

final minutes

Michigan Law Revision Commission Meeting

Thursday, February 21, 2013 ▪ 11:30 a.m.
Legislative Council Conference Room ▪ 3 Boji Tower
124 W. Allegan ▪ Lansing, Michigan

Members Present:

Tony Derezinski, Chair
Senator Vincent Gregory
Representative Andrew Kandrevas
Senator Tonya Schuitmaker
John Strand
George Ward
Judge William Whitbeck

Members Absent and Excused:

Richard McLellan
Representative Tom Leonard

Others Present:

Brad Banasik, Michigan Association of School Boards
Susan Cavanagh, Office of the Legislative Council Administrator
Jack Dempsey, Dickinson Wright
Phil Goodrich, Office of Representative Tom Leonard
Tom Quasarano, Office of the Attorney General
Jane Wilensky, MLRC Executive Secretary

I. Convening of Meeting

Chairperson Derezinski called the meeting to order at 11:35 a.m.

II. Roll Call

The Chair asked the clerk to take the roll. A quorum was present and absent members were excused. The Chair then asked the attendees in the audience to introduce themselves.

III. Approval of October 18, 2012 Meeting Minutes

The Chair asked for a motion to approve the minutes of the last meeting. No corrections or additions were offered.

Senator Gregory moved, supported by Judge Whitbeck, to adopt the minutes of the October 18, 2012 Michigan Law Revision Commission meeting. The minutes were unanimously approved.

IV. Change in Agenda

The Chair asked for a motion to change the agenda to move up the discussion of the 2011 Michigan Law Revision Commission (MLRC) Annual Report immediately. **Mr. Ward moved, supported by Mr. Strand, to amend the agenda in order to take up the discussion of the 2011 Michigan Law Revision Commission Annual Report immediately. There were no objections and the motion was unanimously approved.**

Annual Report

The Chair then called on Ms. Wilensky to begin the discussion. Ms. Wilensky presented an explanation of each case identified in the "Report of Recent Court Decisions Identifying Statutes for Legislative Action and Recommendations to the Legislature" which she noted is to be included in the 2011 MLRC Annual Report. With regard to one of the cases, People v Parks, Senator Schuitmaker shared that legislation to address this issue was introduced and she thought signed into law during the last session. Ms. Wilensky will add a note in the report to include this status update. After some discussion, the Chair asked for a motion to adopt the "Report of Recent Court Decisions Identifying Statutes for Legislative Action and Recommendations to the Legislature" as amended to include a note regarding the People v Parks case. **Judge Whitbeck moved, supported by Senator Schuitmaker, to adopt the "Report of Recent Court Decisions Identifying Statutes for Legislative Action and Recommendations to the Legislature" as amended. There were no objections and the motion was unanimously approved.** The Chair then entertained a motion to include the report in the 2011 Michigan Law Revision Commission Annual Report. **Mr. Ward moved, supported by Senator Gregory, to include the "Report of Recent Court Decisions Identifying Statutes for Legislative Action and Recommendations to the Legislature" as amended in the 2011 MLRC Annual Report. There were no objections and the motion was unanimously approved.**

Tribute Resolutions

The Chair directed members' attention to the tribute resolutions in honor of two former members of the Commission—Representative Kurt Heise and Representative Mark Meadows. He noted that it is the tradition of the Commission to include resolutions of tribute in the Annual Report to recognize the contributions of those no longer serving on the Commission. **Senator Schuitmaker moved, supported by Representative Kandrevas, to adopt the resolutions in honor of Representative Kurt Heise and Representative Mark Meadows and include them in the Commission's annual report. There was no further discussion. The motion was unanimously adopted.**

The Chair noted the final action item is to adopt the 2011 MLRC Annual Report as amended. **Senator Schuitmaker moved, supported by Senator Gregory, to adopt the 2011 Michigan Law Revision Commission Annual Report as amended. There were no objections and the motion was unanimously approved.**

V. Update on Pending Projects

The Chair called on Ms. Wilensky for a report on the Commission's pending projects.

a. Open Meetings Act (OMA) Update

Ms. Wilensky presented some background and provided members with a revised memo (attached to these minutes) that identify some of the issues in updating the Open Meetings Act and offer some specific recommended actions. Pursuant to the discussion at the last MLRC meeting, Ms. Wilensky noted that Mr. Jack Dempsey of Dickinson Wright, Mr. Brad Banasik of the Michigan Association of School Boards, and Mr. Tom Quasarano of the Office of the Attorney General were invited and are present to participate in today's discussion.

