Open Meetings Law

Ethics Law

Parliamentary Procedure

Public Records Law

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City Council - City of Stoughton
June 11, 2019

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1. OPEN MEETINGS LAW.

A. WHAT DOES THE LAW REQUIRE?

All **meetings** of all local **governmental bodies** must be preceded by public notice, publicly held in places reasonably accessible to the public, and open to all citizens at all times unless otherwise expressly allowed by law.

B. WHAT IS A GOVERNMENTAL BODY?

A local agency, board, commission, committee, council, department or public body corporate or politic created by constitution, statute, ordinance, rule or order, or a formally constituted sub-unit of any of the foregoing.

The foregoing definition excludes a body or sub-unit formed for or meeting for the purpose of collective bargaining under subchs. IV or V of ch. 111 of the Wisconsin Statutes. However, ratification or approval of a collective bargaining agreement must be done in open session.

C. WHAT IS A MEETING?

(1) *Meeting presumed*: If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for governmental purposes.

(2) *Two-part test*:

a. There is a gathering for the purpose of discussing, deciding or information gathering regarding governmental business;

b. The number of members participating is sufficient to determine the body's course of action (this can be the affirmative power to pass or the negative power to defeat a proposal). In Stoughton, it is possible for 4 members of the council to defeat a proposal (8 members constitute a quorum, so 4 members could defeat a proposal).

(3) "*Walking quorum*": A walking quorum results when a series of gatherings occur among separate groups that collectively constitute a number of members sufficient to determine the body's course of action, and the participants agree, tacitly or explicitely, to act uniformly. According to the Department of Justice Compliance Guide, the essential feature of a "walking quorum" is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum.

(4) *The "watering hole meeting."* This type of meeting occurs when members of a governmental body gather, at a time and place other than a noticed, regular or special meeting, to discuss governmental business. This could be a gathering at a local tavern after a council meeting. It could be a gathering at a coffee shop some morning or afternoon. It could be anywhere. If the "number test" is satisfied, this meeting would violate the Open Meeting Law.

(5) *The "community organization meeting."* This type of meeting occurs when a group (such as the Arts Council, the School Board, Sustainable Stoughton, the Chamber of Commerce, or another organization) holds a meeting to discuss an issue before the City, and invites Stoughton alderpersons to attend. If the "number test" is satisfied, this would be a "meeting" of the common council under the law. Attendance at this type of meeting can be made lawful by providing public notice of the meeting, and complying with the other requirements of the law (for example, the meeting must be open and accessible to the public).

(6) *Written correspondence*: Attorney General says that circulation of a paper or hard-copy document, which is a largely one-way flow of information, with any exchanges spread over considerable time with no conversation-like interaction, is probably not a meeting.

(7) *Email*: Attorney General says emails may constitute a meeting. Courts are likely to consider (1) the number of participants; (2) the number of communications; (3) the time-frame in which the communications occurred; (4) the extent of the conversation-like interactions. Beware that emails can be forwarded, and replies can be sent to large groups, depriving the original sender of control over the number and identity of recipients.

According to the Attorney General, inadvertent violations can be reduced if email is used mainly to transmit information one-way, with the originator reminding people not to reply.

Because the law is unclear on email, the Attorney General's office "strongly discourages the members of every governmental body from using electronic mail to communicate about issues within the body's realm of authority."

(8) *Social gathering*: A social or chance gathering that is not intended to avoid the open meeting law is not subject to the open meetings law.

D. WHAT IS ADEQUATE NOTICE?

(1) The notice must be specific and detailed enough to apprise members of the public and the news media of the subject matter of the meeting. The Attorney General says "the public is entitled to the best notice that can be given at the time the notice is prepared."

(2) Public comment periods are specifically authorized, but are limited to receiving information, not acting on it.

E. CLOSED SESSION ISSUES.

(1) There must be a statutory basis to meet in closed session. Section 19.85(1).

(2) A contemplated closed session must be noticed as such.

(3) A spontaneous closed session is allowed, but there are limits on when the body may reconvene in open session.

(4) The Attorney General advises that a governmental body should vote in open session, unless the vote is clearly an integral part of what is authorized to be done in closed session. In other words, would voting in open session undermine the authorized closed session discussion?

F. READ THE ARTICLE PUBLISHED BY THE LEAGUE OF WISCONSIN MUNICIPALITIES ("Understanding and Complying with Wisconsin's Open Meeting Law").

G. USE THE DEPARTMENT OF JUSTICE COMPLIANCE GUIDE, AVAILABLE AT THE DOJ WEBSITE *(www.doj.state.wi.us)*.

2. ETHICS.

A. SOURCES OF LAW: Section 2-2 of City Code of Ordinances; Sections 19.59 and 946.13 of the Wisconsin Statutes.

B. USE OF OFFICE FOR PRIVATE GAIN: Public officials are prohibited from using their offices to obtain anything of substantial value for the private benefit of themselves, their immediate family, or organizations with which they are associated. Wis. Stat. § 19.59(1)(a); Section 2-2(g)(1).

Note the application of the rule to actions affecting a whole class of similarly situated interests, in which the official's interest is not significantly greater than other affected interests. Examples: proposed development affecting the neighborhood; special assessment affecting the whole street; public improvement project that would disproportionately impact the official's property.

C. OFFERING OR RECEIVING ANYTHING OF VALUE. No person may give and no public official may receive "anything of value" if it could reasonably be expected to influence the local public official's vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction. Wis. Stat. § 19.59(1)(b). See State of Wisconsin Ethics Board guidance.

D. ABSTAINING FROM OFFICIAL ACTION. The State of Wisconsin Government Accountability Board recommends that the official should leave that portion of the meeting involving discussion, deliberations or votes related to the matters. The minutes should reflect the absence of the official.

E. PRIVATE INTERESTS IN PUBLIC CONTRACTS – CLASS E FELONY.

(1) A public official may not participate in the making of a contract in his or her official capacity if the official has a direct or indirect financial interest in the contract. Wis. Stat. § 946.13(1)(b).

(2) A public official may not in his or her private capacity negotiate or bid for or enter into a contract in which the public official has a direct or indirect financial interest if the official is authorized or required by law to participate in his or her capacity as such officer or employee in the making of that contract. Wis. Stat. § 946.13(1)(a). Abstaining from voting does not solve the problem.

Exceptions: $15,000 in receipts and disbursements or less per year. Other exemptions can apply to bankers, partners in law firms and persons who own no more than 2% of the stock of the corporation involved.

F. ADVISORY OPINIONS. An official may apply to the City Ethics Board for an advisory opinion.

(1) Requests must be in writing, and must provide all the material facts.

(2) Following an advisory opinion is prima facie evidence of intent to comply with the law.

(3) The ethics board may not make the opinion public, except:

a. With the requester's consent;

b. In a redacted form that prevents disclosure of the requester's identity; or

c. If the requester makes or purports to make public all or part of the advisory opinion.

G. SEE DANIEL OLSON ARTICLE FOR DETAILED DISCUSSION ("Ethics and Conflict of Interest Rules").

3. PARLIAMENTARY PROCEDURE.

A. Sources of law: Rules of the Common Council, Committees, Boards and Commissions (see attached copy); Robert's Rules of Order, Newly Revised; Wisconsin Open Meetings Law.

B. PARLIAMENTARY PROCEDURE. Rules of deliberation that are intended to ensure fairness to all members of a body, equality among members, and orderly processes.

C. RULES OF COURTESY AND DECORUM.

(1) One person at a time should have the floor, and every speaker should first be recognized by the Chair.

(2) Someone not recognized should generally not interrupt a speaker. There are a few exceptions. A speaker could be interrupted to make a "point of privilege" (like noting that you cannot hear), to make a "point of order" (relating to something you believe is inappropriate conduct of the meeting), or to make a parliamentary inquiry.

D. MOTIONS.

(1) A Main Motion should be made and seconded.

(2) Discussion follows.

(3) When discussion ends, the chair should call for a vote.

(4) Additional motions can be made, and are ranked. Examples include a motion to amend, to refer, to lay on the table. See attached summary of basic information on motions.

4. PUBLIC RECORDS LAW.

A. WHAT IS A RECORD?

(1) "Record" is defined as "any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority ...."

(2) "Record" includes records not required to be maintained if in possession of officer, but materials must have a sufficient connection with the function of the office to qualify as public record.

(3) "Record" does not include personal drafts and notes and personal property.

B. WHAT IS AN AUTHORITY? "Authority" includes "elected officials, local officers, agencies, boards, councils, commissions, committees, departments and any other public body corporate and politic created by constitution, law, ordinance, rule or order or any subunit of the foregoing."

C. WHO IS A CUSTODIAN OF RECORDS?

(1) The chairperson of a committee of elected officials is the legal custodian of records of the committee.

(2) Every authority shall designate in writing one or more positions occupied by an officer or employee of the authority or of the unit of government of which it is part as a legal custodian to fulfill its duties.

D. WHAT ARE THE CUSTODIAN'S DUTIES?

(1) The legal custodian is responsible for performing all duties imposed by the public records law. The custodian shall "safely keep and preserve all property and things received from the officer's predecessor or other persons and required by law to be filed, kept or deposited in the officer's office. Upon expiration of the term of office or when a vacancy occurs, each officer must deliver to his or her successor all such property and things in his or her custody, and the officer's successor shall issue a receipt to the officer which must then be filed in the clerk's office."

(2) Retain records for the time required by law (see attached record retention guidelines).

(3) Provide access to records as required by law.

Open Meetings Law

LEGAL COMMENT

Understanding & Complying with

By Claire Silverman, Legal Counsel

Wisconsin's open meeting law applies with equal force to every city and village, regardless of size or other characteristics. Because it applies whenever a governmental body conducts the business that it is entrusted with, it is critical that members of local governmental bodies be aware of the open meeting law and understand its requirements. This month's legal comment provides an overview of the law, as well as a more detailed explanation of some of the law's key provisions.

The open meeting law is found in sections 19.81 through 19.98 of the Wisconsin Statutes. The law does not require absolute openness. However, the legislature has declared that the "public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business."[1] To that end, the law requires that all meetings of governmental bodies be preceded by public notice, be held in places reasonably accessible to the public, and be open to all citizens except as otherwise specifically provided.[2] The law authorizes governmental bodies to meet in closed session if the subject matter comes within one of a set number of exemptions set forth in the law.[3]

Definitions Are Key To Understanding Law

The open meeting law only applies to meetings of a "governmental body" as defined by Wis. Stat. sec. 19.82(1). This definition, together with the definition of "meeting" in sec. 19.82(2), is the key to understanding when the open meeting law applies to a particular gathering of local officials. A "governmental body" includes a "local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order," as well as "formally constituted" subunits of any of these bodies. Thus, a common council and village board are obviously subject to the open meeting law, as are municipal committees, boards and commissions. Quasi-governmental bodies are also subject to the open meeting law.[4]

Bodies formed for or meeting for the purpose of collective bargaining are specifically excluded from the definition of "governmental body."[5]

A "meeting" is defined as the convening of members of a governmental body for the purpose of exercising the responsibilities vested in that body. A meeting does not include social or chance gatherings that are not intended to avoid the law. When one-half or more of the members of a governmental body are present, a meeting is "rebuttably presumed" to be for official purposes.[6]

1. Wis. Stat. sec. 19.81(1).
2. Wis. Stat. secs. 19.81 and 19.83.
3. The exemptions are set forth under sec. 19.85.
4. A private entity is a "quasi-governmental corporation" within the meaning of the open meetings and public records laws if, based on the totality of circumstances, it resembles a governmental corporation in function, effect, or status. Key factors include but are not limited to: (1) the entity's finances; (2) whether the entity serves a public function; (3) whether it appears to the public to be a government entity; (4) whether the entity is subject to government control; and (5) the degree of access that government bodies have to the entity's records. No one factor is determinative and determinations must be made on a case-by-case basis. *State of Wisconsin v. Beaver Dam Area Development Corporation*, 2008 WI 90. See Governing Bodies 386 for a more detailed summary of this case.
5. Wis. Stat. sec. 19.82(1).
6. Wis. Stat. sec. 19.82(2).

