

ALABAMA'S OPEN MEETINGS LAW

A PRIMER FOR COUNTIES

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Section 1

Meetings and Deliberation under Alabama's Open Meetings Law

MEETINGS AND DELIBERATION UNDER ALABAMA'S OPEN MEETINGS LAW

Alabama's Open Meetings Law, found at *Ala. Code § 36-25A-1 et seq.*, was originally enacted in 2005 to bring some clarification to an almost century-long debate between public officials and the news media. (See, *Act 2005-40*). Alabama's prior open meetings law, which was repealed effective October 1, 2005, had no definition of "meeting." Because there had been no direct legal pronouncement regarding what is and what is not a meeting, public officials and the news media clashed when trying to determine whether informal "gatherings" of public officials constitute "meetings" and, therefore, must conform to the requirements of the open meetings act.

The law originally passed in 2005 was amended for the first time in 2015 (*Act 2015-240*). The technical amendments passed in 2015 clarify that the law applies to committees and subcommittees, specifically prohibits "serial meetings", and revises the enforcement section to ensure that penalties are assessed where there are violations of the law.

The Open Meetings Law recognizes that there are a variety of circumstances during which public officials may "deliberate" on the public's business. The law also goes to great length to ensure that all such occasions are open to the public and are conducted ONLY after the body has provided notice to the public. The opening section of Alabama's Open Meetings Law (*Ala. Code § 36-25A-1*) states:

"It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6) of this act. Except for executive sessions permitted in Section 36-25A-7(a) of this act or as otherwise expressly provided by other federal or state statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3. No executive sessions are required by this act to be held under any circumstances. Serial meeting or electronic communications shall not be utilized to circumvent any of the provisions of this chapter." (Emphasis added)

While the prior law was written very broadly, the existing statute, which took effect October 1, 2005, includes very detailed rules governing every aspect of a meeting conducted by governmental bodies in Alabama. The law includes important definitions to assist in understanding how its provisions should be applied, but it is essential that public officials recognize that the definitions utilized in this law apply ONLY to this law. For example, a "gathering" of county commissioners may be a "meeting" as defined in and for the purposes of the Open Meetings Law. However, that does not mean the county commission can conduct public "business" at such a gathering.

The law also prohibits the utilization of “electronic communications” to “circumvent any of the provisions” of the law. See, *Ala. Code § 36-25A-1*. Therefore, efforts by public officials to use the telephone, e-mail or even internet chat rooms to avoid compliance with the law will constitute a violation and will likely gain statewide media attention and criticism. And pursuant to the amendments to the law passed in 2015 (*Act 2015-340*), *Ala. Code § 36-25A-1* now also specifically prohibits use of “serial meetings” to circumvent any provision of the law.

WHAT IS A “MEETING”?

For the purposes of the Open Meetings Law, there are four separate circumstances which will constitute a meeting of the county commission (or a committee or subcommittee of the commission). Once any one of these conditions is met and the existence of a meeting is established, the county commission is required to comply with the provisions of the act – including the posting of notice.

1. A pre-arranged gathering of a quorum of the commission required by law;
 - This will be the “regular” county commission meeting
2. A pre-arranged gathering of a quorum of the commission where the body is authorized by law to exercise its powers;
 - This will be any special or emergency meeting called under the procedures set out in *Ala. Code § 11-3-8*
 - This section could also apply to the administrative or agenda-setting meeting, if the county commission routinely takes action during these meetings. Otherwise, these administrative meetings are more likely to fall under category 3 as explained below.
3. Any other gathering of a quorum of the commission (whether or not it was pre-arranged) where the body will deliberate on specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a later date.
 - This will be any administrative or agenda-setting meeting at which the body does not take action but only deliberates the agenda for the upcoming regular commission meeting.
 - This will also be any informal session or occasion during which commissioners deliberate how they will vote on a specific issue that they expect to be addressed at a meeting of the body

4. A gathering of a quorum of a committee or subcommittee of the governmental body (whether or not it was prearranged) where the members will deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body, committee, or subcommittee at a later date.

Ala. Code § 36-25A-2(6)b specifically provides that a meeting is **not** any of the following

- Social or other gatherings attended by a quorum of the body provided the members do not deliberate on matters the members believe the body will act on later
- Conventions, conferences, media events, and trainings attended by a quorum of the body provided the members do not deliberate on matters the members believe the body will act on later
- Gatherings for on-site inspections or meeting with applicants for economic incentives or assistance as long as there is not deliberation
- Gatherings of a quorum to meet with state or federal officials, such as legislators and state agency heads
- Gatherings to discuss economic, industrial, or commercial prospects or incentives that do not include conclusions or final action
- Gatherings of less than a quorum

The Open Meetings Law as amended in 2015 specifically prohibits the use of “serial meetings” to circumvent the law. See, *Ala. Code § 36-25A-1*. “Serial meetings” are defined in *Ala. Code § 36-25A-2(13)a* as a series of gatherings of two or more members of a governmental body where all of the following applies:

- There is less than a quorum of the body present at each individual gathering and at least one member attends one or more other gatherings in the series
- The total number of members attending two or more of the series of gatherings collectively constitutes a quorum
- There is no notice or opportunity for the public to attend as provided in the law

- The participating members deliberate specific matters they expect to come before the body at a later date
- The series of gatherings was held for the purpose of circumventing the law
- At least one of the gatherings in the series occurs within seven calendar days of a vote on any of the matters deliberated

Under *Ala. Code § 36-25A-2(13)b*, “gatherings” are not considered serial meetings if:

- There is no deliberation, or
- The sole purpose of the gathering was to exchange background and education information with members on specific issues, or
- The gatherings are related to a search to fill a position for persons required to file a Statement of Economic Interests until the search has been narrowed to three or fewer persons under consideration, or
- The gatherings only involve a single member of a governmental body

It is important to note that in order to meet the statutory definition of “serial meeting” set out in the Open Meetings Law, the series of gatherings must be held for the purpose of circumventing the law. This will likely be a high standard of proof for those alleging that members of a governmental body held serial meetings in violation of the law.

The question of “deliberation” is the key to determining whether or not a “gathering” of the body becomes a “meeting” of the body. It is the clear intent of the law to draw a distinction between those occasions when members of the body gather to discuss matters and those occasions when the members of the body gather and “deliberate” on matters that are expected to come before the body for action at a future date.

Should members of a public body begin “deliberation” during these information gatherings, the gatherings will (by operation of law) become “meetings” for the purpose of this law. When such deliberation begins, the public officials involved will have committed a violation of the open meetings law if no “notice” of the meeting was given by the governing body. Because the members of the commission do not intend these informal gatherings to be actual “meetings” for the purpose of taking votes on public matters, there will be no “notice” of the time and place of the informal gathering. Without this notice, the members who move from discussion to “deliberation” will have committed an easy-to-prove violation of the new statute.

WHAT IS “DELIBERATION”?

Because the issue of “deliberation” is at the heart of determining when social or other “gatherings” turn into “meetings”, it is important to closely examine the definition of “deliberation” found in *Ala. Code § 36-25A-2(1)*:

“An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full body immediately following the discussion or at a later time.” (Emphasis added)

Deliberation does *not* include every conversation between members of the county commission regarding an issue which may or may not come before the body. Deliberation takes place when a number of members of the body constituting a quorum exchange information on how they intend to vote on a specific matter, and/or the appropriate action to take on a specific issue that is expected to come before the body.

County officials must be careful in their communication to ensure that, when a quorum is present, they do not “exchange” information about how they intend to vote or that they do not “exchange” information intended to influence how another member of the body will vote. The determination of whether or not “deliberation” has occurred will, in the end, be a decision which can only be made by a judge. However, county officials should be careful and avoid the obvious situations in which they are being asked how they will vote on a specific matter.

WHAT IS A “QUORUM”?

A “meeting”(as defined in this act) that results from the act of “deliberation” between members of a public body can occur only when a quorum of the body is involved. The act includes its own definition of a quorum at *Ala. Code § 36-25A-2(12)*:

“Unless otherwise provided by law, a "quorum" is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in subdivision (6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions 2(6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of

whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions 2(6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.” (Emphasis added)

In most circumstances, a quorum of a county commission as defined under the Open Meetings Law will be the number of members representing a quorum of the commission. Commissions which include the Judge of Probate or county-wide elected chairman as the presiding officer, should include such presiding officer in the number of commission members when determining the number of persons necessary to constitute a quorum for the purposes of this law.

The definition of quorum also establishes a procedure that includes persons who have been elected or appointed to public positions but have not yet taken office. County commissions are exempted from this requirement, but other public bodies associated with county government are not exempted. For example, this provision would mean that persons who have been elected to the local school board but have not yet taken office cannot “deliberate” with other members of the body or others who have been elected to the school board without triggering the open meeting statute.

WHAT IS A “GOVERNMENTAL BODY”?

The act says governmental bodies must comply with the open meeting requirements. Although county commissions and their committees and sub-committees are included within this definition found in *Ala. Code § 36-25A-2(4)*, members of other local groups should review the definition closely to determine whether or not the group is a “governmental body” and therefore subject to the act:

All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term "governmental body" does not include any of the following:

- a. Legislative party caucuses or coalitions.

b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.

c. Voluntary membership associations comprised of public employees, retirees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

It is also important to note that, pursuant to *Ala. Code § 36-25A-11*, any boards or commissions which are exempt from the old open meetings law are also exempt from the current law. This means that solid waste authorities are exempt under *Ala. Code § 11-89A-6* and health care authorities are exempt under *Ala. Code § 22-21-316*. There may be other bodies to which this exemption applies.

Section 2

Notice and Procedural Requirements under Alabama's Open Meetings Law

NOTICE AND PROCEDURAL REQUIREMENTS UNDER ALABAMA'S OPEN MEETINGS LAW

Notice Requirements in the Open Meetings Law

Ala. Code § 36-25A-3 of the Open Meetings Law includes a detailed notice requirement for meetings of governmental bodies. However, the notice procedure outlined in the Open Meetings Law DOES NOT apply to county commissions, if the commissions follow the requirements of *Ala. Code § 11-3-8*, as outlined below.

