• OPEN MEETINGS ACT

COMMITTEE GUIDELINES

OPEN MEETINGS ACT ADVISORY COMMITTEE GUIDELINES

As a member of a public body your prime responsibility is to represent your constituency. Representative government necessarily is a reflection of the diversity within the community. The actions of a public body should be consistent with this principle. Expedience, efficiency or personal discomfort are not grounds for ignoring this principle.

Alaska's courts have consistently ruled that the public must be afforded the right to observe all steps of the deliberative process on decisions by public bodies. The threshold determination for application of the open Meetings Act is deciding whether a meeting occurred. Clearly, court decisions hold that if there is a gathering of members of a public body where deliberations on public business occur, this meeting is subject to the Open Meetings Act. Any time a quorum of a municipal assembly, board, or commission discusses public business, it constitutes a meeting. Adequate public notice of the meeting must be provided and the public must be allowed to observe the deliberations. For gatherings of less than a quorum, the type of discussion is key to deciding whether the gathering is a meeting covered by the Act.

A gathering is a meeting when any discussion of public business that creates the possibility that a decision could be influenced occurs. This includes preliminary deliberations on public business, including collective discussions and collective acquisitions and exchanges of facts.

Here are some guidelines on how to comply with the Open Meetings Act:

I. Q. What groups are covered by the Open Meetings Act?

A. The Assembly, all elected boards and commissions, all advisory committees appointed by the Assembly or municipal boards and commissions, and all subcommittees of those groups.

2. Q. As a member of a municipal board or Assembly, can I invite other board members to my home for social gatherings?
Q. Can we all go out for a drink together after the meeting?
Q. What restrictions are there on socializing with other members of my board or commission?

A. Social gatherings are not covered by the Act as long as they remain social gatherings. If small groups of a board get together in a corner of the party or other social gathering and discuss a matter of public business they are denying the public the right to observe all steps of the deliberative process. Avoid discussing public business in this context. The safest way to live under the law is keep municipal business out of social situations.

3. Q. Is a meeting of a group less than a quorum subject to the Open Meetings Act?

A. Yes. A group of less than a quorum meeting to discuss public business is subject to the Act. Adequate public notice must be given and the public invited. This would include formal or informal subcommittees of any public body. However, two, but not more than two, members of a body may meet to discuss public business so long as the discussion does not result in an express or implied commitment by both members to vote in a particular way. Members of subcommittees and other small subordinate groups should avoid unannounced meetings to discuss subcommittee business, even if only two members of such group attend.

4. Q. Can I have lunch with fellow board members and discuss public business?

A. A meeting of more than two members for lunch where public business is discussed is permissible provided that adequate notice is given and the public is invited. Without public notice such actions cut the public out of the deliberative process on as issue and make the board vulnerable to a legal action. Even if it is a luncheon gathering at a local restaurant where public business will be discussed, give reasonable notice of the meeting and invite the public. Although this may sound impractical or inconvenient to board members who are accustomed to informal discussions about pending issues, it would be a way of continuing their informal discussions and acting in accordance with the Act. As you may remember from your high school civics class, nobody ever said democracy was an efficient, or even convenient, type of government. A lunch meeting of not more than two members of a public body to discuss public business does not require public notice, but is, however, subject to Guideline No. 3 above. Adequate public notice must be given for a lunch meeting of two or more members of a subcommittee or other small subordinate group to discuss subcommittee business.

5. Q. Must a public meeting be held in a public place?

A. No, the Open Meetings Act only requires that the meeting be open to the public. Therefore, it would be legal to hold a public meeting in a public building, a restaurant or a private home. However, from a practical standpoint, it is questionable whether a normal restaurant setting is compatible with the objectives of the Open Meetings Act. Limited space, the implied obligation to buy and acoustical limitations are not conducive to public involvement.

6. Q. Is communication between individual board members, which is limited to informational and fact-gathering purposes, a violation of the Act?

A. It's unreasonable to prohibit one board member from talking to another, especially in casual meetings. However, keep such conversations as general as possible. If you want to contact another board member about an unrelated subject it would be unreasonable to argue that such a conversation constitutes a public meeting. However, if the information and fact-gathering discussion results in an express or implied commitment by both members to vote in a particular way, the public is denied the opportunity to watch deliberations about an important decision.

