospitals in West Virginia by passage of the Open Hospital Proceedings Act (hereafter the "Hospital Act").\(^5\) After several rounds of legislative fine-tuning since their initial enactment, both Acts were significantly amended during the 1999 session of the West Virginia Legislature.\(^6\)

State and local government in some form pervades the lives of all West Virginians, from infrastructure to schools to healthcare facilities. It is likely that every citizen in the state has a personal, vested interest in the proceedings of some governmental body. The Open Meetings Act and the Hospital Act ensure that the proceedings of many of these governmental bodies are held in the open, so that the citizens of West Virginia can be aware of the decisions affecting their lives. This article endeavors to assist public citizens, attorneys, members of governmental bodies and members of the press, to understand and to implement West Virginia’s open meetings laws.\(^7\) For that purpose, the article is divided into four substantive

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3. The idea that informed citizens sustain our American form of democratic self-governance can be traced to the Founding Fathers. In an 1822 letter to W.T. Barry, James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in THE COMPLETE MADISON 337 (Padover ed. 1953). In addition, Thomas Jefferson argued that public attendance at meetings would serve to limit government’s power because the public would facilitate dialogue and ensure the propriety of the actions taken. See Pupillo, supra note 2.
7. In this respect, the author urges members of governmental bodies to have an actual copy
sections. Part I is a discussion of the history and purpose of open meetings laws, nationally and in West Virginia, and includes judicial interpretations of West Virginia's statutes. Parts II and III are discussions of the major procedural requirements of the Open Meetings Act and Hospital Act, respectively. These two parts also detail the major changes made by the 1999 amendments. Part IV raises several concerns related to implementation of the 1999 amendments and suggests further legislative action to let the sun shine brighter on public proceedings in West Virginia.

II. HISTORY AND BACKGROUND OF THE WEST VIRGINIA SUNSHINE LAWS

A. The Development of Sunshine Laws

The public has no common law right to attend meetings of governmental bodies. For most of its long and rich history, England's Houses of Parliament conducted debate in secret. Similarly, much of the early colonial discourse in America took place behind closed doors, including the Continental Congress and the Constitutional Convention. In this vein, the Supreme Court of the United States has never held that the Constitution guarantees the public's right to attend meetings of governmental bodies. Therefore, the right of the public to attend a meeting of a governmental body can only be established through the legislative process.

During the middle of the twentieth century, members of the press became disgruntled with their exclusion from the substantive debate of many governmental bodies. In an effort to address their exclusion, the press lobbied heavily at the state
and federal level for admittance to governmental body meetings.\textsuperscript{13} In 1950, the Freedom of Information Committee and the American Society of Newspaper Editors began widespread attempts to open the doors of government meetings.\textsuperscript{14} In 1958, Alabama became the first state to formally adopt a legislative policy of open meetings.\textsuperscript{15} Since that time, all 50 states,\textsuperscript{16} the District of Columbia and the federal government\textsuperscript{17} have adopted some form of open meetings law,\textsuperscript{18} often called "sunshine laws."\textsuperscript{19}

The purpose of open meetings laws is to open governmental meetings to public scrutiny, to educate the citizens about government actions, to promote citizen involvement in public decisions, to promote public confidence in its government, to enable substantive public discussion on important issues, to promote more accurate reporting of meetings, and to decrease corruption in government.\textsuperscript{20} It has been argued that open meetings are also beneficial to government officials, because officials are better able to gauge public sentiment on issues, and because the public is made more aware of the difficulty of issues faced by public officials in deciding issues.\textsuperscript{21}

Nonetheless, some critics have pointed to disadvantages associated with

\textsuperscript{13} The media played the pivotal role in securing early advances in governmental openness. See Watkins, \textit{supra} note 10, at 272.

\textsuperscript{14} See \textit{id.} at 273.

\textsuperscript{15} ALA. CODE §§ 14-393, to -94 (1958).

\textsuperscript{16} See Davis et al., \textit{supra} note 12, at 42. All 50 states passed an open meetings law within an 18 year period. The last state to pass a sunshine law was New York in 1976. See Pupillo, \textit{supra} note 2, at 1165 n.1.

\textsuperscript{17} The federal "Government in the Sunshine" law was passed in 1976 and is now codified at 5 U.S.C. § 552b (1994 & Supp. 1995). The operative language in the federal sunshine law is that "every portion of every meeting of an agency [as defined in section 552(e) of Title 5] shall be open to public observation." \textit{Id.} § 552b(b).

\textsuperscript{18} Perhaps one factor that finally led to the passage of sunshine laws in all 50 states was the melee in Washington in the wake of the Watergate investigation. Voter participation in presidential elections steadily declined in four consecutive elections from 1964 to 1976. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1980 \textit{STATISTICAL ABSTRACT} OF THE UNITED STATES 496 (1980). With fallen voter turnouts, decreased public approval ratings, and a general distrust in politics, legislators around the country may have sought a way to restore the public's confidence in the American political system.

\textsuperscript{19} The term "sunshine laws" generally refers to open meetings laws and it probably arises from Justice Brandeis' oft-quoted statement that "[p]ublicity is justly commended as a remedy for social and industrial diseases" and that "[s]unlight is said to be the best of disinfectants." L. BRANDEIS, \textit{OTHER PEOPLE'S MONEY} 62 (1933) (as quoted in John J. Watkins, \textit{Open Meetings Under the Arkansas Freedom of Information Act}, 38 ARK. L. REV. 268 n.3 (1984)).

\textsuperscript{20} See generally, Davis et al., \textit{supra} note 12.

\textsuperscript{21} See Note, \textit{supra} note 8, at 1201. All of these advantages of open government are included in the new declaration of legislative policy in the 1999 Amendments to the West Virginia Open Governmental Proceedings Act. See W. VA. CODE § 6-9A-1 (1999).
conducting public business in the “sunshine.” For example, it has been argued that premature disclosure of bidding information places some governmental bodies at a competitive disadvantage with private sector entities. In addition, it has been asserted that public disclosure of personal matters unnecessarily leads to embarrassment of the people involved. Furthermore, it has been argued that government efficiency is compromised by delays and the effort required by proper compliance. However, when challenged, sunshine laws have generally withstood assertions of unconstitutionality because they were passed for the benefit of the public.

B. West Virginia Adopts a Sunshine Law

The West Virginia Legislature responded to the national trend seeking increased public awareness of and access to government action by enacting the Open Governmental Proceedings Act in 1975. The first section of the original Open Meetings Act sets forth the rationale for the legislative policy of governmental openness by proclaiming that the citizens of West Virginia “do not yield their sovereignty to the governmental agencies which serve them.” The Legislature also affirmed that citizens “do not give their public servants the right to decide what is good for them to know and what is not good for them to know.”

The movement toward openness in the original act was made evident by its pivotal mandate that “all meetings of any governing body shall be open to the public.” The original law contained nine specific exemptions from openness whereby a governmental body could meet and discuss matters of public competition or personal behaviors. These disadvantages are largely addressed by those sections of the West Virginia open meetings laws enabling closed sessions to discuss matters of public competition or personal behaviors. See, e.g., W. VA. CODE § 6-9A-4(a)(6), (9), (10) (1999); W. VA. CODE § 16-5G-4(7), (10) (1999); see discussion infra parts III-E and IV-E.


See id.


See id.

Id. § 6-9A-3.

See id. § 6-9A-4.
members present, a board could go into executive session for any reason so long as no official action was taken.\textsuperscript{32} In addition, the first open meetings law required governing bodies to produce written minutes of every meeting and make them generally available to the public.\textsuperscript{33} Actions taken by a public body in violation of the Act would not be invalidated, but the county circuit court had jurisdiction to enforce the Act by writ of mandamus or by injunction.\textsuperscript{34}

Conspicuously absent from the original law was any requirement that public notice be given in advance of a governmental body meeting. Furthermore, the penalties for noncompliance with the Act were limited and provided little deterrence for a public body that did not wish to comply with the Act.\textsuperscript{35} Though it provided an essential first step toward the legislative goal of public awareness and participation in the governing process, the original Open Governmental Proceedings Act was relatively weak and ineffective.\textsuperscript{36}

\section{C. Judicial Construction and Evolution of the Law}

The Supreme Court of Appeals of West Virginia first considered the Open Meetings Act in \textit{Appalachian Power Co. v. Public Service Commission.}\textsuperscript{37} Appalachian Power filed a schedule of increased electricity rates with the West Virginia Public Service Commission in 1977.\textsuperscript{38} When the Commission held hearings to allow comment on the increases that did not comply with the Open Meetings Act’s requirements for advance notice and preparation of minutes, Appalachian moved to suspend the hearings to determine whether the Act applied.\textsuperscript{39} While the Commission asserted that the Act did not apply to their hearings, Appalachian contended that all assemblies of the Commission must be open and, therefore, that the action taken by the Commission violated the Act.\textsuperscript{40}

\begin{itemize}
\item [\textsuperscript{32}] Rather, governing body members could discuss the details of a proposal confidentially and then return to the open forum to take a final vote on an issue. \textit{See id.} § 6-9A-4(b).
\item [\textsuperscript{33}] \textit{See W. VA. CODE} § 6-9A-5 (1975) (amended 1999).
\item [\textsuperscript{34}] \textit{See id.} § 6-9A-6.
\item [\textsuperscript{35}] An early commentator on the law considered the penalties in the original sunshine law to be relatively meaningless and of “limited utility.” \textit{ALFRED S. NEELY, ADMINISTRATIVE LAW IN WEST VIRGINIA} 594 (1982).
\item [\textsuperscript{36}] Professor Neely wrote an analysis of the early years of the West Virginia Open Governmental Proceedings Act. \textit{See id.} at 571. He opined that “the language of certain pivotal definitions remains susceptible to interpretations which drastically restrict its coverage.” \textit{Id.} at 575.
\item [\textsuperscript{37}] 253 S.E.2d 377 (W.Va. 1979).
\item [\textsuperscript{38}] \textit{See id.} at 379.
\item [\textsuperscript{39}] \textit{See id.}
\item [\textsuperscript{40}] \textit{See id.} at 379-80.
\end{itemize}
The circuit court found the Act applied to all Commission action and, as a consequence, all the hearings held about Appalachian's rate increases violated the Act. Upon appeal, the Supreme Court of Appeals first construed the definition of "meetings" under the Act to determine whether the Commission's hearings must comply with the Act. The court found that for there to be a meeting, under the Act, members of the governing body must be present and the meeting must involve the transaction of business. Given the various types of hearings convened by the Commission, the court held that the sunshine laws apply only to Public Service Commission hearings when convened and conducted by two or more commissioners. However, the Court also concluded that because the Commission's hearings are quasi-judicial proceedings that result in adjudications, they are specifically excluded from the statutory definition of meetings under the Open Meetings Act. As a result, the Act could not apply to the rate hearings in question.

Although the court's first interpretation of the Open Meetings Act clarified the definition of "meeting" to point out situations where the Act does not apply, the opinion nonetheless lauded the broad goals of openness underlying the legislative policy of the Open Meetings Act. However, the Court noted that "it is unfortunate that the actual words of the Act fail to properly implement this lofty policy." With reference to the court's definition of "meeting," one commentator has suggested that the Appalachian Power decision decreased the utility of the Act and reduced its lofty legislative goals to "empty rhetoric." After Appalachian Power, the Legislature made several changes to the Open Meetings Act that improved some definitions used to determine applicability, added a requirement for advance notice to the public, and increased penalties for noncompliance with the Act. However, the Act did not receive the attention of the

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41 However, upon granting the Commission's appeal, the Supreme Court stayed the order of the circuit court pending the resolution of the appeal. See id. at 379-80.

42 See Appalachian Power Co., 253 S.E.2d at 381.

43 See id. at 382. Because no quorum is required and because there is no requirement that members be convened, the court found that the definition of meeting does not include consultations with staff, deliberations or the process of making decisions. See id. at 383.

44 See id. at 383.

45 See id. at 383-85. The Court referred to the statutory definition of meeting in the Act, which excludes from coverage "any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding." Id. at 383 (quoting W. VA. CODE § 6-9A-2(4) (1975)).