Specifically, *Ala. Code § 36-25A-3(d)* includes the following language:

“County commissions which provide proper notice in conformance with Section 11-3-8 shall not be required to comply with subsections (a), (b), and (c) of this section, nor shall committees or subcommittees of such commissions so long as the committees also comply with the notice procedures applicable to the full commission in Section 11-3-8.”

Notice Requirements for County Commissions

The following rules apply to setting county commission meetings and providing proper notice of such meetings to the public:

Establishment of Meeting Dates

Ala. Code § 11-3-8 requires county commissions to establish their regular meeting dates during the first meeting in November following the election of any of the members of the commission.

This meeting date, time and location must be posted in the courthouse and the members of the news media who have filed a written request must be advised of the regular meeting date when it is established.

It is not necessary to contact members of the media in advance of your regular commission meeting once the regular date has been established and the media has been initially notified.

Holidays

When the regular meeting date falls on a holiday, the county commission may meet “on any day” of that week or on another date or time established by the commission. As required in § 11-3-8, this substitute meeting date must be posted in the courthouse at least five days before the meeting. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Special Meetings

Special meetings of the commission can be called with five days notice upon written request of a majority of the members of the county commission. As required in § 11-3-8, the time, date and location of the special meeting along with the “purpose for and agenda of the meeting” must be posted in the courthouse at least five days before the meeting. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Items that are not listed on the agenda may not be considered during the special meeting.

Emergency Meetings

The commission chair may call an emergency meeting of the commission. The five day notice requirement does not apply. However, the meeting time, date and location should be posted in the courthouse, as required in § 11-3-8. The commission must notify the members of the media who have filed a written request with the commission for such notification.

Items that are not part of the “emergency” resulting in the calling of the meeting may not be added to the agenda for action during the emergency meeting.

Meetings of Commission Committees or Sub-Committees

The county commission may establish committees and sub-committees. However, the Open Meetings Law specifically applies to meetings of such committees and sub-committees. Therefore, notice of the meetings must also be given in the same fashion as regular commission meetings.

Once the meeting time, location and date of a committee or sub-committee meeting is established, it must be posted in the courthouse. This posting should occur at least five days before the meeting, unless the meeting is an emergency. The commission must also notify the members of the media who have filed with the commission a written request for such notification.

Media Requests for Notification

Section 11-3-8 requires that the commission notify those local media outlets that have made a written request for notification of commission meeting dates, times and locations. Counties that receive oral requests for notification should advise the media that such requests should be made in writing. The written requests should be kept on file in the commission office.

Record Keeping

Although the law does not require county commissions to keep records of the posting of notice or its communication with representatives of the media, such records will be very important in the courtroom.

Once the county commission establishes its regular commission meeting, the commission is encouraged to confirm that the notice is posted in the courthouse once each week. The Association has developed the attached form for this purpose. Confirmation that notice has been posted should be recorded on this form and retained by the county commission.

Likewise, should the commission alter its meeting dates, call a special meeting or otherwise make changes to the posted notice, such actions should be recorded on this form.

To ensure that the commission can document that it has complied with the requirements to notify those media outlets who have requested notification concerning commission meetings, the commission is also encouraged to record contacts to representatives of the news media. A form developed for that purpose is also attached.

RULES OF PROCEDURE

In addition to specific procedures for providing notice of all meetings, Alabama's Open Meetings Law requires each governmental body to adopt parliamentary rules of procedure, and provides that all meetings be conducted pursuant to those adopted rules. See, *Ala. Code* § 36-25A-5. The law does not prescribe what rules must be adopted.

Section 36-25A-5 authorizes voice votes except where otherwise prohibited by law (such as where the body is voting to convene an executive session). However, this section specifically prohibits voting by secret ballots or voting in an executive session.

The Association has developed a model set of parliamentary rules of procedure for counties, which can be downloaded from the Association's website.

RECORD KEEPING

Ala. Code § 36-25A-4 requires that the governmental body maintain accurate records of its meetings, excluding executive sessions, which records include the date, time, place, members present or absent, and action taken at each meeting. The records become public record and must be made available to the public as soon as practicable **after** approval by the county commission.

RECORDING OF MEETINGS

Ala. Code § 36-25A-6 provides that, except while in executive session, a meeting of a governmental body may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting. The governmental body may adopt reasonable rules for the implementation of this section.

The Association has developed a model policy for allowing recording of meetings, which is also available for download from the Association's website.

Section 3

Executive Sessions under Alabama's Open Meetings Law

EXECUTIVE SESSION UNDER ALABAMA'S OPEN MEETINGS LAW

WHAT IS AN EXECUTIVE SESSION?

An executive session is a meeting by the governmental body held in private “behind closed doors” to discuss a confidential matter under circumstances authorized by Alabama’s Open Meetings Law. *Ala. Code § 36-25A-2(2)* defines “executive session” as,

That portion of the meeting of a subcommittee, committee or full governmental body from which the public is excluded for one or more reasons prescribed in § 36-25A-7(a).

This definition was amended in 2015 to specifically include subcommittees and committees. See *Act 2015-340*. This means that all the rules for executive session apply to meetings of committees and subcommittees of a governmental body.

Ala. Code § 36-25A-7(a) specifically states that executive sessions are not required by the law, meaning that an open meeting can be held even when there are grounds for an executive session.

When a governmental body meets in executive session, all members of the press, all members of the public, and all employees except those participating in the discussion are cleared from the meeting chambers so that the meeting can be held in private. Alternatively, the governmental body may vacate the meeting chambers and move to a room where the discussion can take place in private.

A detailed description of the permissible reasons for convening an executive session is set out below.

WHEN CAN AN EXECUTIVE SESSION BE CONVENED?

An executive session can only be convened during a meeting of the governmental body in which notice of the meeting has been properly given to the public and the media as required by law. In other words, an executive session can only be convened at a prearranged gathering of a quorum at a time and place which is set by law or operation of law (the “regular” county commission meeting) or at which the governmental body is authorized to exercise its powers (a special meeting scheduled under the procedures set out in *Ala. Code § 11-3-8*).

The definition of “meeting” found in *Ala. Code § 36-25A-2(6)* includes circumstances other than a regular or special meeting where a quorum of the body gathers to deliberate matters expected to come before the body at a later date. However, this is **not** a meeting at which the body can take any official action or properly vote on any issue including whether or not

to convene an executive session. Therefore, the body cannot properly convene an executive session during such a gathering.

HOW IS EXECUTIVE SESSION CONVENED?

Ala. Code § 36-25A-7 details steps for convening an executive session, outlined below.

Noticed Meeting Called to Order

First of all, as discussed above, the decision to convene an executive session can only be made while a quorum of the body is in session at a meeting where it is authorized by law to take official action.

Motion to Convene

Once a quorum is present for conducting business, a motion to convene an executive session must be made. The motion must state the purpose for executive session and must identify with specificity which of the nine permissible grounds for calling the executive session applies. The nine permissible grounds are explained below.

Recorded Vote

There must be a recorded vote to convene the executive session, and the motion must pass by a majority of the members of the body present. The vote of each member must be recorded in the minutes. Therefore, this motion cannot be adopted by voice vote.

Statement of Applicability

There are four circumstances under which the law sets out a special requirement that the governmental body be advised, ***prior to convening the executive session***, that the executive session is necessary and/or proper to protect confidential information. This advice must be provided in writing or by an oral declaration made on the record and included in the minutes of the meeting. Each of these circumstances will be discussed below in connection with the proper grounds for convening an executive session. In brief, however, the circumstances and specific requirements are as follows:

(1) Pending or Threatened Litigation

The governmental body must be advised by an attorney licensed in Alabama that an executive session is authorized for the planned discussion.

(2) Criminal Investigations or Revealing Undercover Agents

The governmental body must be advised from one of the following that the discussion would “imperil effective law enforcement” if disclosed outside of an executive session.

- A law enforcement officer with arrest powers,
- A district attorney or assistant district attorney, or
- The attorney general or an assistant attorney general

(3) Matters of Commerce or Trade

The governmental body must be advised that, if not held in executive session, the discussions:

- (a) Would have a detrimental effect upon the competitive position of a party to the negotiations or the location, retention, expansion, or upgrading of a public employee or business entity in the area **or**
- (b) Would disclose information protected by the Alabama Trade Secrets Act.

This advice must be provided by a person who is involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve information protected by the Alabama Trade Secrets Act.

(4) Public Employee Negotiation Strategy

The governmental body must be advised by a person representing the interests of the governmental body in the negotiations that the discussions would have a detrimental effect on the negotiating position of the governmental body if disclosed outside of an executive session.

Statement on Reconvening “Open” Portion of the Meeting

Ala. Code § 36-25A-7(b)(4) requires that, prior to calling the executive session to order, the chairperson shall state on the record whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

WHO CAN PARTICIPATE IN AN EXECUTIVE SESSION?

With a few exceptions, the Open Meetings Law does not directly address who can be present during an executive session of the governmental body. However, the attorney general had issued opinions under the old law, which likely still apply under the current law.

The general rule, at least with regard to discussions of “good name and character” (which is now termed “general reputation and character” under *Ala. Code § 36-25A-7(a)(1)*), has been that only persons whose presence is needed in “an official capacity” should be present in an executive session. See, e.g., *AG’s Opinion # 99-247 and # 89-011*. There are exceptions, such as where due process requires that the person whose good name and character is at issue be given notice of the meeting and an opportunity to be heard. See, e.g., *AG’s Opinion # 89-190 and # 99-247*. This would generally apply in the case of a personnel proceeding where the person’s employment or position is at risk.