Wisconsin's Open Meeting Law

In addition to the above two definitions, the term "open session" is also important. It is defined as a meeting "which is held in a place reasonably accessible to members of the public and open to all citizens at all times."[7] The Wisconsin Supreme Court has interpreted this to mean "that a governmental body must meet in a facility which gives reasonable public access, not total access, and that it may not systematically exclude or arbitrarily refuse admittance to any individual."[8]

When Is There A Meeting Subject To The Law?

The simplistic answer to this question is, "Whenever a governmental body meets." Although the application of the open meeting law is usually straightforward, determining whether there is a "meeting" can sometimes be complicated and there are pitfalls for the unwary.

The statutory definition of a meeting, which provides that a meeting is presumed if one-half of the members of a governmental body are present at a meeting, may lull officials into a false sense of security. The trouble is that the courts have interpreted the law to apply when there is less than one-half of the body present. In the *Showers*[9] case, the Wisconsin Supreme Court ruled that the test of whether a meeting occurs is twofold: "First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed."

With regard to the second part of the *Showers* test, the potential of a gathering to determine the parent body's course of action concerning a proposal can be either the affirmative power to pass or the negative power to defeat. Thus, a gathering of less than one-half the members of a body may constitute a meeting if the number of members present constitutes a "negative quorum," (i.e., a sufficient number to block action by the body on a particular issue).

For example, when a proposal requires a two-thirds vote of the entire body, such as a budget amendment under Wis. Stat. sec. 65.90(5), if more than one-third of the governmental body members are present at an unnoticed meeting, discussion of that particular proposal would violate the open meeting law. This is what happened in the *Showers* case. Four out of eleven members met privately to discuss a budget matter. The court held that the meeting was illegal because four members constituted a negative quorum since they could determine the outcome by voting as a block against the budget change, which required a two-thirds majority vote.

The same principle would seem to apply with regard to matters that can be passed by a vote based on the quorum rather than total membership, such as a majority or fraction of a quorum. In such cases, the minimum figure for triggering the open meeting law may be less if it is known that fewer members will attend a meeting. For example, if a village board has seven members and all attend a meeting, a matter requiring a majority vote may be blocked by four members. But if only four members attend, the matter may be blocked by two.[10]

Local officials must also be aware of and avoid what is sometimes called a "walking quorum." A "walking quorum" is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient num-

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7. Wis. Stat. sec. 19.82(3).
8. *State ex rel. Badke v. Village Bd. of Greendale,* 173 Wis.2d 553, 580, 494 N.W.2d 408, 418 (1993).
9. *State ex rel. Newspapers, Inc. v. Showers,* 135 Wis.2d 77, 102, 398 N.W.2d 154, 165 (1987).
10. A UW law review note criticized the *Showers* court for not considering this issue, and recommends that "To be safe, officials will need to hold in public all meetings at which at least a majority of a quorum is present." 1988 Wis. L. Rev. 827, 851, 856. This is hardly the safe approach where, as in the example in the above text, less than a majority of the quorum can block a matter. Consider also an eleven member village board. A quorum of the board is six and four is thus a majority of the quorum. So three can defeat a matter if only six are present.

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ber to reach a quorum.[11] A series of gatherings, telephone calls, or e-mails between a small enough number of officers so as not to trigger the law at one specific gathering may constitute an illegal meeting.[12]

From the public's perspective, the danger of the walking quorum is that it may produce a consensus or predetermined outcome with the result being that the publicly-held meeting is a mere formality without any real discussion or consideration of the issue being conducted in public.

The use of a walking quorum to conduct business is subject to prosecution under the open meeting law.[13] Local officials must use caution when using electronic message technologies. These technologies have the potential to create walking quorums because of the rapid pace of communication and the inability of the sender to control whether and how other members may choose to respond. For this reason, the Attorney General strongly discourages members of governmental bodies from using electronic mail to communicate with other members of the body about matters within the body's realm of authority.[14] The Wisconsin Department of Justice's 2010 *Open Meeting Compliance Guide* provides as follows:

> Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

Because e-mail is so easy, quick and inexpensive, it is unlikely that governmental bodies will be able or willing to refrain from using it completely. However, it is advisable to set procedures in place or parameters for the use of e-mail to ensure that its use does not violate the open meeting law. The Attorney General's Open Meeting Compliance Guide suggests that inadvertent violations of the open meetings law through the use of electronic communications can be reduced "if electronic mail is used principally to transmit information one-way to a body's membership; if the originator of the message reminds recipients to reply only to the originator, if at all; and if message recipients are scrupulous about minimizing the content and distribution of their replies."

In addition to being careful about the number of members of a particular body that gather to talk about topics pertaining to that body, it is important to be aware that a "meeting" might take place when a sufficient number of members are present at meetings of other governmental bodies. Clearly, planned joint meetings of governmental bodies must be separately noticed by each governmental body planning to attend the joint meeting. But what about situations where members of one governmental body independently attend the meeting of another governmental body?

In the *Badke* case,[15] a majority of the village board regularly attended meetings of the village plan commission to gather information about subjects over which they had decision-making responsibilities. The Wisconsin Supreme Court concluded that since the trustees regularly attended plan commission meetings, the gatherings were not chance and therefore should have been noticed as meetings of the village board. Specifically, the Wisconsin Supreme Court held that when one-half or more of the members of a governmental body attend a meeting of another governmental body to gather information about a subject over which

11. *Showers*, 135 Wis.2d at 92.
12. *See Showers,* 398 N.W.2d at 161, 164; 1988 Wis. L. Rev. at 846-7, 855; Governing Bodies 339 and 371.
13. *State ex rel. Lynch v. Conta,* 71 Wis.2d 662, 687, 239 N.W.2d 313 (1976).
14. *Wisconsin Department of Justice Open Meeting Compliance Guide* (2010), at p. 8 citing Correspondence, October 3, 2000.
15. *Badke, supra,* n.7.

they have ultimate decision-making responsibility, such a gathering is a "meeting" within the meaning of the open meeting law and must be noticed as such, unless the gathering is social or chance.

Thus, whenever a majority of the members of one governmental body regularly attend or plan in advance to attend the meeting of another governmental body, it is necessary to provide notice that a majority of that body will be attending the meeting of another body for the purpose of observing and gathering information. However, municipalities should avoid routinely placing boilerplate language designed to comply with *Badke* at the bottom of all committee, commission and board meetings notices.

Such a *Badke* notice should be provided only if:

1) governing body members routinely attend the meetings of a second body, such as a committee or commission;

or

2) the chair of the governing body or clerk has been informed or otherwise has reason to believe that governing body members will likely be attending the meeting of the second body.

For a further discussion of this issue see Governing Bodies 353.

Badke also held that when a quorum of a governing body is present at a meeting of a second governmental body merely because all of the individual members of the quorum make up the membership of the second governmental body, additional notice is not required.[16]

Local officials should not place too much reliance on the exception to the definition of a meeting for chance or social gatherings. Remember, that exception is qualified by the tag "not intended to avoid" the law. If a negative quorum (or more) of a body gets together by chance or for a social occasion there is no violation of the law unless the discussion turns to matters pertaining to that body, in which case the gathering probably converts to an improper meeting.

By now it should be clear that governmental body members must be very careful when discussing public body business with other members outside of a properly noticed meeting. The numbers test raises a troubling question, however, relating to the legality of one-on-one conversations between members outside of a meeting. The obvious problem is that prohibiting person-to-person discussions outside of meetings does not jibe with how government works. Officials need to discuss matters they are working on. In addition, the legislature chose not to make the requirements of the open meeting law automatically applicable whenever two members of a governmental body get together.

The Wisconsin Supreme Court strongly suggested in an earlier case that such one-on-one discussions would be protected by the First Amendment and would not violate the open meeting

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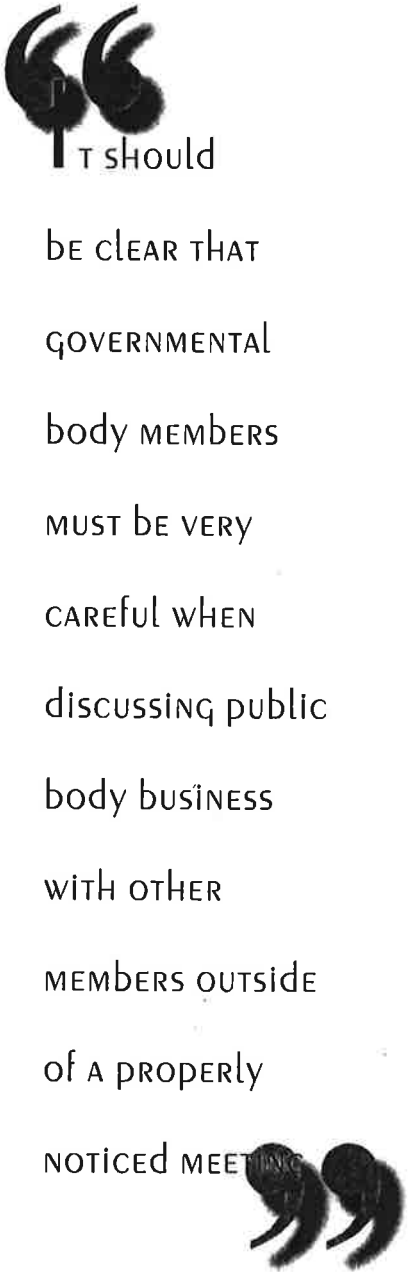
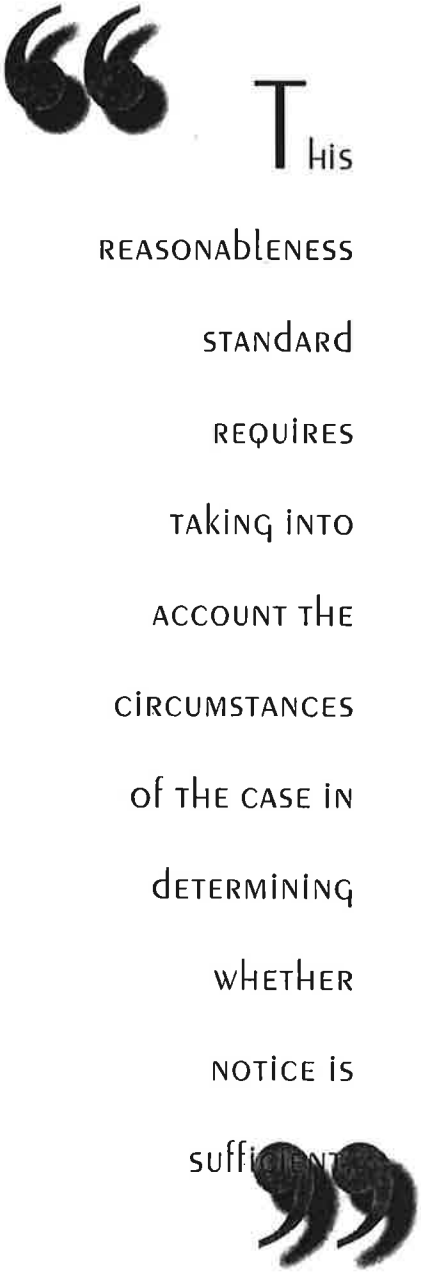


16. *Id.* at 417-418.



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law, but, unfortunately, this was not discussed in the *Showers* or *Badke* cases.[17]

If governmental body members should arguably violate the law by discussing matters outside of a meeting, a wise course to take would be to make sure that the matter receives an appropriate level of discussion at a properly noticed meeting before it is voted on. This may help avoid prosecution and decrease the likelihood that a court will void the action.