46 See id. at 385.

47 Appalachian Power Co., 253 S.E.2d at 385 n.6.

48 See NEELY, supra note 35, at 574-75.

49 A series of amendments in 1978, 1979, and 1993 expanded a single enforcement provision (allowing only injunctive relief with no ability to invalidate actions) to more stringent provisions that provided for civil and criminal penalties. See Act of March 11, 1978, c. 85, 1978 W. Va. Acts 563; Act of
state's highest court until 1996, in McComas v. Board of Education.\textsuperscript{50}

In McComas, the Fayette County Board of Education was investigating the possible consolidation of Gauley Bridge High School and Valley High School.\textsuperscript{51} Ample notice was provided to the public of a meeting held in connection with the investigation, and the meeting was conducted in compliance with the Open Meetings Act.\textsuperscript{52} However, because of the large amount of written material received by the Board from the public attending the meeting, several of the Board members met with the county school Superintendent three days later to ask questions about the public's concerns.\textsuperscript{53} In response to this unannounced meeting, several community members asserted violations of the Act and filed a petition seeking a writ of mandamus for injunctive relief.\textsuperscript{54} The Board asserted that it was not a formal gathering, that there was no conspiracy to evade the public, and that no official action was taken.\textsuperscript{55} However, the circuit court found that the ad hoc meeting violated the Act and granted the writ of mandamus.\textsuperscript{56}

Upon review, the West Virginia Supreme Court of Appeals held that proof of intent to violate the Act was not required to establish a violation of the Act.\textsuperscript{57} Thus, a planned meeting among a quorum of the school board to “gather, review, or discuss information relevant to an issue before the board” and must comply with all the provisions of the Act, regardless of the intent of the school board members.\textsuperscript{58}

In reaching this holding, the court espoused an expansive reading of the “sunshine law” while, at the same time, acknowledging that not every chance encounter of government officials is governed by the Act.\textsuperscript{59} Focusing on the

\textsuperscript{50} 475 S.E.2d 280 (W. Va. 1996) (opinion by Justice Franklin Cleckley).

\textsuperscript{51} See id. at 283.

\textsuperscript{52} See id.

\textsuperscript{53} See id. at 284.

\textsuperscript{54} See id.

\textsuperscript{55} See McComas, 475 S.E.2d at 284.

\textsuperscript{56} See id.

\textsuperscript{57} Citing the absence of a statutory good faith defense and two categories of enforcement provisions based on the intent of the board or member, the Court stated that “focusing on the intent of governing body members would seem to be an empty undertaking.” See id. at 288.

\textsuperscript{58} See id. at 293.

\textsuperscript{59} See id. at 289-90. This balancing of the far-reaching goals of the Open Meetings Act and the realistic difficulties of compliance was addressed in the 1999 amendment to the legislative policy section of
legislative policy underlying the Act, the court suggested a "common sense approach" whereby any meeting in which there was deliberation toward a decision on a matter should be treated as a public matter.\(^{60}\) Consistent with this common sense approach, the court set forth the following suggestion for compliance with the Act: "When in doubt, the members of any board, agency, authority, or commission should follow the open-meeting policy of the State."\(^{61}\) However, in the conclusion, the *McComas* opinion confessed to the narrowness of the holding and to the multitude of remaining unanswered questions under the Act.\(^{62}\)

The third review of the state sunshine laws by the West Virginia Supreme Court of Appeals came in a 1999 case, *Peters v. County Commission of Wood County*.\(^{63}\) In *Peters*, two citizens claimed that three meetings of the county commission were closed in violation of the Open Meetings Act.\(^{64}\) The commission claimed that one of the meetings fell within a statutory exemption from the Act, and that the other two meetings were protected by the attorney-client privilege.\(^{65}\) The court addressed the issue of whether a public body could exclude the public from a meeting by invoking the attorney-client privilege.\(^{66}\)

In an opinion by Justice Workman, the court reversed the circuit court's grant of summary judgment for the county commission.\(^{67}\) In determining how the attorney-client privilege interfaces with the Open Meetings Act, the Court returned to the expansive reading of the Act's legislative policy and the "common sense approach" espoused by the Court in *McComas*.\(^ {68}\) After considering the deliberations of courts in several jurisdictions,\(^ {69}\) the court found that the attorney-client privilege exempts privileged communications from the Open Meetings Act, so long as narrowly construed to uphold the purpose of the Act,\(^ {70}\) and if in

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\(^{60}\) See *McComas*, 475 S.E.2d at 290.

\(^{61}\) *Id.* at 293 (quoting Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974)).

\(^{62}\) See *id.* at 298-99 (suggesting that these issues, mostly procedural flaws, can be avoided).

\(^{63}\) 519 S.E.2d 179 (W. Va. 1999).

\(^{64}\) *Id.* at 181.

\(^{65}\) *Id.*

\(^{66}\) *Id.* at 183-88.

\(^{67}\) *Id.* at 188.

\(^{68}\) *Peters*, 519 S.E.2d at 185 (quoting syllabus point four of *McComas v. Board of Educ.*, 197 W.Va. 188, 475 S.E.2d 280 (1996)).


\(^{70}\) *Peters*, 519 S.E.2d at 187.
compliance with certain requirements of the Act. Thus, although a narrow exemption for the attorney-client privilege exists, the court again ruled in favor of openness in its construction of the Open Meetings Act.

The state's highest court has reviewed the Open Meetings Act only three times in the Act's twenty-five year history. These three cases, especially McComas and to some degree Peters, suggest a trend toward an expectation of greater openness by public bodies. After McComas, many public bodies around the state, especially county boards of education, realized the importance of compliance with the law and the consequences of noncompliance. Regardless, several groups have sought legislative clarification of the specific requirements of the Act, leading to the most recent update of West Virginia's sunshine laws, the 1999 amendments to the Open Meetings Act.

III. REMAKING A LAW: THE 1999 AMENDMENTS TO THE OPEN GOVERNMENTAL PROCEEDINGS ACT

Attempts to amend the sunshine laws were defeated in the three consecutive years prior to the 1999 Legislative Session. Five members of the West Virginia House of Delegates proposed several changes to the existing Act in House Bill 2005 during the Regular Session of the 1999 Legislative Session.

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71 The court held executive sessions may only be closed to the public when the following conditions are met: "1) a majority affirmative vote from members of the governing body, present, as required by West Virginia Code § 6-9A-4, 2) the notice requirements as found in West Virginia Code § 6-9A-3 shall be followed and, 3) the written minutes requirements as found in West Virginia Code § 6-9A-5 shall be followed." See id. It should be noted that written minutes for executive sessions may no longer be required under the newest version of the Open Meetings Act. See W. Va. Code § 6-9A-5 (1999); See also discussion infra part III-D.

72 In its eighteen-year history, the Hospital Act has never been construed by the Supreme Court of Appeals of West Virginia.

73 Pat McGill, the registered lobbyist of the West Virginia Hospital Association, surmised that the momentum of the 1999 amendments to the Open Governmental Proceedings Act came primarily from the county boards of education. In the aftermath of McComas, there was a considerable number of questions as to what exactly was covered under the Act, whether committees of the boards were included, and to what extent school boards could be held accountable for slight infractions of the Act. Discussion with Pat McGill, registered lobbyist of the West Virginia Hospital Association (June 30, 1999).

74 See W. Va. Code §§ 6-9A-1 to -12 (1999). In the same bill, the Legislature also significantly amended the Hospital Act. See W. Va. Code §§ 16-5G-1 to -7 (1999); see also discussion infra part IV.

75 In the previous three sessions of the Legislature, bills amending the open meetings laws passed the House of Delegates but were rejected in Senate committees. See Brett Martel, Open Meetings Proposal Heads for Uncharted Waters, ASSOCIATED PRESS NEWSWIRES, Mar. 12, 1999, at 1.

After Governor Cecil Underwood vetoed the bill for technical reasons, the Legislature passed the revised version on March 21, 1999. With some reluctance, Governor Underwood eventually signed the bill on April 8, 1999, and it became effective on June 19, 1999.

During the deliberation of the 1999 amendments and after their enactment, some of the key players affected by the legislation expressed their viewpoints. Since the beginning, the media has been the driving force behind the nationwide development of open meetings laws. Likewise, the editorial boards of several West Virginia newspapers disapproved of the 1999 amendments to the state sunshine laws as being too easy to evade. However, the West Virginia Press Association, as well as the county boards of education and other state and county officials supported the changes.

A. Expanding the Purpose and Policy of the Law

Among the numerous changes to the Open Meetings Act in the 1999 amendments is a declaration of expanded legislative policy so as to more clearly delineate the goals and limits of West Virginia's sunshine law. Three new

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77 Apparently someone attached an earlier draft of the amendments to the bill that was filed with the Senate Clerk, causing the Legislature to vote on the wrong version of the bill. See Fanny Seller, Open Meetings Bill Must Be Vetoed: Approved Legislation Omitted Key Language, CHARLESTON GAZETTE, Mar. 19, 1999, at 1, available in 1999 WL 6717655.


79 Governor Cecil Underwood was somewhat reluctant to sign the Open Meetings bill as passed by the Legislature. He told members of the press that he favored public access to government, but that he had “some concerns about the way this bill redefines the meetings that governmental bodies hold as they conduct the public’s business.” Jennifer Bundy, Underwood Signs “Open Meetings” Bill With Hesitation, ASSOCIATED PRESS NEWSWIRES, April 9, 1999, at 1.

80 The bill was passed March 21, 1999 and became effective ninety days from passage, June 19, 1999. See W. VA. CODE § 6-9A-1 note (1999).

81 See Watkins, supra note 10, at 272; see also discussion supra part II-A.

82 See Allison Barker, Open Meetings, ASSOCIATED PRESS NEWSWIRES, July 9, 1999, at 2. Most notably, the Charleston Gazette and the Register-Herald of Beckley were skeptical about the potential for abuse in the new law. However, some newspapers supported the bill, such as the Clarksburg Exponent-Telegram. See Jennifer Bundy, Underwood Signs “Open Meetings” Bill With Hesitation, ASSOCIATED PRESS NEWSWIRES, April 9, 1999.

83 See Barker, supra note 82.

84 The second through fourth paragraphs were added in the 1999 amendments, and the section is reproduced here in full to emphasize the legislative policy of the sunshine laws and the purpose of this article: The Legislature hereby finds and declares that public agencies in this state exist for the singular purpose of representing citizens of this state in governmental affairs, and it is, therefore, in the best interests of the people of this state for the proceedings of public agencies to be conducted openly, with only a few clearly defined exceptions. The Legislature hereby further finds and declares that the citizens of this state do not yield their sovereignty to the governmental agencies that serve them. The people in delegating authority do not give their public servants the right to decide what is good for them to know and what is not good for them
paragraphs of text were added to the single paragraph in the old policy section. The two added paragraphs list the advantages of open government. The third additional paragraph alludes to a balancing test between openness and the impossibility of making every meeting, contact, or discussion available to the public. One can infer from the added text that in future controversies about the openness of a proceeding, the new section of legislative policy will be fruitful ground for argument.

The new legislative policy also suggests that governing bodies may satisfy the public’s interest in openness without sacrificing effectiveness or decisiveness. This position is reflected in the dramatically altered statutory definition of a meeting. Since the beginning, meetings covered under the Open Meetings Act to know. The people insist on remaining informed so that they may retain control over the instruments of government created by them.

Open government allows the public to educate itself about government decision-making through individuals’ attendance and participation at government functions, distribution of government information by the press or interested citizens, and public debate on issues deliberated within the government. Public access to information promotes attendance at meetings, improves planning of meetings, and encourages more thorough preparation and complete discussion of issues by participating officials. The government also benefits from openness because better preparation and public input allow government agencies to gauge public preferences accurately and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs. Accordingly, the benefits of openness inure to both the public affected by governmental decision-making and the decision makers themselves. The Legislature finds, however, that openness, public access to information, and a desire to improve the operation of government do not require nor permit every meeting to be a public meeting. The Legislature finds that it would be unrealistic, if not impossible, to carry on the business of government should every meeting, every contact and every discussion seeking advice and counsel in order to acquire the necessary information, data or intelligence needed by a governing body be required to be a public meeting. It is the intent of the Legislature to balance these interests in order to allow government to function and the public to participate in a meaningful manner in public agency decision-making.


See W. VA. CODE § 6-9A-1 (1999). Commentators have discussed these advantages for years. See, e.g., Note, supra note 8, at 1201; see also discussion supra part II-A.


For example, both sides of a dispute could fashion persuasive arguments supporting their position from the newly created balancing test in the statute’s legislative policy section. See W. VA. CODE § 6-9A-1 (1999).

Under the 1999 amendment, the definition of a meeting for the purposes of the Open Meetings Act was expanded to include the following:

(4) "Meeting" means the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means. The term meeting does not include:

Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding;
Any on-site inspection of any project or program;
Any political party caucus;
General discussions among members of a governing body on issues of interest to the
included all governing body gatherings for which a quorum is required to make an official decision. Three situations excluded by the Act were adjudicatory decisions made in quasi-judicial proceedings, on-site inspections, and political party caucuses. However, the 1999 amendment added some widely debated language that created a much broader exception to the definition of “meeting.” The new law excludes from coverage discussions of public business when held in either planned or unplanned social, educational, informal or ceremonial settings, even if a quorum is present. The key limitation is that there must be “no intention for the discussion to lead to an official action.”

