

## Open Meetings Compliance: A 21<sup>st</sup> Century Perspective

*The use of mobile phones, email, texting and social media impact on Open Meetings Law compliance*

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## Our Approach Today

- Kyle will tell you what you need to know about the law
- Mark will tell you what you want to know about how to make it work for you and the public

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## Why talk about Open Meetings?

- Embrace a culture of transparency: it's good for the public and for you
- Know the law but also know what works
- Keep your nose clean!

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### Open Meetings

- The purpose of the Open Meetings Law is to give the public the fullest and most complete information concerning the affairs of government.
- All meetings shall be publicly held, § 19.81(2), *Wis. Stats.*: "To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law."

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### Open Meetings

- Section 19.81, *Wis. Stat.* sets forth the State of Wisconsin's policy perspective regarding meetings of governmental bodies and the need for those meetings to occur in public to the fullest extent:
  - (1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state 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.
  - (2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.

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### Open Meetings

- Section 19.81, *Wis. Stat.* continued:
  - (3) In conformance with article IV, section 10, of the constitution, which states that the doors of each house shall remain open, except when the public welfare requires secrecy, it is declared to be the intent of the legislature to comply to the fullest extent with this subchapter.
  - (4) This subchapter shall be liberally construed to achieve the purposes set forth in this section, and the rule that penal statutes must be strictly construed shall be limited to the enforcement of forfeitures and shall not otherwise apply to actions brought under this subchapter or to interpretations thereof.

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### Open Meetings - Scope of the Law

- Applies to Governmental Bodies, which are defined 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; a local exposition district under sub ch. II of ch. 229; a family care district under s. 46.2895; a nonprofit corporation operating the Olympic ice training center under §42.11(3); or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under Subch. I, IV or V of Ch. 111.”

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### Open Meetings - Recording

- A governmental body must make a reasonable effort to accommodate anyone who wants to record, film or photograph an open session meeting, provided the activity does not interfere with the conduct of the meeting. Wis. Stat. § 19.90.
- The same right does not extend to closed session meetings.

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### Open Meetings - What types of meetings are covered?

- Definition of meeting: “[T]he 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. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” Wis. Stat. § 19.82(2).

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### Open Meetings - What types of meetings are covered?

#### Purpose 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. *Showers*, 135 Wis. 2d at 102-03.
- A governmental body is engaged in governmental business when its members gather to simply hear information on a matter within the body's realm of authority. *State ex rel. Badke v. Greendale Village Board*, 173 Wis. 2d 553, 573-74 (1993).

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### Open Meetings - What types of meetings are covered?

#### Purpose to Engage in Governmental Business:

- But, the Court of Appeals concluded in *Paulton v. Volkmann*, 141 Wis. 2d 370, 375-77 (Ct. App. 1987), that no meeting occurred where a quorum of school board members attended a gathering of town residents, but did not collect information on a subject the school board had the potential to decide.
- But, an informal meeting of a quorum of Board members where the Town Chairperson decided not to place a sensitive personnel issue on the agenda and where one Board member conveyed advice received from the Town attorney about that issue was not a "meeting." *State ex rel. Gates v. Dorshorst*, 2004 WI App 88 (Unpublished).

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### Open Meetings - What types of meetings are covered?

- The *Showers* Test - The above definition of a "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. *State ex rel. Newspapers v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).

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### Open Meetings - What types of meetings are covered?

#### Number of Members Present Requirement.

- It is critical to remember that the power to control a body's course of action can refer either to the affirmative power to pass a proposal or the negative power to defeat a proposal, *i.e.*, a "negative quorum."
- The size of a negative quorum is smaller than a tie-vote of a quorum in situations where a super-majority (2/3 or 3/4) vote is required for a body to pass a measure.

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### Open Meetings - Quorums

#### Walking Quorums:

- 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.
- The critical element of a walking quorum is an agreement to act uniformly. If there is no tacit or express agreement, exchanges among separate groups of members may take place without violating the Open Meetings Law.

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### Open Meetings - Quorums

#### Problems with Walking Quorums:

- The danger is that walking quorums produce a predetermined outcome and may render publicly-held meetings a mere formality. See *State ex rel. Lynch v Conta*, 71 Wis. 2d 622, 239 N.W. 2d 313 (1976).
- Proxies or surrogates cannot be used to circumvent the Open Meetings Law. Clifford Correspondence, April 28, 1986.

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### “Petitions” and Walking Quorums

- The signing, by members of a body, of a document asking that a subject be placed on the agenda of an upcoming meeting does not constitute a “walking quorum.” Kay Correspondence, April 25, 2007; Kittleson Correspondence, June 13, 2007.
- In contrast, where a majority of members of a body sign a document that expressly commits them to a future course of action, a court could find a walking quorum violation. Huff Correspondence, January 15, 2008.

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### LEST WE FORGET . . . .

- The Public Records Law will presumptively require the release of electronic records that are used to assert an open meeting occurred unless prohibited from release by statute, common law, or the balancing test.

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### Open Meetings - Telephonic Meetings

- Telephone Conferences - In 1980, the Attorney General opined that a telephone conference involving a governmental body constituted a meeting and was subject to the provisions of the Open Meetings Law. 69 Op. Att’y Gen. 143 (1980).

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### Open Meetings - Video Conferences

#### Video Conferences

- In order to comply with the Open Meetings Law, the video conference must be "reasonably accessible" to the public.
- A video conference may be "reasonably accessible" if it is broadcast at a location open to the public.
- It would seem prudent that an accessible room be reserved for the public viewing of the meeting.