Notice Requirement

The open meeting law requires that all meetings of a governmental body be preceded by public notice. The presiding officer of a governmental body, or that person's designee (typically the clerk), must give proper notice of a meeting twenty-four hours in advance. If good cause exists and twenty-four-hour notice is impossible or impractical, shorter notice may be given but in no case may the notice be provided less than two hours in advance of the meeting.[18] If the notice is mailed, it must be mailed early enough to allow it to arrive within the statutory time frame.[19]

The notice must specify the date, time, place and subject matter of the meeting, and any contemplated closed sessions must be included.[20] The notice must be in such form as is "reasonably likely to apprise" members of the public and the news media of the time, date, place and subject matter of the meeting.

A few years ago, the Wisconsin Supreme Court overruled *State ex rel. H.D. Enterprises II, LLC v. City of Stoughton,* which held that general notice of a topic (e.g., licenses) is sufficiently specific to comply with the notice requirement in sec. 19.84(2).[21] The Wisconsin Supreme Court stated that the notice requirement in sec. 19.84 is not amenable to a bright line rule but, rather is subject to a "reasonableness standard." This reasonableness standard requires taking into account the circumstances of the case in determining whether notice is sufficient. This includes analyzing such factors as the burden of providing more detailed notice, whether the subject is of particular public interest, and whether it involves non-routine action that the public would be unlikely to anticipate.[22]

The court further stated:

> The determination of whether notice is sufficient should be based upon what information is available to the officer noticing the meeting at the time notice is provided, and based upon what it would be reasonable for the officer to know. Thus, whether there is particu-

17. The earlier case is *State ex rel. Lynch v. Conta,* 71 Wis.2d 662, 239 N.W.2d 313, 331 (1976), and this issue is discussed in Governing Bodies 309, which was published in the July 1987 issue of the Municipality, pp. 262-263.
18. Wis. Stat. sec. 19.84(3).
19. 77 Op. Att'y Gen. 312 (1988).
20. Wis. Stat. sec. 19.84(2).
21. *State ex rel. Buswell v. Tomah Area School District,* 2007 WI 71
22. *Id.*, 2007 WI 71 para. 28.

lar public interest in the subject of a meeting or whether a specific issue within the subject of the meeting will be covered, and how that affects the specificity required, cannot be determined from the standpoint of when the meeting actually takes place. Rather, it must be gauged from the standpoint of when the meeting is noticed.[23]

League attorneys are often asked whether it is appropriate to rely on broad umbrella clauses such as "old business" or "miscellaneous business" on the agenda to take up unforeseen matters which arise shortly before the scheduled meeting. In most cases, the answer is no. It is best to deal with late-breaking events by amending the notice, with twenty-four hours, or postponing the matter until it can be properly noticed. Minor matters may appropriately be subsumed under broader topics, but matters of particular interest should be given explicit notice. In recent years, the attorney general has taken the view that governing bodies may not rely on a general designation clause in their agenda, such as "other business," to discuss, receive information or take action on a matter not identified in the notice of that meeting.

A related issue is whether governmental bodies may discuss or act on matters raised by citizens during a "public comment" or "citizen participation" portion of a meeting if the subject is not on the agenda. The open meeting law allows governing bodies to designate a period for public comment in the notice of the meeting.[24] During such a designated public comment period, a governmental body may "discuss" information raised by a member of the public.[25] A governmental body may not take action on matters raised during a public comment period if the subject was not on the agenda.

Some governing body members have inquired whether they, as members of the public, can bring up items not specifically designated on the agenda under a period of public comment allowed by Wis. Stat. sec. 19.84(2). The answer is no. The limited exception allowing members of the public to bring up items not specifically on the agenda during a period of noticed public comment was intended to allow local governments to be responsive to their constituents and to allow the governing body to receive information from members of the public. It was not intended to allow governing body members to bring up items for discussion without placing the items on the agenda. Any such use of the exception by governing bodies in that way will likely be viewed as an attempt to circumvent the notice requirements of the open meeting law.[26]

With regard to who must be given notice of a meeting, notice has to be given to any news medium that has requested the notice, and to the official newspaper or, if there is none, to a newspaper, TV or radio station that is likely to give notice in the area.[27] The open meeting law does not require that the notice actually be published,[28] although it does require that notice be given as required by other specific statutes governing the subject matter (e.g., Wis. Stat. sec. 62.23 (7)(d)2, requires a Class 2 notice be published in advance of a proposed rezoning).[29] As an alternative to written notice, telephone or other verbal communication to members of the news media is sufficient.[30] The law also requires some form of direct notice to the public; this requirement may be met by posting the notice in one, or preferably several, public places.[31]

A limited exception to the notice requirement allows subunits of governmental bodies[32] to meet during the meeting of the parent body, during a recess, or directly after such meeting,

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23. *Id.*, para 32.
24. Wis. Stat. sec. 19.84(2).
25. Wis. Stat. sec. 19.84(2).
26. For additional discussion of this issue see Governing Bodies 361.
27. Wis. Stat. sec. 19.84(1)(b).
28. *Martin v. Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979); 77 Op. Att'y Gen. 312 (1988).
29. Notice requirements of other statutes must be met in addition to the requirements of the open meeting law. Wis. Stat. sec. 19.84(1)(a).
30. 77 Op. Att'y Gen. 312 (1988).
31. Wis. Stat. sec. 19.84(1)(b); 63 Op. Att'y Gen. 509, 510-11 (1976); 66 Op. Att'y Gen. 93, 95 (1977).
32. The League has opined that statutory boards or commissions, such as a library board, a utility commission and a police and fire commission, are not subunits of a common council or village board, although committees (e.g., a finance committee, a public safety committee) are typically subunits. Governing Bodies 310.

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to discuss or act on matters that were the subject of the meeting of the parent body.[33] The presiding officer of the parent body must announce the time, place and subject matter of the subunit meeting in advance at the meeting of the parent body. This announcement must mention any contemplated closed session.[34]

No charge may be made for providing notice to meet the requirements of the open meeting law. However, once these notice requirements have been met, charges may be made, under the public records law, for additional notices and supplementary information.[35]

CLOSED SESSIONS

Generally, meetings of governmental bodies must be held in open session. However, the law authorizes meetings to be closed if the subject matter falls within one of the specific exemptions set forth in Wis. Stat. sec. 19.85. Note that the general authority to close a meeting is inapplicable where specific authority requires openness, as in the case of hearings before a police and fire commission under Wis. Stat. sec. 62.13(5), and Board of Review meetings under sec. 70.46(2m).

As a general rule, we recommend using the term "closed" session or meeting instead of "executive" session, which suggests that meetings may be closed whenever the body wishes to take action on a matter.

Section 19.85 authorizes closing meetings for a number of reasons including the following:

1) deliberating after a quasi-judicial hearing;
2) considering the discipline of an employee or person licensed by the municipality;
3) considering employment, promotion, compensation or performance evaluation data of a public employee;
4) deliberating or negotiating the purchase of public properties, or conducting other business whenever competitive or bargaining reasons require a closed session;[36]
5) considering financial, medical, social, personal history and disciplinary data of specific persons or specific personnel problems which, if discussed in public, would be likely to have a substantial adverse effect on the person's reputation; and
6) conferring with legal counsel with respect to litigation in which the body is involved or is likely to become involved.

See Wis. Stat. sec. 19.85(1)(a)-(j), for the specific exemptions. For more detailed information on the appropriate use of these exemptions, see Governing Bodies 375.

When deciding whether it is appropriate to hold a particular meeting in closed session, a good rule of thumb is to ask the preliminary question: "Is there a reason why this matter is best discussed privately, other than the desire to escape the scrutiny of the public eye or the media?" When closing a meeting is appropriate, it is important to follow the statutory procedures. As mentioned above, closed sessions planned in advance must be specified in the public notice; however, if the closed session was not contemplated, the meeting may still be closed for a valid reason.[37] The body must first convene in open session and vote to go into closed session. Before the vote is taken, the presiding officer must announce the nature of the business to be discussed and the specific statutory provision which authorizes the closed session. The vote of each member must be recorded and preserved.[38]

Attendance at the closed session is limited to the body, necessary staff and other officers, such as the clerk and attorney, and any other persons whose presence is necessary for the business at hand. If the meeting is of a subunit of a parent body, such as a committee, the members of the parent body (i.e., the common council or village board) must be allowed to attend the closed session, unless the rules of the parent body provide otherwise.[39] Discussion in the closed session must be limited to the topics for which the meeting was closed.[40]

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33. Wis. Stat. sec. 19.84(6).
34. 65 Op. Att'y Gen. Preface vi (1976).
35. 77 Op. Att'y Gen. 312 (1988); Governing Bodies 323.
36. This exemption was read rather narrowly by the Wisconsin court of appeals in *State ex rel Citizens for Responsible Development v. City of Milton,* 2007 WI App. 114, 300 Wis.2d 649. 731 N.W.2d 640. For an in-depth summary of that case, see Governing Bodies 380 (*the Municipality,* May 2007).
37. Wis. Stat. sec. 19.84(2); 66 Op. Att'y Gen. 106 (1977); Governing Bodies 325.
38. Wis. Stat. sec. 19.85(1). These requirements also apply to a closed session of a subunit meeting without notice as provided by sec. 19.84(6). 65 Op. Att'y Gen. Preface vi (1976).
39. Wis. Stat. sec. 19.89.

Questions sometimes arise as to whether a member of a governmental body may tape record closed sessions. An individual member of a governmental body does not have the right to tape record closed sessions of the governmental body. Although a governmental body is obliged under sec. 19.90 to make a reasonable effort to accommodate any person desiring to record, film or photograph an open meeting (provided the person does not do so in a disruptive manner), the law does not apply to closed sessions.[41]

A governmental body may not reconvene in open session until twelve hours after completion of the closed session, unless notice of the subsequent open session was given at the same time and in the same manner as the public notice of the meeting held prior to the closed session.[42]

Penalties and Remedies

Violations of the open meeting law may be prosecuted by the district attorney, the attorney general, or by a private individual, if the district attorney does not take the case.[43] Governmental body members who violate the open meeting law are subject to a forfeiture of between $25 and $300; this is a personal liability which may not be reimbursed by the municipality.[44] However, members may very likely obtain reimbursement for costs and attorney fees incurred in defending against prosecutions under the open meeting law.[45] Members may protect themselves from liability by voting in favor of a motion to prevent the violation (e.g., voting against going into an unauthorized closed session).[46] In addition to finding personal liability for violations of the law, a court may also order the violations to cease and void action illegally taken. In order to void action taken in violation of the open meeting law, the court must find that the public interest in enforcing the open meeting law outweighs the public interest in sustaining the validity of the action taken.[47]

Conclusion

Members of local governmental bodies must understand and comply with the open meeting law. As with other legal matters, officials should consult their municipal attorneys if they have questions.

For additional information on Wisconsin's open meeting law, see the Wisconsin Department of Justice's Open Meeting Compliance Guide on the Department of Justice's website www.doj.state.wi.us. Another good source of information is the State Bar of Wisconsin, Government Lawyers Division's *Wisconsin Public Records and Open Meeting Handbook* which is available from the State Bar for a fee. The Bar's phone number is (800) 728-7788.

Governing Bodies 135R10

Members of local governmental bodies must understand and comply with the open meeting law.

40. Wis. Stat. sec. 19.85(1).
41. See 66 Op. Att'y Gen. 318 (1977).
42. Wis. Stat. sec. 19.85(2).
43. Stat. sec. 19.97(1), (2) and (4).
44. Wis. Stat. sec. 19.96.
45. Wis. Stat. secs. 62.115, 895.35 and 895.46(1)(a); 77 Op. Att'y Gen. 177 (1988).
46 Wis. Stat. sec. 19.96.
47. Wis. Stat. sec. 19.97(3).