7. Q. Can I serially talk to members of my board about the same topic?

A. No. Serial communications, no matter how general, imply intent to build a consensus. The court has previously declared that serial communications on the same topic violate the spirit, if not the letter, of the law because the action is for all practical purposes occurring during these private meetings.

8. Q. When are executive sessions allowed?

A. The law states that you can recess into executive session to discuss matters the immediate knowledge of which would be detrimental to city-borough finances or, under certain conditions, subjects that tend to prejudice the reputation and character of a person. That person must be given prior notice and may require that the session be held in public. The law also states that you can hold an executive session for matters, which by law or municipal charter or ordinance are required to be confidential. Remember though, that to hold an executive session the law states that you must make a motion at a duly-noticed public meeting to recess into executive session. Once in executive, session, you are to discuss only those specific issues for which the executive session was convened. Then, if the

discussion leads to a vote, you must reconvene the public meeting and hold the vote in public. Many stipulations apply to executive sessions. Please consult either the Municipal Attorney or Municipal Clerk before planning an executive session.

9. Q. During a meeting, can we recess and hold off-the-record discussions (huddle in the corner) to resolve an impasse?

A. No. It cuts the public out of some of the deliberations. It is suggested that impasses be resolved in public. The chair could appoint an ad hoc committee of the body and recess the meeting. The committee could in short order resolve the impasse by discussing the conflict in public. The meeting could then be resumed.

10. Q. What if I think the Act has been violated?

A. If you think there may have been a violation, this should be disclosed in a public forum at the first opportunity. At that time, the meeting in question should be reconstructed as nearly as possible. The court has stated that a violation may result in the action being declared void. If the violation is serious enough for the action to be declared void, the court has held that the burden is on the public body to start the deliberative process again, from the beginning, and to prove this in court.

11. Q. How can we make sure we don't violate the Act in the future?

A. Familiarize yourself with the Act itself. Don't depend on someone else to do it for you. Then, to be absolutely safe, always keep in mind the general goal of keeping deliberations of public issues in the public arena.

AVOIDING VIOLATIONS OF THE OPEN MEETINGS ACT

The Open Meetings Act prohibits having a meeting without advertising. The definition of a "meeting" differs based on what kind of body it is—that is, whether it is a policy-making or decision-making body or an advisory-only body. For a body that has the authority to establish policies or make decisions—which would certainly include the Assembly and the Hospital Board—a meeting occurs when more than three members OR a quorum (whichever is less) are present and the members consider a matter upon which that body has the power to act. The traditional rule for the Assembly stands: If three Assembly Members are sitting around talking about City and Borough business and a fourth Member shows up, the conversation about City and Borough business should stop immediately.

For a body that is advisory only, a meeting occurs whenever two or more members get together on a pre-arranged basis to consider a matter upon which the body is empowered to act. The practical effect of this is that members of advisory-only bodies should never talk about the business of that body unless the meeting is advertised or unless they have just bumped into each other.

Members of both bodies should be cautious about contacting other members in person or by telephone or e-mail to try to influence other members or find out how they feel about an issue if the total number of members contacted exceeds the limits discussed above. This activity is sometimes called a "SERIAL MEETING." Although the law in this area is unclear, the courts might find, for example, that if two Assembly Members have discussed a matter and then each polled one other Member, that there has been a violation of the Open Meetings Act.

If there is a claim that a violation of the Open Meetings Act has occurred, the best approach is to conduct an informal CURE by holding a substantial and public reconsideration of the matters considered at the allegedly improper meeting. This "let the sunshine in" approach is similar to the disclosure recommended if a member arguably has a conflict of interest.

Once again, if you have questions, please contact the City and Borough Attorney.

--Clifford J. Groh, II
City and Borough Attorney
March 30, 2005
Revised April 4, 2005

- CONFLICT OF INTEREST

CONFLICT OF INTEREST

There are two standards for conflict of interest—the financial conflict of interest standard applies to every question made by an elected or appointed City and Borough official or employee, and a special standard of bias or prejudice applies to the special category of quasi-judicial decisions.

