

VIRTUAL MEETINGS DURING COVID-19 Ramifications of the Open Meetings Law

—Andrew T. Phillips, Ryan P. Heiden, & Bennett J. Conard, von Briesen & Roper, s.c.

With the onset of the COVID-19 pandemic, and particularly following the various county emergency orders the pandemic necessitated, many county boards moved their board and committee meetings to a virtual platform. While many in-person meetings have resumed, several counties continue to conduct at least some of their meetings virtually in light of current health and safety concerns and to comply with local health guidelines. Some counties may also choose to return to a virtual platform during the winter months if cases increase in conjunction with the cold and flu season.

In light of this virtual environment, county boards have faced many questions as to whether the Open Meetings Law¹ allows virtual meetings to be legally conducted and, if so, what specific compliance issues surround virtual meetings. As virtual board meetings continue, whether as a result of the pandemic or merely as a convenience, counties should take the opportunity to audit board rules and procedures to ensure the meetings comply with standard procedure and are otherwise conducted in compliance with the Open Meetings Law.

In addition, as meetings moved to a virtual platform, many governmental agencies implemented, or considered implementing, a live-stream component to their meetings whereby the meetings were simulcast over the internet or through a service that otherwise allows the public to monitor the meeting from the comfort of home. Similarly, several local governments began posting video recordings of meetings on their websites. While the use of video

recording is not a novel practice and is undoubtedly a valuable mechanism for ensuring broad-based public access to the affairs of government, there may be legal ramifications associated with video recorded meetings.

The purpose of this article is to discuss the legal principles associated with both virtual meetings and the presentation of meetings on a virtual platform. Understanding these principles will allow county boards to work with corporation counsel in ensuring compliance.

OPEN MEETINGS LAW REQUIREMENTS

The Wisconsin Open Meetings Law requires that “all meetings of all state and local government bodies shall be publicly held in all places reasonably accessible to members of the public and shall be open to all citizens at all times” (Wis. Stat. § 19.81(2)). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins (Wis. Stat. § 19.84).

The Open Meetings Law applies to any meeting that is: (1) for the purpose of conducting governmental business; and (2) involves a sufficient number of members of the body to determine the body’s course of action on the business under consideration (*State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1997)). There is no doubt the Open Meetings Law applies to county board and committee meetings, even while conducted during the ongoing COVID-19 pandemic.²

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So long as virtual meetings are permitted under board rules and procedures, county board and committee meetings may be conducted virtually. Even though the Open Meetings Law requires meetings to be held in places that are reasonably accessible to members of the public, this does not limit meetings to being physically held only in publicly owned places (*e.g.*, the county government building). Additionally, the Open Meetings Law also does not require direct public participation, such as providing public comment, in meetings. Direct participation and public comment is only required for certain public hearings (*e.g.*, a public hearing for a zoning petition). Rather, the public must be reasonably able to *monitor* meetings. For these reasons, virtual meetings, by teleconference or by videoconference, are permitted under the Open Meetings Law so long as the teleconference or videoconference is reasonably accessible to members of the general public, and otherwise complies with the Open Meetings Law.³ This includes providing the public with notice of the meeting and the opportunity to “dial-in” to monitor a telephonic meeting and/or a live-stream being made available for the public to view on a video conference platform.

Some counties also have a requirement in their local rules or ordinances requiring a public comment period during board and/or committee meetings. In this case, a county may want to consider temporarily or permanently amending their board and committee rules to exclude such a requirement in the event a meeting is conducted in a virtual environment. However, it is important to remember that there may be situations where public comment is required by state statute. In those circumstances, the public must be allowed to speak at the meeting even if the meeting is completely virtual.

It is also recommended that county boards thoroughly vet the technology used for virtual meetings. Some platforms provide better security than others. Likewise, some platforms are more effective at controlling participation of both government officials and the public (mute, unmute, chat features, etc.). As discussed above, the public only has a right to monitor meetings of governmental bodies, not to directly participate in such meetings (absent a county ordinance or board rule requiring participation). For this reason, counties should utilize platforms that only allow observation by the public, and not the ability to speak in order to be able to conduct efficient and orderly meetings.