The new language has been criticized as both difficult to interpret and to apply, as well as for its potential for abuse. It is indeed likely that the mental component of the amended Act will prove difficult to apply as claimed violations are adjudicated because it requires an inquiry into the board members’ intentions.

Another type of meeting excluded from the Act is when a public body meets in private to discuss “logistical and procedural methods to schedule and regulate a meeting.” This exclusion has been criticized as providing board members with the opportunity to discuss in advance who will be permitted to address the board at the next meeting. These new provisions may have created loopholes that can only be tested over time. Perhaps, however, the changes were the necessary compromise that enabled passage of the whole bundle of reforms.

public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed but there is no intention for the discussion to lead to an official action; or
Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.


See id.


See id.

Id.

Governor Cecil Underwood hesitated to sign the bill into law primarily because of this provision. He stated to a member of the press, “I do have some concerns about the way this bill redefines the meetings that governmental bodies hold as they conduct the public’s business.” Bundy, supra note 79. The Charleston Gazette editors were concerned that the narrow definition of “meeting” in the new law will “potentially allow[] important public business to be discussed in private.” Editorial, CHARLESTON GAZETTE, May 5, 1999, at 1.

See discussion infra part V-A.


after its tortured history of defeat. Regardless, all governing bodies subject to the Open Meetings Act should revise and update their rules or bylaws to comply with the changes to the Act.

B. Providing Adequate Public Notice of Meetings

The Open Meetings Act requires that the public be given advance notice of all meetings to be held by public agencies, except in the case of emergency gatherings. The 1999 amendment also requires governing bodies to “promulgate rules by which the date, time, place and agenda” of all regular meetings shall be provided in advance to the public and media, whereas the previous law did not require notice of the agenda. For special meetings, the “date, time, place and purpose” of the meeting must be announced. The statute does not differentiate between agenda and purpose, nor does it specify the requirements necessary to satisfy the mandate. The statute also fails to provide a vehicle by which the requisite information is made “available, . . . , to the public.”

As with the old law, the majority of governing bodies need not satisfy any specified time frame in order to meet the requirement of public notice under the

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99 One newspaper expressed its frustration at enduring “ten years of fits and starts and defeats and delays” in trying to revise the West Virginia sunshine laws. Editorial, DOMINION POST, Aug. 6, 1999. The bills to amend the open meetings law were defeated in the three years prior to the passage of the 1999 amendments. See Martel, supra note 75.

100 In addition, governing bodies are urged to have a copy of the Open Meetings Act at all official meetings to ensure compliance in the event questions arise.


102 Id. (emphasis added). In addition, the Attorney General of West Virginia has decided that any rule promulgated by a state agency must be in compliance with the State Administrative Procedures Act. It must also be filed in the state register pursuant to section 29A-3-7, and under section 29A-3-11, it becomes effective 30 days after filing in the register. See 58 W. Va. Op. Att’y Gen. 33 (Nov. 20, 1978). Each governing body covered under the West Virginia sunshine laws should ensure that its rules or bylaws comply with the new mandate that the agenda of regular meetings be included in the advance notice.


104 Id. (emphasis added). The statute or case law does not define “special meeting,” but it can be inferred from the context that a special meeting is a non-emergent meeting other than a regularly scheduled meeting called for a special purpose or to discuss a special topic. See id.

105 W. VA. CODE § 6-9A-3 (1999). In its first official opinion on the West Virginia sunshine laws, the Attorney General’s office answered the question of availability of notice posed by the Mason County Commission. By construing language that is identical to the amended statute section, the Attorney General stated that posting notice “at the courthouse door a reasonable time prior to the meeting” satisfies the law. See 57 W. Va. Op. Att’y Gen. 238, at 2 (June 23, 1978). To maximize uniformity and accessibility, the Attorney General’s office has suggested the office of the Secretary of State as the most appropriate place to file proper notice of meetings of entities covered by the Open Meetings Act. See 58 W. Va. Op. Att’y Gen. 33, at 2 (Nov. 20, 1978). In subsequent amendments, the Open Meetings Act required placement of advance notice in the state register. See W. VA. CODE § 6-9A-3 (1987) (amended 1999).
MORE SUNSHINE IN THE MOUNTAIN STATE

Open Meetings Act. However, governing bodies within the executive branch of the state must file the date, time, place and purpose of its meetings with the secretary of state far enough in advance to allow publication in the state register at least five days prior to the meeting. The statute does not indicate why executive branch governing bodies must publish the purpose of meetings, whereas governing bodies of other agencies need only make the agenda available to the public.

C. Conduct of Meetings

The overarching theme of the West Virginia sunshine laws is embodied in a single phrase in section three of the Open Meetings Act: “all meetings of any governing body shall be open to the public.” This one phrase encapsulates the rich history of the sunshine laws and the declaration of legislative policy of the Open Meetings Act. There are, however, numerous issues and requirements stemming from that simple directive. In this regard, the 1999 Amendments have added some new material to help determine the proper conduct of meetings.

For example, under a new provision, members of a public agency may not deliberate, vote, or take official action by a furtive reference to a letter, number or other secret method such that citizens would not understand the reference. However, governing bodies may use this method if the meeting agenda provided is...

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106 The second paragraph of this section refers to governing bodies generally without a timing requirement. Only in the third paragraph, specifically relating to the executive branch, is a specific time period required. See W. VA. CODE § 6-9A-3 (1999). In an opinion to Governor Rockefeller, the Attorney General’s Office suggested that “notice be given as soon as practicable in each case.” 58 W. Va. Op. Att’y Gen. 33, at 2 (Nov. 20, 1978).

107 See W. VA. CODE § 6-9A-3 (1999). There are four ways to notify the Secretary of State’s office and, thereby, comply with this requirement. The notice may be hand-delivered or mailed to the Secretary of State’s office at the Capitol Complex in Charleston. Notices also may be sent to the office by facsimile or by electronic mail. The fax number is (304) 558-0900 and the e-mail address of the person responsible for meeting notices is jcooper@secretary.state.wv.us. The notice should contain all the information required by the statute and, for ease of inclusion, can be written in the same format (i.e. date, time, place and agenda for regular meetings). Because the state register is generally published each Friday of the year (except when official holidays interfere), all meetings scheduled on Wednesday or later in a week should have a notice included in the register by the previous Friday to comply with the five-day notice requirement. For meetings scheduled before Wednesday in a given week, the notice should be submitted to the Secretary of State for publishing two Fridays ahead. The deadline for inclusion in a given week’s Friday register is by 4:30 P.M. on Wednesday of the week in which it is published. Call or write the Secretary of State’s office to receive a copy of the publication dates for the state register and the deadlines for submission. The phone number of the office is (304) 558-6000.


109 In addition to substantive changes to existing sections, five new sections have been added to the Open Meetings Act, including two that specifically relate to the conduct of meetings. See id. §§ 6-9A-8 to – 9.

110 For example, the presiding officer may not simply say, “Now we will take the vote of the board on Resolution 3-A,” if there is no way that the public citizens in attendance would reasonably know the substance of Resolution 3-A from the reference. See id. § 6-9A-8.
as required by section 6-9A-3,111 clearly stated and available for public inspection at the meeting.112 After such deliberation, the agency must make its final determination with full disclosure; it cannot vote by secret or written ballot.113

The new Open Meetings Act entitles radio and television stations to broadcast any meeting that is required to be open, with some reasonable restrictions about the placement and use of the equipment to avoid undue interference with the meeting.114 If a meeting is overcrowded, the agency may require the pooling of broadcasting equipment and personnel to accommodate the conduct of the meeting.115 The combination of media access provisions and prohibition against secretive voting methods contained within the amended Open Meetings Act, effectuates the legislative policy of the sunshine laws by ensuring both public access to meetings of a governing body, and citizen awareness of the substance of the body’s discussion and decision-making.

Although additions, such as those mentioned above, were made to the Open Meetings Act, some pertinent procedural rules about the conduct of meetings were retained from the original Act. For example, a governing body may create rules about attendance and presentation at overcrowded meetings, but cannot require persons desiring to address the body to register more than fifteen minutes before the scheduled start time of the meeting.116 Also, the governing body may remove a disruptive attendee to ensure orderly conduct of the meeting.117

D. Recording the Minutes of Meetings

Governing bodies must prepare written minutes for all meetings and make them available to the public within a reasonable time.118 The Open Meetings Act requires that specific information be contained within the minutes to be adequate; the date, time and place of the meeting and the name of each member of the governing body present and absent must be recorded.119 In addition, the minutes

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111 The governing body must now provide the date, time, place and agenda of any regular meeting to the public in advance. See id. § 6-9A-3 (Supp. 1999); discussion, supra part III-B.

112 See W. VA. CODE § 6-9A-8(a) (Supp. 1999).

113 See id. § 6-9A-8(b).

114 See id. § 6-9A-9.

115 See id.


117 See id.

118 See id. § 6-9A-5. No specific time frame is given in the statute, but it may be prudent to apply the same standard the Attorney General devised for advance notice of meetings. In an early advisory opinion, the Attorney General suggested that “notice be given as soon as practicable in each case.” 58 W. Va. Op. Atty. Gen. 33, 34 (1978).

must contain all motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the member who proposed it, and its disposition.\textsuperscript{120} Finally, the results of all votes must be recorded in the minutes.\textsuperscript{121}

The most significant changes to the section on meeting minutes in the 1999 amendments concern the recording of minutes of executive sessions. Previously, this subsection implied that minutes of executive sessions were required, though limited to material not protected from disclosure.\textsuperscript{122} The statute as amended carves out an exception for executive sessions so that minutes, "if any are taken," need not be made available.\textsuperscript{123} This suggests that minutes of executive sessions not only are protected from public scrutiny, but also that no written record of the closed proceedings need be made at all.

\section*{E. Holding Executive Sessions Behind Closed Doors}

Every state's open meetings law provides for certain circumstances under which public bodies may meet in closed sessions.\textsuperscript{124} In addition, the federal "Government in the Sunshine Act" contains several exemptions from the Act for certain qualifying executive sessions.\textsuperscript{125} Similarly, the West Virginia statute governing executive sessions allows a public body to protect certain people and information while at the same time maximizing the legislative purpose of the sunshine law to keep the doors of public discourse as wide open as possible.

The West Virginia Open Meetings Act defines an executive session as "any meeting or part of a meeting of a governing body which is closed to the public."\textsuperscript{126} The section of the Act listing acceptable reasons to enter executive session, last amended in 1978,\textsuperscript{127} establishes twelve situations that justify an

\begin{enumerate}
\item See id. § 6-9A-5(3).
\item See id. § 6-9A-5(4).
\item See W. VA. CODE § 6-9A-5 (1993) (amended 1999). Until the 1999 amendment, this section contained the following language: "Minutes of executive sessions may be limited to material the disclosure of which is not inconsistent with the provisions of section four [§ 6-9A-4] of this article." Id. The new language lifts that requirement.
\item See id. § 6-9A-5 (Supp. 1999).
\item See Pupillo, \textit{supra} note 2, at 1172.
\item See 5 U.S.C. § 552b(c) (1994 & Supp. 1999). At the federal level, courts have held that closed sessions are prohibited unless specifically permitted by a provision in the federal open meetings law, that courts should construe the applicability of executive sessions narrowly, and that there is a general presumption that agency meetings should be open. For a discussion of federal court interpretations of ten exemptions for closing a meeting under the federal Government in the Sunshine Act, see Eunice A. Eichelberger, Annotation, \textit{Construction and Application of Exemptions, Under 5 USCS § 552b(c), to Open Meeting Requirement of Sunshine Act} (pt. 2), 82 A.L.R. FED. 465, part II (1997).
\item See W. VA. CODE § 6-9A-2 (Supp. 1999).
\end{enumerate}
executive session. However, no official decisions may be made during an executive session. Furthermore, to convene an executive session, a public body must satisfy the requirements of the Open Meetings Act in two respects. First, during the public portion of a meeting, the presiding officer of the body must identify the provision of the Open Meetings Act that authorizes an executive session. Second, a majority affirmative vote of the members present is required to hold an executive session. The requirement of a majority vote is a relatively low threshold that could be satisfied by only 26% of the total number of members on the public body. By contrast, some states require a majority vote of the entire public body in order to hold a closed meeting.