Ethics Law

ARTICLE I. IN GENERAL

Sec. 2-1. Form of government.

The city operates under the mayor-council form of government under Wis. Stats. ch. 62.
(Code 1986, § 1.01)

Sec. 2-2. Code of ethics.

(a) *Definitions.* The following words, terms and phrases, when used in this section, shall have the meanings ascribed to them in this subsection, except where the context clearly indicates a different meaning:

Financial interest means any interest which shall yield, directly or indirectly, a monetary or other material benefit to the officer or employee or to any person employing or retaining the services of the officer or employee.

Immediate family means an individual's spouse; and an individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his support.

Person means any person, corporation, partnership or joint venture.

(b) *Penalty and sanctions.* Violations of any provisions of this section may constitute a cause for suspension, removal from office or employment or other disciplinary action.

(c) *Declaration of policy.* The proper operation of democratic government requires that:

(1) Public officials and employees be independent, impartial and responsible to the people;

(2) Government decisions and policy be made in proper channels of the governmental structure;

(3) Public office not be used for personal gain; and

(4) The public have confidence in the integrity of its government.

In recognition of these goals, there is established a code of ethics for all city officials and employees, whether elected or appointed, paid or unpaid, including members of boards, committees and commissions of the city. The purpose of this section is to establish guidelines for ethical standards of conduct for all such officials and employees by setting forth those acts or actions that are incompatible with the best interests of the city and by directing disclosure by such officials and employees of private financial or other interests in matters affecting the city. The provisions and purpose of this section and such rules and regulations as may be established are declared to be in the best interests of the city.

(d) *Responsibility for public office.* Public officials and employees are agents of public purpose and hold offices for the benefit of the public. They are bound to uphold the Constitution of the United States and the constitution of this state and carry out impartially the laws of the nation, state and municipality and to observe in their official acts the highest standard of morality and to discharge faithfully the duties of their office regardless of personal consideration, recognizing that the public interest must be their prime concern. Their conduct in their official affairs should be above reproach so as to foster respect for all government.

(e) *Dedicated service.*

(1) All officials and employees of the city should be loyal to the objectives expressed by the electorate. Appointive officials and employees should adhere to the rules of work and performance established as the standard for their positions by the appropriate authority.

(2) Officials and employees should not exceed their authority or breach the law or ask others to do so, and they should work in full cooperation with other public officials and employees unless prohibited from so doing by law or by officially recognized confidentiality of their work.

(f) *Fair and equal treatment.*

(1) *Use of public property.* No official or employee shall request or permit the unau-

thorized use of city-owned vehicles, equipment, materials or property for personal convenience or profit.

(2) *Obligations to citizens.* No official or employee shall grant any special consideration, treatment or advantage to any citizen beyond that which is available to every other citizen.

(g) *Conflict of interest.*

(1) *Financial interest prohibited.* No local public official or employee may use his public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or his immediate family or for an organization with which he is associated. This subsection does not prohibit a local public official from using the title or prestige of his office to obtain campaign contributions that are permitted and reported as required by Wis. Stats. ch. 11.

(2) *Specific conflicts enumerated.*

a. *Incompatible employment.* No official or employee shall engage in or accept private employment or render service, for private interests, when such employment or service is incompatible with the proper discharge of his official duties or would tend to impair such official or employee's independence of judgment or action in the performance of his official duties, unless otherwise permitted by law and unless disclosure is made as provided in this section.

b. *Disclosure of confidential information.* No official or employee shall, without proper legal authorization, disclose confidential information concerning the property, government or affairs of the city, nor shall such official or employee use such information to advance the financial or other private interest of such official or employee or others.

c. *Gifts and favors.* No official or employee shall accept any gift, whether in the form of service, loan, thing or promise from any person which to his knowledge is interested directly or indirectly in any manner whatsoever in business dealings with the city; nor shall any such official or employee accept any gift, favor or thing of value that may tend to influence such official or employee in the discharge of his duties, or grant in the discharge of his duties any improper favor, service or thing of value, except campaign contributions as controlled by subsection (i) of this section. Gifts received under unusual circumstances should be referred to the ethics board within ten days for recommended disposition.

(3) *Contracts with the city.* No official or employee who in his capacity as such officer or employee participates in the making of a contract in which such officer or employee has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the part of such official or employee, shall enter into any contract with the city unless, within the confines of Wis. Stats. § 946.13, the contract is awarded through a process of public notice and competitive bidding.

(4) *Disclosure of interest in legislation.* To the extent known, any member of the city council who has a financial interest in any proposed legislation before the council shall disclose on the records of the council the nature and extent of such interest. Any other official or employee who has a financial interest in any proposed legislative action of the council and who participates in discussion with or gives official opinions or recommendations to the council shall disclose on the records of the council the nature and extent of such interest.

(h) *Disclosure of certain financial interests.*

(1) All elected and appointed officials and employees as directed by the city council shall file an initial statement of economic

interests and amend such statement if substantial changes have occurred in economic interests as defined and limited to subsection (h)(3) of this section, within a time period specified by the ethics board.

(2) If a person must make a disclosure as provided in subsection (h)(1) of this section, within seven days after such person becomes a candidate for any elective city office, prior to appointment to such office such person shall file a statement of economic interests or a statement as provided in subsection (h)(4) of this section with the ethics board.

(3) A person filing any statement of economic interests under this section shall file the statement on a form prescribed by the ethics board and shall supply the following information to the ethics board: a description of all parcels of real estate within the city and adjoining towns or villages in which the person or spouse owns any interest, including an option to purchase, if such property is to be considered for rezoning or purchase, if such property is to be considered for rezoning or purchase by an entity of government, but exempting homestead property. All candidates for elective and appointive office required to file under this section shall identify any and all interests of more than two percent or $7,500.00, whichever is lesser, he or his spouse has in any business organization, either as an owner, part owner, partner, silent partner or lender. The statement shall include a listing of all corporations or businesses on which the person or spouse serves as a director or on a consultation basis.

(4) Any candidate, elected or appointed official or employee who feels their standards of privacy would be compromised by a statement of economic interests may decline to offer such a statement. In lieu thereof, he shall initially file a statement with the ethics board of his knowledge and awareness of the requirements to disclose interest in legislation required under subsection (g)(4) of this section.

(i) *Campaign contributions.* Campaign contributions shall be reported by all candidates for city office in strict conformity with the provisions of statute. Any campaign contribution tendered to or accepted by a candidate subsequent to the final statutory report shall be reported to the clerk, who shall forward a copy of such report to the ethics board.

(j) *Ethics board.*

(1) There is created an ethics board to consist of five members as follows: one alderperson as appointed by the mayor, one city officer or employee and three citizen members all appointed by the mayor and confirmed by the city council. Terms of office shall be three years. The ethics board shall elect its own chair and vice-chair, and the city attorney shall furnish the board whatever legal assistance is necessary to carry out its function. If any member of the ethics board petitions the board for a hearing and advice regarding his own conduct, such member shall be mandatorily excepted from sitting in his own case and the city attorney shall be substituted therefor.

(2) The ethics board may make recommendations to the city council with respect to amendments to this section.

(3) Upon the verified complaint of any person alleging facts which, if true, would constitute improper conduct under the provisions of this section, the ethics board shall first conduct a private and confidential inquiry into the merits of the complaint. Upon a finding of probable misconduct by a majority of the ethics board, the ethics board shall conduct a public hearing in accordance with all common law requirements of due process and, in written findings of fact and conclusions based thereon, make a determination concerning the propriety of the conduct of the subject official or employee. If the ethics board finds probable cause exists for action against an employee based on a violation of this section, it shall refer the matter for appropriate action to the council or district

attorney. In making such referral, the ethics board shall supply the council or district attorney with a written statement of their determination.

(4) The ethics board shall be required to only report probable cause for misconduct when three-fourths of the members of the ethics board present and voting vote to do so.

(k) *Applicability.* When an official or employee has doubt as to the applicability of a provision of this section, such official or employee shall apply to the ethics board for an advisory opinion. The official or employee shall have the opportunity to present his interpretation of the facts at issue and of the applicability of provisions of this section before such advisory decision is made. This section shall be operative in all instances covered by its provisions except when superseded by an applicable statutory provision and statutory action is mandatory, or when the application of a statutory provision is discretionary but determined by the ethics board to be more appropriate or desirable.
(Code 1986, § 1.12; Ord. No. 0-02-06, § 1, 1-24-2006; Ord. No. 0-17-06, § 1, 4-11-2006)

Sec. 2-3. Ward boundaries and polling places.

The city council adopts by reference the pamphlet entitled "Establishing Wards, Ward Boundaries and Polling Places" in its entirety and confirming in all respects as amended. See Wis. Stats. § 66.0103.
(Code 1986, § 1.15)

Sec. 2-4. Aldermanic districts.

Aldermanic districts are established as follows by combining contiguous whole wards and as shown on a map entitled "City of Stoughton Aldermanic Districts and Wards" on file in the office of the clerk. Such aldermanic districts shall become effective beginning with the Spring 2002 Election.

(1) First aldermanic district: Wards 1 through 3.

(2) Second aldermanic district: Wards 4 and 5.

(3) Third aldermanic district: Wards 6 through 8.

(4) Fourth aldermanic district: Wards 9 and 10.

(Code 1986, § 1.16)

Secs. 2-5—2-30. Reserved.

ARTICLE II. CITY COUNCIL

DIVISION 1. GENERALLY

Sec. 2-31. Organization meeting.

Following a regular city election, the new council shall meet on the third Tuesday of April. A president and vice-president of the council shall be chosen at this time from among the alderpersons by majority vote.
(Code 1986, § 2.02(1))

Sec. 2-32. Regular meetings.

The regular meetings of the council shall be held at the council chamber at 7:00 p.m. on the second and fourth Tuesday of each month, except that when the second Tuesday of the month is an election day or a legal holiday the first regular meeting of the month of the council shall be held on the second Wednesday of the month, and except that when the fourth Tuesday of the month is a legal holiday or falls on the day before Christmas, the second regular meeting of the month shall be on the fourth Thursday of the month. One of the two regular meetings in any month may be canceled for cause shown. The clerk shall notify the official newspaper of such cancellation in a timely fashion.
(Code 1986, § 2.02(2); Ord. No. 0-26-05, § 1, 7-26-2005)

LEGAL COMMENT

ETHICS AND CONFLICT OF INTEREST PART I:

by Daniel Olson, Asst. Legal Counsel

When we published a comment similar to this one a little more than nine years ago, we noted the highly publicized allegations of misconduct by state legislators and how such activity served to remind us all of the public and private consequences when a public official violates the public trust of his or her public office. Unfortunately, newspaper headlines over the last twelve months have once again highlighted multiple stories of alleged misconduct by Wisconsin public officials. Today, as then, such conduct provides energy for expanding the public trust deficit between citizens and public officials, a serious threat to any democracy. It thus seems an appropriate time to once again provide an overview of some of the important ethics and other conflict of interest laws and rules that regulate the conduct of local officials and a few hypothetical situations as a means to help local officials recognize and avoid conduct that will further increase the lack of trust too many citizens seem to have for public officials.

STATE CODE OF ETHICS FOR LOCAL OFFICIALS, EMPLOYEES AND CANDIDATES

The state code of ethics for local government officials[1] went into effect on August 15, 1991. These and other rules regulating the conduct of local officials continue to generate frequent questions to League legal counsel.

Government Units and Individuals Affected

The state code applies to a "local governmental unit"[2] which is defined to include a political subdivision of the state, an instrumentality or corporation of such a political subdivision or a combination or subunit of any such entity. This means cities and villages are covered. It also means a city redevelopment authority or similar instrumentality or subunit of city or village government is covered.