Therefore, when the governmental body conducts an executive session, all media and all members of the public shall be excluded from the meeting. Additionally, all employees and any other interested parties are excluded, unless their presence is essential to provide

information to the body related to the issue being discussed. In this instance, the person providing information should only attend the portion of the executive session wherein he or she is providing information, and when his or her “role” in the meeting is completed, he or she should leave the meeting.

There are a few specific references in the law setting out who should be present in an executive session convened for a particular purpose.

- Where the discussion involves pending or threatened litigation, the attorney representing the governmental body in the legal matter at issue **must** be present.
- Where the discussion involves the sale or purchase of property, only the person representing the interests of the governmental body in the transaction may be present during the executive session.
- If a member of the governmental body has a personal interest in a real estate transaction wherein the price will be discussed in executive session, he or she cannot attend or participate in the executive session concerning that transaction.
- Where discussion of security matters involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure must be given notice of the meeting and an opportunity to attend the executive session.

HOW DOES THE GOVERNMENTAL BODY CONDUCT ITSELF DURING THE EXECUTIVE SESSION?

With the one limited exception related to administrative hearings, no deliberation and no votes can take place during the executive session. The executive session is for discussion and information-gathering purposes **only**, and must be concluded before the body begins to deliberate or make decisions about its course of action.

Deliberation

It is important to understand the difference between “discussion” and “deliberation” to understand what conduct is appropriate in an executive session. *Ala. Code § 36-25A-2(1)* defines “**deliberation**” as:

An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full body immediately following the discussion or at a later time.

Simply put, this means that when the body is ready to vote – or ready to debate how it should vote – the executive session must come to an end. Decisions **cannot** be made during the executive session. The body also cannot poll members on how they intend to vote or attempt to persuade them on how they should vote.

Proper Discussion

When an executive session is properly convened, the discussion held by the governmental body must be limited to the subject matter for which the closed meeting is convened, even if there are other issues for which an executive session could properly be convened. As set out above, as part of the motion for convening the executive session, the specific ground for convening the closed meeting must be stated on the record before the executive session is convened. Therefore, the body cannot decide once it is in the session that it wishes to discuss other matters which were not included in the motion to convene the session. Moreover, the body can never discuss in executive session any issue which is not covered by one of the nine grounds set out in the law.

Keep in mind also that, while an issue may fall within one of the grounds for executive session, as will be discussed in the section detailing the grounds for executive session, the discussion authorized by the law may be limited. For example, it is not proper to discuss any aspect of a proposed plan to purchase or sell property. The law only allows a closed door session to discuss the purchase or sale price. Discussion about whether the property is appropriate for its suggested purpose, whether the location is convenient, or whether there are alternatives to the purchase or sale of property must all be discussed in the “open” portion of the meeting.

Terminating Executive Session

When the discussion authorized to be held in executive session has concluded and the body is ready to debate or vote on the issue, or to table any action, the executive session must be adjourned. If the governmental body is reconvening the “open” portion of the meeting, the chairperson shall call the open meeting back into order and the media and public shall be allowed to return for the remainder of the meeting. If the body has moved to a different location for the executive session, it shall return to the body’s original meeting location for the remainder of the meeting.

If the chairperson announced prior to convening the executive session that the body would not reconvene the open meeting upon conclusion of the executive session, the meeting of the governmental body will be adjourned once the “closed door” discussion is completed. The body cannot change its mind and reconvene the open meeting if the media and the public have been advised that the body would not return to the open portion of the meeting following the executive session.

HOW CAN MEMBERS OF THE GOVERNMENTAL BODY PROTECT AGAINST BEING SUED OR FINED?

There are several ways that a member of a governmental body can be sued and/or fined for violating the executive session provisions of the law. Some examples are:

- Voting to go into executive session **and** remaining in the executive session during a discussion on a subject not included in the motion to convene the executive session.
- Intentionally violating the prohibition against deliberation or voting during the executive session.
- Intentionally participating in an executive session on a subject for which there is no authority to convene an executive session.
- Failing to follow the proper procedures for convening an executive session.

To protect against being sued or having to pay any fine for violating the Open Meetings Law, each member of the body must carefully consider each of the following:

- Whether or not to vote for the body to convene an executive session
- Whether or not to participate in an executive session
- Whether or not to remain in the executive session once convened

The law states that each member of a governmental body who remains in attendance at an alleged “illegal” meeting shall be named in a lawsuit filed over the alleged violation. Therefore, if a member believes that the governmental body is **intentionally** violating the law with regard to executive sessions, such as by deliberating or voting in an executive session, he or she should leave the meeting.

Furthermore, the law says that to be fined for discussing a subject other than the subject covered in the motion to convene the executive session, the member must have both voted for executive session **and** remained in the closed door session during the “illegal” discussion. Therefore, if the member voted to convene the executive session on proper grounds, but following the proper discussion, the governmental body begins to discuss another issue, the member should leave the meeting. However, if the member did not vote for the executive session, he or she may “legally” remain in the closed door meeting and should not be subject to assessment of fines for discussing subjects not covered by the motion.

WHAT ARE THE GROUNDS FOR EXECUTIVE SESSION?

Ala. Code § 36-25A-7 sets out nine possible grounds for convening an executive session. Each is written as narrowly as possible to ensure that an executive session is only allowed in very limited circumstances. It is important to become familiar with each ground, and to understand the limited applicability in each area. It is also important to keep in mind that an

executive session is never required, but is simply authorized under the limited circumstances set out below.

The nine grounds, each of which is discussed separately below, are as follows:

1. General Reputation and Character
2. Employee Disciplinary Matters
3. Pending or Threatened Litigation and Mediation/Arbitration
4. Security Matters
5. Criminal Investigations
6. Purchase or Sale of Property
7. Matters of Commerce or Trade
8. Public Employee Negotiations Strategy
9. Administrative Hearing Matters

General Reputation and Character/Job Performance

A governmental body may convene an executive session to discuss:

- The general reputation and character of an individual
- The physical condition of an individual
- The professional competence of an individual
- The mental health of an individual
- The job performance of a public employee who is not required by Alabama law to file a Statement of Economic Interests

To understand the scope of this authority for executive session, it is important to fully understand the definitions of terms set out in the law. Those definitions are as follows:

General reputation and character -- “Characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, not including job performance.”

Job performance -- “The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties. [It] includes whether a person is meeting, exceeding, or failing to meet job requirements or whether formal employment actions should be taken by the governmental body. [It] does not include the general reputation and character of the person being discussed.”

Professional competence -- “The ability of an individual to practice a profession within the profession's acceptable standards of care and responsibility. A profession is a vocation requiring certification by the State of Alabama or passage of a state licensing examination that may only be granted to or taken by persons who have completed at least three years of college-level education and obtained at least a college-level degree.”

Although the definition of “general reputation and character” specifically excludes job performance, with important exceptions noted below, the law does authorize an executive session to discuss the job performance of public employees. However, the job performance of the following persons **cannot** be discussed in an executive session:

- Any elected or appointed public official
- Any appointed member of a state or local board or commission
- A public employee required to file a Statement of Economic Interests with the Alabama Ethics Commission under *Ala. Code § 36-25-14*

Additionally, the governing body cannot generally discuss the salary, compensation, and job benefits of these public officials and public employees in executive session.

Although an executive session is generally prohibited to discuss the job performance of public employees required to file a Statement of Economic Interests, such discussion may be allowed in executive session if it fits into one of the other categories for executive session. For example:

- If the “job performance” discussion involves “professional competence” as that term is defined, an executive session of that aspect of the job performance is permitted.
- If the job performance circumstances to be discussed are the subject of a pending or threatened lawsuit or a personnel hearing where the body is serving in a quasi-judicial capacity, the discussion in executive session would likely be appropriate despite this prohibition.

Clearly, this is a limited exception to the prohibition against closed door meetings involving these specific employees, and the general rule is that the job performance of these individuals cannot be discussed in executive session. It is also important to note that this exception applies **only** to the specific employees named above. ***There are no circumstances under which the job performance of public officials can be discussed in executive session.***

Act 2015-340 includes language that a gathering of members of a body is not a serial meeting if “related to a search to fill a position required to file a statement of economic interests . . . until the search has been narrowed to three or fewer persons under consideration.” See, *Ala. Code § 36-25A-2(13)(b)(2)*. This is not included as a ground for executive session and it is unclear exactly how this provision will be interpreted, but it does appear to give governmental bodies some flexibility during the initial interview process when considering positions for department heads. This language also adds credibility to the argument that once the search has been narrowed to three or fewer persons, interviews and meetings to make final recommendations or decisions related to filling the position can only be held in an open meeting following public notice by the governmental body or any committee it has created.

Employee Disciplinary Matters

When expressly allowed by federal or state law, a governmental body may convene an executive session to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against:

- A public employee
- A student at a public school or college
- An individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body

This ground for executive session will have very limited applicability for county government. There must be a specific federal or state law allowing for a “closed-door” meeting in order for this to apply.

Pending or Threatened Litigation/Mediation and Arbitration

A governmental body may convene an executive session:

- To discuss **with their attorney** the legal ramifications of and legal options regarding pending litigation.
- To discuss **with their attorney** controversies where litigation is imminently likely if the body pursues a proposed course of action.
- To meet or confer with a mediator or arbitrator regarding any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body.

Before convening an executive session under this ground, the governmental body must be advised by an Alabama attorney that the planned discussion fits into this category. This can be a written opinion or an oral declaration entered into the minutes of the meeting. A sample opinion letter is attached.

The executive session is authorized for discussion **only**. The body may meet with the attorney in private, wherein he or she can explain things like the status of the case, the legal issues involved, and the applicable laws at play. The body can ask the attorney questions about the case and the likely or possible consequences of taking certain actions. However, the body **cannot** deliberate while in executive session. This means that the body cannot vote on any matter, poll the members on how they intend to vote, attempt to persuade other members of the commission, grant settlement authority, or otherwise instruct the attorney on how to proceed with the case.