Financial conflict of interest: An Assembly Member or a member of a board or commission should not vote or even participate in a discussion of a matter in which he or she has a "substantial financial interest." The law defining a "substantial financial interest" is attached. If you think you MIGHT have a conflict of interest, you should DISCLOSE the facts at the meeting and ask the presiding officer to rule on whether you have a substantial financial interest. This allows the presiding officer and the body as a whole to make the determination. Disclosure also helps cure the likelihood that the body's action will survive legal challenge.

Prejudice/improper motives: A special set of rules applies when the Assembly or a board or commission is asked to apply the law to a certain set of facts, because then the matter is quasi-judicial. Examples of quasi-judicial decisions are zoning cases and tax appeals. When a matter is quasi-judicial, financial interest is not the only consideration—you might have a conflict of interest based entirely on how you feel about the people involved. In a quasi-judicial matter, you should not vote or participate in any way if you feel that you cannot be fair. One rule of thumb is that if somebody's name is in the motion and it's not a contract award or a vote on somebody getting a job, it's probably quasi-judicial and you should consider your state of mind.

PUBLIC PARTICIPATION IN MUNICIPAL MEETINGS

All meetings of the Assembly and City and Borough boards and commissions must be public unless there is a legally conducted executive session. The public has a right to attend and listen and review the materials to be considered at the meeting (sometimes called "the packet"). State law also requires that members of the public attending public meetings be given a "reasonable opportunity" to be heard. This right to be heard does not give a right to be heard on every topic the Assembly or boards or commissions consider, and the presiding officer can impose reasonable time limits when members of the public do speak.

USE OF SEPARATE LEGAL COUNSEL FOR BOARDS AND COMMISSIONS

The Charter provides that there be a City and Borough Attorney. The Sitka General Code provides that the City and Borough Attorney shall be responsible for providing legal services for the City and Borough. Any board or commission considering the engagement of separate legal counsel should (a) consult with the City and Borough Attorney first and (b) have an appropriation approved by the Assembly that will cover this expenditure.

--Clifford J. Groh, II
City and Borough Attorney
March 30, 2005

1.04.080 Conflict of interest.

A. No member of the assembly, elected or appointed official, municipal employee or official may participate in official action in which the assembly person, elected official, employee or official has a substantial financial interest.

B. If a member of the assembly or other municipal board or commission has a substantial interest in an official action, that member shall declare the substantial financial interest and ask to be excused from the vote on the matter.

C. Upon a request made under subsection B of this section, the following procedure shall be followed:
   1. The presiding officer shall rule on the request by a member to be excused from the vote.
   2. The assembly, board or commission may override the decision of the presiding officer on the request to be excused by a majority vote.

D. As used in this section, "substantial financial interest" means an expectation of receiving a non-trivial pecuniary or material benefit. A substantial financial interest of a person includes any substantial financial interest of that person's immediate family. A person has a substantial financial interest in an organization in which that person has an ownership interest, or is a director, officer, or employee. A person has a substantial financial interest in a decision if a substantial financial interest of that person will vary with the outcome of the decision. A substantial financial interest does not include the following: a personal or financial interest which is not of the magnitude that would exert an influence on an average, reasonable person; a personal or financial interest of a type which is generally possessed by the public or a large class of persons to which that official or employee belongs; or an action or influence which would have an insignificant or conjectural effect on the matter in question.

E. As used in this section, "immediate family" of a person means anyone related to that person by blood, marriage, or adoption or who lives in that person's household.

- EX PARTE CONTACTS

L E G A L
DEPARTMENT

MEMO

To: Mayor Nelson and Members of the Assembly

From: Clifford J. Groh, II, City and Borough Attorney CJG

Subject: Importance of Avoiding *Ex Parte* Contacts in Matters that Are Appeals or Seem Likely to Become Appeals

Date: May 2, 2001

This memorandum gives advice aimed at keeping us all out of trouble. If a citizen calls you or comes up to you and wants to talk to you about an appeal pending before the Assembly, please change the subject or end the conversation. If it will help, please tell the citizen that this is the advice from the City and Borough Attorney. You could also suggest that the citizen (a) call me or (b) write a letter to the Municipal Clerk to be put in the packet. As discussed before, off-the-record contacts concerning an appeal between an Assembly member and a citizen without the presence of other interested parties are *ex parte* contacts.[1] *Ex parte* contacts could lead to either the **disqualification** of the Assembly member or even the **invalidation** of the decision made by the Assembly when hearing the appeal.[2] If--despite your best efforts--you do have an *ex parte* contact concerning an appeal, please call me immediately at 747-1810 so that we can make sure that it is put on the record before the consideration of the appeal.[3]

It is also important to avoid any *ex parte* contacts on subjects that might become an appeal. Obviously, this can be difficult. One tip-off of a matter that might become an appeal is if a citizen wants a decision by the City and Borough that will grant a specific and concentrated benefit on himself or herself. If you have questions about a citizen contact on a matter that you think might become an appeal, please call me. Thanks.