The state code limits coverage in the covered local government units to local public officials who are defined as individuals holding a local public office.[3] The definition of local public office includes elective offices; city and village managers; appointive offices and positions where the individual serves for a specified term, except independent contractor positions and positions limited to the exercise of ministerial action.[4] The definition also includes appointive offices or positions filled by the governing body or executive or administrative head where the appointee serves at the pleasure of the appointing authority, except independent contractors and clerical and ministerial positions.[5] This means a city council member, village trustee, mayor, village president, city clerk, village attorney, city finance director, village director of public works, city zoning administrator, village building inspector, a park board member and those holding similar elected or appointed offices/positions are subject to the code.

Prohibited Conduct

The state ethics code prohibits local officials from engaging in the following conduct:

1. Using their office to obtain financial gain or anything of substantial value for the private benefit of themselves, their immediate families, or organizations with which they are associated.[6]

1. Wis. Stat. sec. 19.59. For a further discussion of the state ethics law, see the legal comments in the June 1995, October 1991 and December 1991 issues of the *Municipality*.
2. Wis. Stat. sec. 19.42(7u).
3. Wis. Stat. sec. 19.59(7x).
4. Wis. Stat. sec. 19.42(7w).
5. *Id.*
6. Wis. Stat. sec. 19.59(1)(a).

State Code and Financial Interests

The restriction on "using" an office encompasses more than voting. The Government Accountability Board (GAB) (formerly Wisconsin Ethics Board) interprets this rule to prohibit a local official from accepting any item or service, including food or drink, and travel, of more than nominal value offered and available because the official holds public office.[7] It would also prohibit an official from using information derived from holding office that is not available to the public. In short, an official may violate the restriction on "using" her office even if she does not vote on a matter.

An official is "associated" with an organization for purposes of the state ethics law when the individual or a member of the individual's immediate family is an officer, director or trustee, or owns at least 10 percent of the organization. An individual is not associated with an organization merely because the individual is a member or employee of the organization.[8]

The term "immediate family" means an official's spouse and family members who receive more than one-half of their support from the official or from whom the official receives more than one-half of his or her support.[9]

2. Receiving "anything of value" if it could reasonably be expected to influence the local public official's vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction.[10]

The term "anything of value" includes any money, property, favor or service.[11] The GAB guidelines for local officials indicate that a local public official may only accept items of insubstantial value such as "mere tokens and items or services of only nominal, insignificant, or trivial value."[12]

3. Taking official action substantially affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest or using his or her office in a way that produces or assists in the production of a substantial benefit for the official, immediate family member or organization with which the official is associated.[13]

State law does provide a limited exception to these restrictions. Wisconsin Statutes sec. 19.59(1)(d) expressly exempts lawful payments of expenses, benefits, or reimbursements, or actions on proposals to modify an ordinance.

Also, the GAB guidelines and advisory opinions indicate that a local official may participate in an action that will affect the official or an organization with which the official is associated when: (a) the official's action affects a whole class of similarly-situated interests; (b) neither the official's interest nor the interest of a business or organization with which the official is associated is significant when compared to all affected interests in the class;[14] and (c) the action's effect on the interests of the official or of the related business or organization is neither significantly greater nor less than upon other members of the class. The basic test, therefore, appears to be whether the action has a general impact on, or whether the action chiefly benefits, the official, a member of the official's immediate family or an organization with which the official is associated. Thus, a public official should not participate in or perform any discretionary act with respect to making, granting, or imposing an award, sanction, permit, license, contract, offer of employment, agreement or other matter in which the official, a member of the official's immediate family or a business or organization with which the official is associated has a substantial financial interest or would gain a substantial benefit.

The GAB guidelines for state officials suggest that when a matter in which a local official should not participate comes before a body, which the official is a member of, the official should leave that portion of the body's meeting involving discussion, deliberations, or votes related to the matter.[15] When, because of a potential conflict of interest, an official withdraws from the body's discussion, deliberation, and vote, the body's minutes should reflect the absence.

4. Giving, offering or promising to give, or withholding or offering or promising to withhold, his or her vote or influence, or promising to take or

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7. GAB Guideline 1219 (GAB 1219): Receipt of Food, Drink, Favors and Services. GAB guidelines for local officials are available online at http://gab.wi.gov/guidelines/ethics
8. Wis. Stat. sec. 19.42(2).
9. Wis. Stat. sec. 19.42(7).
10. Wis. Stat. sec. 19.59(1)(b).
11. Wis. Stat. sec. 19.42(1).
12. Supra note 7.
13. Wis. Stat. sec. 19.59(1)(c).
14. GAB Guideline 1240 (GAB 1240): Mitigating Conflicting Interests: Private Interest vs. Public Responsibility.
15. *Id.*

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refrain from taking official action with respect to any proposed or pending matter in exchange for any other person making or refraining from making a political contribution or providing or refraining from providing any thing of service or thing of value to or for the benefit of a candidate, political party, any other person who is subject to registration under Wis. Stat. sec. 11.05, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.[16]

Enforcement and Penalties

Local officials may request advisory ethics opinions from the municipal ethics board or, if there is none, from the municipal attorney. The municipal ethics board or attorney may issue a written advisory opinion. If the official follows the advice in the opinion, it is evidence of intent to comply with the law.[17]

The state ethics code for local officials is enforced by the local district attorney upon verified complaint of any person.[18] If the district attorney fails to commence an action within twenty days after receiving such complaint or refuses to commence an action, the person making the complaint may petition the attorney general to act on the complaint.[19]

The ethics code provides civil and criminal penalties for violations. A local official who intentionally violates any part of sec. 19.59 except 19.59(1)(br), may be fined not less than $100 nor more than $5,000 or imprisoned not more than one year in the county jail or both.[20] In the alternative, a civil forfeiture of up to $1,000 may be imposed against a local official for violating any part of the state ethics code for local officials.[21]

State Ethics Code Gaps

The state ethics code for local government officials has not been amended since adoption in 1991. This does not mean there are no flaws or gaps in the law, there are.

Many public positions are not covered by the law since it applies only to local public offices and the law narrowly defines "local public office." This narrow definition leaves many public positions uncovered by the law including police and fire chiefs, assistant city attorneys, deputy treasurers, and other officials not appointed by the governing body or the executive or administrative head of the local government. Thus, the law does not cover a number of public officials the general public might expect to be subject to the state ethics code requirements.

The law also allows conduct the general public might not approve of. For example, the law does not prohibit a public official from voting on a matter involving his parent unless the parent receives, directly or indirectly, more than one-half of his or her support from the official or the official receives, directly or indirectly, more than one-half his or her support from the parent. The same provisions also apply to brothers and sisters and other family members of the public official.

The law also does not prohibit an official from voting or using his or her office to help on a matter involving a person they are not married to but live and share a home with, an employer, or a large campaign contributor. However, activity by an official in such situations is also likely to be disfavored by the general public.

However, these and other gaps in the state ethics code can be addressed. The law authorizes local ordinances that might be used to set higher standards and/or expand coverage beyond state law.[22]

Hypothetical Ethics Code Problems

1. You are a member of the common council. Your 18-year-old daughter who lives at home with you was arrested last night for underage drinking in your city and given a ticket with a fine of $96. She is distraught and begging for your help with the ticket because she thinks an underage drinking conviction will ruin her chances of getting into law school. She says she was not drinking even though a breathalyzer result shows she was. You call the city attorney and tell him that you believe your daughter and you think the ticket should be dismissed or least amended to a lesser violation. Have you violated the state ethics code for local officials?

Probably. The line between being a parent and being a public official is fuzzy at best in this circumstance. Since dismissal or amendment of the underage drinking ticket will provide relief from the increased insurance rates, a financial gain, something of substantial value, or substantial benefit for you, your call to the city attorney could easily be construed as an attempt to use the influence of your public office contrary to Wis. Stat. sec. 19.59(1)(a), or 19.59(1)(c)2. Even if your action does not violate the state ethics code, if the contact does produce a favorable result, the prosecutorial integrity of the city attorney is severely compromised. Any favoritism by the

16. Wis. Stat. sec. 19.59(1)(br).
17. Wis. Stat. sec. 19.59(5)(a).
18. Wis. Stat. sec. 19.59(8)(a).
19. Wis. Stat. sec. 19.59(8)(c).
20. Wis. Stat. sec. 19.58. An intentional violation of 19.59(1)(br) is a Class I felony.
21. Wis. Stat. sec. 19.59(7).
22. Wis. Stat. sec. 19.59(1m).

city attorney would call into question all future prosecutions by him and expose him and your municipality to charges of selective prosecution. In short, you should not make the call even if you think it does not violate the state ethics code.

If the person who got the ticket is not your daughter but the daughter of a friend, do you still have a problem with sec. 19.59(1)(a), or 19.59(1)(c)1. Stats., if you make the call?

No, unless the action produces a substantial direct or indirect benefit (e.g., campaign contribution, free food at the your friend's restaurant, etc.) for you contrary to sec. 19.59(1)(c)1., Stats. Nonetheless, the problems regarding the prosecutorial integrity of the city attorney noted above are still implicated and you should not make the call even though it may not be a violation of the state ethics code.

2. You are a village trustee. While you and your spouse are attending a conference for local public officials, an engineering consulting firm invites you and your spouse to attend a dinner and offers to pay all costs. The written policies established by your village only authorize meal reimbursement for you. Meal expenses for spouses or children traveling with an official are not covered. Should you let the firm pay for you and your spouse?

No. A local public official should not accept an offer to purchase a meal or other item unless, and only to the extent that, the local government would otherwise bear the official's expense and the governmental unit's obligation to bear the expense is expressly authorized by, and in accordance with, established written criteria. Can you pay the costs for your spouse and let the firm pay for yours without violating the state ethics code? You could if your village policies are sufficiently specific to permit it. However, the better practice is to pay for the meal yourself and advise the firm that they can reimburse the village directly if it wishes.

3. You are a member of a common council. The committee you serve on is reviewing bids that the city has received from a number of computer consulting firms. One of the firms that has submitted a bid is owned by your spouse. Can you participate in this matter?

No. If you participate, you will be violating the prohibition in sec, 19.59(1)(c)1., Stats., against taking any official action affecting a matter in which you, a member of your immediate family or an organization with which you are associated has a substantial financial interest.

At what point should you withdraw from participation?

You should excuse yourself from participating in any discussion, deliberations or votes relating to the selection of a computer consultant for the city. The best way to proceed would be to remove yourself from the committee meeting before the bids are discussed, reviewed and evaluated. Also, the minutes should reflect your absence.

If the firm is owned by your father instead of your spouse, can you participate in the matter without violating the state ethics code?

Yes. Assuming you do not provide one-half of your father's support or he does not provide one-half of yours, there is no violation of sec. 19.59(1)(c)1., Stats. or any other provision of the state ethics code if you participate in the matter. However, your local code may be more restrictive and should be checked. In addition, you should also consider the public response even if your local ethics code does permit your participation since many, if not most, people will question your ability to place your public obligations over your personal connections.

4. You are a member of a common council. The council is considering plans and specifications for a major street widening and repair project and a resolution authorizing special assessments to be levied against abutting property owners to pay for the project. Your home abuts the street that is going to be widened and repaired. Should you participate in the matter when it comes before the council?

The state ethics code would probably not prohibit you from participating in this matter even though the action affects you and your property. This is because the action will affect a whole class of similarly situated property owners abutting the street project.

What if the proposed project will greatly improve the value of a piece of commercial property you own but does not have a similar effect on most of the other properties? Can you still participate?

Probably not since the test for determining whether you can participate is not limited to the number of other persons affected but also asks whether the impact of the action has a similar effect. Under the ethics law, you may vote on the project only if your interest is not significant relative to all the affected persons and the action's effect on your property is neither significantly greater nor less than upon other property owners abutting the street project.