The law states specifically that “if any deliberation begins among the members of the governmental body regarding what action to take relating to pending or threatened litigation based upon the advice of counsel **the executive session shall be concluded** and the deliberation shall be conducted in the open portion of the meeting **or** the deliberation shall cease.”

It is also important to keep in mind that this provision only authorizes the executive session to discuss legal ramifications or options **with the body’s attorney**. The law does not allow members of the body to meet alone in executive session to discuss legal matters or to meet with other parties involved or with members of the county commission staff.

**SAMPLE “OPINION LETTER” REGARDING
EXECUTIVE SESSION ON A LEGAL MATTER**

ATTORNEY LETTERHEAD

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

This is to advise the members of the _____ County Commission that I have reviewed the matter on which the County Commission is considering convening an executive session for discussion with legal counsel regarding a legal matter or to meet or confer with a mediator or arbitrator, and have determined that, in my legal opinion, this matter is appropriate for executive session under *Ala. Code § 36-25A-7(a)(3)*.

Pursuant to *Ala. Code § 36-25A-7(a)(3)*, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

County Attorney (Alabama Bar No. _____)*

** The attorney should include his or her Bar Number as proof that he or she is licensed to practice in the State of Alabama as required in Ala. Code § 36-25A-7(a)(3)..*

Security Matters

A governmental body may convene an executive session to discuss each of the following security matters if public disclosure could reasonably be expected to be detrimental to public safety or welfare:

- Security plans, procedures, assessments, measures, or systems
- The security or safety of persons, structures, facilities, or other infrastructures
- Critical energy infrastructure information, as defined by federal law

The only specific requirement for use of an executive session under this provision is that, when the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure shall be given notice and an opportunity to attend the session.

Criminal Investigations

A governmental body may convene an executive session related to criminal investigations under the following circumstances:

- To discuss information that would disclose the identity of an undercover law enforcement agent or informer
- To discuss a criminal investigation of someone who is not a public official where there are allegations or charges of specific criminal misconduct
- To discuss whether or not to file a criminal complaint

Before convening an executive session under this ground, the governmental body must be advised that the discussions would imperil effective law enforcement if disclosed outside of an executive session from one of the following:

- A law enforcement officer with authority to make an arrest
- A district attorney or assistant district attorney
- The attorney general or an assistant attorney general

This statement can be given either in writing or by oral declaration entered into the minutes of the meeting. A sample statement is attached.

**SAMPLE “OPINION LETTER”
REGARDING EXECUTIVE SESSION ON A CRIMINAL
INVESTIGATION**

LETTERHEAD OF PERSON OR ENTITY GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

I have been advised that the _____ County Commission proposes to discuss matters related to a criminal investigation and/or matters which may reveal the identity of an undercover law enforcement agent or informer. I am writing to advise the _____ County Commission that this discussion would imperil effective law enforcement if conducted outside of executive session, and that under authority granted under *Ala. Code § 36-25A-7(a)(5)*, this body may convene an executive session for this discussion.

Pursuant to *Ala. Code § 36-25A-7(a)(5)*, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

Attorney General/Assistant Attorney General/District
Attorney/Assistant District Attorney/Law Enforcement Officer
with arrest powers*

* *This letter must be signed by one of these persons.*

Purchase or Sale of Property

A governmental body may convene an executive session to discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. Only persons representing the interests of the governmental body in the transaction may be present during the executive session.

The law specifically states that this provision authorizing an executive session shall not apply if:

- Any member of the governmental body has a personal interest in the transaction and attends or participates in the executive session.
- A condemnation action has been filed to acquire the real property involved in the discussion.

This closed door session may only be held for discussion of the price to offer or accept. The law states that, "the material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting prior to the execution of the contract." This means that the governmental body cannot execute the contract while in the executive session. The governmental body must make all decisions related to the real estate transaction in an open meeting, and all terms of the contract it intends to enter into must be disclosed in an open meeting before the contract is signed.

Matters of Commerce or Trade

A governmental body may convene an executive session to discuss “preliminary negotiations” involving matters of trade or commerce where the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama, in other states, or in foreign nations. The law does not define “preliminary negotiations”.

An executive session may also be convened to discuss matters or information as defined or described in the Alabama Trade Secrets Act (*Ala. Code § 8-27-1 et seq.*). Under *Ala. Code § 8-27-2*, a “trade secret” is defined as information that:

- a. Is used or intended for use in a trade or business;
- b. Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process;
- c. Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret;
- d. Cannot be readily ascertained or derived from publicly available information;
- e. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and
- f. Has significant economic value.

Before convening an executive session under this ground, the governmental body must be advised that the discussions:

- Would have a detrimental effect upon the competitive position of a party to the negotiations if disclosed outside of an executive session, or
- Would have a detrimental effect upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or
- Will involve matters or information of the character defined or described in the Alabama Trade Secrets Act

This statement must come from a person who is involved in the recruitment or retention effort or who has personal knowledge that the discussions would disclose information protected by the Alabama Trade Secrets Act. It can be given either in writing or by oral declaration entered into the minutes of the meeting. A sample statement is attached.

While not included in the section on executive sessions, *Act 2015-340* made changes to the law that should be beneficial to county commissions when considering economic development proposals. *Ala. Code § 36-25A-2(6)(b)* now excludes from the definition of “meeting” both of the following:

- Gatherings of a quorum for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body as long as there is ***no deliberation***.

- Gatherings to discuss an economic, industrial, or commercial prospect or incentive provided the discussion does not include conclusions as to recommendations, policy, decisions or final action – i.e., there is ***no deliberation***.

These exceptions would not extend to circumstances where the body would convene an executive session to discuss “preliminary negotiations”. As used throughout the law, the term “gathering” does not extend to nor apply to official “meetings” of the commission.

In addition, it is important to keep in mind that the law specifically prohibits deliberation during these “gatherings” that are not considered meetings under *Ala. Code § 36-25A-2(6)(b)*. Therefore, if commissioners begin to discuss or deliberate during gatherings as outlined here, they will be in violation of the law.

**SAMPLE “OPINION LETTER”
REGARDING EXECUTIVE SESSION ON NEGOTIATIONS
RELATED TO TRADE OR COMMERCE**

LETTERHEAD OF PERSON OR ENTITY GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

Please be advised that I have reviewed the commerce or trade matter which the _____ County Commission proposes to discuss in executive session. It is my opinion that an executive session is authorized for this discussion under *Ala. Code § 36-25A-7(a)(7)*, and that it will have a detrimental effect upon the competitive position of the _____ County Commission or will reveal information protected by the Alabama Trade Secrets Act if the discussion is conducted outside of executive session.

Pursuant to *Ala. Code § 36-25A-7(a)(7)*, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

*

** This letter must be signed by a person involved in the recruitment effort or, if the ground is that the information is protected by the Alabama Trade Secrets Act, by someone with personal knowledge that the discussion regards information covered by the Alabama Trade Secrets Act.*

Public Employee Negotiation Strategy

A governmental body may convene an executive session to discuss strategy in preparation for negotiations between the governmental body and a group of public employees.

This would generally apply where the governmental body is negotiating with a union or other employee interest group, and as such, will have limited applicability for county government.

Before convening an executive session under this ground, the governmental body must be advised from a person representing the interests of the governmental body in such negotiations that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session. This statement can be given either in writing or by oral declaration entered into the minutes of the meeting. A sample statement is attached.

**SAMPLE “OPINION LETTER”
REGARDING EXECUTIVE SESSION ON PUBLIC EMPLOYEE
NEGOTIATIONS**

LETTERHEAD OF PERSON GIVING ADVICE

(Insert Date)

Members of the _____ County Commission
(Insert Address)

RE: Opinion on Applicability of Executive Session

Dear _____ County Commission Members:

This is to advise the members of the _____ County Commission that, as the person representing the interests of the county commission in pending negotiations with a group of county employees, it is my opinion that under *Ala. Code § 36-25A-7(a)(8)*, the _____ County Commission may properly convene an executive session for this discussion, and that there would be a detrimental effect upon the negotiating position of the _____ County Commission if discussion of these matters was conducted outside of an executive session.

Pursuant to *Ala. Code § 36-25A-7(a)(8)*, a copy of this letter should be attached to the minutes of the County Commission meeting wherein the body considers a motion to convene an executive session to discuss this matter.

Sincerely,

Person representing County Commission in
negotiations with employees

Administrative Hearing Matters

If the governmental body is acting as a “quasi-judicial body”, the body may convene an executive session to deliberate and discuss evidence or testimony presented during a public or contested case hearing, provided that the body either:

- Votes upon its decision in an open meeting or
- Issues a written decision which may be appealed to a body which has the authority to conduct a hearing or appeal which is open to the public

There is no clear definition of what a “quasi-judicial body” is, but in essence, it means that the governmental body is making judicial decisions, such as in the case of a personnel hearing conducted by or before the governmental body or a committee created by the body. This provision would apply to any state agency conducting administrative hearings on matters governed by the agency, and will likely have limited applicability for county governments. However, this provision would apply in any instance where the county commission conducts an administrative hearing regarding disciplinary or other personnel issues. It would also apply to any personnel board created by the county commission or pursuant to local law.

This provision differs from the other eight grounds for executive session in that it does allow the body to deliberate in the closed session provided the body will vote in open session or issue a written decision which could be appealed to a body that would conduct an open hearing.

In fact, the governmental body acting as a quasi-judicial body can actually vote in the executive session if there will be a written appealable decision.

Section 4

Enforcement of Alabama's Open Meetings Law

ENFORCEMENT OF ALABAMA'S OPEN MEETINGS LAW

Ala. Code §36-25A-9(a) states that the Open Meetings Law “is designed and intended to hold members of governmental bodies, and the bodies themselves, accountable to the public for violations of [the law].” The enforcement provisions of the law provide the means to accomplish these goals. The law was amended in 2015, in part to strengthen and clarify some of the enforcement provisions of the law. See *Act 2015-340*.

