Wisconsin Association of School Superintendent Assistants

Fourteenth Annual Fall Workshop

FUNDAMENTALS OF THE FUNDAMENTALS: MEETINGS, MINUTES, AGENDAS AND NOTICES

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Friday, October 21, 2016

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LAW FIRM

I. School Board Meetings: How School District Business Gets Done.

A. **S**chool boards must hold regular meetings at least once each month and at other times as permitted by statute. Wis. Stat. §§ 120.11, 120.43.

B. Such meetings are important because they are the only times during which the school board can conduct its business and take action as the governing body for the school district. The statutes permit school district officers to conduct certain business outside of such meetings; however, the school board, as a body, conducts school district business only during such meetings.

C. The authority of a governing board, such as a school board, is vested in the entire board itself. 2 *Education Law* § 3.04[2]. Accordingly, it has been held that the members of a governing board may not act separately or independently on behalf of the school district, but must act as a board. *Id*.

D. The above shows that school boards must make sure that its meetings are conducted in an efficient and legal manner in order it to accomplish the business of the school district.

II. Different Types of School Board Meetings.

A. Organizational Meeting

1. In common and union high school districts that have a school board with more than three members and in unified school districts, the organizational school board meeting must be held on or within thirty days after the fourth Monday in April. Wis. Stat. §§ 120.05(1)(c) and 120.43(1).

2. Various actions and informational matters may be discussed at this meeting. Most importantly, the election of school district officers occurs.

    a. In common and union high school districts that have a school board with more than three members, the school board annually elects a president, vice president, treasurer, and clerk from among its members. Wis. Stat. §§ 120.05(1)(c).

    b. In unified school districts, the board must elect a president, vice president, treasurer, and clerk from among its members and a school board secretary who need not be a member of the school board. Wis. Stat. § 120.43(1).

3. Election of these officers can be done by either general ballot or secret ballot. Wis. Stat. § 19.88(1).

B. Regular Meetings

1. In a common or union high school district, the school board must hold a regular meeting at least once each month at a time and place determined by the board. Wis. Stat. §§ 120.11(1).

2. The term "regular meeting" is not defined by statute or by case law.

3. In a common or union high school district, so long as a meeting is held at a time and place determined by the school board, the meeting can be characterized as a regular meeting. The statutes do not provide a procedure by which a school board calls a regular meeting.

4. Nothing in the relevant statutes requires a regular meeting to be held on the same day, or at the same time or place, each month. Nothing in the relevant statutes prohibits the board from changing the time and place of a regular meeting or from adding additional regular meetings.

5. School board policy, however, may dictate the days for meetings each month. School board policy may also state that the days can be changed or amended by the school board. This change may be accomplished through a motion at the previous meeting to change the day of a regular meeting without calling the new meeting a special meeting.

6. In a unified school district, the school board must meet at least once each month. Wis. Stat. § 120.43(2).

C. Special Meetings

1. In common or union high school districts, the procedures and requirements necessary to hold a special meeting are set by statute. *See* Wis. Stat. § 120.11(2). Special meetings may only be held through strict compliance with the statutory provisions which allow the meetings. *See Village of Coon Valley v. Spellum*, 190 Wis. 140, 208 N.W. 916 (1926); *Kleimenhagen v. Dixon*, 122 Wis. 526, 100 N.W. 826 (1904).

2. In a common or union high school district, the school board must hold a special school board meeting upon the request of any school board member. Wis. Stat. § 120.11(2).

    a. The request must be filed with the school district clerk, or, in the clerk's absence, the school district president. Wis. Stat. § 120.11(2).

    b. The school district president shall notify in writing each school board member of the time and place of the special school board meeting at least 24 hours before the meeting. Wis. Stat. § 120.11(2)

c. The notice shall be delivered to each school board member personally or shall be left at the usual place of abode of the school board member or shall be mailed by first class mail to the usual place of abode of the school board member so as to arrive at least 24 hours before the special school board meeting. Wis. Stat. § 120.11(2).

3. A special school board meeting may be held without prior notice, if all school board members are present and consent, or if every school board member consents in writing even though he or she does not attend the meeting. Wis. Stat. § 120.11(2).

4. While Wis. Stat. § 120.11(2) authorizes special meetings to be called for by any member of the school board upon written request and proper notice to the other board members, no other procedure is specified for calling a special meeting which may be attended and consented to by all board members.

   a. Accordingly, except for single-member-initiated special meetings, it can be inferred that a school district is free to establish its own procedures for calling special meetings of the school board, so long as all school board members are present and consent to the meeting, or the absent members have consented to the meeting in writing.

   b. The authorization to hold special meetings without notice cannot override the school board's mandate to provide notice of the meeting under Wisconsin's Open Meetings Law.

5. In a unified school district, the school board must also hold meetings at other times upon the call of the school district president or upon the filing of a request with the school district clerk signed by a majority of the school board members. Wis. Stat. § 120.43(2).

III. Application of the Open Meetings Law.

A. Defining a "Governmental Body"

1. Wisconsin law defines a "governmental body" as a "state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation created under Ch. 232; any public purpose corporation as defined in § 181.79(1); a non profit corporation operating an ice rink which is owned by the state; or a formally constituted subunit of the forgoing, but excludes any such body which is formed for or meeting for the purpose of collective bargaining under subchapter IV or V of Chapter 111." Wis. Stat. § 19.82(1).

2. State or local agencies, boards and commissions

a. The provision defining a governmental body as a state or local agency, board or commission focuses on the manner in which the body was created as opposed to the type of authority the body possesses. Thus, bodies created by constitutions, statute, ordinance, rule or order are subject to the law even if they are purely advisory in function. *See State v. Swanson*, 92 Wis.2d 310, 317, 284 N.W.2d 655 (1979).

b. State or local bodies created by "rule or order" are included in the definition. The phrase "rule or order" has been construed to include any directive, formal or informal, creating a body and assigning it duties. 78 Op. Att'y Gen. 67 (1989). This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials such as county executives, school superintendents, mayors, or heads of a local agency, department or division. *Id.*

c. In a school setting, some examples of entities that qualify as "governmental bodies" for the purpose of the Open Meetings Law include:

i. A committee created by a school board policy rule to review administrative decisions. *Fritschel Correspondence*, April 4, 1985.

ii. A committee appointed by a school superintendent for the purpose of considering school library materials. *Staples Correspondence*, February 10, 1981.

iii. A consortium of school districts created by a contract between the districts. *I-10-93*, October 15, 1993.

iv. A strategic planning team whose creation was authorized, and whose duties were assigned to it by the school board. *1-29-91*, October 17, 1991.

3. Subunits

a. A formally constituted subunit of a governmental body qualifies as a governmental body for the purpose of the Open Meetings Law. *Open Meetings Law Compliance Guide,* Department of Justice.

b. A subunit is a separate, smaller body created by a parent body and composed exclusively of the members of a parent body. 74 Op. Att'y Gen. 38, 40.

c. The subunit need not constitute a quorum of the parent body in order to qualify as a governmental body. *Dziki Correspondence*, December 12, 2006.

4. Who Is Excluded from the Definition of "Governmental Body"

a. The definition of "governmental body" explicitly excludes bodies that are formed for, or meeting for, the purpose of collective bargaining.

i. A body formed exclusively for the purpose of collective bargaining is not subject to the Open Meetings Law. Wis. Stat. § 19.82(1).

ii. A body formed to serve multiple purposes, in addition to collective bargaining, is not subject to the Open Meetings Law when conducting collective bargaining. *Id.*

b. The Attorney General has opined that multi-purpose bodies should comply with the Open Meetings Law when meeting for the purpose of forming negotiation strategies to be used in collective bargaining. 66 Op. Att'y Gen. 93, 96-97 (1977).

c. School Districts and other governmental entities subject to the Municipal Employment Relations Act must conduct the initial exchange of bargaining proposals in a meeting that is open to the public. Wis. Stat. § 111.70(4)(cm)2.

d. The collective bargaining exclusion <u>does not permit</u> a body to consider final ratification or the approval of a collective bargaining agreement in closed session. The final ratification or approval must occur in open session. Wis. Stat. § 19.85(3).