5. You are a member of the village plan commission. The commission is considering a conditional use permit request by a person who owns property next door to your father-in-law. Do you participate in the matter?

If your father-in-law does not receive more than 50 percent of his support from you and you do not receive more than 50 percent of your support from him, then the state ethics law would not preclude you from voting on the zoning change. However, the state and federal constitutional guarantees of

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due process require administrative or quasi-judicial decisions such as this to be made by an impartial decision maker. If you cannot be impartial, then you should not participate. Even if you believe that you can be impartial, you should advise the applicant that your father-in-law lives next door to the property and determine whether the applicant has any objection to your participation.

Private Financial Interests in Public Contracts

Wisconsin Statute section 946.13 prohibits public officials and employees from having a private interest in a public contract. Importantly, it is a strict liability statute and a conviction requires no proof of criminal intent.[23] This means public officials and employees must regularly review their public and private connections to avoid inadvertent violations of this law.

Prohibited Conduct.

Section 946.13(1) prohibits a public official or employee from engaging in the following conduct:

1. In his or her private capacity, negotiating or bidding for or entering into a contract in which the official or employee has a direct or indirect private pecuniary interest if the official or employee is also authorized or required by law to participate in his capacity as such officer or employee in the making of that contract.[24]

This is the most significant prohibition in the pecuniary interest statute since there is no requirement that an official or employee actually take any action in regard to the contract. The statute imposes liability simply when an official or employee is ***authorized*** to participate in its making. Abstaining from voting will not prevent a violation.

It is also important to note that a violation of sec. 946.13(1)(a) is also not automatically avoided if someone other than the official or employee negotiates or bids for or enters into a contract in which they have a private pecuniary interest. This position is reflected in the following statement by the Wisconsin attorney general: "It is equally clear, however, that the law [Wis. Stat. sec. 946.13(1)] forbids a public officer or employe from accomplishing through an agent that which the law prohibits [the officer or employee] from doing directly."[25] This means that if another person or entity is acting as agent for the public official or employee, then the actions of that person or entity will be deemed those of the official or employee for purposes of sec. 946.13(1).

Similarly, officials and employees should be mindful that violation of sec. 946.13(1)(a), Stats., does not require that a contract actually be executed. Attempts to negotiate or bid for the contract are enough to violate the restriction and there is nothing in the plain language of the statute that defines or limits negotiation or bidding to only formal procedures. Thus, informal discussions with a person involved in a municipal employee hiring process about abilities and interest in the position prior to resignation might be sufficient to violate the law.

2. Participating in the making of a municipal contract in his or her official capacity or performing some function requiring the exercise of discretion in regards to a municipal contract if the official has a direct or indirect financial interest in the contract.[26]

This restriction requires some affirmative act such as a vote or some other participation in the making or execution of the contract before there is a violation. Accordingly, refraining from acting in all official or authorized capacities on the contract will prevent violation.

Exceptions.

There are a number of statutory exceptions to sec. 946.13(1)[27]. Probably the most important exception is for contracts in which any single public officer or employee is privately interested that do not involve receipts and disbursements by the state or its political subdivision aggregating more than $15,000 in any year.[28]

It is important to note that the exceptions do not authorize any particular behavior. They only remove the conduct from the scope of sec. 946.13(1). They do not immunize the behavior from other applicable restrictions such as the state ethics code for local officials, common law rules, or local ordinances and rules.

Enforcement and Penalties

Violation of Wis. Stat. sec. 946.13 is a Class I felony and subjects the person to a fine of not more than $10,000, imprisonment for not more than three years and six months, or both.[29] A conviction would also lead to an automatic vacation of an elective office since the official would be constitutionally barred from holding public office.[30]

23. *State v. Stoehr*, 134 Wis.2d 66, 396 N.W.2d 177 (1986).
24. Wis. Stat. sec. 946.13(1)(a).
25. 75 Op. Att'y Gen. 172, 174 (1986).
26. Wis. Stat. sec. 946.13(1)(b).
27. See Wis. Stat. secs. 946.13(2), (5), (6), (7), (8), (9), (10), and (11).
28. Wis. Stat. sec. 946.13(2)(a).
29. Wis. Stat. sec. 939.50(3)(e).
30. Wis. Const. art. XIII, sec. 3(3) and sec. 17.03(5).

Hypothetical Pecuniary Interest Statute Problems

1. You are a member of the city council and are employed by a local engineering firm. Your city has recently decided to solicit bids from qualified engineering firms for a study of its municipal water system. The contract will pay $50,000. You are not involved in any management decisions at your engineering firm but a major portion of your work with the engineering firm is related to the design and operation of municipal water and sewage systems. In fact, you are the expert in your firm on municipal water systems. Your firm intends to bid for the water system contract with your city and you intend to do work on the contract if it is awarded to your firm. Do you have a problem with sec. 946.13(1)?

There is no case law or legal authority that provides a clear answer. However, League legal staff believe there is probably sufficient evidence under these facts to suggest that the engineering firm is acting as your agent for purposes of the contract. If so, any attempt by the firm to negotiate or bid for or enter into the water system contract with the city is a violation by you of sec. 946.13(1)(a).

What if you did not do any work on the contract?

If you did not do any work on the contract, it is less likely that the firm is acting as your agent. What if you were a senior partner in the firm but still did not do any work on the contract? If being a senior partner means you have a say in the management decisions of the firm, your firm is probably acting as your agent and sec. 946.13(1)(a) has probably been violated if the firm submits a bid.

2. You are a nominee for a position on a city's redevelopment authority and the director of a local non-profit organization, which received a $25,000 development loan from the authority one year ago. Can you serve on the authority?

Yes. Since the loan was negotiated, bid for, and entered into prior to appointment to the redevelopment authority and before you had any authority to participate as a public official in the making of the loan, there is no violation of sec. 946.13(1). However, if your organization attempts to renegotiate the terms of the existing loan or seeks a new loan while you serve on the authority, the statute would be violated. Moreover, you cannot take any action regarding the current administration of the existing loan while you serve on the authority.

3. You are a member of the village board. You also own the only hardware store in the village. The village regularly purchases supplies from the store. You always abstain from voting on bills and claims relating to your store. Last year total sales to the village amounted to $12,000. This year, sales to the village are approaching $17,000 dollars. Did you violate sec. 946.13(1), Stats., last year?

No. You are allowed to do a total of $15,000 worth of business with the municipality in a year.

Are you in violation of sec. 946.13(1), Stats., this year?

Yes. The sales transaction that pushed you over the $15,000 limit of sec. 946.13(2)(a) constituted execution of an impermissible contract under sec. 946.13(1)(a). While abstention will protect you from violating the prohibition on official action on a contract where you have a financial interest, it will not prevent you from violating the provision prohibiting private involvement in a contract where you have official authority to act.

4. You are a city council member. The human resources director position with the city will be vacant in the near future due to the retirement of the current director. The position pays an annual salary of $50,000. Can you apply for the position before you resign from the city council?

No. Submission of an application for employment is a bid for a contract. Since the position will pay an annual salary in excess of the sec. 946.13, Stats., limit of $15,000, you must resign from the city council before you can apply for the position.

You intend to resign from office before you submit your application. However, you know the mayor will nominate the new director to the city council for approval and want to talk to her about your options. Can you talk to the mayor while you are still a member of the city council and let her know that you are interested in the position?

Probably not. Such discussion probably constitutes negotiation or bidding for the employment and violates sec. 946.13(1)(a). The discussion with the mayor may also be an improper use of your office and be a violation of sec. 19.59(1)(a) of the state ethics code for local government officials.

Would you violate sec. 946.13(1), Stats., if you applied before resigning but withdrew your application before the city acted on it?

Yes. Section 946.13(1)(a) prohibits a public official from merely negotiating or bidding for a contract in which the official has a financial interest if the official is authorized to participate in his official capacity in the making of the contract. Here, you have submitted a bid by applying for the position while being authorized to exercise official discretion with regard to the contract. This violates the statute and it does not matter that you have withdrawn your application before it was acted on.

Compatibility of Offices 605R
Pecuniary Interest 389R

Ethics and Conflict of Interest Part II:

by Daniel Olson, Asst. Legal Counsel

Compatibility of Offices and Positions

One of the most important common-law (court made) rules regarding conflict of interest is the doctrine of incompatibility. This doctrine recognizes a conflict of interest in some situations where a public official holds two public offices or holds a public position and a public office.[31]

A leading commentator on municipal law states the basic concern associated with conflicts in this context as follows:

> Public policy demands that an officeholder discharge his or her duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his or her individual capacity to achieve impartiality, for inquires of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his or her talent.[32]

The Wisconsin Attorney General cited approvingly in a formal opinion, 74 Op. Att'y Gen. 50 (1985), a summary of common law incompatibility principles discussed in 63A Am. Jur. 2d Public Officers and Employees sec. 78 (1984):

> Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions, which attach to them. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.

The commentator and attorney general statements reveal a key principle of the incompatibility doctrine. The doctrine is not concerned with actual evidence of disloyalty or bias. Rather, incompatibility is present if the dual service creates any potential for a conflict over salary negotiations, supervision and control of duties or obligations to the public to exercise independent judgment. This means the question of incompatibility is determined upon a review of the duties and responsibilities of the two offices or office and position involved, not the personal character or abilities of the official or employee.[33]

The incompatibility doctrine probably does not apply to an individual who holds a public position and provides a service to a governmental entity as an independent contractor.[34] The Wisconsin supreme court has adopted the following definition of an independent contractor:

> An independent contractor is one who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work in accordance with his own ideas or under plans furnished by the person for whom the work is done, to produce certain results required by such person.[35]

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31. See *State v Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); and *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, (Ct. App. 1984).
32. 3 McQuillin, Mun. Corp., sec. 12.67 (3d ed.)
33. See *State v Jones*, 130 Wis. 572 (1907); *Martin v. Smith*, 239 Wis. 314 (1941); and *Otradovec v. City of Green Bay*, 118 Wis. 2d 393 (Ct. App. 1984).
34. Compatibility of Offices 581.

Compatibility of Office and Other Laws

The court has also explained that the "reservation by a municipality of the privilege of inspecting and generally supervising the work, and making changes in the plans, does not destroy or impair the character of independent contractor."[36] In addition, the court advised that "whether one is an employee or an independent contractor generally should be determined from the facts of the particular case, and from a proper construction of the contract as a whole."[37] This means an official cannot avoid an incompatibility problem by simply declaring his non-public employment to be that of an independent contractor. Rather, the particulars of the relationship between the official and the government entity will be closely examined to determine whether the official is truly an independent contractor.

A good rule of thumb for governing body members to follow is that they cannot hold other public offices or positions unless the arrangement is specifically authorized. For example, governing body members are expressly authorized to serve on local boards and commissions, as long as they receive no additional remuneration other than a per diem that is paid to all members of the board or commission.[38] Also, elected public officials may serve as EMTs and volunteer firefighters for their municipalities, as long as total compensation, including fringe benefits does not exceed $15,000 per year.[39] A member of a city council or village board may also serve as a county supervisor.[40]

Enforcement and Penalties

Under the doctrine of incompatibility, if a second office is taken that is incompatible with an existing office, the official is deemed to have vacated the first office. The law is not so clear regarding the holding of an incompatible office and position. While it is clear that the official must give up the office or position, there is no clear direction in the law as to whether the first office/position is automatically vacated or whether the person may choose between the office and position.

Hypothetical Incompatibility Problems

1. You are a member of a city library staff and are thinking about running for the city council. Can you work for the library and serve on the city council if elected?