WHAT ACTION CAN BE BROUGHT FOR VIOLATION OF THE LAW?

The old open meetings law was a criminal statute. However, the current law is a civil statute with civil penalties imposed for violation of its provisions. See *Ala. Code § 36-25A-9*. The party or parties bringing the suit against members of a governmental body may seek any of the following remedies:

- Monetary penalties against each member found to have violated the law.
- A preliminary injunction or temporary restraining order preventing the body from proceeding with certain meetings or activities pending final outcome of the case.
- A declaratory judgment whereby the court will issue an order regarding whether or not the conduct or action(s) of the body is proper under the law.
- A permanent injunction prohibiting the governmental body from certain conduct or action(s).

WHO CAN BRING THE ACTION?

The lawsuit can be filed in the circuit court of the county where the governmental body is located by any of the following:

- The attorney general
- The district attorney
- Any media organization
- Any Alabama citizen impacted by the alleged violation to an extent greater than the impact on the public at large

Pursuant to *Act 2015-340*, where the action is filed by an Alabama citizen, the complaint must state specifically how the person bringing suit is or will be impacted by the alleged violation to an extent greater than the general public. See, *Ala. Code § 36-25A-9(a)*.

The Open Meetings Law specifically provides that suit **cannot** be brought by a member of the governmental body against other members of the body on which he or she serves.

This would not prevent a member of the governmental body from testifying against other members regarding an alleged violation. However, if a member of the body participates in the alleged illegal activity, he or she **must be named** in the lawsuit, and may be subject to payment of the fines in the event that the alleged violation is proven in court.

WHO GETS SUED?

The law requires that the lawsuit be filed against all members of the governmental body who are alleged to have participated or remained in attendance at an alleged meeting held in violation of the law.

- The lawsuit is brought against the members in their official capacity.
- There is no provision for bringing action against employees or other participants in the meeting.

WHAT ARE THE GROUNDS FOR BRINGING SUIT?

Under *Ala. Code* § 36-25A-9, there are four possible grounds for bringing suit, and the law requires that a person filing the lawsuit include in the initial complaint the specific violation or violations alleged to have taken place. This will ensure that the members of the governmental body sued will know from the beginning what they are charged with, so that they can properly prepare the defense.

Additionally, the final order from the court must state with specificity the ground or grounds upon which the ruling is based which, among other things, will assist the members and the county attorney in determining whether there are grounds for appeal.

The grounds for filing suit against members of the governmental body are set out below.

1. The members of the governmental body named in the lawsuit “disregarded the requirements for proper notice of the meeting” as required by the law.

This would cover the circumstance where the governmental body set a meeting but did not post the notice as required by law or did not provide notice to members of the media who had filed a written request for notice of all meetings.

This would not include the situation where an employee failed to follow the governmental body’s instructions to give notice or where a posted notice had been removed from the bulletin board without the knowledge of the governmental body.

In essence, to prevail on this violation, the plaintiff would have to show that the members of the governmental body knew or should have known that they were required by law to post notice and either intentionally failed to give the notice required or failed to take reasonable steps to ensure that notice was properly given.

Counties can easily protect themselves against most lawsuits on these grounds if they establish standard procedures for providing notice and keep written documents and records of when and how notice of all meetings is given.

2. The members of the governmental body named in the lawsuit disregarded provisions of the law during the open portion of the meeting.

This would cover any claims that the public officials disregarded specific provisions of the law, such as:

- Voting by secret ballot
- Refusing to allow a member of the press or general public to record the meeting under reasonable circumstances
- Failing to conduct the meeting pursuant to the body's rules of procedure
- Failing to follow the procedures for convening an executive session

This provision does **not** cover any activity which takes place during an executive session. Actions claiming violations of the executive session portions of the law must be proved as explained below.

3. The members of the governmental body named in the lawsuit “voted to go into executive session and while in executive session discussed matters other than those subjects included in the motion to convene an executive session”.

This violation would occur if the body went into executive session to discuss one issue, and while in executive session, discussed subjects other than those covered by the motion to convene the executive session.

For example, if an executive session is convened to discuss pending litigation, the governmental body cannot also discuss whether or not to fire the county engineer while in the executive session.

This would apply even if there are other issues for which executive session is proper. If the motion to convene only addressed one of those issues proper for executive session, only that issue can be discussed. If there are several “executive session items” to be discussed, there must be a proper motion and affirmative vote to convene the closed door session for each separate subject – even if they will all be discussed in the same executive session.

However, this provision would **not** cover the circumstance where the body deliberated during an executive session. That circumstance is covered by the fourth possible ground for suit, which is set out below.

4. The members of the governmental body named in the lawsuit “intentionally” violated a provision of the law not covered by one of the other three grounds.

This ground would apply where the governmental body intentionally failed to take certain action required by the law, such as:

- Refusing to adopt parliamentary rules of procedure.
- Refusing to maintain an accurate record of the meeting.
- Refusing to include in the record of the meeting, the date, time, place, members present or absent, and action taken at the meeting.
- Refusing to make the record of the meeting available to the public as soon as practicable after approval of the minutes.
- Knowingly deliberating or voting during an executive session.
- Using electronic communications to circumvent the law.

The “failure to act” involved here must be intentional. While this will likely be an issue for the court to decide, this would not cover a circumstance where the governmental body was acting in good faith, but did not realize what was required or did not realize that the requirements had not been met.

WHAT SHOULD MEMBERS OF THE BODY DO IF SUED?

The law requires that the defendants (the members of the governmental body sued) file their initial response within seven business days of personal service of the lawsuit. Therefore, when a member of the governmental body is served with legal papers, he or she must contact the county attorney and the county’s insurance carrier *immediately*. In the event that service is made to the county commission office, and the members of the body named are not present at the office, the county administrator should contact each member as soon as possible and forward the legal papers to the county attorney immediately upon receipt.

The law also provides that a preliminary hearing on the lawsuit must be held no later than 10 business days after the defendants’ initial response, or if no initial response is filed, no later than 17 business days after the lawsuit is filed. The purpose of this hearing is for the plaintiff to convince the court that there is enough evidence to proceed with a trial on the allegations made in the lawsuit. Therefore, the members of the governmental body must be prepared to defend their actions early in the case.

This lawsuit is complicated and is designed to move very quickly, so the county attorney must be involved from the outset. Unless a longer period is agreed to by the parties and the court, a final order on the merits of the case must be issued by the court within 60 days after the preliminary hearing. Therefore, each member of the county commission, and the county attorney, must move quickly to prepare the county’s defense.

WHAT ARE THE PENALTIES IF THE COURT DETERMINES THERE HAS BEEN A VIOLATION OF THE LAW?

The Open Meetings Law sets out monetary penalties to be paid where the court determines that there has been a violation of the Open Meetings Law. Under the law, each member of the governmental body found to have violated the law can be assessed a penalty of up to \$1000 or one-half of his or her monthly salary for service on the body, whichever is less. Fines can be assessed for each separate violation of the law. And under *Ala. Code § 36-25A-9(g)*, as amended in *Act 2015-340*, the court must issue a minimum penalty of one (\$1.00) dollar. The penalties assessed are payable to the plaintiff(s).

Any penalties must be paid personally by each member of the governing body found to have violated the law. This means that the county commission cannot pay the fine on behalf of the members and cannot reimburse the members for any fines paid.

Where the violations are related to improper discussion during an executive session, the monetary penalties can **only** be assessed against members who voted to go into executive session **and** remained in the executive session during a discussion determined by the court not to have been authorized by the law. Therefore, when considering an executive session, each member of the body must carefully consider each of the following:

- Whether or not to vote for the body to convene an executive session
- Whether or not to participate in an executive session
- Whether or not to remain in the executive session once convened

Who pays the legal fees?

The law states that a governmental body may pay or provide for the legal expenses of present or former members of the body named as defendants in a lawsuit filed for violation of the law.

However, there is no provision requiring the members of the governmental body to pay the attorney's fees of the person or entity filing suit alleging violation of the law. It also does not make any provision allowing the governmental body or the members sued to be reimbursed their legal fees from the plaintiff in the event the Court finds that there was no violation.

WHAT HAPPENS TO ACTIONS TAKEN AT A MEETING AT WHICH A VIOLATION OF THE LAW OCCURRED?

Ala. Code § 36-25A-9(f) provides that the court may invalidate any action taken during a meeting held in violation of the law if:

- The lawsuit is filed within 21 days of the date when the action is made public,
- The violation was not the result of mistake, inadvertence, or excusable neglect, **and**
- Invalidating the action taken will not unduly prejudice third parties who have acted in good faith reliance upon the challenged action of the governmental body

However, the court cannot invalidate any action taken at an open meeting conducted in a manner consistent with the law because of a violation which occurred prior to the meeting, which would include the failure to post notice or take other actions required under the law before the meeting.

IS THERE ANY IMMUNITY PROTECTION UNDER THE LAW?

The Open Meetings Law does include limited immunity protection for statements made during a meeting conducted in compliance with the law by members of the governmental body **or** by employees of that body. *Ala. Code § 36-25A-8* states that:

In addition to any existing applicable immunity, members of a governmental body and any of its employees participating in a meeting conducted in conformance with this chapter shall have an absolute privilege and immunity from suit for any statement made during the meeting which relates to an action pending before the governmental body.

This means that a person cannot sue any member of the governmental body or any governmental employee for statements made during a meeting of the body, if those statements are made during a matter pending before the body. For example, if the county commission is considering whether or not to award a bid to a local contractor, and a member of the commission states that the contractor is not reliable or not honest, the commissioner making that statement is protected against any lawsuit brought by the local contractor for the statements made.

The immunity protection granted **only** applies to statements made during a meeting which relate to a matter pending before the governmental body at the time the statement is made. This immunity does **not** authorize members of the county commission or county employees to use the county commission meeting as a protected forum to make inappropriate or unkind statements about other members of the body or any other persons. It is only intended to provide protection in the event that the open discussion required by the law

may include sensitive or unflattering statements to be made about some person or entity, where the discussion is directly related to the subject “on the table” in the meeting.