The Open Meetings Act lists several reasons to enter executive session for deliberation, including individual personnel matters, licensing issues, situations affecting individual privacy, security issues, and matters of public competition. The Act recognizes that these are limited situations in which the clear need for open public debate must be balanced with the strategic importance of keeping sensitive categories of information confidential. For example, because safety issues are always in the public interest, all matters of security, law enforcement, and crime prevention may be conducted in a closed session. The first reason given in the statute for allowing a body to enter executive session is "[t]o consider acts of war, 

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129 See id. § 6-9A-4(a). The Act defines a decision as "any determination, action, vote or final disposition of a motion, proposal, resolution, order, ordinance or measure on which a vote of the governing body is required at any meeting at which a quorum is present." Id. § 6-9A-2(1). After the closed session, the governing body should reconvene an open meeting and vote on the official action.
130 See W. VA. CODE § 6-9A-4(a).
131 See id. Though not specifically required by the statute, the presiding officer should have a copy of the law and state the specific subsection under which the executive session is to be convened. In order to avoid confusion and to have a record if problems arise, the author suggests that the minutes of the open meeting also reflect the specific reason that the body went into closed session.
132 See W. VA. CODE § 6-9A-4(b) (Supp. 1999).
133 The vote could be as small as 26% if only enough members to constitute a quorum attend the meeting (51%), and if only a simple majority of those present (51%) vote in the affirmative to enter executive session on a certain issue - 51% of 51% equals 26%.
135 See W. VA. CODE § 6-9A-4(b) (Supp. 1999).
136 The legislative policy section of the Open Meetings Act refers to "a few clearly defined exceptions" rendering open proceedings not in the best interests of the people of the state. Id. § 6-9A-1 (1999).
threatened attack from a foreign power, civil insurrection or riot.\(^{138}\)

Among the commonly invoked exceptions, a public body may enter executive session to consider the appointment, employment, demotion, disciplining, discharge, dismissal or compensation of a current or prospective public officer or employee.\(^{139}\) Under the former Act, if an affected employee did not request an open meeting, a governmental body was permitted to conduct the hearing of a complaint in closed session.\(^{140}\) This language was retained in the amended Act, but the Legislature did clarify this section in the 1999 Amendments so as to include an express statement that final action on a personnel matter must be taken by the public agency in an open meeting.\(^{141}\) Also, the statute now mandates that "[g]eneral personnel policy issues may not be discussed or considered in a closed meeting."\(^{142}\) This restrictive language suggests that general personnel policy discussion is not a valid reason to enter an executive session, nor is it a permissible topic of discussion while the body is in closed session for any other reason.

In addition to specific personnel policies, a meeting may be closed to protect matters affecting an individual’s right to privacy, unless the person affected by the discussion requests an open meeting.\(^{143}\) For example, the issuance and revocation of licensure, and the physical and mental health of a person may be kept out of the public’s hearing.\(^{144}\) If the discussion of any records, data, or personal materials concerning a person served by an agency or program would amount to an "unwarranted invasion" of that person’s privacy, including the person’s “personal and family circumstances,” the meeting may be closed.\(^{145}\) This more limited approach replaced the previous exception for matters that "would be likely to affect adversely the reputation of any person."\(^{146}\) This change should lead to a greater amount of open debate while maintaining the privacy of public personnel when discussing sensitive topics.

A public body may convene an executive session to consider matters involving public or commercial competition, such as the sale or lease of property, construction planning, and the investment of public funds.\(^{147}\) If this information

\(^{138}\) Id. § 6-9A-4(b)(1).

\(^{139}\) See id. § 6-9A-4(b)(2)(A).

\(^{140}\) See id. § 6-9A-4(b)(2)(B).

\(^{141}\) See id.


\(^{143}\) See id. § 6-9A-4(b)(4)-(6).

\(^{144}\) See id.

\(^{145}\) Id. § 6-9A-4(b)(6).


\(^{147}\) See id. § 6-9A-4(b)(9) (Supp. 1999).
were made public, the financial interest of the public might be adversely affected and the state could be stripped of its competitive edge in a bidding process or investment vehicle. A new limitation on this exception in the 1999 Amendments to the Open Meetings Act requires that information considered in the executive session be disclosed to the public once the commercial transaction has been completed, unless otherwise protected by the Freedom of Information Act.\footnote{See id. § 6-9A-4(b)(9). The West Virginia Freedom of Information Act is codified at W. VA. CODE § 29B-1-1 to -7 (1998).}

Similarly, the Legislature created a new exception that allows for an executive session to discuss a matter that is otherwise legally authorized to remain confidential, such as by statute or court order.\footnote{See W. VA. CODE § 6-9A-4(b)(12) (Supp. 1999).} In addition, the public body may convene to discuss any matter that is not considered a public record within the meaning of the West Virginia Freedom of Information Act.\footnote{See id. Under the Freedom of Information Act, a “public record” is defined as “any writing containing information relating to the conduct of the public’s business, prepared, owned and retained by a public body.” Id. § 29B-1-2(4) (1998).} A public body may also avoid premature disclosure of honorary degrees, scholarships, or awards by discussing these in closed session.\footnote{See W. VA. CODE § 6-9A-4(b)(10) (1999). This would also have a similar but slightly less crucial effect than the provision allowing a governing body to convene an executive session to discuss matters of public competition. See id. § 6-9A-4(b)(9).}

In another addition to the statute, if an agency has approved or considered a settlement in closed session, and the terms of the settlement allow disclosure, the terms of the settlement must be entered into the agency’s minutes within a reasonable time after the settlement is concluded.\footnote{See id. § 6-9A-4(b)(11).} This language lends itself to considerable bargaining over whether terms that “allow disclosure”\footnote{Id.} will be included, and it may induce creative drafting of settlements that specifically address this issue.

An agency attorney’s participation, by itself, does not justify a closed session.\footnote{See id. § 6-9A-4(b)(11). This new provision uses decidedly different terms than the new provision in the Hospital Act which enables an executive session “[t]o consider the work product of the hospital’s attorney or the hospital administration.” See id. § 16-5G-4(b)(5); see also discussion infra part IV-E.} This suggests that a clear rationale for the invocation of the attorney-client privilege must exist to convene an executive session.\footnote{Id.} However, regardless

\footnote{For an informative discussion of the requirements for invoking the attorney-client privilege under open meetings laws, refer to the opinion of Justice Workman in Peters. The opinion refers to the new language of the 1999 amendments to the Open Meetings Act. See Peters v. County Comm’n, 519 S.E.2d 179, 185 (W. Va. 1999).}
of an attorney's participation, meetings conducted "for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding" are not required to be open under the Open Meetings Act.\(^{156}\)

Because "no decision may be made" during an executive session,\(^{157}\) the justifications for going into closed session generally begin with the language "to consider," "to discuss," or "to plan."\(^{158}\) However, the Act does include one exception that allows a governing body, in executive session, "to decide upon disciplining, suspension, or expulsion of any student in any public school or public college or university, unless the student requests an open meeting."\(^{159}\) Although an affected student has the option to hold the meeting in public,\(^{160}\) this appears to either override or contradict the clear mandate that no decisions take place in closed sessions.\(^{161}\) The parallel section of the Act dealing with public officers and employees permits the body "to consider" matters about the officer or employee and to conduct a hearing on a complaint in executive session, unless the officer or employee requests an open meeting.\(^{162}\)

Although the 1999 amendments to the Open Meetings Act added several new reasons for a governing body to enter an executive session, it limited the scope of several existing exemptions. Hopefully, this will enable governing bodies covered by the Act to understand and implement the new changes and to carry out the legislative policy of the sunshine laws.

F. Violations and Penalties

As a means toward full effectuation of the legislative purpose, the Open Meetings Act provides for punitive measures to encourage compliance with its provisions. Both civil and criminal penalties can result from violations of the Open Meetings Act.\(^{163}\) To report a suspected violation of the Act, any West Virginia citizen may bring a civil action in the circuit court of the county where the public agency regularly meets.\(^{164}\) The action must be brought within 120 days after the

\(^{156}\) W. VA. CODE § 6-9A-2(4)(A) (1999). The term "meeting" as defined by the statute does not include these proceedings. See id.

\(^{157}\) Id. § 6-9A-4(a).

\(^{158}\) See id. § 6-9A-4(b).

\(^{159}\) Id. § 6-9A-4(b)(3) (emphasis added).

\(^{160}\) See id. § 6-9A-4(b)(3).

\(^{161}\) See W. VA. CODE § 6-9A-4(a) (1999).

\(^{162}\) See id. § 6-9A-4(b)(2)(A), (B).

\(^{163}\) See id. § 6-9A-6, 7.

\(^{164}\) See W. VA. CODE § 6-9A-6 (1999).
purported violative conduct took place or the decision complained of was made.\textsuperscript{165}

The primary vehicle for court intervention is an injunction against the public agency. The court may compel compliance, enjoin noncompliance, annul decisions made in violation of the Open Meetings Act, and order that subsequent actions be taken in accordance with the Act.\textsuperscript{166} Any court order to this effect must include findings of fact and conclusions of law, and be recorded in the minutes of the governing body.\textsuperscript{167} The Act specifically grants the circuit court the power to invalidate any action taken at a meeting for which advance notice of a meeting was not given to the public in compliance with the requirements of the Act.\textsuperscript{168}

The 1999 Amendments make clear the Legislature’s intolerance of intentional violations of the Open Meetings Act. In addition to other infractions, the law now states that “it is a violation of this act for a governing body to hold a private meeting with the intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.”\textsuperscript{169} This eliminates the possibility of conspiratorial efforts to avoid public scrutiny. If a public body is found to have violated the Act, in addition to the judicial sanctions set forth above, a court may order payment of the complainant’s attorney fees and expenses.\textsuperscript{170}

Criminal penalties are also available for individual intentional violations of the Open Meetings Act. Members of a governing body who “willfully and knowingly violate” the Act are guilty of a misdemeanor and may be fined up to five hundred dollars.\textsuperscript{171} Second and subsequent offenses also constitute a misdemeanor and, if convicted, the member may be fined between one hundred and one thousand dollars.\textsuperscript{172} The 1999 amendments to the Open Meetings Act doubled the maximum fine but removed the prospect of up to ten days of imprisonment for intentional violations of the Act.\textsuperscript{173}

To maintain some checks and balances in the system, a court may also take measures against a complainant. If a person files a civil action seeking an injunction against a public agency, and the petition appears to be without merit or made with the sole intent of harassing or delaying the public body, the court may

\textsuperscript{165} See id.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id. 6-9A-3.
\textsuperscript{169} W. VA. CODE § 6-9A-6 (1999).
\textsuperscript{170} See id. § 6-9A-7(b).
\textsuperscript{171} See id. § 6-9A-7(a).
\textsuperscript{172} See id.
require bond at the time of filing.\textsuperscript{174} If the court then finds that the action was frivolous, was intended to harass the governing body or was meant to delay its meetings or decisions in bad faith, the court may award attorney fees and expenses to the governing body against the complainant.\textsuperscript{175}

Some commentators have suggested that stiffer penalties, including writs of mandamus and removal from office, are necessary to overcome the natural tendency of some public officials to conduct business in secret.\textsuperscript{176} They contend that state sunshine laws should minimize judicial discretion to levy penalties, and that enforcement provisions should require automatic invalidation of decisions at noncompliant meetings and automatic criminal or civil penalties for repeat violations.\textsuperscript{177} However, perhaps this alleged tendency toward secrecy is overstated. Many members of public bodies subject to the Open Meetings Act are private citizens who donate their time and expertise to serve the public. They may simply be accustomed to the business practices of the private sector and may unintentionally breach a provision of the Act.\textsuperscript{178}

Although the amended Act does not provide for incarceration of intentional violators or removal from office, the Act does provide a range of punitive measures including the invalidation of decisions made by non-compliant means. Therefore, the county circuit courts have the discretion to penalize intentional violators more harshly, while still discouraging and correcting the actions of unintentional violators. This distinction between intentional and unintentional violations in the amended law should help to minimize violations, encourage compliance with the Act, and ensure openness in public discourse, without discouraging civic minded individuals from full participation as members of public bodies out of fear of liability.

**G. A New Solution: The Committee on Open Governmental Meetings**

In the 1999 amendments to the Open Meetings Act, the Legislature adopted a novel approach to minimize the need for policing and enforcing the open

\textsuperscript{174} See id. § 6-9A-6.

\textsuperscript{175} See id. § 6-9A-7.

\textsuperscript{176} One article suggests that public officials naturally prefer secrecy over “sunshine” and are only apt to comply with the Act if the threat of enforcement exists. Therefore, stiffer penalties must be levied to encourage the preferred behavior. See, e.g. Davis et al., supra note 12, at 44.

\textsuperscript{177} See id. at 59.