No. The fact that the library board comes between the librarian and the common council does not remove the incompatibility problem. This is because the common council controls the amount of money the city appropriates to the library board and confirms appointments to the library board. Thus, a person who is an employee of the library and who simultaneously sits on the common council can exercise ultimate control over his or her employer, the library board, through controlling the level of funding and the appointments to the board.

2. You are employed by a private firm whose head is the village assessor and are thinking about running for the village board. Can you continue to work for the firm and serve on the village board if the head of your firm is still the village assessor?

The answer is probably yes since the incompatibility doctrine has not been extended to non-public employment situations. However, this situation is very close to the one found incompatible in the *Otradovec* decision and does create some potential for a conflict over salary negotiations, supervision and control of duties or obligations to the public to exercise independent judgment that might lead a court to include such private employment within the scope of the incompatibility doctrine.

What if the engineering firm, not just its head, has been appointed as village engineer?

This minor change in facts probably renders your employment with the firm and service as a village trustee incompatible since a court is unlikely to find the "private" employment significant enough in light of the potential for a conflict over salary negotiations, supervision and control of duties or obligations to the public to exercise independent judgment.

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35. *Weber v. Hurley*, 13 Wis. 2d 560, 568, 109 N.W.2d 65 (1961).
36. *Id.*
37. *Id.*
38. Wis. Stat. sec. 66.0501(2).
39. Wis. Stat. sec. 66.0501(4).
40. Wis. Stat. sec. 59.10(4) and Compatibility of Office 604.

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3. You have served as a member of your village's volunteer fire department for 10 years. You have received, on average, $1,000 a year for your services. You have just been elected to the village board. Must you resign from the volunteer fire department?

No. Section 66.0501(4) allows governing body members to serve as volunteer firefighters for their municipalities, as long as the total compensation they receive does not exceed $15,000. Note: There may be some question under the Fair Labor Standards Act (FLSA) whether an individual who is paid $15,000 in any year is a volunteer under that law and the $15,000 threshold under sec. 66.0501(4) should not be interpreted as permitting noncompliance with the requirements of the FLSA.

OTHER CONFLICT OF INTEREST LAWS AND RULES

The "*Hall*" Decision

The general rule of law, according to an old Wisconsin supreme court decision, is that members of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the municipality. *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879). This rule seems to expand upon the restrictions in the ethics code. If the rule extends to legislative decisions, it would, for example, prohibit a city council member who owns a restaurant with a liquor license from voting on a proposed change in the liquor license fees to be charged. However, it is not clear whether the rule applies to legislative and non-legislative actions of a governmental body or board.[41]

Robert's Rules of Order

Many municipalities have adopted Robert's Rules of Order. Officials should be aware that section 44 of those rules provides:

> No member should vote on a question in which he has a direct personal or pecuniary interest not common to other members of the organization. . . . The rule on abstaining from voting on a question of direct personal interest does not mean that a member is prevented from voting for himself for an office or other position to which members are generally eligible, nor from voting when other members are included with him in a motion.

This rule and the *Hall* case noted above were cited by the Wisconsin court of appeals in a case where the employee of an entity seeking a rezoning abstained from voting as a county board supervisor on the matter.[42] The court concluded that had the employee-supervisor voted, his vote would have been disqualified.

Eligibility for Other Public Positions Statute

The pecuniary interest statute, sec. 946.13(1) discussed earlier, is probably the most significant limitation on a public official's eligibility for another public position with the municipality she serves. However, it is not the only one. A separate provision also provides that a member of a city council or village board is ineligible, during the term of office for which the member is elected: (1) for any office or position that has been created during that term, even if the member resigns this or her office prior to appointment; and (2) an existing office or position, if the selection for it is vested in the governing body, unless the member resigns before the selection is made.[43]

Mid-term Salary Change Statute

An elected official who is entitled to participate in the establishment of the salary for their office shall not during the term of the office collect salary in excess of the salary provided at the time the official took office.[44] This provision does not prohibit all votes on salary during a term of office. An official may vote on a proposed salary increase that will take effect at the beginning of the next term of office.

Misconduct in Office Statute.

State law[45] provides that any public officer or employee who does any of the following is guilty of a Class I felony, punishable by a fine not to exceed $10,000 or imprisonment not to exceed three years and six months or both:

1. Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law.
2. In the officer's or employee's official capacity does an act which

41. See 63 Op. Att'y Gen. 545 (1974), citing 133 A.L.R. 1257; 62 C.J.S., Municipal Corporations, sec. 402 (rule may not extend to legislative decisions) and McQuillin MUN. CORP., sec. 13.35 (3d ed) (this municipal law treatise does not cite any legislative act exception to the *Hall* rule).
42. *Ballenger v. Door County*, 131 Wis. 2d 422, 388 N.W.2d 624 (Ct. App. 1986).
43. Wis. Stat. sec. 66.0501(2).
44. Wis. Stat. sec. 66.0505.
45. Wis. Stat. sec. 946.12.

he or she knows is in excess of the officer's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity.

3. By commission or omission, in the officer's or employee's official capacity, exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others with intent to obtain a dishonest advantage for the officer or employee or another.
4. In the officer's or employee's official capacity intentionally and materially falsifies an entry in an account or record book or return, certificate, report or statement.
5. Under color of the office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

Bribery Statute

Any public officer or public employee who directly or indirectly accepts or offers to accept any property or personal advantage, which the officer or employee is not authorized to receive, pursuant to an understanding that the officer or employee will act in a certain manner regarding any matter which is pending or might come before the officer or employee in the officer's or employee's capacity as such officer or employee or that the officer or employee will do or omit to do any act in violation of the officer's or employee's lawful duty is guilty of bribery, a Class H felony.[46]

Discounts at Certain Stadiums Statute

No person serving in a local elective office may accept any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is tax exempt from general property taxes under sec. 70.11(36).[47]

Liquor Licensee Relations Statute

No member of the municipal governing body may hold an alcohol beverage wholesalers permit under sec. 125.54 or, with respect to the issuance or denial of licenses under this section, do any act in violation of sec. 19.59 (1).[48]

Rules of Professional Conduct

Some public officials and employees are also subject to special conflict of interest rules that are imposed pursuant to professional rules of conduct related to their profession or position.

One public officer subject to such professional rules of conduct is the municipal attorney. Like other attorneys, a municipal attorney is subject to the rules of professional conduct for attorneys, which includes a set of conflict of interest rules.[49] In some instances, these rules or others rules of professional conduct may prohibit a city or village attorney from acting in a matter and necessitate the use of outside counsel.

Another "local" official with special conflict of interest rules is a municipal judge.[50] Municipal judges, even those who are not lawyers, are subject to the same rules of judicial conduct as other judges with some limited exceptions.[51] Some of these rules extend to municipal court staff.[52] A municipal judge is also subject to a special incompatibility conflict of interest rule that prohibits a municipal judge from holding any other office of public trust during his or her term of office.[53]

Wis. Const. Art. XIII, Sec. 11

The Wisconsin Constitution also contains an important ethics provision for public officials in Article XIII, Section 11. It provides in relevant part:

> No person, association, copartnership, or corporation, shall promise, offer or give, for any purpose, to any political committee, or any member or employee thereof, to any candidate for, or incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication. No political committee, and no member or employee thereof, no candidate for and no incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality of this state, shall ask for, or accept, from any person, association, copartnership, or corporation, or use, in any manner, or for

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46. Wis. Stat. sec. 946.10.
47. Wis. Stat. sec. 19.451.
48. Wis. Stat. sec. 125.51(1)(b).
49. See e.g. SCR 20:1.7.
50. A municipal judge is included in the list of officials subject to the state ethics code for state officials. See Wis. Stat. secs. 19.42(13) and (14).
51. See Chapter SCR 60 of the Wisconsin Statutes.
52. SCR 60.04(2)(b).
53. Wis. Stat. sec. 757.02(2).

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> any purpose, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.
>
> No political committee, and no member or employee thereof, no candidate for and no incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality of this state, shall ask for, or accept, from any person, association, copartnership, or corporation, or use, in any manner, or for any purpose, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

Any violation of any of the above provisions shall be bribery and punished as provided by law, and if any officer or any member of the legislature be guilty thereof, his office shall become vacant.

In 1988, the Wisconsin Attorney General opined that Art XIII, Section 11 was "intended to prohibit bribery of public officials through gifts of transportation and traveling accommodation services; in short, to prohibit covert as well as overt bribery." 77 Op. Att'y Gen. 237 (1988), 244. He also concluded that the provision "prohibits the giving of any free pass, frank or privilege involving traveling accommodation, or transportation of any person or property, or the transmission of any message or communication to any of the listed offices and positions, including all state officers and employes." *Id.* at 243.

Conclusion

The foregoing provides an introduction and overview of some of the more important rules and laws addressing ethics and conflict of interests for Wisconsin municipal officials. Some, such as the impartiality requirement under the due process clause of the state and federal constitutions are too complex to fully address in an overview. However, it is hoped that this short refresher course or introduction will help local officials recognize and avoid potential conflict of interest problems in their community and encourage further discussion with their municipal attorney.

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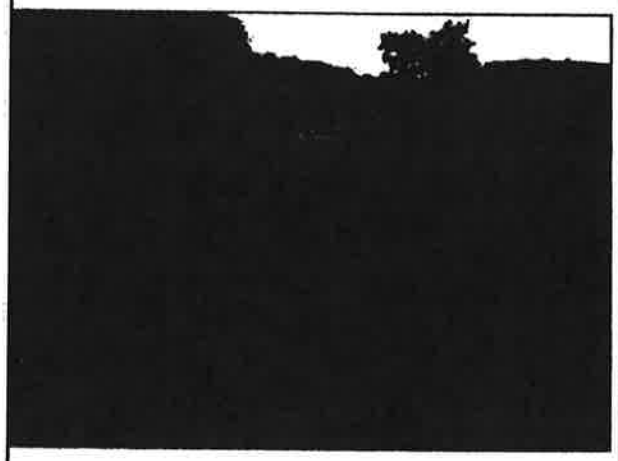
Providing Personal Service & Quality Work for Wisconsin Towns



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Parliamentary Procedure

Rules of the Common Council, Committees, Boards, and Commissions City of Stoughton, Wisconsin
Adopted June 2015

Adopted pursuant to the authority granted in Wis. Stat. § 62.11(3).

Rule 1. MEETINGS

A. Regular Meetings

1. Following the spring election of each year, the Common Council shall meet on the third Tuesday of April for the purpose of organization. Regular meetings of the Common Council shall be held on the second and fourth Tuesday of every month at 7:00 pm, in the council chambers.

2. If any meeting date, as fixed by paragraph (1) above, falls on a legal holiday or election day, the meeting shall instead be held on the first business day succeeding that holiday or election day at the same hours and place, unless the meeting is cancelled or another date is specified by the council president.

B. Special Meetings

The mayor or council president may call special meetings by written notice to each council member and the mayor. The notice shall be delivered to all council members either personally, electronically to those who have consented to electronic delivery of notices from the city, or left at their usual abode at least 24 hours before the meeting, unless for good cause a 24-hour notice is impossible or impractical. In that case, a shorter notice may be given, but the notice may not at any time be provided less than 6 hours in advance of the meeting. The notice shall specify the time, place, and purpose of the meeting. Attendance by any council member is a waiver of any defect of notice.

C. Adjournment

Any council member may move to adjourn a meeting. If any agenda item is not considered before a motion to adjourn, it shall automatically be referred to the council's next regular meeting, unless the motion provides for a specific date and hour.

Rule 2. QUORUM REQUIRED

A quorum is necessary for the transaction of any council business. Two-thirds of all members of the council shall constitute a quorum. In determining whether a quorum is present, neither vacancies nor the mayor shall be included in calculating the number of members of the council or in calculating the number of members present.