IS THERE A TIME LIMIT FOR BRINGING SUIT?

Ala. Code § 36-25A-11 states that a lawsuit alleging a violation of the law must be brought within sixty (60) days of the date that the person or entity bringing suit knew or should have known of the activity which is believed to have been a violation of the law.

Additionally, the law provides that the lawsuit must be filed no later than within two years of the alleged violation.

CAN THERE BE MULTIPLE SUITS FILED RELATED TO THE SAME ACTIONS OR MEETING?

One of the most important changes to the Open Meetings Law found in *Act No. 2015-340* is a new provision requiring that all causes of action based on or arising out of the same alleged violation or violations of the law must be consolidated into one action. This provision, found in *Ala. Code § 36-25A-9(g)*, allows for consolidating actions where necessary and allows parties to intervene in an ongoing action, but states specifically that:

[N]o member found to have acted in violation of this [law] by a final court order and assessed a penalty as authorized herein shall be subject to further liability or penalty to the same or different plaintiffs in separate causes of action for the same violation or violations.

Section 5

Alabama's Open Meetings Law

Ala. Code § 36-25A-1 et seq.

ALABAMA'S OPEN MEETINGS LAW

Ala. Code § 36-25A-1 et seq.

§ 36-25A-1 – Purpose and Title

(a) It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3. No executive sessions are required by this chapter to be held under any circumstances. Serial meetings or electronic communications shall not be utilized to circumvent any of the provisions of this chapter.

(b) This chapter shall be known and may be cited as the "Alabama Open Meetings Act."

§ 36-25A-2 -- Definitions

As used in and for determining the applicability of this chapter, the following words shall have the following meanings solely for the purposes of this chapter:

(1) **DELIBERATION.** An exchange of information or ideas among a quorum of members of a subcommittee, committee, or full governmental body intended to arrive at or influence a decision as to how any members of the subcommittee, committee, or full governmental body should vote on a specific matter that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full body immediately following the discussion or at a later time.

(2) **EXECUTIVE SESSION.** That portion of a subcommittee, committee, or full meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 36-25A-7(a).

(3) **GENERAL REPUTATION AND CHARACTER.** Characteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, not including job performance.

(4) **GOVERNMENTAL BODY.** All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties or municipalities; all quasi-judicial bodies of the executive and legislative departments of the state; and all standing, special, or advisory committees or subcommittees of, or appointed by, the body. The term "governmental body" does not include any of the following:

- a. Legislative party caucuses or coalitions.
- b. Alabama appellate or trial courts, except as required by the constitution of this state or any body governed by rules of the Alabama Supreme Court.

c. Voluntary membership associations comprised of public employees, retirees, counties, municipalities, or their instrumentalities which have not been delegated any legislative or executive functions by the Legislature or Governor.

(5) JOB PERFORMANCE. The observed conduct or actions of a public employee or public official while on the job in furtherance of his or her assigned duties. Job performance includes whether a person is meeting, exceeding, or failing to meet job requirements or whether formal employment actions should be taken by the governmental body. Job performance does not include the general reputation and character of the person being discussed.

(6) MEETING. a. Subject to the limitations herein, the term meeting shall only apply to the following:

1. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body at a time and place which is set by law or operation of law.

2. The prearranged gathering of a quorum of a governmental body or a quorum of a committee or subcommittee of a governmental body during which the full governmental body, committee, or subcommittee of the governmental body is authorized, either by law or otherwise, to exercise the powers which it possesses or approve the expenditure of public funds.

3. The gathering, whether or not it was prearranged, of a governmental body during which the members of the governmental body deliberate specific matters that, at the time of the exchange, the participating members expect to come before the full governmental body at a later date.

4. The gathering, whether or not it was prearranged, of a quorum of a committee or subcommittee of a governmental body during which the members of the committee or subcommittee deliberate specific matters relating to the purpose of the committee or subcommittee that, at the time of the exchange, the participating members expect to come before the full governmental body, committee, or subcommittee at a later date.

b. The term "meeting" shall not include:

1. Occasions when a quorum of a governmental body, committee, or subcommittee attends social gatherings, conventions, conferences, training programs, press conferences, media events, association meetings and events or gathers for on-site inspections or meetings with applicants for economic incentives or assistance from the governmental body, or otherwise gathers so long as the subcommittee, committee, or full governmental body does not deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee, or full governmental body at a later date.

2. Occasions when a quorum of a subcommittee, committee, or full governmental body gathers, in person or by electronic communication, with state or federal officials for the purpose of reporting or obtaining information or seeking support for issues of importance to the subcommittee, committee, or full governmental body.

3. Occasions when a quorum of a subcommittee, committee, or full governmental body, including two members of a full governmental body having only three members, gathers to discuss an economic, industrial, or commercial prospect or incentive that does not include a conclusion as to recommendations, policy, decisions or final action on the terms of a request or an offer of public financial resources.

c. Nothing herein shall restrict or prevent two members of the same full governmental body from talking together without deliberation, including two members of a full governmental body having only three members, and nothing herein shall restrict or prevent a mayor or executive director of a city or municipality who is not a voting member of the city or municipal council from talking or deliberating with a member of the city or municipal council.

(7) OPEN OR PUBLIC PORTION OF A MEETING. The open or public portion of a meeting is that portion which has not been closed for executive session in accordance with this chapter, for which prior notice was given in compliance with this chapter, and which is conducted so that constituents of the governmental body, members of the media, persons interested in the activities of the governmental body, and citizens of this state could, if they desired, attend and observe.

(8) PROFESSIONAL COMPETENCE. The ability of an individual to practice a profession within the profession's acceptable standards of care and responsibility. A profession is a vocation requiring certification by the State of Alabama or passage of a state licensing examination that may only be granted to or taken by persons who have completed at least three years of college-level education and obtained at least a college-level degree.

(9) PUBLIC EMPLOYEE. Any person employed at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations and authorities, who is paid in whole or in part from state, county, or municipal funds. A public employee does not include a person employed on a part-time basis whose employment is limited to providing professional services other than lobbying, the compensation for which constitutes less than 50 percent of the part-time employee's income.

(10) PUBLIC FUNDS. Taxes or fees charged or collected by a governmental body or from the sale of public property including, but not limited to, matching funds from the federal government or income derived from the investment of taxes or fees.

(11) PUBLIC OFFICIAL. Any person elected to public office, whether or not that person has taken office, by the vote of the people at state, county, or municipal levels of government or their instrumentalities, including governmental corporations, and any person appointed to a position at the state, county, or municipal levels of government or their instrumentalities, including governmental corporations.

(12) QUORUM. Unless otherwise provided by law, a quorum is a majority of the voting members of a governmental body. Except where a governmental body is prohibited from holding a non-emergency meeting as defined in subdivision (6)a.1. between the date of election of members and the date such members take office, any person elected to serve on a governmental body shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., beginning on the date of certification of the results of the general election. In the case of appointment to a governmental body, any person shall be counted in the determination of whether a quorum of that governmental body is present, except for any meeting as defined in subdivisions (6)a.1. and 2., from the date that the appointment is made or issued whether or not the appointment is effective on that date.

(13) SERIAL MEETING. a. The term serial meeting applies to any series of gatherings of two or more members of a governmental body, at which:

1. Less than a quorum is present at each individual gathering and each individual gathering is attended by at least one member who also attends one or more other gatherings in the series.
2. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum.
3. There is no notice or opportunity to attend provided to the public in accordance with the Alabama Open Meetings Act.
4. The members participating in the gatherings deliberate specific matters that, at the time of the exchange, the participating members expect to come before the subcommittee, committee or full governmental body at a later date.
5. The series of gatherings was held for the purpose of circumventing the provisions of this chapter.
6. At least one of the meetings in the series occurs within seven calendar days of a vote on any of the matters deliberated.

b. The term serial meeting does not include:

1. Gatherings, including a gathering of two members of a full governmental body having only three members, at which no deliberations were conducted or the sole purpose was to exchange background and education information with members on specific issues shall not be considered a serial meeting under this chapter.
2. A series of gatherings related to a search to fill a position required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14 until the search has been narrowed to three or fewer persons under consideration.
3. A gathering or series of gatherings involving only a single member of a governmental body.
4. A series of gatherings by the trustees of an institution of higher education established by the Constitution of Alabama of 1901, as amended, or of any statutorily created four-year institution of higher education in the state, or of Athens State University involving a search to fill a position that directs the institution or a department or major divisions thereof, including the position of president, vice president, provost, dean, department head, or athletic coach.
5. A meeting in which a public official who is a member of a non-profit professional association comprised of members of the same profession, discusses or participates in the formation of the policy or policies of the professional association of which the public official is a member. This exception shall apply to both legislative policies of the professional association and regulatory policies of the professional association of which the public official is a member, and regardless of whether a quorum of the members of the governmental body are members of the same professional association.

§ 36-25A-3 – Notice Requirements

(a) Unless otherwise specified by law and as provided herein, any governmental body subject to this chapter, except for an advisory board, advisory commission, advisory committee, task force, or other advisory body created solely to make recommendations on public policy issues and composed of persons who do not receive compensation for their service as members of the board, commission, committee, task force, or body from public funds, shall post notice of all meetings, as defined in Section 36-25A-2(6)a.1., at least seven calendar days prior to the meeting as follows:

- (1) The Alabama Legislature is solely governed by the Alabama Constitution which establishes that the doors of each house of the Alabama Legislature shall be open to the public unless a vote is taken that secrecy is required under the circumstances. The respective houses

of the Alabama Legislature shall develop rules consistent with the Constitution of Alabama of 1901, providing for access to and prior notice of all sessions and standing committee and standing subcommittee meetings and all meetings of permanent and joint legislative committees. Because the Alabama Legislature is solely governed by the Alabama Constitution and sets its own rules to ensure public access as guaranteed by the Constitution, no other provision of this chapter applies to the Alabama Legislature.