The Chair called on Mr. Dempsey to start the conversation. Mr. Dempsey remarks highlighted the need to modernize the OMA in light of the Internet and to enhance greater access to government. Mr. Banasik was next to comment and shared information on an amendment that was passed that allows the posting of special meeting notices on websites. He added he would like to see some clarity on the issue of board members participating remotely. Mr. Quasarano was then called on to share his knowledge and insight from the perspective of his background with the Attorney General's office. A discussion followed.

b. International Law Licensure

Ms. Wilensky provided an update and directed the members' attention to proposed language that she redrafted to reflect the discussion at the last meeting. After discussion, Senator Schuitmaker stated that she will submit a bill drafting request to the Legislative Service Bureau using the latest documents. Judge Whitbeck suggested that each member review the draft language and submit written comments to the Executive Director. There was consensus on that suggestion and the Chair noted this issue will be put on the agenda as an action item at the next MLRC meeting.

VI. Comments from Commissioners

Judge Whitbeck made brief comments about two cases pending before the courts. The first is the so-called Carp case which he brought up at the last meeting. The second case is in response to the Duncan case which deals with indigent defense funding and lack of funding on a county level. The Chair stated these cases should be considered at the next meeting as action items. Mr. Strand also suggested that including those two cases in the 2012 Annual Report may be the vehicle to transmit the Commission's recommendations to the Legislature especially if the 2012 report can be released in May or June.

VII. Public Comment

The Chair asked if there were any public comments. There were none

VIII. Adjournment

Having no further business, the Chair asked for a motion to adjourn. **Mr. Ward moved, supported by Judge Whitbeck, to adjourn. There were no objections and the motion was unanimously approved. The meeting was adjourned at 1:00 p.m.**

(Approved at the June 20, 2013 Michigan Law Revision Commission meeting.)

To: Commissioners

**From: Jane Wilensky
Executive Secretary**

Re: Updating the Open Meetings Act (“OMA”)

1. Guests at the February 21st Meeting.

At the October meeting, I was asked to invite individuals familiar with the OMA issues being discussed to the Commission’s next meeting. I want you to know that **Jack Dempsey**, attorney with Dickinson Wright who wrote an article about this topic for the Administrative Law Journal (Mr. Dempsey’s article is in the Oct. 18, 2012 Board Materials, attached to the Draft Minutes of the June 21, 2012 meeting.) and **Brad Banasik**, Legal Counsel and Director of Bylaw and Policy for the Michigan Association of School Boards, will be attending the February meeting. **Thomas Quasarano**, Assistant Attorney General, who handled OMA issues for the Department of Attorney General for many years, has also been invited.

2. Issues and Recommendations

The Commission’s 2003 report about the ways technology could be used to make government operations more accessible to the public focused on the Open Meetings Act, and reviewed the range of new telecommunication technologies. Believing that agencies would be reluctant to invest in technological changes without the assurance that implementing procedures would not run afoul of the OMA, the Commission’s recommendations to the Legislature were very broad. The Commission recommended that the Legislature amend the OMA to revise the definition of “meeting” in MCL 15.262(b) and the meeting requirements in MCL 15.263(1) to clarify the circumstances under which a public meeting could be conducted using technology.

To assist the Commission as it considers updating the 2003 report, I met with Jack Dempsey, and compiled the following list of issues and possible recommendations for the Commission’s review and discussion.

- (1) In addition to other methods, the recording and transmission of proceedings of a public body at a public meeting includes the right to use any technology that does not interfere with the conduct of the meeting. MCL 15.263.**

The OMA now provides that the public may “tape-record, videotape, broadcast live on radio and telecast live on television the proceedings of a public body at a public meeting”. MCL 15.263. The OMA should reflect the availability of new technologies, such as webcasting, to record and/or transmit the proceedings of a public body; provided, however, that the means used does not interfere with the conduct of the meeting. The OMA currently provides that the public body may establish reasonable rules and regulations to minimize the possible disruption of a meeting. MCL 15.263(1).