ADDITIONAL NOTICE REQUIREMENTS FOR VIRTUAL MEETINGS DURING COVID-19

In addition to the general notice requirements set forth in Wis. Stat. §19.84(1)(b) – requiring providing at least 24 hours’ notice of the time, date, place, and the subject matter of the meeting – the Department of Justice’s (DOJ) guidance suggests there are additional notice requirements for virtual meetings under the Open Meetings Law. Specifically, DOJ guidance indicates the notice for virtual meetings must also state the board or committee meeting will be held remotely and include instructions for how the public may access the meeting. The agenda should also include this information to help ensure the meeting’s accessibility to the public. Best practices dictate that the notice contain a name and contact number for a designated staff member that can be contacted in the event that a member of the public is unable to participate in the remote meeting to allow the board to evaluate its potential obligation to accommodate participation.

SPECIAL ACCOMMODATIONS & CONSIDERATION FOR CONDUCTING VIRTUAL MEETINGS

Appropriate Accommodations May Be Necessary

The DOJ has advised that a county board conducting a meeting remotely should be mindful of the possibility that it may be particularly burdensome or even unfeasible for one or more individuals who would like to observe a meeting to do so remotely. Under such circumstances, state and federal law require that a county board make a good faith effort to reasonably accommodate those with access issues.

For example, county boards may need to make appropriate accommodation for people without telephone or internet access or who are blind, deaf, or hard of hearing in order to facilitate reasonable access to the meeting for such individuals. County boards should consider alternative methods of accommodation for such individuals in order to evaluate their potential obligation to provide reasonable access to the virtual meeting.

Ultimately, Wisconsin courts apply a reasonableness standard to the actions taken by a county board to accommodate public access. Only reasonable, not total, access by the public is required under the law (*Badke v. Village Board of Greendale*, 173 Wis.2d 553, 580-81, 494 N.W. 2d 408 (1993)). A county board that makes a good faith effort to reasonably accommodate those with access issues – especially in light of the pandemic – will likely remain in compliance with the Open Meetings Law and Title II of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments (such as county board meetings).⁴ However, the DOJ has advised that the final determination will depend on the facts of each circumstance, so county boards should consult with corporation

counsel should any difficult accommodation issues arise before conducting the meeting or denying the accommodation request.

Recording & Posting of Meetings Encouraged

If a county board typically records meetings, it should continue to do so. The DOJ advises that when possible, the county board may consider recording and posting the meeting on its website as soon as practicable after the meeting concludes to ensure that their meetings remain open and accessible to the public. While posting a recording is not a substitute for real-time monitoring of the meeting under the Open Meetings Law, it provides an additional level of access to the public and shows a good faith attempt to maintain openness. County boards must also remain mindful of their responsibility to ensure accessibility for all individuals of recorded meetings, such as individuals with disabilities who may be hard of hearing and require subtitles, sign language, or other reasonable accommodations under Title II of the ADA.

Meeting Procedures

There are no required additional or special procedures for meetings conducted virtually. However, at the beginning of each meeting, the DOJ advises that the board chair should encourage all members to identify themselves before they begin speaking and not to speak over one another. This will help all those listening to the meeting better understand who is speaking. When it comes to voting, votes on any matters other than the truly routine should be conducted by roll call vote. Likewise, members should be encouraged to announce when they are temporarily absent from a virtual meeting. Finally, it is important that the board chair maintain decorum and order to allow for the

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orderly transaction of business. Best practice dictates that the board chair (in consultation with others) develop a script to announce these procedures prior to taking up the order of business so the members of the board and the public will have a better understanding of how to conduct themselves.

Situations Where Virtual Meetings May Be Inappropriate

While virtual meetings that otherwise comply with the Open Meetings Law requirements are permissible, the DOJ has cautioned that remote access to an open meeting is not always appropriate. For example, where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be appropriate because important aspects of the discussion or deliberation would not be communicated to the public (or the elected officials). Best practices prescribe that any meeting that requires the use of plans, drawings, or charts be conducted by videoconferencing means featuring a “screen-share” option so that viewers and meeting participants can follow the discussion meaningfully. Handouts or materials that are relevant to the discussion should be distributed electronically in advance of the meeting to all participants upon request, and this should be set forth in the notice. As noted above, the technology should be thoroughly tested and vetted to avoid technical problems during the meeting. County boards should consult with legal counsel if any doubtful situations arise.

In addition, and prior to the pandemic, the Attorney General advised against holding meetings that involve quasi-judicial functions by videoconferencing. If such a situation arises, consideration must be given as to how to hold an appropriate in person “hearing” with appropriate safeguards.