(2) Any governmental body with statewide jurisdiction shall submit notice of its meeting to the Secretary of State. The Secretary of State shall post the notice on the Internet for at least seven calendar days prior to the day of the meeting. The Secretary of State shall also send electronic mail notifications to anyone who has registered with the Secretary of State to receive notification of meetings. The Secretary of State may promulgate reasonable rules and regulations necessary for the uniform receipt and posting of notice and of registration for electronic mail notification. The Secretary of State shall provide during regular office hours a computer terminal at a place convenient to the public in the office of the Secretary of State that members of the public may use to view notices of meetings posted by the Secretary of State. Any governmental body with less than statewide jurisdiction may also submit notice to the Secretary of State for posting on the website. Nothing shall prevent a governmental body subject to this subsection from posting notice in any additional manner.

(3) A municipal governmental body shall post notice of each meeting on a bulletin board at a place convenient to the public in the city hall, provided, however, that a corporation a majority of whose governing board is appointed or elected by a municipality and that has a principal office separate from the city hall may, in lieu of posting notice in the city hall, post notice of each meeting on a bulletin board at a place convenient to the public in the principal office of the corporation or other instrumentality.

(4) A local school board shall post notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the board.

(5) Any other governmental body shall post notice of each meeting in a reasonable location or shall use a reasonable method of notice that is convenient to the public. Any change of the location or method for posting notices of meetings shall not take effect until the change has been approved at an open meeting by the members of the governmental body and announced to the public at an open meeting.

(6) If practicable, a governmental body other than those with statewide jurisdiction, in addition to the posting requirements, shall provide direct notification of a meeting, as defined in Section 36-25A-2(6)a., to any member of the public or news media covering that governmental body who has registered with the governmental body to receive notification of meetings. A governmental body may promulgate reasonable rules and regulations necessary for the uniform registration and payment for direct notice and for the distribution of the notices. The governmental body may choose to transmit a notice using electronic mail, telephone, facsimile, the United States Postal Service, or any other method reasonably likely to provide the requested notice. The actual cost of issuing notices, if there is one, may be required to be paid in advance by the person requesting notice by the governmental body. Direct notice to persons who have registered with the governmental body shall, at a minimum, contain the time, date, and place of the meeting.

(b) Unless otherwise specified by law directly applicable to the governmental body, notice of a meeting, as defined in Section 36-25A-2(6)a.2. and 3. as well as meetings called pursuant to Section 11-43-50 shall be posted as soon as practicable after the meeting is called and in no event less than 24 hours before the meeting is scheduled to begin, unless such notice (i) is prevented by emergency circumstances requiring immediate action to avoid physical injury to persons or

damage to property; or (ii) relates to a meeting to be held solely to accept the resignation of a public official or employee. In such situations, notice shall be given as soon as practical, but in no case less than one hour before the meeting is to begin. At the same time general notice is given, special notice shall be directed to any person who has registered to receive direct notices pursuant to the provisions of subsection (a)(6).

(c) Posted notice pursuant to this section shall include the time, date, and place of meeting. If a preliminary agenda is created, it shall be posted as soon as practicable in the same location or manner as the notice given pursuant to this section. A governmental body may discuss at a meeting additional matters not included in the preliminary agenda. If a preliminary agenda is not available, the posted notice shall include a general description of the nature and purpose of the meeting.

(d) County commissions which provide proper notice in conformance with Section 11-3-8 shall not be required to comply with subsections (a), (b), and (c) of this section, nor shall committees or subcommittees of such commissions so long as the committees also comply with the notice procedures applicable to the full commission in Section 11-3-8.

(e) Governmental bodies may give, but shall not be required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session under this chapter or existing state law.

(f) A governmental body is authorized, but not required, to provide notice in addition to that specified in this section and to provide notice for gatherings which are not meetings as defined in Section 36-25A-2(6).

§ 36-25A-4 – Maintenance of Records

A governmental body shall maintain accurate records of its meetings, excluding executive sessions, setting forth the date, time, place, members present or absent, and action taken at each meeting. Except as otherwise provided by law, the records of each meeting shall become a public record and be made available to the public as soon as practicable after approval.

§ 36-25A-5 – Rules of Parliamentary Procedure and Voting

(a) Unless otherwise provided by law, meetings shall be conducted pursuant to the governing body's adopted rules of parliamentary procedure not in conflict with laws applicable to the governmental body.

(b) Unless otherwise permitted by this chapter or directed by provisions in the Constitution of Alabama of 1901, or other existing state law applicable to the governmental body, all votes on matters before a governmental body, including, but not limited to, votes to appropriate or to authorize a governmental body's designated employee, within limits prescribed by the governmental body without further authorization of the governmental body, to spend public funds, to levy taxes or fees, to forgive debts to the governmental body, or to grant tax abatements, shall be made during the open or public portion of a meeting for which notice has been provided pursuant to this chapter. Voice votes may be allowed. Unless permitted by this chapter, existing statute, or constitutional amendment, no votes shall be taken in executive sessions. Unless otherwise directed by provisions in the Constitution of Alabama of 1901, or other existing state law applicable to a governmental body, a governmental body may not vote by secret ballot.

§ 36-25A-5.1 – Telephone or Video Conference

(a) Except as provided in subsection (d), members of a governmental body as defined in Section 36-25A-2, that is comprised of members from two or more counties, may participate in a meeting of that governmental body by means of telephone conference, video conference, or other similar communications equipment which allows all persons participating in the meeting to hear each other at the same time. Participation by such means shall constitute presence in person at the meeting for all purposes, except for the establishment of a quorum.

(b) Every meeting shall have one physical location available for persons wishing to be physically present, at which any interested member of the public shall be able to hear all persons who are participating remotely, and that location shall be published in a manner consistent with this chapter.

(c) Utilization of electronic communication shall be done in a manner that complies with this chapter and allowing members of the public to be present at the physical location required by subsection (b) is sufficient for compliance with this chapter and the electronic communication does not have to be otherwise made available to members of the public.

(d) The members of the following governmental bodies are prohibited from participating in meetings and deliberation via electronic communications as otherwise authorized by this section: The Board of Pardons and Paroles, the Public Service Commission, standing committees of the Legislature while the Legislature is in session, a governing board taking any action under the Students First Act of 2011, any state board or agency acting in any quasi judicial capacity involving employment actions or the promulgation of rules pursuant to statutory authority, any state board, agency, or other governmental body conducting a hearing which could result in loss of licensure or professional censure, and the Alabama Ethics Commission.

(e) Any other provision of this section to the contrary notwithstanding, a majority of a quorum of the members participating in any given meeting shall be physically present at the location noticed and called for the meeting in order to conduct any business or deliberation, and only those members who are physically present may participate in an executive session of the governmental body.

(f) Any vote taken at a meeting utilizing the equipment contemplated by subsection (a) shall be taken as a roll call vote that allows each participant to vote individually in a manner audible to all persons participating or present at the physical location provided for in subsection (b).

(g) No member utilizing this section shall claim any form of reimbursement for expenses, including mileage and per diem.

(h) Any governmental body with specific statutory or constitutional authority to meet via electronic means under a procedure different than that set forth in this section may continue to operate under the requirements of that specific authority or may adopt a resolution opting to come under the requirements of this section.

§ 36-25A-6 – Recording of Meetings

A meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting. The governmental body may adopt reasonable rules for the implementation of this section.

§ 36-25A-7 – Executive Sessions

(a) Executive sessions are not required by this chapter, but may be held by a governmental body only for the following purposes:

(1) To discuss the general reputation and character, physical condition, professional competence, or mental health of individuals, or, subject to the limitations set out herein, to discuss the job performance of certain public employees. However, except as provided elsewhere in this section,

discussions of the job performance of specific public officials or specific public employees may not be discussed in executive session if the person is an elected or appointed public official, an appointed member of a state or local board or commission, or a public employee who is one of the classification of public employees required to file a statement of economic interests with the Alabama Ethics Commission pursuant to Section 36-25-14. Except as provided elsewhere in this section, the salary, compensation, and job benefits of specific public officials or specific public employees may not be discussed in executive session.

(2) When expressly allowed by federal law or state law, to consider the discipline or dismissal of, or to hear formal written complaints or charges brought against a public employee, a student at a public school or college, or an individual, corporation, partnership, or other legal entity subject to the regulation of the governmental body.

(3) To discuss with their attorney the legal ramifications of and legal options for pending litigation, controversies not yet being litigated but imminently likely to be litigated or imminently likely to be litigated if the governmental body pursues a proposed course of action, or to meet or confer with a mediator or arbitrator with respect to any litigation or decision concerning matters within the jurisdiction of the governmental body involving another party, group, or body. Prior to voting to convene an executive session under this exception the governmental body shall receive a written opinion or oral declaration reflected in the minutes from an attorney licensed to practice law in Alabama that this exception is applicable to the planned discussion. Such declaration shall not otherwise constitute a waiver of the attorney-client privilege. Notwithstanding the foregoing, if any deliberation begins among the members of the governmental body regarding what action to take relating to pending or threatened litigation based upon the advice of counsel, the executive session shall be concluded and the deliberation shall be conducted in the open portion of the meeting or the deliberation shall cease.

(4) To discuss security plans, procedures, assessments, measures, or systems, or the security or safety of persons, structures, facilities, or other infrastructures, including, without limitation, information concerning critical infrastructure, as defined by federal law, and critical energy infrastructure information, as defined by federal law, the public disclosures of which could reasonably be expected to be detrimental to public safety or welfare. Provided, however, that when the discussion involves critical infrastructure or critical energy infrastructure information, the owners and operators of such infrastructure shall be given notice and an opportunity to attend the session.