- (2) In addition to other methods, notice of public meetings must be posted on the public body's website, and notices must contain the web address of the public body. See MCL 15.264; MCL 15.265.**

This amendment would provide that, in addition to other methods, notice of a meeting must be posted on the public body's website. Posting notice on the web is particularly useful for rescheduled regular or special meetings of a public body when notices must be posted at least 18 hours before the meeting, or conference committees that must provide a 6-hour or 1-hour notice. MCL 15.265(4).

Also, in addition to traditional methods, the public should be able to request electronic notification of meetings.

It is noted that some states have a centralized public notice website for all units of state and local government.

- (3) In addition to other methods, minutes of meetings must be posted on the public body's website. See MCL 15.269.**
- (4) Copies of any documents that must be provided to the public must be posted on the public body's website and may be provided electronically. See MCL 15.266.**

Minutes of meetings and records that are the subject of agenda items that must be made available to the public would have to be posted on the public body's website.

- (5) Clarify the circumstances under which a public meeting may be conducted using technology, including videoconferencing, teleconferencing, and webcasting. See MCL 15.262(b); MCL 15.263.**

As described in my previous memo, other states address this issue in various ways. Some define the term "meeting" to include the use of teleconferencing for attendance and participation by members of the public body, and provide that if the public body uses video conferencing to conduct its meetings, the public must be able to attend, listen and observe the proceedings at any site at which a member participates. Others provide that meetings may be held by video conferencing, telephone conference or other electronic means, provided that (1) reasonable arrangements are made to accommodate the public's right to attend the meeting; (2) the meeting is recorded; and (3) all votes are taken by roll call.

Some statutes provide that only agencies with statewide jurisdiction may use video or teleconferencing for meetings. Some permit meetings using these technologies only under limited circumstances, such as emergencies that involve public safety or the preservation of private property. If a meeting is held by video conference, there may be additional requirements for notice, record-keeping and two-way communication between meeting locations.

If videoconferencing is used to conduct the meeting, the public notice for the meeting may have to let the public know that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.

Quorum - The use of teleconferencing or video conferencing can impact the quorum requirements for a public meeting. Some statutes provide that a quorum may be reached by members attending the meeting in person or electronically. Others provide that a quorum must be physically present at one location before other members may attend the meeting by other means.

(6) Update the penalty provisions of the OMA. See MCL 15.272.

The OMA provides that a public official who intentionally violates the act is guilty of a misdemeanor, punishable by a fine of not more than \$1,000.00. A public official convicted of violating the act a second time in the same term, is guilty of a misdemeanor and is subject to a fine of not more than \$2,000.00, or imprisonment for not more than one year, or both. The penalty provisions have been in effect since 1977, and have not been amended since. The impact of the penalty is not as great as it could be.

(7) Consider creating the position of Open Meetings Act coordinator, under which a public body would designate a person responsible for ensuring compliance with the Open Meeting Act.

The Freedom of Information Act (“FOIA”) provides that public bodies must designate an individual to serve as the public body’s FOIA coordinator. See MCL 15.236. This person is responsible for accepting and processing FOIA requests for public records. A similar position could be created for the OMA, under which a public body designates an individual who is responsible for ensuring that the public body complies with the OMA.

(8) New technologies may not be used to avoid public deliberation.

New technologies, including microblogs such as Twitter, social media websites such as Facebook, email, text messaging and instant messaging, present significant challenges for state legislatures. Although these technologies may facilitate efficient communication among members, these technologies may not be used to avoid public deliberation. Depending on the facts, electronic communications could be construed as a meeting and/or deliberations leading to a decision by the public body.

In the Michigan Open Meetings Act Handbook, Attorney General Bill Schuette states that e-mail, texting, or other forms of electronic communications among members of a board or commission during the course of an open meeting that constitutes deliberations toward decision-making or actual decisions violates the OMA, since it is in effect a “closed” session. Electronic communication that cannot be heard by the public attending an open meeting is contrary to the purpose of the OMA, which is to promote openness in government. The Handbook states that the use of email to distribute handouts, agenda items, statistical information during an open meeting should be allowable under the OMA, especially when copies of the documents or information are also made available to the public before or during the meeting.