Virtual meetings may also not be appropriate for meetings involving a closed session if adequate safeguards cannot be implemented to ensure only those who are permitted to participate in the closed session have access to the closed session portion of the virtual meeting (*e.g.*, ensuring elected officials do not use a cell phone to broadcast a closed session video meeting). This is particularly true if the closed session discussion relates to privacy interests of employees or strategic financial discussions involving bargaining or negotiation considerations.

If a county wishes to conduct a closed session virtually, the county should ensure it has the ability to drop all lines that are not board or committee members (or other parties deemed necessary) from the closed session part of the agenda. There is also added difficulty if the body intends to reconvene in open session. In that case, it is recommended that the body set a time to resume in open session and tell the public to dial back in at the specified time via the public notice and agenda. As is the typical case, any official action on matters discussed in closed session should be undertaken in open session except in the rarest of circumstances as approved by corporation counsel.

Ensuring a Quorum in a Virtual Meeting

In order for a county board meeting to be a valid meeting, a quorum must be present (*Showers*, 135 Wis. 2d at 102). In many situations, counties either require physical presence in board rule or do not otherwise specify that virtual attendance is considered “present” under Robert’s Rules’ rules regarding presence for quorum purposes. In a virtual meeting, where board members are not physically present, it will be difficult, if not impossible, to obtain a quorum under such rules. In order to address this concern, county boards should review their rules to determine whether the physical presence of a board

member is required for purposes of a quorum. If desired, the county should consider amending the rules to allow those members attending by remote means to be counted for quorum purposes.

Avoiding Nonpublic Comments & Walking Quorums During Virtual Meetings

The Open Meetings Law applies whenever a quorum of the county board is present (*Showers* at 102). Therefore, all communications and discussion by board members that take place during a virtual meeting must be made publicly in a manner accessible to the public attendees of the meeting. Board members should avoid private texting by cell phone or internet-based chat programs and exchanging emails or other private electronic communications while participating in the meeting.

Many videoconferencing platforms include chat functions that are viewable by all meeting attendees if the attendee clicks on the chat box. In the interest of openness and efficiency, county boards should minimize or avoid the use of the chat function during the meeting. Not all users may be familiar with the nuances of the platform, and may not be aware that information is being communicated in the chat box. Additionally, messages exchanged on the chat platform, by text message, or through other transmissions may constitute records under Wisconsin's Public Records Law. In turn, such messages must be appropriately retained by the elected official or the county and produced if requested and subject to disclosure by law. Many virtual platforms may not allow for retention of messages exchanged on them, making compliance with Wisconsin's Public Records Law difficult as it relates to retention and production of such messages.

CONCLUSION

The COVID-19 pandemic has forced counties to re-think the way they conduct county business. In many circumstances, the move to a virtual platform has created efficiencies. Nonetheless, neither the Open Meetings Law nor the regulations regarding public accommodation allow a county to sacrifice open government for the sake of efficiency. For this reason, it is important that counties review their rules and procedures to determine whether they should be updated and, if so, whether it should be on a permanent or temporary basis.

If you have any questions concerning the application of the legal principles discussed in this article to your situation, we encourage you to speak with corporation counsel. ♦

Endnotes

1 Wis. Stat. § 19.81, et seq.

2 The Wisconsin Department of Justice ("DOJ") has provided guidance indicating that remote participation by members of the public complies with the Open Meetings Law in two recent Open Government Advisories. (<https://www.doj.state.wi.us/news-releases/office-open-government-advisory-coronavirus-disease-2019-covid-19-and-open-meetings>; <https://www.doj.state.wi.us/news-releases/office-open-government-advisory-additional-information-regarding-covid-19-and-open>)

3 *Id.*

4 Counties have an obligation to accommodate individuals with disabilities with respect to county board and committee meetings, including meetings held in a virtual environment and streamed to the public. Under Title II of the ADA, counties must provide auxiliary aids or services that enable effective communication. This obligation is ordinarily triggered upon a request for accommodation by an individual with a disability. However, when a county board conducts a virtual meeting, a county must proactively ensure meetings are accessible to individuals with disabilities. Accessibility features of virtual platforms should be considered by counties, such as use of subtitles, speech-to-text, closed captioning, etc. Additionally, meeting notices should include information as to who to contact for accommodation. Background materials for the meeting may be made available prior to the meeting. Requests for accommodation should be immediately addressed and accommodations provided. Under Title II, counties are required to give primary consideration to the type of auxiliary aid or service requested by the individual, and thus, such requests should be honored to the extent the accommodation does not fundamentally alter the nature of the board meeting, result in an undue financial/administrative burden, or an equally effective accommodation is available.