This memorandum has been laminated and given to you with two copies for each Assembly member to make it possible for you to keep one copy in the Assembly packet and one handy near the telephone.

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[1] *See, e.g.*, memorandum to Denton Pearson, "Quasi-Judicial Procedures in Zoning Context," December 1, 2000.

[2] *See Griswold v. City of Homer*, 925 P.2d 1015, 1019 (Alaska 1996); and McQuillin Municipal Corporations §25.262.50 and §25.218.20 (3rd ed.).

[3] *See id.* at §25.266.

- ATTORNEY CLIENT PRIVILEGE

L E G A L
DEPARTMENT

MEMO

To: **Assembly Member Marko Dapcevich**

From: **Clifford J. Groh, II, City and Borough Attorney**

Subject: **Attorney-Client Privilege Between City and Borough Attorney and Assembly Member**

Date: **December 11, 2001**

How does the attorney-client privilege apply between the City and Borough Attorney and an Assembly Member?

The client of the Attorney for the City and Borough of Sitka is the City and Borough of Sitka itself, not any single official or employee.[1] The City and Borough cannot act except through its "constituents" or "representatives," who are its Administrator, the Assembly Members, and the City and Borough employees.[2] When one of the City and Borough's representatives–which would include an Assembly Member–communicates with the City and Borough Attorney, the communication is protected by the ethical rule that protects a client's confidences and secrets.[3] Five important points of clarification need to be made here:

- The **communications** are protected, but the **facts** in those communications are not. Put another way, a client representative cannot bury a fact known to others by telling the organization's attorney.

- A client representative can **waive** confidentiality by revealing the confidence or secret to others besides the organization's attorney.

- The attorney's first duty is to the client–the organization. If the interest of the client representative becomes **adverse** to those of the client (the organization itself), the

[1]Alaska Rule of Professional Conduct 1.13(a); and Comment to Rule 1.13 entitled "The Entity as the Client."

[2]Alaska Rule of Professional Conduct 1.13(a); and Comment to Rule 1.13 entitled "The Entity as the Client." Although the Rule uses the term "constituents," to avoid confusion in the governmental context this memorandum shall use the term "representatives" to refer to the same group of persons.

[3]Comment to Alaska Rule of Professional Conduct 1.13 entitled "The Entity as a Client"; Alaska Rule of Professional Conduct 1.6; and Comment to Alaska Rule of Professional Conduct 1.6.

attorney must take steps to advise that client representative (such as an Assembly Member) that (a) the attorney cannot represent the client representative and (b) discussions between the lawyer and the Assembly Member may not be privileged based on the facts of the case.[4]

- An attorney for an organization–including a governmental organization–"shall proceed as reasonably necessary" to prevent a client representative from **committing a violation** of a legal obligation to the organization or a violation of law which reasonably be imputed to the organization if such violation is likely to result in substantial injury to the organization.[5] "[W]hen a client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved....[I]n a matter involving the conduct of government officials, a government official may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances."[6]

- Other legal process–such as **court orders** served on the attorney–can result in the piercing of the attorney-client privilege.[7]

cc: Mayor Nelson
All Members of the Assembly
A.E. Zimmer, Administrator

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[4]Alaska Rule of Professional Conduct 1.13; and Comment entitled "Clarifying the Layer's Role" to Alaska Rule of Professional Conduct 1.13.

[5]Alaska Rule of Professional Conduct 1.13(b).

[6]Comment entitled "Government Agency" to Alaska Rule of Professional Conduct 1.13.

[7]Comment entitled "Disclosures Otherwise Required or Authorized" to Alaska Rule of Professional Conduct 1.6 ("The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.")