B. The Definition of "Meeting."

1. A "meeting" is defined as "the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body." Wis. Stat. § 19.82(2).

2. There is no meeting within the meaning of the Open Meetings Law when the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action.

3. If one-half or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The governmental body may rebut this presumption. *Id.*

4. The term "meeting" does not include any social or chance gathering or conference which is not intended to avoid the Open Meetings Law. *Id*.

5. The Wisconsin Supreme Court has held that the definition of "meeting" applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business, and (2) the number of members present is sufficient to determine the governmental body's course of action. *Showers,* 135 Wis.2d at 102.

    a. The Purpose Requirement

        i. The purpose of the meeting must be to engage in governmental business. Governmental business refers to any formal or informal action, including discussion, decision or information gathering, on matters within the governmental body's realm of authority, even if the matter is not discussed or the board's members do not otherwise interact. *Showers,* 135 Wis.2d at 102-03.

        ii. A village board conducted a "meeting" for the purpose of the Open Meetings Law, when a quorum of the board regularly attended each plan commission meeting to observe the commission's proceedings on a development plan that was subject to the board's approval. *St. ex rel. Badke v. Greendale Village Bd.,* 173 Wis.2d 553, 570, 494 N.W.2d 408 (1993).

        iii. No meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject that the school board had the potential to decide. *Paulton v. Volkmann,* 141 Wis.2d 370, 375-77, 415 N.W.2d 528 (Ct. App. 1987).

    b. The Numbers Requirement

i. The second portion of the *Showers* test requires the number of members present to be sufficient to determine the governmental body's course of action on the business under consideration.

ii. A governmental body's course of action can refer to either the affirmative power to pass a proposal or the negative power to defeat a proposal.

(a) Typically, governmental bodies operate under a majority rule in which a margin of one vote is necessary to pass a proposal. Under the majority rule, exactly one-half of the members of the body constitute a negative quorum because one half of members is sufficient to prevent the formation of a majority in its favor. Therefore, under the simple majority rule, the Open Meetings Law applies whenever one-half or more of the members of the governmental body gather to discuss or act on matters within the body's realm of authority.

(b) The negative quorum of a governmental body may be less than one half of the members when the governmental body operates under a super majority rule. For example, if a two-thirds majority is required for a body to pass a measure, then any gathering of more than one-third of the governmental body's members would be sufficient to control the body's course of action by blocking the formation of a two-thirds majority.

6. Walking Quorums

a. The phrase "convening of members" is not limited to those situations in which the members of the governmental body are simultaneously gathered in the same location. The phrase extends to any situation in which the members of the governmental body are able to effectively communicate with each other and exercise the authority of the body. This potentially includes communications occurring by telephone, email or instant message.

b. A walking quorum is defined as 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 number to reach a quorum. *Showers*, 135 Wis. 2d at 92.

i. The essential feature of a "walking quorum" is the element of agreement among the members to act uniformly in sufficient numbers to constitute a quorum. *Open Meetings Law Compliance Guide*, Department of Justice.

ii. Where there is no such express or tacit agreement, exchanges between separate groups of the members of the governmental body may take place without violating the Open Meetings Law. *Id.*

c. The Wisconsin Supreme Court recognized that the walking quorum could predetermine the outcome of a vote, and thus render the publicly held meeting a mere formality. *Conta*, 71 Wis.2d at 685-688.

d. Accordingly, the requirements of the open meeting law cannot be circumvented by using an agent to poll the members of governmental bodies through a series of individual contacts. Such a circumvention of the open meetings requirement "almost certainly" violates the law. *Clifford Correspondence*, April 28, 1986.

IV. Establishing An Agenda For School Board Meetings.

A. Preparing the Agenda

1. The responsibility for preparing the agenda sometimes is defined by board policy. Board policy may state that agendas are prepared by the district administrator in consultation with the school board president.

2. School boards sometimes divide the agenda into different categories. For example, the agenda may specify (1) action items (items on which the school board is expected to reach a decision during the meeting); (2) discussion items (items requiring discussion but upon which action is not anticipated); and (3) informational items (items that require no action or discussion, unless a school board member asks for clarification).

3. Some school boards use consent agendas. With a consent agenda, all items that are normally routine or have already been discussed and are likely to be acceptable to all members are noticed and placed on the agenda under one heading to be voted on as one item. Such items may include approval of the agenda, approval of items included in the treasurer's report including the payment of bills and the release of paychecks, and approval of the minutes of previous meetings. However, before a vote is taken, any board

member may remove an item from the consent agenda for separate consideration.

B. Placing Items on the Agenda

1. The means by which a school board member recommends items for inclusion on an agenda is typically a matter of board policy, not a matter of statute.

2. Board policy may specify that, to recommend agenda items, school board members must submit their suggestions to a specific person (e.g., district administrator, school board president) and at a specific time (e.g., several days before the school board meeting).

3. Some school boards include an item on the agenda during which school board members may propose that an item be added to a future agenda.

4. Board policy may also dictate citizen requests for recommended agenda items. The board policy may provide that such requests be provided in writing to the district administrator, who then determines whether the item is a proper item for the board to discuss and whether it should be added to the agenda.

5. In some cases, there may be conditions that must be met prior to placing items on the agenda. For example, pursuant to Wis. Stat. § 65.90, which sets for the process for formulating a budget in a school district, a condition precedent is that, prior to any public hearing, a class 1 notice (one publication), containing a summary of the proposed budget and providing notice of where the detailed budget may be examined must be published.

C. Amending and Reordering the Agenda

1. Board policy may also address the steps the board must take if it seeks to alter the agenda. In some policies, the agenda will only be altered by a majority vote of the members present. If the board votes to alter the agenda however, and it results in an agenda different than that noticed under the Open Meetings Law, it may constitute an Open Meetings Law violation. In short, due to the alteration, the public may miss an opportunity to gain information regarding the affairs of government, which is contrary to the public policy of the law.

2. Board policy may also allow a new matter to be added to an already distributed agenda. If so, the supplementary matter must be noticed under the Open Meetings Law and should be noticed at least 24 hours prior to the commencement of the meeting.

V. Noticing School Board Meetings.

A. Location of Notice

1. Public notice of all meetings of a governmental body must be given (1) as required by any other statutes and (2) by communication from the chief presiding officer of the governmental body or such person's designee to the public, the news media who have filed a written request for such notice, and the official newspaper. Wis. Stat. § 19.84(1)(b).

2. If the district does not have an official newspaper, then a news medium likely to give notice in the area must be notified. *Id.*

B. Timing of Notice

1. Proper notice of a meeting must be given at least 24 hours prior to the commencement of such meeting unless for good cause such notice is impossible or impractical. Wis. Stat. § 19.84(3).

2. When good cause can be shown, then shorter notice may be given, but in no case may the notice be provided less than two hours in advance of the meeting. *Id.*

C. Content of Notice

1. Every public notice of a meeting of a governmental body must set forth the time, date, and place of the meeting. Wis. Stat. § 19.84(2).

2. The notice must also contain the subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise the members of the public and the news media thereof. *Id.*

   The Attorney General clarified the public notice requirements for meetings conducted by governmental bodies in an informal opinion. *See* Wisconsin Attorney General Informal Opinion (March 5, 2004). In this opinion, the Attorney General noted that non-specific agenda descriptors such as "informational items" should be avoided. Simply identifying the source of the information item on the agenda, such as "Commissioner Comments" or "Board Member Comments" will not be sufficient to inform the public about the subject matter of the information the commissioner or board member intends to provide.