(5) To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of a person who is not a public official in which allegations or charges of specific criminal misconduct have been made or to discuss whether or not to file a criminal complaint. Provided, however, that prior to such discussions a law enforcement officer with authority to make an arrest or a district or assistant district attorney or the Attorney General or assistant attorney general shall advise the governmental body in writing or by oral declaration entered into the minutes that the discussions would imperil effective law enforcement if disclosed outside of an executive session.

(6) To discuss the consideration the governmental body is willing to offer or accept when considering the purchase, sale, exchange, lease, or market value of real property. Provided, however, that the material terms of any contract to purchase, exchange, or lease real property shall be disclosed in the public portion of a meeting prior to the execution of the contract. If an executive session is utilized pursuant to this exception in addition to the members of the governmental body,

only persons representing the interests of the governmental body in the transaction may be present during the executive session. This real property discussion exception shall not apply if:

a. Any member of the governmental body involved in the transaction has a personal interest in the transaction and attends or participates in the executive session concerning the real property.

b. A condemnation action has been filed to acquire the real property involved in the discussion.

(7) To discuss preliminary negotiations involving matters of trade or commerce in which the governmental body is in competition with private individuals or entities or other governmental bodies in Alabama or in other states or foreign nations or to discuss matters or information of the character defined or described in the Alabama Trade Secrets Act. Provided, however, that prior to such discussions a person involved in the recruitment or retention effort or who has personal knowledge that the discussion will involve matter or information of the character defined or described in the Alabama Trade Secrets Act advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the competitive position of a party to the negotiations or upon the location, retention, expansion, or upgrading of a public employee or business entity in the area served by the governmental body if disclosed outside of an executive session, or would disclose information protected by the Alabama Trade Secrets Act.

(8) To discuss strategy in preparation for negotiations between the governmental body and a group of public employees. Provided, however, that prior to such discussions a person representing the interests of a governmental body involved in such negotiations advises the governmental body in writing or by oral declaration entered into the minutes that the discussions would have a detrimental effect upon the negotiating position of the governmental body if disclosed outside of an executive session.

(9) To deliberate and discuss evidence or testimony presented during a public or contested case hearing and vote upon the outcome of the proceeding or hearing if the governmental body is acting in the capacity of a quasi-judicial body, and either votes upon its decision in an open meeting or issues a written decision which may be appealed to a hearing officer, an administrative board, court, or other body which has the authority to conduct a hearing or appeal of the matter which is open to the public.

(b) A governmental body desiring to convene an executive session, other than to conduct a quasi-judicial or contested case hearing, shall utilize the following procedure:

(1) A quorum of the governmental body must first convene a meeting as defined in Section 36-25A-2(6)a.1. and 2.

(2) A majority of the members of the governmental body present must adopt, by recorded vote, a motion calling for the executive session and setting out the purpose of the executive session, as provided in subsection (a). If subsection (a) requires an oral or written declaration before the executive session can begin, such oral or written declaration shall be made, prior to the vote.

(3) The vote of each member shall be recorded in the minutes.

(4) Prior to calling the executive session to order, the presiding officer shall state whether the governmental body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.

§ 36-25A-8 -- Immunity

In addition to any existing applicable immunity, members of a governmental body and any of its employees participating in a meeting conducted in conformance with this chapter shall have an absolute privilege and immunity from suit for any statement made during the meeting which relates to an action pending before the governmental body.

§ 36-25A-9 -- Enforcement

(a) This chapter is designed and intended to hold members of governmental bodies, and the bodies themselves, accountable to the public for violations of this chapter. Therefore, enforcement of this chapter, except a violation of Section 26-25A-3(a)(1), may be sought by civil action brought in the county where the governmental body's primary office is located by any media organization, any Alabama citizen impacted by the alleged violation to an extent which is greater than the impact on the public at large, the Attorney General, or the district attorney for the circuit in which the governmental body is located; provided, however, that no member of a governmental body may serve as a plaintiff in an action brought against another member of the same governmental body for an alleged violation of this chapter. The complaint shall be verified, shall state specifically the applicable ground or grounds for the complaint as set out in subdivisions (b)(1) through (4) of subsection (b), and shall name in their official capacity all members of the governmental body remaining in attendance at the alleged meeting held in violation of this chapter. If filed by an Alabama citizen, the complaint shall state specifically how the person is or will be impacted by the alleged violation to an extent which is greater than the impact on the public at large. Members of a governmental body who are named as a defendant in a complaint under this chapter shall serve an initial response to the complaint within seven business days of personal service of the complaint. A preliminary hearing on the complaint filed shall be held no later than 10 business days after the date of the filing of the defendant or defendants' initial response to the complaint or, if no response is filed, no later than 17 business days after the filing of the complaint, or on the nearest day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties.

(b) In the preliminary hearing on the complaint, the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a prima facie case the plaintiff must present substantial evidence of one or more of the following claims:

(1) That the defendants disregarded the requirements for proper notice of the meeting pursuant to the applicable methods set forth in Section 36-25A-3.

(2) That the defendants disregarded the provisions of this chapter during a meeting, other than during an executive session.

(3) That the defendants voted to go into executive session and while in executive session the defendants discussed matters other than those subjects included in the motion to convene an executive session as required by Section 36-25A-7(b).

(4) That, other than a claim under subdivisions (1) through (3), the defendants intentionally violated other provisions of this chapter.

(c) If the court finds that the plaintiff has met its initial burden of proof as required in subsection (b) at the preliminary hearing, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff has presented its prima facie case that an executive session appears to have been improperly conducted as set out in subsection (b)(3), the defendants shall bear the burden of proof at the hearing on the merits to prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion to convene an executive session required in Section 36-25A-7(a).

(d) During a proceeding involving claims brought under subsection (b)(3), the court shall conduct an in camera proceeding or adopt another procedure as necessary to protect the confidentiality of the matters discussed during the executive session, and if there is a determination that the executive session was authorized by this chapter, the matters shall not be disclosed or utilized in any other legal proceeding by any individual or attorney who attends the in camera portion of the proceedings.

(e) Upon proof by a preponderance of the evidence of a defendant's violation of this chapter, the circuit court shall issue an appropriate final order including, if appropriate, a declaratory judgment or injunction. Prior to a final determination of the merits, temporary restraining orders or preliminary injunctions may be issued upon proper motion and proof as provided and required in the Alabama Rules of Civil Procedure. A final order on the merits shall be issued within 60 days after the preliminary hearing unless a longer period is consented to by all parties and the court.

(f) The court may invalidate the action or actions taken during a meeting held in violation of this chapter, provided that the complaint is filed within 21 days of the date when the action is made public, the violation was not the result of mistake, inadvertence, or excusable neglect, and invalidation of the governmental action taken would not unduly prejudice third parties who have changed their position or taken action in good faith reliance upon the challenged action of the governmental body; provided, further however, that any action taken at an open meeting conducted in a manner consistent with this chapter shall not be invalidated because of a violation of this chapter which occurred prior to such meeting.

(g) A final order issued against a defendant shall state specifically upon which claim or claims in subdivisions (1) through (4) the ruling is based. For each meeting proven to be held in violation of this chapter for one or more reasons, the court shall impose a civil penalty payable to the plaintiff(s). The maximum penalty for each meeting shall not exceed one thousand dollars (\$1,000) or one half of the defendant's monthly salary for service on the governmental body, whichever is less. The minimum penalty shall be one dollar (\$1). With regard to claims related to improper discussions during executive sessions, monetary penalties may only be assessed against defendant members of a governmental body who voted to go into an executive session and who remained in the executive session during a discussion determined by the court not to have been authorized by this chapter. Penalties imposed against a member of a governmental body found to have acted in violation of this chapter shall not be paid by nor reimbursed to the member by the governmental body he or she serves. If more than one cause of action is filed pursuant to this chapter, all causes of action based on or arising out of the same alleged violation or violations shall be consolidated into the action that was first filed and any party may intervene into the consolidated action pursuant to the Alabama Rules of Civil Procedure, and no member found to have acted in violation of this chapter by a final court order and assessed a penalty as authorized herein shall be

subject to further liability or penalty to the same or different plaintiffs in separate causes of action for the same violation or violations.

(h) A governmental body is authorized to pay for or provide for the legal expenses of present or former members of the body named as defendants in a proceeding under this chapter.

§ 36-25A-10 – Limitation Period

An action under this chapter must be brought within 60 days of the date that the plaintiff knew or should have known of the alleged act which brings rise to the cause of action; provided, however, that any action under this chapter must be brought within two years of the alleged act which brings rise to the cause of action.

Section 6

County Commission Notice Requirements

Ala. Code § 11-3-8

COUNTY COMMISSION MEETINGS/NOTICE

Ala. Code § 11-3-8

§ 11-3-8 – County Commission Meetings and Notice

(a) At the first county commission meeting held pursuant to Section 11-3-1 following each election of county commissioners, the county commission shall establish the day or days of each month on which regular meetings of the county commission shall be held. The county commission, by resolution, may alter the regular meeting days as necessary. The regular meeting days and the time and place where the meetings will be held shall at all times be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of the schedule of regular meetings of the county commission.

(b) The county commission may schedule a special meeting when determined necessary in writing by a majority of the members of the commission, or in case of an emergency, upon call of the chair. The purpose for and agenda of the meeting shall be included in all public notices of the meeting, and no other items shall be considered at the special meeting. Upon scheduling, except in an emergency, at least five days prior to the special meeting, notice of the meeting time, place, and agenda shall be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of special meetings of the county commission.

(c) When a regular meeting day of a county commission falls on a legal public holiday, the county commission may meet on any day of the following week instead of on the holiday, or at another time determined by the county commission, provided that at least five days prior to the meeting, notice of the meeting time and place shall be posted in a public and conspicuous location in the courthouse and in other public buildings determined appropriate by the county commission and shall be forwarded to all local news media who have on file with the county commission a written request for notification of the schedule of regular meetings of the county commission.