\textsuperscript{178} This is one reason why new members of governing bodies should become familiar with the existence and requirements of West Virginia’s sunshine laws. The new statutorily required informational packet to be compiled and disseminated by the office of the Attorney General has great potential to serve this function and to reduce the number of unintentional violations of the sunshine laws. See W. VA. CODE § 6-9A-12 (1999); see also discussion infra part III-G.
meetings law. The new law creates a mechanism to educate members of public governing bodies about the sunshine laws and to render guidance on questions as they arise to avoid violations and subsequent penalties.

The amended statute requires the Attorney General to compile the statutory and case law pertaining to the Open Meetings Act, as well as to prepare appropriate summaries and interpretations of the Act. The Attorney General and other designated representatives must disseminate the material to all elected and appointed officials in the state within thirty days of the start of their term of office. This is done expressly "for the purpose of informing all public officials" of the requirements of the Act.

If questions arise as to the proper application or enforcement of the open meetings law, members of public governing bodies may seek assistance from a new advisory entity, the Committee on Open Governmental Meetings. The Committee is comprised of three members appointed from among the membership of the West Virginia Ethics Commission, with the chairperson of the new Committee selected by the chair of the Ethics Commission.

Any member of a governing body, or the body as a whole, has two methods available to seek advice from the new Committee. A question may be presented to the executive director of the West Virginia Ethics Commission, who may then render oral advice and information. Alternatively, the governing body or any member thereof may request, in writing, an advisory opinion from the newly created Committee on Open Governmental Meetings as to "whether an action or proposed action violates" a provision of the Open Meetings Act. The Committee must respond in writing to the request or question, and may take appropriate measures to protect information shielded by any of the exceptions to the open meetings laws until the Committee’s decision is rendered.

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179 See id. § 6-9A-10, 11.
180 See id. § 6-9A-12.
181 See id.
182 See id.
184 See id. § 6-9A-10.
185 See id.
186 See id. § 6-9A-11(a).
187 Id.
189 See id. § 6-9A-11(c).
Advisory opinions must be issued within thirty days of the request, and are binding on the parties requesting the opinion. However, advisory opinions are not strictly informative; they also provide a level of protection to the party seeking the opinion. If the party seeking the opinion acts in good faith reliance on the opinion, the party is then granted an absolute defense to any civil action or criminal prosecution for the action taken. There is, however, no grant of immunity if the party seeking the opinion willfully and intentionally misinformed the Committee on Open Governmental Meetings as to the facts.

From its infancy, the Committee has been inundated with requests from public governing bodies seeking answers to probing questions and concerns. This guiding mechanism created by the Legislature may make public officials more aware of the legislative policy and the importance of openness. In addition, it may help them plan and conduct meetings more efficiently.

IV. 1999 AMENDMENTS TO THE OPEN HOSPITAL PROCEEDINGS ACT

A. Enactment of a Separate Hospital Act

In 1982, the West Virginia Legislature adopted a short, two-section act known as the West Virginia Open Hospital Proceedings Act. After an introductory declaration of legislative policy, the original Hospital Act merely stated that public nonprofit hospital boards were subject to the same requirements as other governing bodies covered by the Open Meetings Act. This deference to

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190 See id. § 6-9A-10.
191 See id. § 6-9A-11(a).
193 See id.
194 See id.
195 The committee had a full agenda for its first meeting on July 8, 1999, including a request for clarification as to whether advisory councils and institutional advisory boards of colleges and universities are subject to the sunshine laws. See Phil Kabler, Busy from Day One: Open-meetings Panel has Full Slate for its First Day, CHARLESTON GAZETTE, July 7, 1999, at 1C.
197 See W. VA. CODE § 16-5G-1, 2 (1982) (amended 1999). The full text of section two as it existed before the 1999 amendments is as follows:

Every board of directors or other governing body of any hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit shall be open to the public in the same manner and to the same extent as required of public bodies in article nine-A, chapter six of this Code.
the Open Meetings Act was radically changed by the 1999 amendments to the Hospital Act. 198

The thrust of the declaration of legislative policy of the Hospital Act is that the citizens of West Virginia depend on publicly funded hospitals for their health and well-being, and they therefore have a vested interest in decisions made by the governing bodies that affect health services. 199 Hospitals are defined by the Act to include "any hospital owned or operated by a nonprofit corporation, nonprofit association or local governmental unit." 200 Because nonprofit hospitals are supported "through tax exemptions, public funding and other means," opening the doors of their decision-making process is in the best interest of the people of West Virginia. 201

Although the Legislature appreciably expanded the declaration of legislative policy in the 1999 amendments to the Open Meetings Act, 202 no changes were made to the original statement of legislative policy pertaining to the Hospital Act. 203 Nonetheless, public policy notwithstanding, every section of the new Hospital Act has been either rewritten or newly created to effectively sever the previously parallel relationship between the Hospital Act and Open Meetings Act. 204 In many respects, however, the 1999 Amendments to the Hospital Act simply adopt elements of the Open Meetings Act as it was before the recent amendments. In the following sections, the requirements of the Hospital Act will be compared and contrasted with the Open Meetings Act to understand the two standards that now exist for open meetings in West Virginia. Hospital governing boards subject to the Hospital Act should revise and update their bylaws and rules to ensure compliance with the new version of the Act. 205

Some states have also adopted separate sunshine laws for hospitals and governmental entities. 206 However, other states do not require hospitals to comply

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198 See id. § 16-5G-1 to -7 (1999).
199 See id. § 16-5G-1 (1982).
200 Id. § 16-5G-2(4) (1999).
201 Id. § 16-5G-1 (1982).
203 See id. § 16-5G-1(1982).
204 See id. § 16-5G-2 to -7 (1999).
205 Hospital governing boards are encouraged to have a copy of the Hospital Act at all meetings to ensure proper compliance with the statute, as questions arise.
206 For example, in Florida, "All meetings of a governing board of a public hospital and all public hospital records shall be open and available to the public..." FLA. STAT. ch. 395.3035(1) (1999); see also CAL. HEALTH & SAFETY CODE § 32106(a) (West 1994) (stating that "all of the sessions of the board of directors... shall be open to the public").
with open meetings laws at all. Before 1982, West Virginia did not have a separate law concerning hospital governing boards. Between 1982 and 1999, although West Virginia had a specific statute for hospitals, it merely imposed the same requirements as the Open Meetings Act. By contrast, the 1999 Amendments have created a truly separate law with its own unique requirements for the openness of certain proceedings in West Virginia hospitals covered under the Hospital Act. Therefore, it is important to make a separate examination of the Hospital Acts’ new provisions.

B. Providing Adequate Public Notice of Meetings

As with the Open Meetings Act, the empowering language of the Hospital Act is simple: “all meetings of a governing body of a hospital shall be open to the public.” Accordingly, the public and news media must be given advance notice of special and regularly scheduled meetings. The requirement of providing notice of the date, time, place and purpose of special meetings is identical under both the Hospital Act and Open Meetings Act.

However, there are some key differences in the advance notice requirements of the two Acts. For example, the governing body of the hospital need only make available the “date, time and place” of regularly scheduled meetings. A hospital board is not required to give the public advance notice of its agenda. Another major difference between the Hospital Act and the Open Meetings Act is the placement of the notice. The Hospital Act suggests that notice of regularly scheduled and special meetings be printed in “a local newspaper,” as opposed to the state register. However, the Hospital Act also empowers the hospital governing

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208 Section 2 of the original Open Hospital Proceedings Act merely stated that public hospitals must comply with the Open Governmental Proceedings Act. See W. VA. CODE § 16-5G-1, 2 (1982) (amended 1999).

209 The corresponding language in the Open Meetings Act is that “all meetings of any governing body shall be open to the public.” W. VA. CODE § 6-9A-3 (1999).


201 See id.


214 Governing bodies covered by the Open Meetings Act must give advance notice of their agenda. See id. § 6-9A-3.

body to use an alternative procedure calculated to "reasonably provide the public with notice." The governing body is therefore afforded some latitude in the choice of local media employed to satisfy the Act's advance notice requirements. Moreover, there is no specified period in which advance notice must be satisfied under the Hospital Act, unlike the express five-day requirement for publication in the state register imposed upon executive branch governing bodies under the Open Meetings Act.

C. Conduct of Meetings

Meetings in accordance with the Hospital Act should be conducted in a similar fashion to those covered under the Open Meetings Act. The governing body may create rules about attendance and presentation at overcrowded meetings, but it cannot require persons desiring to address the body to register more than fifteen minutes before the scheduled start time of the meeting. In addition, the governing body may remove a disruptive attendee to ensure the orderly conduct of the meeting.

However, some other new improvements to the Open Meetings Act were not included in the 1999 amendments to the Hospital Act. For example, the new version of the Hospital Act does not address voting by secret or written ballot, or furtive deliberation by reference to letters or numbers. In addition, the Act does not expressly permit the broadcast of meetings by radio or television stations.

D. Recording Minutes of Meetings

The section of the Hospital Act establishing the format and content of meeting minutes is identical to the corresponding section in the amended Open Meetings Act. Governing bodies of covered hospitals must prepare written

216 Id. § 16-5G-3 (1999).
219 See id.
220 The Open Meetings Act specifically prohibits voting by secret or written ballot. See W. VA. CODE § 6-9A-8(b) (1999).
221 The Open Meetings Act added a section that ensures that public citizens in attendance are aware of the topic of discussion and the issue being voted upon. See id. § 6-9A-8(a).
222 The Open Meetings Act now provides guidelines for radio or television station recording and broadcast of meetings. See id. § 6-9A-9.
minutes for all meetings and make them available to the public within a reasonable time.\textsuperscript{224} The Hospital Act sets forth specific information that must be contained in the minutes.\textsuperscript{225} The date, time and place of the meeting and the name of each member of the governing body present and absent must be recorded.\textsuperscript{226} In addition, the minutes must contain all motions, proposals and resolutions, as well as the name of the member who proposed it, and its disposition.\textsuperscript{227} Finally, the results of all votes must be recorded in the minutes.\textsuperscript{228} If a member makes a request, the governing body must record the vote of each member of the governing body by name.\textsuperscript{229}

As in the Open Meetings Act, the Hospital Act makes no distinction in the minutes required for regular, special and emergency meetings.\textsuperscript{230} However, the language of the statute suggests that no minutes are necessary for executive sessions.\textsuperscript{231} Moreover, if minutes are taken during an executive session, they need not be publicly disclosed.\textsuperscript{232}

\subsection*{E. Holding Executive Sessions Behind Closed Doors}

The section of the Hospital Act affording hospital governing bodies the ability to go into executive session adopts much of the language in existence under the Open Meetings Act before the 1999 Amendments.\textsuperscript{233} In addition to many general reasons to convene an executive session, two more specific types of executive session are permitted under the Hospital Act: (1) discussions of the work product of a hospital and its attorneys,\textsuperscript{234} and (2) hospital-specific concerns such as medical staff privileges.\textsuperscript{235} Overall, there are ten situations described in the statute

\begin{itemize}
\item \textsuperscript{224} See id. § 16-5G-5.
\item \textsuperscript{225} See id.
\item \textsuperscript{226} See W. VA. CODE § 16-5G-5(1)-(2) (1999).
\item \textsuperscript{227} See id. § 16-5G-5(3).
\item \textsuperscript{228} See id. § 16-5G-5(4).
\item \textsuperscript{229} See id.
\item \textsuperscript{231} See W. VA. CODE § 16-5G-5 (1999).
\item \textsuperscript{232} See id.
\item \textsuperscript{233} See W. VA. CODE § 16-5G-4 (1999); cf. W. VA. CODE § 6-9A-4 (1978) (amended 1999). See also discussion concerning executive sessions under the Open Meetings Act supra part III-E.
\item \textsuperscript{234} See W. VA. CODE § 16-5G-4(b)(5) (1999).
\item \textsuperscript{235} See id. § 16-5G-4(b)(3)-(4).
\end{itemize}
that may justify holding an executive session,\footnote{238} although no official action may be taken in an executive session.\footnote{237}

Nonetheless, the process necessary to enter closed session is essentially the same as that of the amended Open Meetings Act.\footnote{238} The governing body may convene an executive session after the presiding officer publicly states the statutory authorization to enter closed session.\footnote{239} Then, a majority affirmative vote of the members present is necessary to enable the closed session.\footnote{240}

The hospital governing body may enter executive session to discuss any personnel matters or to conduct a hearing on a complaint against an officer or employee, unless the officer or employee requests an open meeting.\footnote{241} This section on personnel matters differs in two primary ways from the corresponding section of the amended Open Meetings Act. First, the Hospital Act does not expressly prohibit discussion of general personnel policy issues within a closed session.\footnote{242} The more broadly drafted language of the Hospital Act may therefore slightly increase the number of situations in which hospitals may properly enter an executive session. Second, the Hospital Act exception for executive sessions dealing with personnel issues does not contain a specific prohibition against decision-making in personnel matters.\footnote{243} However, the introductory paragraph in the Hospital Act section on executive sessions generally states that no official action may be taken in an executive session.\footnote{244}