3. If the school board intends to meet in closed session and then reconvene again in open session within 12 hours after completion of the closed session, the school board must provide public notice of the subsequent open session

at the same time and in the same manner as the public notice of the meeting convened prior to the closed session. Wis. Stat. § 19.85(2).

4. Separate notice must be given for each meeting of the governmental body at a time and date reasonably close to the time and date of the meeting. Wis. Stat. § 19.84(4).

D. ***State ex rel. Buswell v. Tomah Area School District***

1. In *Buswell*, the court found that allowing broad language to constitute sufficient notice was contrary to the plain language of the open meetings law and to the policies underlying the law. Wisconsin Stat. § 19.84, the notice provision of the open meetings law, requires that public notice be "reasonably likely" to inform members of the public that a subject will be addressed. The court found that use of the word "reasonably" suggests a case-by-case balancing test. The court also found that policies underlying the open meetings law are best served by giving members of the public sufficient information about the business to be conducted at the meeting so they can make an informed decision about whether to attend. *State ex rel. Buswell v. Tomah Area Sch. Dist*., 2007 WI 71, 301 Wis. 2d 78, 732 N.W.2d 804.

2. The court established a new "reasonableness" test for determining whether notice is sufficient. This test includes, but is not limited to, the following factors:

   a. <u>The burden of providing more reasonable notice.</u> To determine whether providing additional notice is too burdensome, a school district should balance the policy of providing greater information against the district's need to conduct business efficiently. A school district may consider the time and effort involved in assessing what information should be provided and the inherent limitations of citizen boards. The requirements of notice specificity should not interfere with the efficient administration of district business.

   b. <u>Whether the subject is of particular public interest.</u> If there is particular public interest in a subject, a school district may be required to provide more specific notice. Particular public interest includes both the number of people interested and the intensity of the interest. A school district may gauge whether there is particular public interest in a subject at the time the meeting is noticed. It need not predict the level of interest at the time of the meeting itself. A school district need not gauge public interest in every item on a meeting's agenda. When predicting public interest on a particular item imposes an unreasonable burden on a district, the district is not required to do so.

c. Whether the meeting involves non-routine action that the public is unlikely to anticipate. When a particular subject is addressed regularly, members of the public are more likely to anticipate it. In this case, there may be less need for specificity. When a particular issue is novel, members of the public are more likely to be caught unaware. These issues may require more specific notice.

3. Under the new standard, it is better to err on the side of specificity. If new information about an agenda item is received after the notice is published, the notice of any meeting may be amended and re-disseminated up to 24 hours before the meeting. A reasonableness standard will not require that every issue on every agenda must always be detailed. General subject headings may be sufficient where a general heading reasonably informs members of the public of the subject matter of the meeting.

VI. Conducting School Board Meetings.

A. Board Procedures

1. The specific parliamentary procedure to be used for the conducting of each school board meeting is not defined in the statutes.

   a. School boards have the control and management of the affairs of the school district. Wis. Stat. § 120.12(1). Within this statutory power, there is the authority to reasonably regulate the procedures of a school board meeting and the conduct of its board members.

   b. At the organizational meeting, board members may be informed of the procedures that must be followed by the school board along with each individual board member's duties and responsibilities. A school board's authority to adopt its own rules of parliamentary procedure has not been challenged. *See Hall v. Banking Review Board*, 13 Wis. 2d 359, 365, 108 N.W.2d 543 (1961).

2. One of the most recognized works of parliamentary procedure is *Roberts Rules of Order. Roberts* can be extremely detailed and may be more specific than needed for many school boards, but it does offer guidance to a school board which desires to adopt its own procedures.

3. Rules of Order adopted by the school board apply to all regular, special, adjourned, and annual meetings.

4. Whatever rules the board adopts, it should apply them consistently, even though the courts have not required strict compliance with the technicalities of parliamentary procedure.

5. Regardless of what policy or procedures the school board adopts, those policies and procedures must comply with the United States Constitution and any Wisconsin laws which govern the conduct of the school district. The school board may not adopt policies or procedures which are in conflict with the U.S. Constitution, Wisconsin Constitution or federal or state laws.

6. Similarly, regulations adopted by a school board may not infringe the constitutional rights of either the body or its members, most particularly their First Amendment rights.

   a. In that regard, it is well-settled that the reasonable regulations of time, place, and manner of protective speech, whether those regulations are necessary to further significant governmental interests, are permitted under the First Amendment. *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

   b. Procedure rules adopted by the school board will not violate First Amendment free speech rights as long as the rules regulate the time, place or manner of speech and (1) the rules do not discriminate against a particular viewpoint, (2) the rules are narrowly tailored to serve a compelling governmental interest, and (3) an alternative channel of communication remains.

B. Statutory Procedures

1. While each school board can adopt its own procedures which it will use for running its meetings, there are certain statutory procedures which must be followed, such as the Open Meetings Law. Every board meeting of a governmental body must be preceded by public notice and must held in open session, except as permitted in closed session under Wis. Stat. § 19.85. As a result, no board business can be conducted without such notice or outside of the public.

2. Meetings must be held in places reasonably accessible to the public. Wis. Stat. §§ 19.81(2), 19.82(3). Governmental bodies are required to hold their meetings in rooms that are reasonably calculated to be large enough to accommodate all citizens who wish to attend the meetings. Absolute access, however, is not required. *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 494 N.W.2d 408 (1993).

3. The Open Meetings Law requires that every meeting of school boards and other governmental bodies be held in open session unless an exemption applies.

4. A closed session held under one of the exceptions to the Open Meetings Law should be viewed by board members as one part or segment of the overall meeting which must initially be convened in open session.

5. Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions under Wis. Stat. § 19.85(1).

    a. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. Wis. Stat. § 19.85(1).

    b. Prior to adopting the motion to meet in closed session, the chief presiding officer must state (1) the nature of the business to be considered at such closed session and (2) the specific exemption or exemptions authorizing the closed session. Wis. Stat. § 19.85(1). The announcement shall become part of the record of the meeting. Wis. Stat. § 19.85(1).

6. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. Wis. Stat. § 19.85(1).

7. The attorney general has indicated that attendance at closed meetings should usually be limited to school board members (Wis. Stat. § 19.89 prohibits the exclusion of duly elected or appointed members of a governmental body from any meetings of the body), confidential staff persons (such as a secretary/reporter) and only those nonmembers as may be directly participating in all or a portion of the closed session. Unless the rules of a governmental body provide to the contrary, no member of the body may be excluded from any meeting of a subunit of that governmental body. Wis. Stat. § 19.89.

8. School board members have a duty to maintain the confidentiality related to information discussed in closed session.

9. Any time there is a conflict between statutory requirements and parliamentary procedures, statutory requirements take precedence.

    a. Wis. Stat. § 118.22(2) requires a majority of the full membership of the school board to employ or dismiss a teacher.

    b. Wis. Stat. § 65.90(5)(a) requires two-thirds of the full membership to spend budget appropriations for alternative purposes.

C. Authorized Closed Sessions

1. Introduction

a. Every meeting of a governmental body must be convened in open session. All business must be initiated, discussed and acted upon in open session unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

b. The Open Meetings Law contains thirteen exemptions to the requirement that governmental business is to be conducted in open session, permitting (but not requiring) the governmental body to convene in closed session. Wis. Stat. § 19.85(1)(a)-(j).

c. However, because the Open Meetings Law is designed to provide the public with the most complete information possible regarding the affairs of government, the statutory exemptions should be strictly construed. *State ex rel Hodge v. Turtle Lake*, 180 Wis.2d 62, 71, 508 N.W.2d 603 (1993).