Rule 3. PRESIDING OFFICER

A. Designation Of

The mayor shall be the presiding officer of the meetings of the council. In the absence of the mayor, the president of the council shall preside at the meetings of the council. If both the mayor and the council president are absent, the vice president of the council shall preside at the meetings of the council. If the mayor, council president, and vice president are absent, the clerk shall call the council to order and preside until the council selects a member to preside at the meeting.

B. Function

The presiding officer shall preserve order, conduct the proceedings of the council, and be its parliamentarian. If a member does not follow the council's parliamentary rules, the presiding officer may, on his or her own motion, or shall, at any members' request, call the offending member to order. The council, if appealed to, shall decide the matter.

C. Question of Order

Any alderperson may raise a point, or question of order. The question of order must be raised at the time the alleged breach of order occurs. The presiding officer may confer with legal counsel during the meeting. The presiding officer shall, in turn, immediately rule on the question of order, subject to an appeal by a member to the council. The appeal may be sustained by a majority vote of the members present, exclusive of the presiding officer.

D. Motion

The mayor or other presiding officer may speak on any question. If the mayor or other presiding officer wishes to make a motion, he or she must first vacate the chair while the motion is pending. If the mayor or other presiding officer vacates the chair while a motion is pending, the next officer in line to preside at the meeting shall preside while the motion is pending.

E. Veto

The mayor may veto all acts of the council as permitted by law. The council may override the mayor's veto by a two-thirds vote of all members of the council.

Rule 4. NOTICE OF MEETINGS

Wisconsin law requires the chief presiding officer of the Common Council or such person's designee to give public notice of every Common Council meeting. Such notice must set forth the time, date, place, and subject matter of the meeting, including that intended for consideration of any contemplated closed session. The mayor or mayor's designee shall give notice of every Common Council meeting in accordance with the Wisconsin Open Meeting Law.

Rule 5. ABSENCE OF MEMBERS

If any alderperson, for any reason, cannot attend a regularly scheduled meeting of the Common Council, he or she shall notify the city clerk as soon as practically able prior to the meeting, of his or her anticipated absence.

Rule 6. ORDER OF BUSINESS

The business of the council shall be conducted in the following order:

1. Call to order by the presiding officer
2. Roll call
3. Presentation of accounts and other claims against the city
4. Presentation of committee reports and minutes
5. Communication, reports of city officers, and recommendations of the mayor
6. Comments and suggestions from the preregistered citizens
7. Consideration of the minutes of the prior meeting(s).
8. Consent agenda
9. Unfinished business from previous meetings (old business)
10. New business

The council may chose to take business out of order.

Rule 7. INTRODUCTION OF BUSINESS

A. Introduction Requirements

All new, proposed ordinances, resolutions, or other new business (collectively "New Business") shall be in writing, shall contain a brief statement of their content, shall indicate the name of the presenting member(s) or presenting committee, and, prior to their consideration by council, shall be delivered to the clerk. Once a proper request to add an item to the Common Council agenda has been made, the Mayor shall approve placement of the item on the agenda for one of the next two regular Common Council meetings following such timely request. Any item added to an agenda at the direction of the Common Council shall not be removed from the agenda without the approval of the Common Council.

B. Agenda

The following individuals and/or bodies may request the city clerk to add an item to the Common Council agenda:

1. The mayor
2. The Common Council or any alderperson
3. Any standing committee of the Common Council or the chair thereof
4. Any city committee, board or commission, or the chair thereof, with respect to an item of business referred to such committee, board or commission by the Common Council, or with respect to an item which such committee, board, or commission is required by law to report or recommend to the Common Council

The final agenda and packet must be approved by the mayor prior to distribution to the common council. Once approved by the mayor, the agenda may not be amended without approval from the mayor. The mayor and council president shall make reasonable efforts to cooperatively review the agenda before it is approved. Except as otherwise provided by this rule, the final agenda and packet must be sent to council members no later than 5:00 p.m. the Thursday prior to the regular Council meeting. The mayor may, in consultation with the Council President if feasible, approve sending the final agenda to council members, or amending the agenda, less than 5 days prior to the meeting, when the mayor, in consultation with the Council president if feasible, deems appropriate to protect the City's interests or to avoid unnecessary delay or hardship for the City or interested parties

C. Reintroduction Restricted

Unless otherwise provided by city ordinance, or unless allowed by approval of a motion for reconsideration pursuant to Rule 10, no proposed ordinance or resolution, having been once defeated, may again be introduced in the same or in substantially the same form until 30 days after the date when that ordinance or resolution was defeated.

Rule 8. PRESIDENT OF THE COUNCIL

A. Selection

The council president shall be selected by a majority vote of all council members at the annual organizational meeting conducted on the third Tuesday of April.

B. Absence of Mayor

During the mayor's absence or inability to serve, the council president shall be acting mayor and shall be vested with the powers and duties of the mayor, except the council president may not approve a council act that the mayor has vetoed. When acting as the presiding officer at meetings of the Common Council, the council president or other presiding officer retains his or

her right to vote as an alderperson and if he or she exercises that right, may not vote in case of a tie.

Rule 9. VOTING

A. Modes of Voting

1. Any alderperson may demand an aye and noe (roll call) vote on any matter. However, the vote must be by roll call if the council is:
   a. Confirming appointments
   b. Adopting any measure that assesses or levies taxes
   c. Appropriating or distributing money
   d. Creating any liability or charge against the city or any fund of the city
2. No member may explain his or her vote during the calling of ayes and noes.
3. All ayes and noe votes shall be recorded in the journal (minutes of the common council) by the clerk.

B. Majority Vote Required

Any item appearing on the agenda of the Common Council that requires the vote of council for approval or passage must be approved by a simple majority except where a different vote is required by law.

C. Tie Vote

The mayor shall not vote except in the case of a tie. When the mayor does vote in the case of a tie, his or her vote shall be counted in determining whether a sufficient number of the council has voted favorably or unfavorably on any measure.

D. Abstentions

A council member who abstains from voting on a matter for the stated reason that voting would violate or might be perceived to violate a law or ethical standard, shall not be counted for determining the number of members present if passage of that measure requires a favorable vote by a majority or other fractional vote (i.e. 2/3 or 3/4) of the members "present", or the presence of a quorum for purposes of that particular vote.

E. Vote Change

A council member may change his or her vote on a matter up to the time the result of the vote is announced.

Rule 10. RECONSIDERATION

Any member who voted with the prevailing side on any question may move for reconsideration immediately after the vote on the question is determined, or at the next succeeding regular meeting of the council. First a vote is taken on the motion to reconsider, if it passes the question can be debated and voted on again. A defeated motion for reconsideration is not subject to further reconsideration. Council actions that have already been implemented, such as approval of contracts that have been signed or ordinances that have become effective are not subject to reconsideration. Nothing in this rule prohibits the reintroduction of any business, subject to the restriction in Rule 7 C.

Rule 11. ORDINANCES

A. All proposed ordinances shall be read a total of two (2) times at two separate meetings before the council may vote on any of them. Each shall be read:

   a. At the time the proposed ordinance is first submitted to the council for its consideration (first reading).

b. Immediately prior to the council's actual vote on it (second reading).

B. The council may dispense with any required reading.

Rule 12. COMMITTEES, BOARDS, & COMMISSIONS

A. Special Committees

The council may provide for special committees as it may from time to time deem necessary. Appointments to these special committees shall be made by the mayor.

B. Committee of the Whole.

The council may meet as a committee of the whole pursuant to Robert's Rules of Order.

C. Minutes

Each committee, board, and commission shall keep minutes. Minutes shall be approved by a majority of the committee, board, or commission at a subsequent meeting. After approval, the minutes shall be filed with the clerk.

D. Notice of Meetings

The chairperson or designee shall file notice of each meeting with the clerk. The notice shall comply with notice requirements found in Wis. Stats. 19.84.

E. Absence of Member.

If any member cannot attend a scheduled meeting, he or she shall notify the city clerk of his or her anticipated absence as soon as practically able prior to the meeting.

F. Quorum.

A quorum is necessary for the transaction of any business. A majority of all members of the committee, board, or commission shall constitute a quorum. The mayor, as ex officio member of standing committees, has the right, but not the obligation, to participate in the proceedings of standing committees, and he or she is not counted in determining the number required for a quorum or whether a quorum is present at a meeting.

D. Agenda

The chair of each committee, board, and commission shall approve all agenda items. He or she shall consider all referrals for the purpose of establishing said agendas.

Rule 13. PUBLIC COMMENT PERIOD

A. Public Comment

A citizen may address the council provided the citizen registers with the clerk before the meeting is called to order, and indicates his or her interest to address the council; and provided the agenda provides for a public comment period.

B. Time Limited

With the exception of informational and public hearings, speakers shall be limited to a maximum of three (3) minutes. The city clerk will maintain the timer and inform the speaker when 30 seconds remain.

C. Other Restrictions

If the presiding officer decides the comments are not relevant or are abusive, the presiding officer may:

1. Order the citizen to modify his or her comments
2. Order the citizen to refrain from speaking
3. Order the citizen to leave council chambers

4. Take such other steps as may be necessary to insure the efficient conduct of the council's business

D. Registration and Time

The city clerk will arrive 30 minutes prior to the start of the council meeting to distribute registration forms as requested. Each form will be dated, numbered, and distributed on a "first-come, first-served" basis.

1. A completed registration form is required to speak by each individual completing his or her own form and is limited to addressing one subject per meeting only
2. Speakers will utilize the microphone at the podium and will begin by stating their name and address prior to addressing the council
3. The maximum time allotted for public comment is 30 minutes
4. The council reserves the right to restrict or increase time limits

Rule 14. MANNER OF DELIBERATION

A. Manner Of

No alderperson shall address the council until recognized by the presiding officer. The alderperson shall then address the presiding officer and keep all remarks to the question under discussion. The alderperson shall also avoid personal confrontation when speaking.

B. Motions

No motion shall be discussed or acted upon until it has been seconded. No motion shall be withdrawn without the consent of those alderpersons making and seconding the motion.

C. Motions: Precedence Of

When a question is under consideration, no motion shall be entertained except the motion to:

1. Fix the time to adjourn
2. Adjourn
3. Recess
4. Privilege
5. Lay on the table
6. Move the previous question
7. Limit or extend limits of debate
8. Postpone to a certain day
9. Refer to committee
10. Amend
11. Postpone indefinitely

The above motions shall take precedence in the order listed.

Rule 15. CONSENT AGENDA

A. Clerk's Responsibilities

The city clerk may create a subsection on any council agenda entitled, "consent agenda." In a consent agenda the clerk shall place matters that, in the clerk's judgment, are routine and noncontroversial and do not require a special vote or specific action by the council. The consent agenda shall be approved by the council president prior to being placed on the council agenda.

B. Procedure for Adoption

The following procedure shall apply when a consent agenda is used:

1. No separate discussion or debate may be permitted on any matter listed on the consent agenda
2. A single motion, seconded and adopted by a majority vote of all members of the council shall be required to approve, adopt, and act or otherwise favorably resolve all matters listed on the consent agenda
3. Any alderperson may request removal of any item or part of an item included in the consent agenda. At the time the consent agenda is considered, the removal of an item as requested by an alderperson shall be approved without debate or vote
4. If an item or any part of an item has been removed from the consent agenda in accordance with this rule, the council shall consider that item at an appropriate time during the council's regular order of business

Rule 16. ROBERT'S RULES OF ORDER

In the absence of a standing rule, the council, committees, boards, and commissions shall be governed by the most current edition of Robert's Rules of Order, Newly Revised, unless contrary to State law.

Rule 17. SUSPENSION OF RULES

These rules or any part of them may be suspended in connection with any matter under consideration by a recorded vote of two–thirds of the members present.

Rule 18. VALIDITY OF COUNCIL ACTIONS

No action by the Common Council shall be invalid or subject to challenge on the grounds that such action was taken in violation of the Rules of the Common Council.