Another reason to enter executive session is to consider the discipline of a student.\footnote{245} Many hospitals in West Virginia, especially the nonprofit hospitals covered under the Hospital Act, train students in the various health professions.\footnote{246}
Similar to the sensitive discussions of personnel conduct, the governing bodies may enter executive session to discuss the disciplining, suspension or expulsion of a student enrolled in a program conducted by the hospital, unless the student requests an open meeting.\(^{247}\)

The Hospital Act also allows an executive session to be convened to discuss matters that are unique to the hospital setting.\(^{248}\) A closed session may be used to investigate issues involving the issuance, denial, suspension or revocation of a medical practitioner's privileges to use the hospital facilities, unless the medical practitioner requests an open meeting.\(^{249}\) In addition, an executive session may be called to discuss the failure or refusal of a medical practitioner to comply with the hospital's regulations concerning the conditions under which medical services are delivered.\(^{250}\) Finally, a medical staff conference is not a "meeting" as defined by the Hospital Act, and therefore need not comply with the sunshine laws.\(^{251}\)

The Legislature's Hospital Act exemption for the management of security issues is essentially the same as the exemption in the Open Meetings Act.\(^{252}\) Also, the Hospital Act deals with matters of personal privacy in the same manner as the Open Meetings Act before the 1999 amendments. In addition to issues of the physical or mental health of a person,\(^{253}\) an executive session can be called regarding matters that "would be likely to affect adversely the reputation of any person."\(^{254}\) This language is arguably broader than the new language in the Open Meetings Act amendment restricting the exception to those situations that may result in an invasion of an individual's right to privacy.\(^{255}\) Presumably, a great

services to the citizens of West Virginia. The legislative policy section of the Hospital Act provides that the hospitals of the state are "relied on by the citizens" of West Virginia to provide the "health services on which they so vitally depend and which they help support through tax exemptions, public funding and other means." W. VA. CODE § 16-5G-1 (1999); see discussion supra part IV-A.

\(^{247}\) See W. VA. CODE § 16-5G-4(b)(2).

\(^{248}\) Two justifications for convening an executive session specifically relate to medical staff issues. See id. § 16-5G-4(b)(3)-(4) (1999).

\(^{249}\) See id. § 16-5G-4(b)(3).

\(^{250}\) See id. § 16-5G-4(b)(4).

\(^{251}\) See id. § 16-5G-2(5).


\(^{253}\) See W. VA. CODE § 16-5G-4(b)(6) (1999); cf. W. VA. CODE § 6-9A-4(b)(5) (1978) (this provision in the Open Meetings Act was not changed by the 1999 amendments).

\(^{254}\) W. VA. CODE § 16-5G-4(b)(7) (1999); cf. W. VA. CODE § 6-9A-4(b)(6) (1978) (amended 1999) (this provision was deleted in the 1999 amendments to the Open Meetings Act and was replaced with language concerning invasion of privacy. See id. § 6-9A-4(b)(6) (1999)).

variety of matters could adversely affect the reputation of "any person," and an executive session could be called to protect the reputation of several people for any given incident.

As in the amended Open Meetings Act, a hospital governing body may convene an executive session to discuss matters involving the purchase, sale or lease of property, construction planning, and the investment of public funds. This may be particularly important for hospitals seeking to expand treatment options with promising medical technology. It could also permit a small group of hospitals to consider a collective effort to purchase and share an expensive piece of equipment, without fear of competitive loss.

Finally, the Hospital Act allows the hospital governing body to enter closed session to consider the "work product of the hospital's attorney or the hospital administration." Work product is a term of art in the legal profession that generally functions to protect the professional from disclosing his mental impressions, opinions and legal conclusions. Rule 26 (b)(3) of the West Virginia Rules of Civil Procedure distinguishes between fact work product and opinion work product for discovery. There is a much greater showing of need required to compel production of opinion work product. The burden of establishing work product protection rests upon the party asserting the privilege. For a document to be protected from disclosure under the work product doctrine, it must be prepared in anticipation of litigation, and the primary purpose behind its creation must have been to assist in pending or probable future litigation.

However, documents prepared in the regular course of business, and not specifically in anticipation of litigation, cannot be protected as work product.

256 See id. § 6-9A-4(b)(10).
257 See id. § 16-5G-4(b)(10).
258 Id. § 16-5G-4(b)(5).
259 Whereas the attorney-client privilege is generally invoked to protect the confidences of the client, the work product doctrine is generally used to protect the attorney from disclosure of her professional efforts. See Franklin Cleckley, 1 HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 5-4(E)(3) (3d ed. 1994).

261 See id. at 211.
264 See id. at 211.
Rather than create a new standard of review for work product under the Hospital Act, courts will likely apply some variation of existing West Virginia law on the work product doctrine. Therefore, the subsection of the Act permitting executive sessions to discuss hospital work product may be narrowly construed, and thus documents used for this purpose must clearly fall within the definition of work product.\textsuperscript{265}

\textbf{F. \hspace{1mm} Violations and Penalties}

The Hospital Act adopted language nearly identical to the enforcement provisions of the Open Meetings Act before the 1999 amendments.\textsuperscript{266} Any West Virginia citizen may bring a civil action against a hospital in the circuit court of the county where the hospital is located.\textsuperscript{267} The action must be brought within 120 days of the conduct or decision alleged to be in violation of the Act.\textsuperscript{268}

The usual judicial remedy is injunction against the hospital. The court may compel compliance, enjoin noncompliance, annul decisions made in violation of the Act, and order that subsequent actions be taken in accordance with the Act.\textsuperscript{269} Any court order to this effect must include findings of fact and conclusions of law and be recorded in the minutes of the governing body.\textsuperscript{270} Also, the Hospital Act specifically grants a court the power to invalidate any action taken at a meeting for which notice did not comply with the requirements of the Act.\textsuperscript{271}

As in the Open Meetings Act, the Legislature makes special mention of intentional violations of the Hospital Act.\textsuperscript{272} In addition to other infractions, "it is a violation of [the] act for a governing body to hold a private meeting with the

\textsuperscript{265} For example, in \textit{United Hospital Center}, an incident report filed by a nurse after a patient fell from a bed was not considered to have been created solely to assist in probable future litigation, and therefore not protected as work product. However, a follow-up investigation report prepared by the hospital's general counsel and risk manager after the incident was found to have been created to assist in probable litigation, and was therefore protected by the Court as work product. \textit{See} State ex rel. United Hosp. Ctr., Inc. v. Honorable Thomas A. Bedell, 484 S.E.2d 199, 213 (W.Va. 1997). Consequently, hospitals should adopt policies for dealing with internal documents to assure compliance with West Virginia law concerning the work product doctrine before attempting to invoke this exception to open meetings.

\textsuperscript{266} \textit{See} W. VA. CODE § 16-5G-6, 7 (1999); \textit{cf.} W. VA. CODE § 6-9A-6 (1993); W. VA. CODE § 6-9A-7 (1978).

\textsuperscript{267} \textit{See} W. VA. CODE § 16-5G-6 (1999).

\textsuperscript{268} \textit{See} id.

\textsuperscript{269} \textit{See} id.

\textsuperscript{270} \textit{See} id.

\textsuperscript{271} \textit{See} W. VA. CODE § 16-5G-3 (1999).

\textsuperscript{272} \textit{See} id. § 6-9A-6, 7; \textit{see also} discussion supra part III-F.

\textsuperscript{273} \textit{See} W. VA. CODE § 16-5G-6, 7 (1999).
intention of transacting public business, thwarting public scrutiny and making decisions that eventually become official action.\textsuperscript{274} If the court finds that the governing body of the hospital intentionally violated the Act, it may be liable for the complainant's attorney fees and expenses.\textsuperscript{275} The Hospital Act also singles out individual members of the governing body who violate the Act intentionally.\textsuperscript{276} Any person found to have intentionally violated the Hospital Act may be liable to the complainant for civil compensatory and punitive damages up to five hundred dollars.\textsuperscript{277} By contrast, compensatory and punitive damages for intentional violations of the Open Meetings Act were eliminated by the 1999 amendments.\textsuperscript{278}

In the area of criminal penalties for willful and knowing violations of the Hospital Act, any member of a hospital governing body found to have intentionally violated the Act is guilty of a misdemeanor.\textsuperscript{279} If convicted, the member shall be fined between one hundred and five hundred dollars, confined in jail up to ten days, or both.\textsuperscript{280} Incarceration has been eliminated as a criminal penalty for intentional violations of the Open Meetings Act, but the fines for second and subsequent offenses were raised.\textsuperscript{281}

The court may also take measures against a complainant in an action.\textsuperscript{282} If a person files a civil action seeking an injunction against the hospital governing body, and the petition appears to be without merit or made with the sole intent of harassing or delaying the body, the court may require bond at the time of filing of the action.\textsuperscript{283} If the court then finds that the action was frivolous or intended to harass the governing body or to delay its meetings or decisions in bad faith, the court may award attorney fees and expenses to the governing body.\textsuperscript{284}

\textsuperscript{274} Id. § 16-5G-7.
\textsuperscript{275} See id.
\textsuperscript{276} See id. § 16-5G-6.
\textsuperscript{277} See id.
\textsuperscript{278} See W. VA. CODE § 6-9A-6 (1999); see also discussion supra part III-F.
\textsuperscript{279} See W. VA. CODE § 16-5G-7 (1999).
\textsuperscript{280} See id.
\textsuperscript{281} See id. § 6-9A-7(a).
\textsuperscript{282} See id. § 16-5G-6.
\textsuperscript{283} See id.
\textsuperscript{284} See W. VA. CODE § 16-5G-6 (1999).
V. POTENTIAL CONCERNS WITH THE NEW SUNSHINE LAWS

The latest revisions in West Virginia's sunshine laws should move the Mountain State closer to its stated goal of conducting the people's business in the open. However, although the 1999 amendments to the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act made numerous improvements to the existing law, several issues remain unresolved. Some of the potential concerns with the new language could be easily addressed by small changes in the wording of some provisions, whereas the more substantive questions may be destined for judicial interpretation. Among the potential difficulties in the new version of the sunshine laws are the definition of meetings, the variation between the Open Meetings and Hospital Acts, the role of the new Committee on Open Government, and the effect of recent technological advances.

A. What Exactly Is Covered by the Sunshine Laws?

One of the difficult questions under the previous versions of the sunshine laws is now even more challenging — exactly what meetings do the statutes govern? Under the previous law, the determination of whether a gathering was a meeting, as defined by the Act, was challenging and led to some of the rare litigation concerning the sunshine laws. The determination of applicability of the open meetings law consists of a three-part inquiry. For the Act to apply, there must be a "meeting" of a "governing body" of a "public agency." After the 1999 amendments, the same three-part inquiry exists to determine whether a meeting falls within the Act. However, the 1999 amendments render the definition of "meetings" significantly more difficult to interpret and to apply.


Two of the three cases on the open meetings law decided by the West Virginia Supreme Court of Appeals determined whether a gathering was a meeting that must comply with the Open Meetings Act. The very first case decided by the court on the Open Meetings Act sought to determine whether proceedings of the Public Service Commission were subject to the Act. See Appalachian Power Co. v. Pub. Serv. Comm'n, 253 S.E. 2d 377 (W.Va. 1979). In the second major Supreme Court case dealing with the sunshine laws, the issue was whether a private encounter among school board members constituted a meeting that must comply with the Open Meetings Act. See McComas v. Bd. of Educ., 475 S.E.2d 280 (W.Va. 1996). See discussion supra part II-C and the accompanying notes. In addition, several Attorney General's Opinions have decided issues of coverage under the Act. The Attorney General has concluded that the open meetings law does not apply to meetings of political party executive committees. See 58 W.Va. Op. Atty. Gen. 29 (Oct. 10, 1978). However, the Act does apply to a meeting of a county commission sitting as a board of canvassers. See 59 W.Va. Op. Atty. Gen. 34 (Oct. 20, 1980).


See W. VA. Code § 6-9A-3 (1975) (amended 1999). This refers to the underlying thrust of sunshine laws, embodied in the directive: "all meetings of any governing body shall be open to the public." Id.

The first hurdle in determining whether the open meetings law applies to a gathering of people is the definition of a “public agency.” The statutory definition is broadly written to include all administrative and legislative units of government authorized by law to exercise some power, except the courts. However, the Open Meetings Act further limits its applicability by confining its scope to the “governing body” of a public agency. The statute defines “governing body” as a group of two or more members of any public agency having the authority to make decisions for or recommendations to the public agency on issues of policy or administration. This language, especially the inclusion of groups that make “recommendations to a public agency,” arguably, suggests that the statute covers a broad range of “bodies.”