2. Exemptions Under Which School Districts Convene in Closed Session

a. To deliberate about judicial or quasi-judicial hearings. Wis. Stat. § 19.85(1)(a).

i. In order for the quasi-judicial exemption to apply, there must be a "case" that is the subject of a quasi judicial proceeding. *Hodge*, 180 Wis.2d at 72.

ii. The term "case" contemplates a controversy between parties that are adverse to one another. *Id.*

ii. Examples of quasi-judicial hearings in school districts that may be conducted in closed session include:

a) Expulsion hearings

b) Employee discharge and nonrenewal hearings

b. To consider dismissal, demotion, discipline, licensing and tenure. Wis. Stat. § 19.85(1)(b).

i. A governmental body may not convene in closed session under this exemption unless the body gives the public employee, person licensed, or faculty member actual notice of any evidentiary hearing and any meeting at which the final action may be taken. *Id.*

ii. The notice must state that the person has a right to request that the hearing or meeting be held in open session. *Id.*

iii. If the person requests an open session, the governmental body may not convene in closed session to conduct an evidentiary hearing or take final action. *Id.*

a) Evidentiary hearings are characterized by the formal examination of charges, the taking of testimony, and the receiving of evidence in support or in defense of specific charges that have been made. 66 Op. Att'y Gen. 211, 214.

b). Evidentiary hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by the circumstances in which the employee or licensee is the subject of charges that might damage the person's good name or reputation, or where the governmental body's action could impose a substantial stigma or disability on the person. 66 Op. Att'y Gen. 211, 214 (1977).

iv. The Wisconsin court of appeals held that a governmental body was not required to comply with a teacher's request that the body convene in closed session to vote on the employee's dismissal. The court held that Wisconsin law does not permit a person who is not a member of a governmental body to demand that the governmental body meet in closed session. *Schaeve v. Van Lare*, 125 Wis. 2d 40, 370 N.W.2d. 271 (Ct. App. 1985).

c. To consider the employment, promotion, compensation and performance evaluations of any public employee over which the governmental body has jurisdiction or exercises responsibility. Wis. Stat. § 19.85(1)(c).

i. An elected official is not considered a public employee over which the governmental body has jurisdiction or exercises responsibility. Thus, the exemption does not authorize a school board to convene in closed session to select a person to fill a vacancy on the school board. 74 Op. Att'y Gen. 70, 72.

ii. The purpose of the exemption is not to protect a governmental body when it discusses general policies that

do not involve the identification of specific employees. *See* 80 Op. Att'y Gen. 176, 177-178.

iii. The exemption authorizes a governmental body to convene in closed session to discuss the qualifications of, and salary offered to, a specific individual or employee, but does not authorize the body to convene in closed session to discuss the qualifications and salary range for the position in general. *Id.* at 178-82.

iv. Wis. Stat. § 19.85 also authorizes a governmental body to convene in closed session to determine which employees to lay off, or to determine whether to non-renew a public employee's contract at the expiration of the contract term. See 66 Op. Att'y Gen. 211, 213.

v. The exemption does not authorize a body to convene in closed session to determine whether or not to reduce or increase staffing. *Id.*

d. To consider financial, medical, social or personal information of specific persons which, if discussed in public, would be likely to have a substantial adverse effect on the reputation of the person. Wis. Stat. § 19.85(1)(f).

i. The exemption applies only where a member of a governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. 74 Op. Att'y Gen. 70, 72.

ii. In addition, the exemption authorizes the governmental body to convene in closed session only for the duration of the discussion about "personal information" as defined in Wis. Stat. § 19.85(1)(f). *Id.*

iii. A school board may convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if the expectation is that the information to be discussed would damage the candidate's reputation. *Id.*

a) The vote on whether the candidate should fill the vacancy must be in open session. *Id.*

b) The exemption does not permit a school board to actually appoint a new member to the board in closed session. *Id.*

e. To deliberate or negotiate the purchase of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require. Wis. Stat. § 19.85(1)(e).

i. This exemption is not limited to deliberating or negotiating the purchase of public property or the investing of public funds. The Attorney General concluded that the exemption authorized a school board to convene in closed session to develop strategies for collective bargaining. 66 Op. Att'y Gen. 93, 96.

ii. The exemption is restrictive rather than expansive. Thus, the exemption applies only when competitive or bargaining reasons require a closed session. *State ex rel. Citizens for Responsible Development v. City of Milton*, 2007 WI App. 114, 300 Wis.2d 649, 731 N.W.2d 640.

a) When a governmental body seeks to convene in closed session, the burden is on the body to show that the competitive or bargaining interests require closure. *Id.*

b) A governmental body was not authorized to convene in closed session because a private developer, who was engaged in negotiations with the city, requested confidentiality. Additionally, the fear that public statements might attract the attention of potential competitors for the developer did not justify convening in closed session because competition would likely help, rather than harm, the competitive and bargaining interests of the city. *Id.*

c) Similarly, holding closed meetings about ongoing negotiations between the city and private parties would not prevent the parties from seeking a better deal elsewhere; thus, the possibility of competition did not justify the governmental body meeting in closed session. *Id.*

d). The exemption does permit a governmental body to close those portions of the meetings that would reveal its negotiation strategy, or the price it planned to offer for a purchase of property. *Id.*

iii. Competitive or bargaining reasons permit a closed session where the discussion will directly and substantially affect

negotiations with a third party. However, the governmental body may not convene in closed session where the discussion might be one of several factors that indirectly influence the outcome of the negotiations. *Henderson Correspondence*, March 24, 1992.

iv. When a governmental body reaches a tentative agreement during the course of collective bargaining negotiations, the discussion as to whether the body should ratify the agreement should be conducted in open session. 81 Op. Att'y Gen. 139, 141 (1994).

f. To confer with legal counsel who is rendering oral or written advice concerning the strategy to be adopted by the body with respect to litigation in which it is, or is likely to become involved. Wis. Stat. § 19.85(1)(g).

i. The exemption only permits the governmental body to convene in closed session if the legal counsel is providing strategy advice with respect to litigation. *Id.*

ii. The mere presence of the governmental body's legal counsel is not, by itself, sufficient reason to convene in closed session under this exemption.

iii. There is no bright line rule determining whether a governmental body is "likely" to become involved in litigation. *Open Meetings Law Compliance Guide*, Department of Justice.

iv. School Districts should rely on legal counsel for advice on whether litigation is sufficiently "likely" so as to authorize convening in closed session.

D. Duties of the School District President

1. The school district president must act as chairperson of school board meetings and has the duty to ensure that minutes of the meetings are properly recorded, approved, and signed. Wis. Stat. §§ 120.15(5) and 120.44(2). In the absence of the president, the vice president, or in the case of a three-member board, another school board member selected by the school board shall act as chair of the school board meetings. *Id.*

2. Under the law, the school board president, like other school board members, is a member of the board with rights and responsibilities consistent with representation of a constituency. Thus, the president has the same duty to vote on all motions before the board as does any other board member.

E. Parliamentary Procedure

1. Main motion

Robert's Rules categorizes motions into one of four types. The main motion is the one which brings business before the school board. Only one main motion may be considered at any given time. Most other motions are related to the main motion in one way or another. Procedurally, the main motion is usually the last one to be addressed by the board after all subsidiary, incidental and privileged motions have been resolved.

2. Subsidiary motions

A subsidiary motion assists the school board in disposing of a main motion. There are a broad range of subsidiary motions. The most common subsidiary motion is one to amend the main motion. Other types of subsidiary motions include motions to indefinitely postpone a motion, lay a motion on the table, and commit (or refer) a motion to a committee. A subsidiary motion does not expressly adopt or reject a main motion based on its merits.

3. Incidental Motions

An incidental motion is generally related to the main motion, but may be related to another pending motion or matter of business. Most commonly, incidental motions are procedural in nature, must be decided immediately and are not subject to debate. For example, if a board member believes that the chair is not following the proper rules of procedure, the board member may rise to a "Point of Order" and ask the chair to rule on whether or not proper procedure is being followed. Also, if a voice vote is unclear, a board member may ask for members to be polled.