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### Open Meetings - E-Mail

- Communications *via* electronic mail may constitute a "meeting" and be subject to the Open Meetings Law.
- The underlying principle is pretty simple: e-mail is a valuable, time saving device for quick and incidental communication, but it should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny. *Benson Correspondence* (March 2004).

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### Open Meetings - E-Mail

- While there is no applicable appellate level judicial precedent in Wisconsin that addresses the use of electronic mail in the context of Wisconsin's Open Meetings Law, members of governmental bodies are strongly discouraged from communicating via electronic mail on matters within the realm of their authority.

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### Open Meetings - E-Mail

- An open meetings violation may occur if elected officials are instant messaging or contacting each other via e-mail within a close time frame if: 1) enough of them are involved in the messaging to determine the body's course of action, and 2) there is a purpose to engage in governmental business. An open meetings violation could also occur if a single official were to e-mail other officials in succession, asking for their support of a particular matter or position. If the sender (or others forwarding the sender's e-mail) were to reach enough officials to constitute a quorum necessary to take the action contemplated in the e-mail, or to block a contemplated action, then a "walking quorum" or "negative quorum" violation may occur. *Benson Correspondence*, March 2004.

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### Open Meetings - E-Mail

- October 2000 Attorney General Opinion: Electronic mail features such as "reply all" and "forward" make it possible for a message to be instantaneously transmitted to a sufficient number of members of the governmental body to determine the body's course of action on the matter, thus satisfying the definition of a meeting. *Krischnan Correspondence*, October 3, 2000.

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### Open Meetings - E-Mail

- Email Voting. Jones Correspondence January 2010: The email voting by members of the city governmental body in question amounted to the exercise of the body's responsibilities, authority, power or duties, and therefore was the conduct of governmental business. In addition, it appears that enough members participated in the voting to determine the course of the body's action. Moreover, it appears that the members voted with the understanding that the body's action would be determined by the number of votes in favor of or in opposition to the question that was the subject of the committee's vote. The members' apparent agreement to determine the body's course of action in this way fits the definition of a "walking quorum" type of "meeting" ..., to which the public notice and accessibility requirements of the open meetings law applied.

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### Open Meetings - E-Mail

- *Email Voting. Jones Correspondence January 2010:* In the absence of a meeting notice that provided time, date, and place information, members of the public could not have reasonable access to observe the body's exercise of its powers or responsibilities. Although it is not appropriate for me to speculate whether a governmental body could create some type of email voting protocol and public notice that would satisfy the public notice and public accessibility requirements of the open meetings law, a governmental body almost certainly violates the open meetings law if it takes binding collective action by aggregating the email votes of its members in using a method that allows no opportunity for public observation of the process.

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### Open Meetings - E-Mail

- Interesting caveat . . . While the "reply all" and "forward" features of e-mail may run amok of the Open Meetings Law, note that written correspondence is not viewed as convening a "meeting."
- Still, open records issues remain.

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### Open Meetings - Texting and IM

- The same principles as Email likely apply to "texting" or instant messaging, but with greater concern that the exchange is intended to be a "discussion" due to the inherent nature of instant messaging and texting.

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### Open Meetings - Texting and IM

- Query:
  - Electronic messaging between Board members before (or after) a meeting?
  - Electronic messaging between Board members during an open session meeting?
  - Electronic messaging between Board members during a break of a meeting?
  - Electronic messaging between Board members during a closed session meeting?

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### Madison General Ordinance 2.15(2)

No member of the Council shall communicate electronically with another member of the Council during a meeting on any matter on the meeting agenda, unless the electronic communication is saved and available under the Public Records Law and unless such communication in no way violates the Open Meetings Law. (enacted 2007)

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### War Stories

Madison "City Council emails, texts present challenges for laws governing open meetings, records" Wisconsin State Journal (May 7, 2012).

<http://host.madison.com/news/local/govt-and-politics/city-council-emails-texts-present-challenges-for-laws-governing-open-meetings-records-05465175-95e1-11e1-8a00-0019ba056936.html>




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### War Stories

OPEN MEETINGS LAW | CITY ATTORNEY CLAIMS VIOLATIONS

#### City attorney finds Madison council members violated open meetings law in government reform talks

KAREN RIVEDAL krivedal@madison.com, 608-252-6106 Apr 28, 2016

City Attorney Michael May, in an investigation directed by Mayor Paul Soglin, determined that then-council president Denise DeMarb and Ald. Mark Clear engaged in a single "clear violation" of the law, while serving on a three-member Subcommittee on Strategic Plans and Priorities that developed the plan to shift certain mayoral powers to the council.

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### War Stories

Dinner, the Quorum and Email Evidence . . . .  
"Wisconsin Natural Resources Board violates open meetings law," Milwaukee Journal Sentinel (June 2, 2017).

<http://www.jsonline.com/story/news/2017/06/02/wisconsin-natural-resources-board-violates-open-meetings-law/266310001/>

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### War Stories

Email Polling approving a change order to a Fire Station Construction Contract Allegedly Violates Ohio Open Meetings Law

[http://www.cleveland.com/brecksville/index.esdf/2017/08/brecksville\\_officials\\_violated.html](http://www.cleveland.com/brecksville/index.esdf/2017/08/brecksville_officials_violated.html)

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### Quorums, negative quorums, and quantum quorums

- Three-person subcommittees: Don't
- The quantum quorum conundrum:  
Two alders walk into a bar to talk about the budget...



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### Additional Resources

- Attorney General's Open Meetings Compliance Guide - <http://www.doj.state.wi.us/dls/open-government>
- The UW-Extension Local Government Center has many resources on the topics covered in this presentation and contributed content to this presentation.

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### Questions...and answers?

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