Nonetheless, the term “governing body” may connote only the highest official group within any given public agency. Many public agencies and hospitals are advised by a wide array of councils, sub-committees, boards and commissions with a great variety of purposes. However, it is unclear which of these advisory groups satisfy the general definition of governing body, especially if a particular advisory group provides recommendations only on rare and finite issues, or serves a single constituency. This imprecise delineation of groups and

290 See id. § 6-9A-3; § 16-5G-3.
291 See id. § 6-9A-2(3).
292 Id.
293 Two official opinions have been rendered on the question of whether a group is a “governing body.” Members of a board of education constitute a “governing body” and are thus subject to the requirements of the Open Meetings Act. See McComas v. Bd. of Educ., 197 W.Va. 188, 475 S.E. 2d 280 (1996). In addition, a county commission sitting as a board of canvassers is a “governing body” of a public body and must therefore comply with the Open Meetings Act. See 59 W.Va. Op. Atty. Gen. 34, at p. 2 (Oct. 20, 1980).
294 Professor Neely commented that this common sense understanding of the term may mislead those trying to interpret it. See Neely, supra note 35, at 577.
295 For example, the first case considered by the Supreme Court of Appeals of West Virginia posed the sole question, “To which, if any, of the [Public Service] Commission’s various types of assemblages does the Sunshine Act apply?” Appalachian Power Co. v. Pub. Serv. Comm’n, 253 S.E. 2d 377, 380 (W.Va. 1979).
296 In its very first meeting, the newly created Committee on Open Governmental Meetings discussed whether the institutional advisory boards at each college and university in West Virginia, and whether the student, faculty and staff advisory councils to the college and university boards, are subject to the requirements of the Open Meetings Act. Because the institutional advisory boards make recommendations that the higher education governing bodies must take into consideration, the boards are subject to the Open Meetings Act. However, because the advisory councils merely “consult and advise” the boards on matters dealing with their particular constituencies, they do not need to comply with the open meetings laws. Phil Kabler, Open Meetings Committee Starts Off with Little Debate, CHARLESTON GAZETTE, July 9, 1999, at 10A. This draws a line in the sand that helps to establish just how far removed from the “central public agency” open meetings must be observed.
its constituent subparts also raises the threshold question of whether a group should be considered a “public agency.” Courts and the Committee on Open Governmental Meetings should develop more descriptive criteria to clarify these distinctions.

Once it is determined that a particular group is covered by the Act, it must be determined which of its gatherings and discussions constitute a “meeting” that is subject to the sunshine laws. A meeting is a gathering of a governing body for which a quorum is required to make a decision or to deliberate toward an official decision. The new definition of meeting excludes general discussions among members of the governing body when they are held in social, educational, informal or ceremonial settings, or when there is no intention for the discussion to lead to official action. In addition, informal discussions about agency rules or proposed rules are also exempt from the Act. This language received widespread criticism during the legislative process leading to its passage. The applicability of the open meetings law in certain circumstances now depends on the intention of the members of a governing body. Although this enables board members to take a more realistic approach to governance, the new standard could make adjudication more difficult, increase the likelihood of disputes, and decrease judicial efficiency. Courts may be called upon to apply the “common sense approach” fashioned by Justice Cleckley in McComas to determine whether a gathering is a

297 A public agency can be any administrative or legislative unit or sub-unit of government that is “authorized by law to exercise some portion of executive or legislative power.” W. VA. CODE § 6-9A-2(6) (1999).

298 See id. § 6-9A-2(4).

299 See id. § 6-9A-2(4)(D).

300 Because neither a quorum nor a convening of the members is required, informal consultations, deliberations and even decision-making about rules or proposed rules do not constitute a meeting under the Act. See id. § 29A-1-4 (1994).

301 Governor Cecil Underwood and several newspaper editorial boards disapproved of the changes in the definition of “meetings.” See Jennifer Bundy, Underwood Signs “Open Meetings” Bill With Hesitation, ASSOCIATED PRESS NEWSWIRES, April 9, 1999; see also discussion supra introduction to part III.

302 Perhaps this new reliance on the intention of the members of the governing body can be compared with the reliance on the intention of the members when determining violations of the law and their requisite penalties. See W. VA. CODE § 6-9A-6, -7 (1999); W. VA. CODE § 16-5G-6, 7 (1999).

303 The new statement of legislative policy recognizes that it is impossible for every meeting, contact and discussion between board members, staff and others to be conducted in the open. See W. VA. CODE § 6-9A-1 (1999). However, this also places a premium on communication between board members, a unified commitment to openness and compliance with the sunshine laws.

304 In McComas, the Supreme Court of Appeals of West Virginia stated that the determination of “what constitutes a meeting in violation of the open meetings statute is a fact specific inquiry to which we give great deference [to the circuit court’s finding.]” McComas v. Bd. of Educ., 475 S.E.2d 280, 294 (1996).
meeting subject to the Act.\textsuperscript{305} Factors to be considered in the determination include: the content of the discussion, the number of members participating, the percentage of the total body present, the significance of the absent members, the intention of the members, the nature and degree of planning involved, the duration of the substantive discussion, the setting and the possible effects on decision-making.\textsuperscript{306}

Even if questions are posed to the Committee on Open Government or to the Attorney General, it may prove more difficult for these groups to discern the truth and make accurate rulings or opinions. Furthermore, the perception that new loopholes in the definition of meetings have increased the potential for abuse may arouse the suspicion of the public and the press, leading to greater scrutiny by the media and potentially more claims.\textsuperscript{307} Although this language was probably born of political compromise, enabling the bill's passage,\textsuperscript{308} the Legislature should revisit the Act with an eye toward improving ease of application.

\section*{B. Why Do Inconsistencies Exist Between the Governmental and Hospital Acts?}

As discussed \textit{supra}, the 1999 amendments to the Open Hospital Proceedings Act closely resemble the Open Meetings Act before the 1999 changes were made.\textsuperscript{309} Language of the advance notice,\textsuperscript{310} executive session\textsuperscript{311} and enforcement provisions\textsuperscript{312} in the amended Hospital Act is substantially similar to

\begin{itemize}
\item \textit{See id.} at 280.
\item \textit{See id.} at 290.
\item Like Governor Underwood, several newspaper editorial boards disfavored the new language in the definition of meetings. \textit{See, e.g.}, Editorial, \textit{CHARLESTON GAZETTE}, available in \textit{ASSOCIATED PRESS NEWSWIRES} 12:03:00 (May 5, 1999).
\item Given the bill's history of introduction and defeat in the Legislature, it probably went through many rounds of discussion and political compromise to arrive at the final version. \textit{See discussion supra} introduction to part III.
\item \textit{See discussion \textit{supra} part III.}
\item \textit{See} W. VA. CODE § 6-9A-3 (1987) (amended 1999); \textit{cf.} W. VA. CODE § 16-5G-3 (1999). These sections are virtually identical except notice is placed in the state register by executive branch governing bodies under the Open Meetings Act, and placed in the local newspaper or other local media for hospitals under the Hospital Act.
\item \textit{See} W. VA. CODE § 6-9A-4 (1978); \textit{cf.} W. VA. CODE § 16-5G-4 (1999). Issues common to both Acts use essentially the same language. For example, the sections on personnel, student matters, health and reputation of persons, security issues, and matters of public competition are worded similarly.
\item \textit{See} W. VA. CODE § 6-9A-6 (1993) (amended 1999); \textit{cf.} W. VA. CODE § 16-5G-6 (1999). With the exception of specialized language about bond issues for governmental bodies, the language of section six is identical in both statutes. \textit{See} W. VA. CODE § 6-9A-7 (1978) (amended 1999); \textit{cf.} W. VA. CODE § 16-5G-7 (1999). The paragraphs in section seven of each statute (concerning individuals in violation of the law and the corresponding penalties and fines) are identical. Although incarceration was deleted from the new version of the Open Meetings Act, it remains in the Hospital Act. \textit{See} W. VA. CODE § 6-9A-7 (1999); \textit{cf.} W. VA. CODE § 16-5G-7 (1999). However, the 1999 amendment to the Hospital Act also added a paragraph concerning intentional violations by the governing body as a whole.
\end{itemize}
the previous version of the Open Meetings Act.

However, the Hospital Act did not adopt the pre-1999 Open Meetings Act wholesale. In addition to provisions specifically tailored to the needs of a hospital board,\textsuperscript{313} some provisions of the newly amended Hospital Act adopted new language first found in the 1999 amendments to the Open Meetings Act. For example, the minutes section of the Hospital Act is identical to that of the new Open Meetings Act, which no longer requires minutes to be taken during executive sessions.\textsuperscript{314}

It is unclear why some of the improvements to the Open Meetings Act were ignored in passage of the Hospital Act, and whether the creation of two separate standards of openness will be a productive development in the law. In the 1999 amendments to the Open Meetings Act, the Legislature opened the doors to public agency meetings more than ever before,\textsuperscript{315} whereas it retained in the Hospital Act some of the more restrictive language of the old Open Meetings Act. However, the declaration of legislative policy section of the Hospital Act\textsuperscript{316} might suggest greater reasons for openness in hospital proceedings than the corresponding section of the Open Meetings Act.\textsuperscript{317} According to the legislative policy of the Hospital Act, citizens of West Virginia have a vested interest in publicly funded hospitals "on which they so vitally depend" for their health and well-being.\textsuperscript{318}

Given the divergence of the two Acts after the 1999 amendments, it is unclear how courts will address the apparent differences between the two Acts.

For example, there are some key discrepancies between the allowances for executive sessions in the two Acts. The previous version of the Open Meetings Act empowered a body to convene an executive session for matters that "would be likely to affect adversely the reputation of any person."\textsuperscript{319} One newspaper editorial board considered this to be a "ridiculous exemption,"\textsuperscript{320} and it was removed in the

\textsuperscript{313} For example, the exemption of medical staff conferences from the requirements of the Hospital Act applies only to hospitals. See W. VA. CODE § 16-5G-2(3) (1999). Also, an executive session dealing with staff privileges of medical practitioners and compliance with hospital protocol would be applicable only to the hospitals involved. See id. § 16-5G-4b(3)-(4).

\textsuperscript{314} See W. VA. CODE § 6-9A-5 (1978); cf. W. VA. CODE § 16-5G-5 (1999). The substantive provisions for the minutes are exactly the same, but the Hospital Act does not require minutes for executive sessions.

\textsuperscript{315} Among the new provisions guaranteeing greater openness are the sections prohibiting secret voting, and allowing for the recording and broadcasting of meetings by radio and television stations. See id. § 6-9A-(8)-(9) (1999).

\textsuperscript{316} See id. § 16-5G-1 (1982).

\textsuperscript{317} It has been suggested that sunshine laws and governmental openness strengthen a democracy by making the citizens more aware of the actions of its government representatives. See Note, supra note 8, at 1201; see also discussion supra part I and part II-A.

\textsuperscript{318} W. VA. CODE § 16-5G-1 (1982).

\textsuperscript{319} Id. § 6-9A-4(6) (1978).

\textsuperscript{320} The Gazette was displeased with the new bill, but offered as one improvement the elimination of
1999 amendments to the Open Meetings Act. Unfortunately, it is the exact language adopted as a rationale for convening executive sessions in the latest version of the Hospital Act. Thus, hospital boards now have greater latitude to convene an executive session to protect the reputation of any person.

The most striking difference between the executive session provisions of the Hospital and Open Meetings Acts concern privilege and the board’s attorney. The Open Meetings Act does not recognize participation of the board’s attorney as a legitimate reason to close a meeting, although the supreme court has acknowledged a narrowly drawn exception for the attorney-client privilege under the Open Meetings Act. On the other hand, the Hospital Act creates an explicit exemption from openness when the hospital board considers the work product of the hospital’s attorney or hospital administration. Although the difference in language might suggest that the rules for hospital boards are more lenient, courts may apply the same standard of openness to both statutes on the basis of legislative policy.

There is also some variation in the penalties incurred for violations of the two statutes. Incarceration was eliminated as a possible criminal penalty for individuals who willfully and knowingly violate the Open Meetings Act whereas, a member of a hospital governing body who commits a similar infraction may be imprisoned up to ten days and fined up to five hundred dollars for a first offense. Thus, a hospital board member could be jailed for repeated violations of the sunshine law, while a school board member, engaged in the same conduct, could only be fined for the violation. Arguably, the Legislature is making a value judgment between the work of the two boards based on the heightened legislative policy underlying the Hospital Act. However, it is more likely that either

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321 The new exemption enables an executive session only if the material to be discussed would "constitute an unwarranted invasion of an individual's privacy." W. VA. CODE § 6-9A-4(6) (1999).