- EXECUTIVE SESSIONS

The proper motion to go into executive session would be one of the following:

1. TO DISCUSS MATTERS, THE IMMEDIATE KNOWLEDGE OF WHICH WOULD ADVERSELY AFFECT THE FINANCES OF THE MUNICIPALITY

2. TO DISCUSS SUBJECTS THAT TEND TO PREJUDICE THE REPUTATION AND CHARACTER OF ANY PERSON.

   .....with the proviso that the person to be discussed could require that the matter be discussed in public.

3. TO DISCUSS MATTERS WHICH BY LAW, MUNICIPAL CHARTER, OR ORDINANCES ARE REQUIRED TO BE CONFIDENTIAL.

4. TO DISCUSS COMMUNICATIONS WITH THE MUNICIPAL ATTORNEY OR OTHER LEGAL ADVISORS CONCERNING LEGAL MATTERS AFFECTING THE MUNICIPALITY OR LEGAL CONSEQUENCES OF PAST, PRESENT OR FUTURE ACTIONS.

L E G A L
DEPARTMENT

MEMO

To: Ken Creamer, Chairman
Police and Fire Commission

From: Clifford J. Groh, II, City and Borough Attorney CJG

Subject: Executive Sessions

Date: April 9, 2001

You have asked about the law concerning executive sessions, including those called to consider subjects that tend to prejudice the reputation and character of a person. Executive sessions are of course allowed for any governmental body to which the Alaska Open Meetings Act applies, although the subjects for which they are allowed are construed narrowly in order to maximize open government and avoid unnecessary executive sessions.[1] There are four essential requirements for going into an executive session:

(1) a body can only go into an executive session if the body is **already convened in a public meeting** of the body;

(2) a member of the body must **make a motion** to go into executive session that clearly and specifically describes the subject of the proposed executive session without defeating the purpose of addressing the subject in private;

(3) the **proposed subject** of the executive session **must fall into one of five categories–**

- matters which if they were made public immediately would clearly have an adverse impact on the City and Borough,
- subjects that tend to prejudice the character and reputation of any person, provided that the person may request a public discussion,
- matters which by law, the Charter, or ordinance are required to be confidential,
- matters involving consideration of governmental records that by

[1]AS 44.62.310-.312. There are similar provisions concerning executive sessions in the Sitka General Code, but those ordinances are pre-empted to the degree that they conflict with the state statutes. *See Walleri v. City of Fairbanks*, 964 P.2d 463, 468 (Alaska 1998).

From the desk of:

Clifford J. Groh, II
Municipal Attorney
100 Lincoln Street, Rm# 302
Sitka, Alaska 99835
Phone: (907) 747-1821
Fax (907) 747-7403

law are not subject to public disclosure, or

- communications between the body and a lawyer for the body if revelation of the communications will injure the public interest or if there is some other recognized purpose in keeping the communication confidential; and

(4) **a majority of the body must vote** for the motion to go into executive session.[2]

The executive session called for the purpose of considering subjects that tend to prejudice the character and reputation of a person is one of the most frequently litigated of all types of executive sessions.[3] The law requires both that **the person involved must be notified in advance of the executive session and given an opportunity to request a public discussion** unless the body can show that the person has received notice and has chosen not to exercise the right to request a public discussion.[4]

After the body goes into executive session, care must be taken to **avoid any consideration of**

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[2]AS 44.62.310 (b)-(c); and *Cool Homes v. Fairbanks North Star Borough*, 860 P.2d 1248, 1259-62 (Alaska 1993) (lawyer-client privilege is permissible basis to go into executive session even though it is not mentioned in Open Meetings Act, but privilege should not be applied blindly).

[3]*See Ramsey v. City of Sand Point*, 898 P.2d 917, 133-35 (Alaska 1995); *Geistauts v. University of Alaska*, 666 P.2d 424, 429 (Alaska 1983); *von Stauffenberg v. Committee for Honest and Ethical School Board*, 903 P.2d 1055, 1060 (Alaska 1995); and *City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d 1316, 1325-26 (Alaska 1982).