4. Privileged motions

These motions do not relate to the disposition of a currently-pending motion. Privileged motions include a motion to recess or adjourn, a motion to take up business that was previously scheduled to be taken up at that time, or a motion to address excessive noise or climate control. As the name implies, privileged motions take priority over most other matters which are pending.

5. Main Motion

a. Basic steps

i. The purpose of a main motion is to induce action by the board. A main motion must be voted on by the board before any action is adopted. Usually (and preferably), no discussion or debate should occur until a member of the body has made a main motion.

ii. Once the chair has recognized the board member, a main motion can be made by the board member stating, "I move that (insert substance of the motion)." The proper form of a motion should include the exact wording of the motion.

iii. All motions should propose affirmative action, rather than negative action. For example, a motion to support or oppose a resolution would be proper, whereas a motion to take no action on a resolution would generally not be proper.

iv. A main motion must receive a second in order to allow further discussion or debate by the board. If a motion does not receive a second, the chair may restate the motion and ask for a second, otherwise the motion should not be considered.

b. Procedure

i. Once a main motion is made and seconded, the chair should state the motion and open the floor for debate. At that time, board members may debate the motion, propose amendments to the motion, or propose other procedural motions which would dispose of the main motion.

ii. After a main motion has been made and seconded, if the board member who made the motion wishes to alter the wording of the motion, the member can ask for unanimous consent to modify the motion. However, if any board member objects, the board member who made the motion must then bring a motion to amend the original motion.

iii In order to pass, a main motion must receive a majority vote of the members present, unless there are other requirements set by statute, by-laws, or board policy. An abstention is not counted in the vote total. A vote can be deemed passed when a plurality of the votes actually cast are in the affirmative,

even though one or more members abstain (or even cast a blank ballot) and no majority vote results, as long as the total votes cast provide a quorum. *State ex rel. Burdick v. Tyrrell*, 158 Wis. 425, 149 N.W. 280 (1914).

iv. It should be noted that, during a meeting, a main motion which raises the same question that was previously answered cannot be introduced. A board member cannot present the same question as a motion previously disposed of during the same meeting other than to bring a motion to rescind the previous motion or to amend something previously adopted, as will be discussed below. A motion to reconsider the previous motion may also be in order.

6. Amendments

a. General

i. An amendment is a subsidiary motion which modifies the wording of a main motion pending before the governmental body.

ii. An amendment may be made to a main motion as soon as the motion is made and seconded and the floor is open for debate. An amendment may be made by any board member who has been recognized by the chair by saying, "I move to amend the motion by (insert substance of the amendment)."

iii. There are three ways to amend a motion: 1) inserting words, 2) striking words, and 3) striking and inserting words.

iv. Once an amendment is properly passed, it only revises the main motion in front of the board. The board must then either consider other amendments or vote on the main motion as amended.

v. A board member may make, or vote in favor of, an amendment to a main motion and still vote against the main motion. For example, if a board member opposes funding a particular program which is the subject of a main motion, the board member could propose and vote in favor of an amendment that significantly reduces the funding level of that program, and still vote against adoption of the program, even if the amendment passes.

vi. An amendment which would have the same result as voting against the main motion is out of order. For example, if the main motion is that the board employ John Doe as an elementary teacher, it would be out of order for an amendment to change the motion to specify that the board not employ John Doe as an elementary teacher, since that would be the same result as voting against the main motion.

vii. Nothing has been adopted by virtue of an amendment to a main motion. Adoption only occurs once the main motion passes.

b. Friendly Amendments

i. The person who makes a motion has a right to change the wording of the motion until the chair has stated the question and opened debate.

ii. It is not uncommon in meetings for another board member to suggest a "friendly amendment" to make a slight modification to the main motion. If the person who made the motion agrees with this change in the wording, and the person who seconded the motion agrees to the change, the chair should state the new motion.

iii. If the person who initially seconded the motion wishes to withdraw his second, the person who suggested the "friendly amendment" shall be considered the second to the motion.

c. Germaneness of Amendments

i. An amendment must be germane, or closely related in subject matter, to the main motion. For example, if the main motion were to implement an all-day kindergarten program, it would not be germane to that motion to move to amend the motion to include providing breakfast at the school.

ii. Ultimately, the chair must decide whether the amendment is germane. If the amendment is not related to the main motion, the chair should rule the amendment out of order and it should not be considered. If the chair is unsure whether an amendment is germane, the chair may ask for a vote of the board to determine whether the amendment should be allowed.

d. Procedure

i. An amendment must receive a second in order to be debated by the board. Once an amendment has been made and received a second, the board can then debate the amendment and members will vote on whether the amendment should be allowed to modify the main motion.

ii. An amendment must be voted on before the main motion can be voted upon.

iii. Passage of an amendment does not adopt the motion. If an amendment is not passed, the main motion is not modified and when board members vote on the motion, they will vote only on the motion in its original form.

e. Amendment to the Second Degree

i. An amendment can also be amended. This is often referred to as an amendment to the second degree. Only one secondary amendment may be considered at any one time. However, once the board adopts or rejects the secondary amendment, a new secondary amendment can be made.

ii. A secondary amendment must be germane to the primary amendment. For example, if the main motion is to establish the school year from September 1st to June 1st from 8:30 a.m. to 3:30 p.m. and a motion for a primary amendment is made which would change the school start time from 8:30 a.m. to 8:00 a.m., a secondary amendment which proposed to change the dates of the school year would not be germane to the primary amendment and could not be considered as a secondary amendment.

iii. An amendment of the third degree is not allowed. It would be far too complicated to keep track of what was being voted on if multiple amendments to amendments were allowed.

iv. At any time a secondary amendment has been voted upon and adopted or rejected, a new secondary amendment is in order.

f. Filling Blanks

i. Technically, this is not a form of an amendment, but an incidental motion. However, this process allows multiple alternatives to be considered at one time. For example, a board member might offer a motion to build a new school at a cost not to exceed $_____ and to be completed by not later than June 30, 2008.

ii. Alternatively, the previous main motion could be changed to insert another blank to build a new school at a cost not to exceed $_____ and to be completed by not later than _____.

iii. The chair may also propose creating a blank by striking out terms. If no member objects, the blank is created. If any member objects, board members must vote on whether or not to create the blank.

iv. Once one or more blanks have been created, board members may suggest terms to fill the blanks. Each proposal is subject to debate and should be voted on separately until one alternative receives a majority vote.

v. The fill-in-the-blank process may be used for nominations of people, amounts of money, places, dates or other numbers.

vi. Once the blanks have been filled, the board must still vote on the main motion.

g. Substitute Amendment

i. This is an amendment which proposes to strike an entire paragraph or the entire text of a resolution or main motion to add another.

ii. The new or different paragraph(s) are referred to as the substitute. A substitute to a main motion is treated as a primary amendment. A primary amendment to substitute is treated similarly to a motion to strike out and insert as previously described.

h. Debate

i. The role of the chair is to maintain control and facilitate an orderly debate on motions and amendments which are being considered by the governmental body.

ii. Under the rules of parliamentary procedure, no discussion or debate of an issue is in order until a motion or an amendment to a motion is made and has received a second.

iii. At the beginning of a debate, the chair should state the motion or the amendment which will be debated.

i. Recognition

i. It is the duty of the chair to call upon members of the board to make motions and/or debate a motion or amendment in front of the board.

ii. When possible, the chair should attempt to alternate between those he believes are in favor of the motion or amendment and those who oppose the motion or amendment.

iii. The chair will normally give the person who made the motion or amendment the first opportunity to address that motion.

iv. The chair should not recognize any board member for a second time during debate until all other board members have been given an opportunity to address the issue.

j. Interruption

i. Generally, a member of the board may not interrupt a speaker or a debate, other than to make certain privileged motions.

ii. Privileged motions which allow for interruption of a speaker include parliamentary inquiries, points of information and an appeal from a decision of the chair among others.

k. Chair's Participation and Rulings

i. Again, the school board president, like other school board members, is a member of the board with rights and responsibilities consistent with representation of a constituency. Thus, the president has the same duty to vote on all motions before the board as does any other board member.

ii. If a member disagrees with a ruling of the chair affecting any substantial question, he or she should not hesitate to appeal. A majority vote by school board members can overrule the chair's ruling. The situation is no more delicate than disagreeing with another member in debate. A member desiring to appeal rises and states that he or she wishes to appeal the decision from the chair. Once seconded, the chair must state the exact question at issue and ask whether the decision from the chair should stand.

iii. A majority (or tie) vote will sustain the chair's decision. For example, if the chair rules that an amendment is not germane to the main motion and a member disagrees, asks to appeal the decision and gets a second, the chair should ask whether the chair's decision that the amendment is not germane to the main motion should stand. If a majority of the members vote in the affirmative, the ruling stands. If the vote ends in a tie, the ruling stands.