322 See id. § 16-5G-4(7) (1982).


324 See Peters v. County Comm'n, 519 S.E.2d 179, 185 (W.Va. 1999).

325 See supra note 315.

326 Assuming that both the Peters holding and Rule 26(b)(3) of the West Virginia Rules of Civil Procedure apply, alike, to hospitals and governmental bodies, then there is no arguable difference on this issue between the Open Meetings and Hospital Acts.

327 See W. VA. CODE § 6-9A-7 (1999); cf. W. VA. CODE § 6-9A-7 (1978). Previously, an individual could be imprisoned up to ten days for the first offense.

328 See W. VA. CODE § 16-5G-7 (1999).

329 See id. § 16-5G-1 (1982). Openness of hospital boards is in the "best interest of the people of this State" because of their decisions "affecting the health services on which [West Virginia citizens] so vitally
political expediency or uncertainty about the new language in the Open Meetings Act was the impetus behind the adoption of the pre-1999 amendment language into the Hospital Act.

Another variance is the absence of any provision, within the Hospital Act, affording hospitals access to advisory opinions from the new Committee on Open Government. However, because citizens "vitaly depend" on hospitals in West Virginia, hospital boards should be granted access to the new Committee on Open Governmental Meetings. Access to Committee guidance would help boards properly comply with the 1999 amendments, could prevent unintentional violations, and could potentially decrease litigation.

To this end, hospital board members should also be given the compilation of material disseminated by the Attorney General's office to members of bodies covered by the Open Meetings Act. It is likely that many people who serve on hospital boards have little if any experience in complying with open meeting laws. This valuable resource would, therefore, educate board members as to both the need and means for compliance with the Hospital Act, would reduce the number of unnecessary violations, and would more effectively promote the legislative policy of the Act. Because the Hospital Act and Open Meetings Act are no longer identical, prospective decisions about the Open Meetings Act may be of limited utility to hospital board members. However, because the amended Hospital Act closely resembles the Open Meetings Act before the 1999 Amendments, the Attorney General's collection of previous decisions would be a valuable educational tool.

Although there are literal differences between the declarations of legislative policy in the Governmental and Hospital Acts, they are probably intended to have the same general effect. Unless the Legislature formed a separate Hospital Act to hold a higher standard for hospital boards, there should only be one standard of openness for both governmental and hospital proceedings. With the exception of provisions tailored specifically to the functions of a hospital or a governmental body, all the language of the provisions should be as similar as possible. This would promote ease of application by governing bodies, ease of interpretation by the Committee on Open Government and the Attorney General, and ease of adjudication by the courts.

C. Will the Committee on Open Government Be Used Effectively?

In its twenty-five year history, the Open Meetings Act has resulted in only depend." Id.

330 Id.

331 The amended Open Meetings Act obliges the Attorney General both to compile all the statutory and case law dealing with the Open Meetings Act, and to disseminate it to all members of governing bodies covered under the Act. See id. § 6-9A-12 (1999).

three opinions from the Supreme Court of Appeals of West Virginia. The high court has never construed the Hospital Act since its enactment in 1982. This suggests that the newly created Committee on Open Government has the potential to become the main body for statutory interpretation. The immunity granted to those who seek advisory opinions provides an attractive incentive to governing bodies with potential disputes. Since its formation, groups have sought the guidance of the Committee, and it can be expected to be used extensively to resolve questions of interpretation. This could have a very positive impact by creating one group of reviewers that builds experience with the details of the Act, rather than seeking review by a county circuit court that may have no experience with the Act.

One potentially negative aspect of the new Committee on Open Government is that the advisory opinions are case-specific and have no legal precedential value. The advisory opinions apply only to the public governing body seeking the opinion and cannot be a source of immunity for other bodies facing similar circumstances. Furthermore, members of the public may not request an opinion from the Committee, but rather may only seek redress from the courts. Although this result appears to have been intended by the Legislature, it could prove duplicative and inefficient for all similarly situated public bodies to submit a request for an advisory opinion on the same topic. The statute permits a public body to seek and rely on either an oral opinion of the

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333 See discussion supra part II-C.

334 The Legislature created the Committee on Open Government to render advisory opinions to governing bodies and their members on current or proposed actions. See W. VA. CODE § 6-9A-10, 11 (1999).

335 In reference to the new Committee's full agenda, one article was entitled, "Busy from Day One." See Phil Kabler, Busy from Day One: Open-meetings Panel has Full Slate for its First Day, CHARLESTON GAZETTE, July 7, 1999, at 1C.

336 Mr. Rick Alker, the executive director of the Ethics Commission, stated that "the only person who benefits from the opinion is the person who requests it." Martel, supra note 75.

337 See id.

338 Legal counsel for the Committee, Ms. Sherri Goodman, stated that the Committee is not designed to help individuals and that the public must turn to the courts for help. See Allison Barker, Open Meetings, ASSOCIATED PRESS NEWSWIRIES, July 8, 1999, avail. at 18:05:00.

339 Delegate Jon Amores (D-Kanawha), a co-author of the 1999 amendments in House Bill 2005, said that the legislators did not intend for the advisory opinions of the Committee to set statewide precedent. However, he also stated that even if the opinions "don't have any precedential value, they will be instructive." Martel, supra note 75.

340 Mr. Rick Alker, the executive director of the Ethics Commission, indicated that an advisory opinion applies only to the body that requests it. This was in response to the submission of a request for an advisory opinion by a county board of education. Even on a general question pertinent to every county school board in the state, all 55 school boards would be required to file a separate request. See id.
executive director of the Ethics Commission or a written opinion of the Committee on Open Government. Ideally, identical opinions would emanate from either source on any given issue. Realistically, the alternative choices for drawing opinions could lead to strategic profiling of members of the Committee and the executive director, creating some variation of forum shopping for the more favorable opinion. In an extreme case, a body may intentionally avoid a request for an advisory opinion from the Committee or the executive director if a negative result is anticipated. Alternatively, the group could decide that a more favorable result is obtainable from the county circuit court judge. Hopefully this possibility of forum shopping will be a rare phenomenon that does not undermine the legislative policy of the sunshine laws.

Another potential concern rests in the absence of any provision within the Hospital Act affording hospitals access to advisory opinions from the new Committee on Open Government. Consequently, hospitals cannot receive immunity through reliance upon opinions rendered by the Committee. Perhaps this was a simple legislative oversight, but this inconsistency between the two Acts could unfairly deny hospital governing bodies in West Virginia a valuable tool to ensure compliance with the legislative policy of the sunshine laws.

Overall, the Committee has great potential to improve understanding and compliance with the Open Meetings Act. In addition, it may increase judicial efficiency by resolving potential disputes before they result in costly litigation. If the new guidance mechanism is used effectively by governing bodies around the state, and if the tool is extended to bodies under the Hospital Act, the Committee on Open Government could prove to be a great addition to the sunshine laws of West Virginia.

D. Do the Laws Keep Up with Cyberspace?

The West Virginia sunshine laws are probably adequate to address most questions about the proper conduct of meetings. The amended Open Meetings Act even permits radio and television stations to broadcast meetings, and we have progressed beyond the era of posting meeting notices on the courthouse door. However, the laws may already be obsolete in terms of dealing with the latest technological advances. Although the 1999 amendments include a new feature allowing boards to conduct meetings by “telephone conference or other electronic

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342 See id. § 6-9A-9.

343 The first official interpretation of the sunshine laws by the Attorney General’s office concluded with the following opinion: “The adoption of rules requiring the posting of the time, place and, under some circumstances, the purpose of a county commission’s meetings at the courthouse door a reasonable time prior to the meeting will satisfy West Virginia Code 6-9A-2 et seq.” 57 W.Va. Op. Atty. Gen. 238, at p.2 (June 23, 1978) (italics added). Only later that year was it suggested by the Attorney General’s office that the state register would be a sensible and effective location for the placement of public notice. See 58 W.Va. Op. Atty. Gen. 33, at p.2 (Nov. 20, 1978).
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手段，"444法律不考虑科技的全部影响。例如，这项修正案似乎允许时间节省和成本低廉的线上实时交互会议。然而，它没有充分地考虑公民在在线会议中的需求。结果，公民可能失去在面对面会议中提供的许多机会。445而且，除非做出一些规定来提供公众访问技术，电子会议可能不公平地歧视那些负担不起或没有必要的计算机环境来参加会议的公民。448

一个有见识的管理机构可以制定一个规则来收集和讨论公众的评论或问题，使电子会议成为可能。然而，现行法律不足以解决其他技术考虑。例如，一个管理机构必须决定在会议通知或会议记录仅在网站上发布时，阳光法规是否得到满足。449这种公开传播信息的方法可能比传统的书面形式的通知和记录更广泛地影响到观众。449 除此之外，这项法律未解决电子邮件通讯来讨论"公共业务"之间的成员的管理机构。有些州已经通过修正他们的公开会议法律来解决这些问题和其他问题。

因此，西维吉尼亚的法律应被增强，既使管理机构能够拥抱当前的科技，也帮助他们预测未来的进步。450

345 See id. § 6-9A-1; § 16-5G-1.
346 Although this potential concern may be overcome by a radio or television broadcast of the meeting in question, it is not possible for all meetings to be broadcast. Therefore, it will be in the discretion of the radio or television stations, with their own motivations and interests, to determine which meetings will be aired. See id. § 6-9A-9.
347 Both the West Virginia Open Governmental Proceedings Act and the Open Hospital Proceedings Act permit a governing body to make rules for "attendance and presentation" at meetings where there is not enough room for members of the public. Id. § 6-9A-3; § 16-5G-3. Perhaps governing bodies could promulgate an "attendance and presentation" rule granting public citizens access to the discussion and interactive capacity in a chat room format. This would help uphold the sunshine laws’ policy that all meetings "shall be open to the public." Id.
348 Minutes of regular, special, and emergency meetings must be made "available to the public within a reasonable time after the meeting." W. VA. CODE § 6-9A-5 (1999); W. VA. CODE § 16-5G-5 (1999).
349 For example, posting the minutes of a meeting on a web-site may be faster, less expensive, and more convenient than travelling to a particular office or building to photocopy the meeting minutes, or waiting for a mailing or facsimile to arrive.
350 For example, Colorado has amended its Open Meetings Law by redefining "writings," "correspondence" and "public record" to include technologically or electronically based methods of creation and storage. See CRS §§ 24-6-401 et seq. (Colorado’s Open Meetings Law); James G. Colvin, II, E-mail, Open Meetings, and Public Records, 25-Oct. COLORADO LAWYER 99 (1996).
VI. SUMMARY AND CONCLUSION

Sunshine laws have a rich history that has emboldened the state and nation. This now ubiquitous policy of openness has improved the working dynamic of the American political structure. Public citizens can now be grouped with the media to comprise the proverbial “fourth branch” in the checks and balances of the executive, legislative and judicial branches of government. For a quarter-century, West Virginia has contributed to a political atmosphere of governmental openness through its evolving sunshine laws.

Once it is determined that the sunshine laws apply to a certain meeting, the West Virginia Open Governmental Proceedings Act and Open Hospital Proceedings Act are relatively uncomplicated, straightforward, and easy to apply. Although they might now represent two standards of openness, they espouse the same policy of ensuring the public’s right to scrutinize the actions of its representatives and caregivers. The latest series of amendments should improve the work of West Virginia’s dedicated decision-makers by putting the legislative policy of the sunshine laws into action. Although a small number of additional amendments should be passed to strengthen and clarify the language of the sunshine laws, the two Acts are on the right pathway to success.

At a minimum, all governing bodies of public agencies and nonprofit hospitals should adopt rules and procedures to formally comply with the Open Meetings and Hospital Acts. Ideally, members of each governing body will also embrace the values and goals of the Acts, making them an integral part of all public business subject to the Acts. Compliance with the statutes should quickly become systematic and second nature to members of any governing body covered by the new laws.

However, unnecessary noncompliance with the Acts will hinder the wheels of progress. Where the problems and questions raised supra do exist, assistance is now available in the newly created Committee on Open Government, at least for governmental bodies. Finally, all members of governmental bodies are advised, when in doubt, to take the advice of Justice Cleckley to heart, and err on the side of openness. For the good of all its citizens, let the sun shine brighter in the Mountain State.

Brian J. Caveney*

351 In the McComas opinion, Justice Cleckley wrote the following: “We leave government officials with this guide: ‘When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.’” McComas v. Bd. of Educ., 475 S.E.2d 280, 293 (W.Va. 1996) (quoting Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974)).

352 The official state nickname of West Virginia is the Mountain State. See NEW YORK PUB. LIBRARY DESK REF. 696 (Paul Fargis et al. eds., 1989).

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