[4]*Ramsey v. City of Sand Point*, 898 P.2d at 133-35. This requirement that a person be given advance notice and opportunity to request a public discussion does not appear to apply in one narrow class of executive sessions called to discuss a subject that tends to prejudice the character and reputation of a person, and that is when a governing body goes into executive session to discuss the personal characteristics of the applicants for the position of city manager. *See City of Kenai v. Kenai Peninsula Newspapers*, 642 P.2d at 1325-26. There appears to be no requirement that the City Council–or City and Borough Assembly–notify in advance each applicant of the executive session and the right to ask for an executive session. *See id.*

From the desk of:

Clifford J. Groh, II
Municipal Attorney
100 Lincoln Street, Rm# 302
Sitka, Alaska 99835
Phone: (907) 747-1821
Fax (907) 747-7403

any subject not mentioned in the motion unless that subject is auxiliary to the main question.[5] Additionally, the body should take no action at the executive session except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiation.[6]

Finally, **a person who violates the confidentiality of the executive session may both be subject to disciplinary procedure and also may face a lawsuit for defamation** (libel or slander).[7]

cc: Mayor Nelson and Members of the Assembly
Members of Boards and Commissions
Gary L. Paxton, Administrator

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[5]AS 44.62.310(b).

[6]*Id.*

[7]Robert's Rules of Order, Newly Revised (10th ed.), p. 630-31, 638.

From the desk of:

Clifford J. Groh, II
Municipal Attorney
100 Lincoln Street, Rm# 302
Sitka, Alaska 99835
Phone: (907) 747-1821
Fax (907) 747-7403

L E G A L

DEPARTMENT

To: Mayor Reeder and Assembly Members

From: Clifford J. Groh, II, City and Borough Attorney CJG

Subject: Executive Sessions and the Sitka Community Hospital Board Meeting of February 26

Date: March 12, 2004

Introduction

Assembly Member Marko Dapcevich has asked some questions that seem appropriate to answer rapidly given that they seem to arise repeatedly. This memorandum starts with some important points about the law of executive sessions and then applies them to the Sitka Community Hospital Board's executive session on February 26, 2004. I will address in a separate memorandum his question about the relationship between the Hospital Administrator, the Hospital Board, and the Assembly.

Open Meetings Act and Executive Sessions

The Alaska Open Meetings Act provides that meetings of governmental bodies are open unless (a) the law specifically excludes certain kinds of meetings from the application of the law or (b) the meeting of the governmental body fits in a narrow exception for executive sessions. As to (a), an example of a meeting to which the Open Meetings Act does not apply is that portion of a Hospital Board addressing credentialing of physicians. (AS 44.62.310(d)(5).) As to (b), the authorized reasons for an executive session under the Open Meetings are four:

> (1) matters, the immediate knowledge of which would clearly have an adverse impact upon the finances of the public entity;
>
> (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
>
> (3) matters which by law, municipal charter, or ordinance are required to be confidential;
>
> (4) matters involving consideration of government records that by law are not subject to public disclosure. (AS 44.62.310(c).)

Note that the exception involving adverse impact upon finances would not allow a governmental body to go into executive session to negotiate with an entity with which it had

a dispute, although the governmental body could go into executive session to develop a strategy for dealing with that other entity. Note also that the exception involving prejudice to the reputation and character of any person gives that person the right to get advance notice of the possibility of the executive session (assuming the person is not attending the meeting) so that the person can demand a public discussion, but this exception does not give that person the right to go into an executive session. (The governmental body does have the right, however, to invite whomever it wants into the executive session as long as the presence of a person would not be inconsistent with the purpose of the executive session.)

To comply with the law regarding executive sessions, a board must

(1) be convened in a public session before considering whether to go into executive session;

(2) consider a motion to go into executive session for one of the permissible reasons set out above–note that the motion to convene in executive session "must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private";and

(3) go back into public session when the executive session is over. (AS 44.62.310(b).)

It is a good practice to give advance notice to the public by advertising on a published agenda specific topics that might be considered in an executive session, and in the case of particularly important or complex topics such notice would seem to be legally required. *Cf. Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage*, 672 P.2d 891, 894-95 (Alaska 1983) ("The timing and specificity of 'reasonable notice' is necessarily dependent upon the complexity and importance of the issue involved.") The legal requirement would go to naming the specific topic on the agenda–not a general announcement that one or more topics may be the subject of an executive session–although such an announcement of a possible executive session is often seen as a courtesy to the public and the press.