7. Subsidiary Motions

A subsidiary motion is one which would dispose of the main motion without it being adopted or rejected. All subsidiary motions must be acted upon before the main motion. If a subsidiary motion is passed, the main motion is affected. Examples of some of the most common subsidiary motions follow.

a. Postpone Indefinitely

A motion to postpone indefinitely kills the main motion during that meeting and avoids any vote on that question. A motion to postpone indefinitely can be applied only to a main motion. During the debate on the motion to postpone indefinitely, the merits of the main motion can be debated. The adoption of a motion to postpone indefinitely indirectly rejects the main motion but is not technically a decision on the merits of the main motion.

b. Commit or Refer

A motion to commit (or refer) is more often phrased as a motion to refer a matter to committee. A matter may be referred to a particular committee or a committee of a whole. The motion to commit takes precedence over a motion to postpone indefinitely and a motion to amend. It is subsidiary to motions to postpone definitely, limit or extend limits of debate, and lay on the table.

c. Postpone to a Certain Time

A motion to postpone to a certain time (or to postpone definitely) differs from the motion to postpone indefinitely. The motion to postpone to a certain time places the main motion back in front of the body at that particular time. The motion to postpone to a certain time can either set a particular time for a motion to be considered or it can specify a particular event after which the motion should be considered. For example, under a motion to postpone to a certain time, the main motion can be postponed to the group's next meeting, a specific hour before which the question will not be considered, or after a particular event in the meeting.

d. Previous Question

The previous question motion is the motion which brings the board to an immediate vote on pending questions. It is sometimes referred to as a "motion to call the question" or a "call for the question." Under any of these terms, the motion immediately closes debate and stops amendment of the pending question and prevents any other subsidiary motions from being made, except a motion to lay on the table. Debate ends and a vote occurs on the pending question if the previous question is passed by a two-thirds vote. The previous question motion must be seconded, but is not debatable.

e. Lay on the Table

If a motion passes to lay another motion on the table, that motion is temporarily deferred until it is brought off the table for consideration. More commonly referred to as a motion to "table," it should not be used to kill a measure or to avoid dealing with it.

8. Incidental Motions

a. Point of Order

A point of order is the motion that is used when a board member believes that the chair is not following proper parliamentary procedure or the rules of the board. The chair may then correct the improper procedure, reject the challenge, consult the parliamentarian, or ask the board for a vote on the ruling. For example, a board member may rise to a point of order and object to an amendment based on the grounds that the board member believes the amendment is not germane to the main motion. The chair may

either rule that the amendment is germane and that the member's point of order is "not well taken" or the chair may rule that the board member's point of order is "well taken" and declare the amendments to be non-germane. Alternatively, the chair may ask the other board members to vote on whether the amendment is germane to the resolution. If the board members vote on whether the amendment is germane or not, the board member who raised the issue may not appeal the ruling.

b. Appeal

An appeal is the process by which a board member may contest a ruling of the chair. As in the previous example, if the chair rules that an amendment is not germane to the motion, the board member who raised the point of order may then appeal the chair's ruling. Another board member must second the appeal and then the whole board will vote on whether or not the chair's ruling should stand.

c. Suspend the Rules

A motion to suspend the rules can be brought when the board wants to do something during a meeting which it cannot do without violating one or more of its regular rules. A motion to suspend the rules cannot be used to circumvent the by-laws. For example, if a board has a rule or a policy in which a matter is introduced at one meeting and voted upon at the next meeting, that rule could be suspended by a two-thirds vote of the members present, so long as that rule was not incorporated into the organization's by-laws.

d. Division of a Question

When a motion contains several parts, each of which may be capable of being debated individually, a board member can ask for the question to be divided. For example, if the motion is to approve building a new elementary school at a cost of $5 million, there are potentially two questions, first, whether an elementary school should be built and secondly, whether $5 million should be spent. Alternatively, this could be handled as a fill-in-the-blank motion if the main debate centers on the cost of the construction.

e. Consideration by Paragraph or Seriatim

This motion may be appropriate when the main motion consists of a report or a long motion consisting of a series of resolutions, paragraphs, articles or sections that are not totally separate questions. During this motion, board members would vote

separately on whether to accept each individual component of the main motion, report or resolution. Once each portion of the motion has been accepted or rejected, the board votes on the main motion as revised.

f. Division of the Assembly

When a board member has reason to doubt the results of a vote, a board member can ask for a division of the assembly. In a division of the assembly in a small group, members may be polled, raise their hands or rise to indicate their support or opposition to a motion. A single member can request a division of the assembly.

9. Motions That Bring a Question Again Before the Assembly

a. Take From The Table

In order to take a motion from the table, there must already be a motion on the table from earlier in the same meeting or from a previous meeting.

b. Rescind

The effect of a motion to rescind is to strike out, or nullify, an entire motion that was previously passed. A motion to rescind may be made by any member of the board, regardless of how that member voted on the original motion. Additionally, there are no specific time limits on making or voting on a motion to rescind. If passed, the previous motion is negated. Not every action can be rescinded. For example, when something has been done as a result of the vote on the original motion that is impossible to undo, a motion to rescind is out of order. If notice of the motion to rescind has been given to all board members, a simple majority of board members present is needed to pass the motion. If no prior notice has been given, a two-thirds majority of members present, or a simple majority of the full board is required.

c. Amend Something Previously Adopted

The motion to amend something previously adopted revises only a portion of the main motion which was adopted or substitutes a different version of that motion.

d. Reconsider

A motion to reconsider enables a majority, within a limited time and without advance notice, to bring back for more consideration a motion upon which a vote has already been taken. To avoid abuse

by a defeated minority, a motion to reconsider can only be made by a member who voted with the prevailing side, but can be seconded by anyone. No matter what vote was necessary to adopt the original motion, a motion to reconsider requires only a simple majority for passage. A motion to reconsider must be made on the same day as the original motion. However, a motion to reconsider can be debated and voted on a later date. Once made, a motion to reconsider results in the suspension of all actions arising from the vote on the original motion. This suspension lasts until (1) the motion to reconsider is voted on and (if the motion passes) reconsideration of the original motion is completed or (2) the suspension period expires. For school boards which hold regular meetings monthly, the suspension period expires upon adjournment of the next regular meeting.

e. Renewal

If a motion is made and disposed of without being adopted, and is later allowed to come before the board after being made again by any member in essentially the same connection, the motion is said to be renewed. Renewal of motions is limited by the basic principle that an assembly cannot be asked to decide the same, or substantially the same, question twice during one session—except through a motion to reconsider a vote or a motion to rescind an action or in connection with amending something already adopted. Any motion that is still applicable can generally be renewed at any later session, except where a specific rule prevents its renewal.