Executive Session on February 26, 2004

The minutes of the February 26, 2004 meeting of the Hospital Board reflect that the Board adopted a motion "to go into executive session to discuss subjects that tend to prejudice the reputation and character of any person, and to discuss matters the immediate knowledge of which would adversely affect the finances of the hospital." After a 25-minute executive session, the Board reconvened in public and adopted two motions that gave information and/or requests to attorneys for the City and Borough and/or Hospital.

Given the law set out above, the Board should have set out more detail to make clear and specific each of the reasons offered in the motion to go into executive session. The person to be discussed should have been identified both in the motion as made in the public session and in the minutes. This identification should have done because such identification could have been done without damaging the person's reputation or character, because it would help make sure that the person was notified in advance, and because it would eliminate any doubt about who it was. Similarly, the matters whose public discussion would hurt the Hospital's finances should have been described more fully–although not so fully as to defeat the purpose of the motion.

Having said that, though, my opinion is that under the law and the facts a court would not void the two motions under the Open Meetings Act. If a court finds that these actions were voidable, before actually voiding these actions a court must consider whether under all the circumstances the public interest in compliance with the Open Meetings Act outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. AS 44.62.310(f). Given that the only actions appear to be the giving of information and direction to attorneys in publicly adopted motions, there is little to void and little public interest in doing so.

I have given additional advice to the Hospital Administrator on the Open Meetings Act after this matter arose, and I am of course happy to advise the Board and the Assembly about it in greater detail if there is interest.

cc: Hugh Bevan, Administrator
Members of the Sitka Community Hospital Board
Bill Patten, Administrator, Sitka Community Hospital

- TELEPHONIC PARTICIPATION

SITKA GENERAL CODE:

2.60.050 Teleconference participation.

A. The use of teleconferencing at meetings of boards, commissions and committees is for the convenience of government officials and the public. Teleconference participation by the members of boards, commissions and committees and the public is authorized by AS 44.62.310(a) and 44.62.312. While physical presence of the members and the public is the preferred method of participation at the meetings, the members and the public are allowed to participate at assembly meetings in the following manner:

1. Participation of Members by Teleconference.
    a. Any member may participate in any meeting by teleconference. Teleconference participation is solely at the discretion of the member who requests this method of participation if the member is out of town or incapacitated. The member shall notify the secretarial staff for that board, commission or committee to arrange for teleconference participation at least twenty-four hours before any regular meeting, and at least twelve hours before any special meeting.
    b. A member who is the presiding officer of any board, commission or committee may also participate in any meeting by teleconference. The presiding officer shall notify the secretarial staff for that board, commission or committee at least twenty-four hours before any regular meeting, and at least twelve hours before any special meeting to arrange for teleconference participation. However, the presiding officer shall not preside over the meeting when participating by teleconference.
    c. Any member participating by teleconference shall be deemed to be present at the meeting for all purposes, including for quorum and voting, except as provided in subsection (A)(1)(b) of this section.
    d. Any member participating by teleconference shall have the same right to participate in any matter as if physically present at the meeting, including executive sessions, adjudicatory matters, and presentations. Reasonable efforts shall be made to make available to the member participating by teleconference any pertinent documents that are to be discussed and/or acted upon.
    e. Any member participating by teleconference shall have the same right to vote on any matter as if physically present at the meeting. All voting at the meeting shall be by roll call vote. It is at the discretion of the member who is participating by teleconference to determine whether the member has had the opportunity to evaluate all pertinent information, including any testimony and/or evidence, and is prepared to vote.
    f. Teleconference participation at any meeting is limited to four times a year by each member.

2. Participation of Public by Teleconference. Any member of the public who will not be present within the city and borough of Sitka during the meeting, and who wants to participate by teleconference concerning any agenda item which allows for public participation, may request participating by teleconference. The member of the public shall provide the secretarial staff for that board, commission or committee, who is listed on the city and borough of Sitka website, with a telephone contact number for the teleconference participation at least twenty-four hours before any regular meeting, and at least twelve hours before any special meeting. The secretarial staff will call that phone number during the public participation section on the agenda item.

B. Cost of Teleconference Participation. A member of any board, commission, or committee and any member of the public who participates by teleconference shall not be charged for any telephone costs associated with the teleconference participation.

(Ord. 06-01 A(2) § 4(B), 2006.)