10. Voting

a. Conducted In Open Session

A governmental body should vote in open session unless the vote is clearly an integral part of deliberations authorized to be conducted in closed session. In other words, a board should vote in open session unless doing so would compromise the need for closed session. See *State ex rel. Cities S.O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 538-39, 124 N.W.2d 809 (1963).

b. No Secret Ballots

Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting. Wis. Stat. § 19.88(1)

c. Any Member May Request Roll Call Vote

Except in the case of election of officers by secret ballot, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded. Wis. Stat. § 19.88(2). This manner of voting is commonly referred to as a roll call vote.

d. Voting By Voice Or Show Of Hands

In instances where a statute does not require voting in a form that the vote of each member must be ascertained and recorded, and where no member requires the vote to be taken in that manner, action may be by voice vote or by hand vote. 66 Op. Att'y. Gen. 60 (1977).

e. No Proxy Votes

School board members must be present at a meeting in order to exercise voting privileges. The law makes no provision for voting by "proxy" or for having an absent school board member's vote recorded as a result of a written or oral communication to the board requesting that the member's vote on a particular issue be recorded either yea or nay.

f. Order Of Voting

The school board may establish a board policy that sets forth the order of voting. The policy may establish the voting occur in order of seniority. In the alternative, the policy may vary the order of voting, thereby avoiding the same members voting first on all matters.

11. Abstaining From Voting and Conflicts of Interest

a. Routine Abstentions

No statute specifically requires a school board member to vote on each and every motion coming before the board. However, particular statutes do express a legislative policy favoring the accountability of public officials for their actions. Therefore, a practice of routine abstention from voting by a board member may be a breach of the responsibility to those who elected that official.

b. Conflicts of Interest

School board members, however, should be aware of any conflicts of interest and abstain from voting in such instances. Generally, no public officer may vote on any question involving his or her direct financial interest. *See Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879). However, remote, contingent, or merely speculative conflicts are not sufficient to disqualify a public officer. *LeBow v. Optometry Examining Board*, 52 Wis. 2d 569, 574, 191 N.W. 2d 47 (1971).

c. Public Contracts

School board members should also be fully familiar with Wis. Stat. § 946.13, a criminal statute that is specifically directed at public contracts in which a public officer or employee has a private pecuniary interest.

F. Public Participation

1. A public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public. Wis. Stat. § 19.84(2).

2. During a period of public comment included in a meeting's public notice, a governmental body may discuss any matter raised by the public. Wis. Stat. § 19.83(2).

3. The fact that meetings are open to the public does not mean that individuals other than board or committee members have a right to speak or otherwise participate in meetings. 66 Op. Att'y Gen. 68, 71 (1977). The degree of participation is generally a matter for determination by the government agency. *Id.*

4. If the meeting notice contains a general subject matter designation, the public may raise issues and questions to the board. If a subject that was not specifically noticed comes up at the meeting, however, the board should refrain from engaging in any information gathering or discussion or from taking any action that would deprive the public of information about the conduct of governmental business. More specifically, the board should limit itself to answering basic questions from the public that do not require board discussion or deliberation and to placing the matter on a future agenda or referring it to an official or a committee. Op. Att'y Gen. I-5-93, April 26, 1993.

5. To make sure that public participation at board meetings is orderly and does not take up an inordinate amount of time, boards may want to adopt policies governing public participation at board meetings. Boards may require that

speakers preregister, limit the amount of time they devote to hearing public comments, limit the amount of time a speaker may address the board, and implement other measures to facilitate and govern public participation at meetings.

6. School boards should be aware of the potential for liability when defamatory remarks are made at public board meetings, whether they are made by board members themselves or members of the public.

7. Boards only have limited power to restrict citizens' statements because of first amendment issues. In *City of Madison v. WERC*, 429 U.S. 167 (1976), the United States Supreme Court held that, where a board has, by its own decision, opened its decision-making processes to direct public participation, the board cannot prohibit teachers from speaking, even on matters of collective bargaining. According to the Supreme Court, "public discussion of public business cannot be confined to one category of interested individuals."

G. Recording Devices

1. Whenever a governmental body holds a meeting in open session, the body shall make reasonable effort to accommodate any person desiring to record, film, or photograph the meeting as long as it does not interfere with the conduct of the meeting. Wis. Stat. § 19.90.

2. Although a governmental body may adopt reasonable rules governing the location and use of equipment in the meeting room, a policy which totally excludes the use of such equipment would be unlawful.

3. Different rules apply in the case of a board member's desire to record a closed session. Members of a governmental body have no right to record a closed meeting under circumstances that might mean its private and secret nature could be violated. However, if a governmental body believes it desirable to record its closed meetings, it may do so as long as it arranges to keep the recordings secret. 66 Op. Att'y Gen. 318 (1977).

VII. <u>Technology and the Open Meetings Law</u>.

A. Telephonic Communications

1. Telephone conference calls among members of a governmental body fit within the definition of "meeting" subject to the open meetings law. *Id.*

2. An Open Meetings Law violation may occur if elected officials are meeting via telephone conference, if: (a) the purpose of the call is to conduct the governmental business of the body; and (b) the call involves a sufficient

number of members of the body to determine the body's course of action. Also, in the event that the conversations on the call were conducted in such a way as to attempt to either explicitly or tacitly obtain agreement on a course of action, the calls could have violated the Open Meeting Law by creating a "walking quorum" situation. *See* Wisconsin Attorney General Informal Opinion (March 24, 2004). 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 number to reach a quorum. *Showers*, 135 Wis. 2d at 92.

3. Telephone trees, where members serially and repeatedly phone each other to form a collective decision, are also prohibited under the Open Meetings Law. The use of voice mail messages for this purpose is probably similarly prohibited.

B. Email Communications

1. Two members of a governmental body larger than four members may discuss a body's business without violating the Open Meetings Law by e-mail, telephone or in person. However, the Open Meetings Law could be violated if a single official were to contact other officials by e-mail, telephone or in person, in succession to ask for their support of a particular matter or position, depending upon the content of the contact or the use of features like "forward" or "reply all." *See* Wisconsin Attorney General Informal Opinions, (March 12, 2004 and October 3, 2000).

2. Avoiding a violation of the open meetings law when board members communicate by e-mail is complicated by the concept of a "walking quorum." An example of the walking quorum problem was addressed by the Attorney General regarding e-mail communications between members of the University of Wisconsin-Madison Athletic Board. The situation involved the approval of a contract with Reebok that required Athletic Board review. The chairman of the board sent an e-mail to the members of the Athletic Board, soliciting their opinions regarding a compromise contract. The board members replied back to the chairman via e-mail with unanimous support for the revised contract. The Board of Regents subsequently approved the contract. This action was challenged, and the Attorney General concluded that the e-mail communications between board members constituted a walking quorum and that the Athletic Board had violated the open meetings law. *See* Paul E. Kritzer, Attorney General Correspondence (August 20, 1996).

3. However, the Attorney General has reasoned that an e-mail message retains the characteristics of a letter or memorandum when it is used as a one-way conduit of information from one member of the board to another board member. Sending a letter or memorandum to a quorum of a board is not by

itself the convening of a meeting. A single reply letter or memorandum from the recipient back to the sender, even in the form of an e-mail message, does not make the completed communication a meeting. *See* Kenneth J. Merkel, Attorney General Correspondence (March 11, 1993).

C. Instant Messaging

1. Another type of electronic communication is referred to as instant messaging. This form of communications is more like telephone conferencing because participants are separated in space, but not by time. Each participant connects to a specific electronic location and can send and receive typewritten messages, which are displayed on each individual's computer screen. Locations are often set up by a provider for its users and are referred to as "chat rooms."

2. This type of communications has the potential to be as instantaneous as spoken communication. All participants are present in the communication environment at the same time and have access to all the information provided by every other participant during the communication.

3. The Attorney General has reasoned that it is possible to conduct a meeting using this technology that clearly falls within the requirements of the open meetings law. *See* Tom Krischan, Attorney General Correspondence (October 3, 2000). This is accomplished by making a centrally located computer available for non-members of the board so that the communications between the participants can be monitored. In addition to the notice requirement indicating date, time, and subject matter of the meeting, the board would need to designate a location where the public could view the computer display of the members' instant messages to each other. This would be considered similar to designating a central listening location for monitoring telephone conferences with a speakerphone.

D. Conducting Meetings Electronically

1. Whether a school board may conduct a school board meeting using electronic communication devices (telephone, instant messaging, video conferencing, etc.) is a question that has not been officially answered in Wisconsin. The statute governing school board meetings states that a school district shall hold a regular meeting at least once each month **at** a time and a **place** determined by the school board . . . . A majority of the school board members constitute a quorum **at** a regular or special school board meeting. Wis. Stat. § 120.11(1).

2. Based on this statutory language, it is likely that a board may conduct a meeting at which board members appear electronically. However, in order to do so, it may be that a **quorum** of school board members must be

physically present **at** the **place** of the meeting. Moreover, board members that participate electronically should not be counted toward establishing a quorum, because a quorum is defined as a majority of school board members **at** a meeting being held **at** a **place** determined by the board. *See* Wis. Stat. 120.11(1).

3. Furthermore, considerable doubt exists as to whether board members who participate electronically should be permitted to vote on any business matter. For example, any quasi-judicial proceeding being conducted by the board (e.g. student expulsion or teacher discipline/nonrenewal hearings) may require board members to review exhibits or assess the demeanor and credibility of persons appearing before the board. A board member participating electronically does not have the benefit of reviewing such exhibits or making credibility determinations. Therefore, allowing a board member who is participating in the meeting electronically to vote at such meetings, without the benefit of reviewing the same information as those who are physically present at the meeting, may suggest to the public that the absent board member is acting without the full knowledge that the other board members have. Such a perception could result in lengthy, costly and disruptive legal challenges to the board's decision.

4. When a school board decides to allow absent board members to participate electronically, the first step should be to develop a policy governing the circumstances in which electronic participation is permissible. Some issues that should be considered when determining whether or not to develop such a policy, and what the policy should entail, include:

    a. When a school board permits a board member to participate electronically in a closed session discussion, it has no control over who may be listening. Electronic communications may be intercepted, recorded or broadcast in a number of different ways.

    b. Broken or inadequate equipment or technological disruptions may impair the public's right of reasonable access, which in turn, may give rise to a violation of the Open Meetings Law if the public is unable to monitor the communications of the board member participating in the meeting.

5. If a school board elects to develop a policy to permit board members to participate electronically, it should have the policy reviewed by legal counsel to ensure that the policy meets the requirements of both the Open Meetings Law and the law governing school board meetings.

VIII. Minutes and Publication of Proceedings of the School Board Meeting.

A. Minutes

1. Generally, the school district clerk is responsible for recording the minutes of all school board meetings, including both open and closed sessions, and for entering in the record book provided by the school board the minutes of the meetings. Wis. Stat. §§ 120.11(1), 120.17(3), and 120.44(2). In his or her absence, the school board may select another school board member to act as the clerk of the meeting. Wis. Stat. § 120.11.

2. Minutes should, at a minimum, reflect the "substance of every official action" taken by the board in both open and closed session. Wis. Stat. § 120.11(4). "Substance" is defined as "an intelligible abstract of synopsis of the essential elements of the official action taken by a local governing body, including the subject matter of a motion, the persons making and seconding the motion and the roll call vote on the motion." Wis. Stat. § 985.01(6).

3. The Open Meetings Law requires that the motions and roll call votes of each meeting of a governmental body be recorded, preserved, and open to public inspection to the extent prescribed under the Wisconsin Public Records Law. Wis. Stat. § 19.88(3). This rule applies for open and closed sessions of the meeting. This rule also applies to meetings of all "governmental bodies," even those committees that fall within this term. In most instances, the minutes of the meeting serve as the record complying with this requirement.

4. Although closed session minutes may constitute a record under the Wisconsin Public Records Law, inspection and copying of such records are subject to limitations. In particular, the exemptions to the requirement of a governmental body to meet in open session may be used as grounds for denying public access to a record, but only if the records custodian makes a specific determination that there is a need to restrict public access at the time that the request to inspect or copy the record is made. Wis. Stat. § 19.35(1)(a). Certain segments of closed session minutes may be properly open to public inspection, while other segments retain their confidential nature. In this case, the custodian may have to review the minutes and block out certain portions prior to disclosure.

B. Publication

1. The proceedings of a school board meeting (both open and closed sessions) must be published within 45 days after the meeting as a class I notice in a newspaper published in the district, if any, or by a district-wide distribution prepared and directed by the school board and paid out of school funds. Wis. Stat. §§ 120.11(4) and 120.43(4). If there is no newspaper published in the district, the proceedings shall be posted or published as the school board directs. *Id.*

2. The notice should include the substance of every official action taken by the board and a statement of receipts and expenditures in the aggregate. Wis. Stat. §§ 120.11(4) and 120.43(4).

3. The Attorney General has taken the position that these publication requirements apply to proceedings conducted in closed, as well as open, sessions. However, according to the Attorney General, the board should keep any portion of the recorded proceedings of the closed session confidential, if the public interest demands continued confidential treatment.

4. It is the school board president's responsibility to ensure minutes of meetings are properly recorded, approved and signed. Wis. Stat. § 120.15(5).

C. Retention of Minutes

1. School board meeting minutes must be retained at least for a minimum of seven (7) years, except as otherwise provided by the public records board. Wis. Stat. § 19.21(6).

2. Tape recordings used for the purpose of preparing minutes may be destroyed no sooner than 90 days after the minutes have been approved and published. Wis. Stat. § 19.21(7).

3. Best practice: permanent retention of school board meeting minutes is strongly recommended. Consider scanning/saving on computer or putting a year's worth of board meeting minutes on microfiche after the auditor's report is done each year to save space.

4. School board meeting minutes (open and closed session) are considered public records and must be maintained and disclosed in accordance with provisions of Wisconsin's Public Records Law.

    a. Under the Wisconsin Public Records Law, a "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."

i. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), computer printouts and optical disks.

ii. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

b. Minutes of open and closed sessions of all school board meetings are generally "records" as that term is defined under the Wisconsin Public Records Law. Wis. Stat. § 19.32(2). The general rule is that public records are open to public inspection. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.*, 125 Wis. 2d 480, 482, 373 N.W.2d 459 (Wis. Ct. App. 1985).

c. In some instances, before the minutes are approved, the minutes may be considered to be "drafts." A "draft" is specifically excluded from the definition of "record," and, as a result, it is not a "record" that is accessible by the public pursuant to the Wisconsin Public Records Law.

d. As a result, if minutes are requested, a records custodian should first analyze whether the minutes are still "drafts," rather than "records." If the minutes have not been approved by the board, then the minutes may still be "drafts."

e. Once approved by the board, the minutes are then likely "records," which generally must be provided to members of the public upon request. However, before disclosing the minutes, the custodian of the minutes must weigh the competing interests involved and determine whether permitting inspection is required. A custodian of a record must engage in this balancing process and must state specific reasons if inspection is refused. *Oshkosh Northwestern Co.*, 125 Wis. 2d. at 483 (citations omitted).

f. Open session minutes are likely subject to disclosure without limitation.

g. Minutes from a closed session meeting are not exempt simply because the meeting was a valid closed session meeting. However, the records custodian may refuse to permit the inspection of records of closed sessions if the need for secrecy continues and if sufficient reason is given consistent with the law. In many cases, the need to keep confidential the minutes of a closed session may not extend past the closed meeting itself. In other cases, confidentiality may be required indefinitely, such as in the case of minutes which refer to pupil records.

h. Certain segments of closed session minutes may be properly open to public inspection, while other segments retain their confidential nature. As such, the custodian may have to review the minutes and block out certain portions prior to disclosure.

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