

In the Board Room

with Attorney Andy Phillips and
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Open Meetings Law

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Agenda

- IMPORTANT Stuff
- Scope of the Open Meetings Law
- Notice of Meetings
- “Virtual” Meetings
- Public Comment

Important Stuff

- If you have a question on OML compliance, **ask your corporation counsel.**
- Public Records Open Meetings (PROM) Help Line:
 - opengov@widoj.gov
 - (608) 267-2220

SCOPE OF OPEN MEETINGS LAW

Open Meetings

- Public Policy Behind Open Meetings . . . Wis. Stat. s. 19.81
 - 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.”
 - Liberal construction, § 19.81(4), *Wis. Stats. State ex rel. Lawton v. Town of Barton*, 2005 WI App 16, ¶ 19.
- The purpose of the Open Meeting Law is to give the public the fullest and most complete information concerning the affairs of government. *Martin v Wray*, 473 F. Supp. 1131 (E.D. Wis. 1979).

Scope

- 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.”

Scope (cont.)

- The key test is the source of authority from which the body obtains its power.
- Coverage is determined by the method of its creation.
- Governmental bodies are created by “constitution, statute, ordinance, rule or order” where collective power is conferred and defined. This includes formally constituted sub – units. See *State ex rel. Lynch v Conta*, 71 Wis. 2d 622, 681, 239 N.W. 2d 313 (1976):
- Even bodies that are purely advisory are subject to the law if they are created by constitution, statute, ordinance, rule or order. *State v. Swanson*, 92 Wis. 2d 310, 317, 284 N.W.2d 655 (1979).

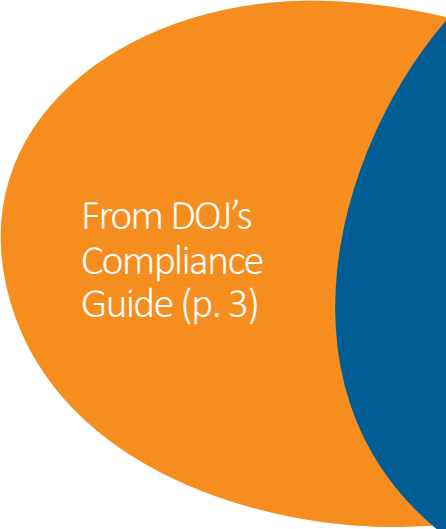
From DOJ's Compliance Guide (p. 2)

State and local bodies created by “rule or order” are also included in the definition. The term “rule or order” has been liberally construed to include any directive, formal or informal, creating a body and assigning it duties.¹² This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials, such as county executives, mayors, or heads of a state or local agency, department, or division.

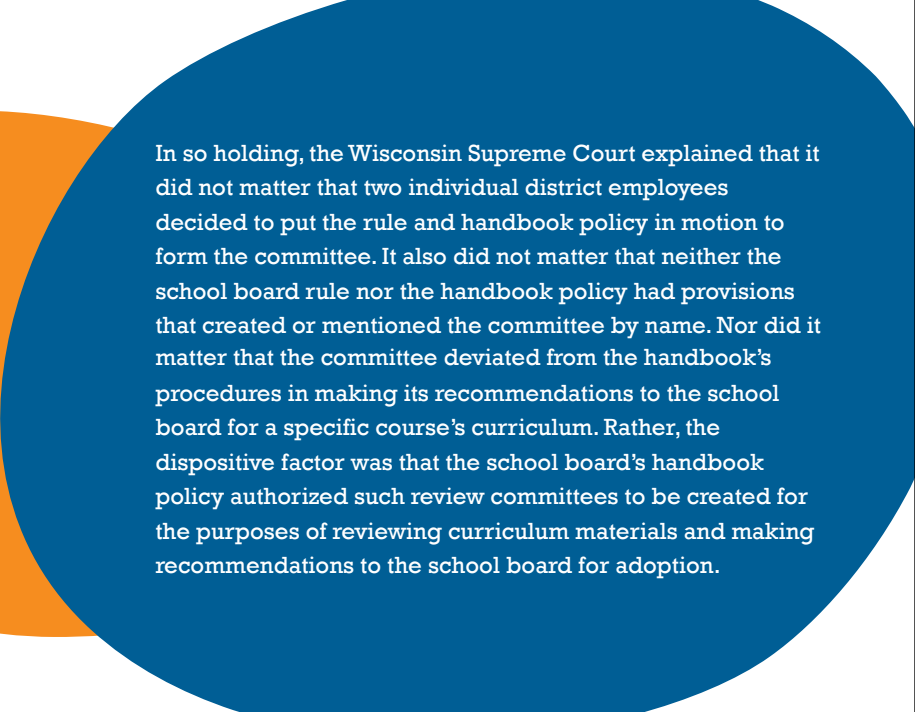


What is a “governmental body” - *Krueger v. Appleton School District*

- Determine what committees are created by “rule” of the governing body – ordinances, by-laws, resolutions, policies, handbooks, etc.
- Ensure policies are consistent with practices.
- Revise and amend policies to reflect accurate interpretations of what groups constitute committees created by rule.
- Counsel board members, business office, etc., as to proper application of the Open Meetings Law.



From DOJ's
Compliance
Guide (p. 3)



In so holding, the Wisconsin Supreme Court explained that it did not matter that two individual district employees decided to put the rule and handbook policy in motion to form the committee. It also did not matter that neither the school board rule nor the handbook policy had provisions that created or mentioned the committee by name. Nor did it matter that the committee deviated from the handbook's procedures in making its recommendations to the school board for a specific course's curriculum. Rather, the dispositive factor was that the school board's handbook policy authorized such review committees to be created for the purposes of reviewing curriculum materials and making recommendations to the school board for adoption.

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).

Open meetings-
what types of meetings are covered? (cont.)

- Judicial and Attorney General interpretation.
- 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).

What types of meetings are covered? (cont.)

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).
- Nonetheless, 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.

Number of Members Present Requirement.

What types of meetings are covered? (cont.)

- 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 majority in situations where a super-majority (2/3 or 3/4) vote is required for a body to pass a measure.

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.

OPEN MEETINGS- Quorums

OPEN MEETINGS- quorums (cont.)

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.

“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.

Open Meetings – EMAIL

- 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).

Electronic Mail

- A violation may occur if elected officials are instant messaging or emailing each other 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. *Benson Correspondence*, March 2004.
- A 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 or block the action contemplated in the e-mail, then a "walking quorum" or "negative quorum" violation may occur. *Benson Correspondence*, March 2004.

Open Meetings –
What types of meetings are covered?

Electronic Mail

- 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. *DOJ Correspondence*, October 3, 2000.
- While there is no applicable precedent that addresses the use of electronic mail in the context of the Open Meetings Law, members of governmental bodies are strongly discouraged from communicating via electronic mail on matters within the realm of their authority.

Open Meetings –
What types of meetings are covered?

"The meeting is so peaceful with Bridget not speaking to me."

— Ald. Lisa Subeck to Ald. Jill Johnson, 7:44 p.m., Nov. 29, 2011 (referring to Ald. Bridget Maniaci)

"U r a hoot."

— Johnson reply to Subeck

"You really have no idea the difference her silence makes :)"

— Subeck reply to Johnson

"Help!!!"

— Bob Dunn, president of Hammes Co., to Ald. Shiva Bidar-Sielaff, 9:28 p.m., Nov. 15, 2011

These are a sampling of text message exchanges between Madison City Council members and others while council meetings were in progress. They were obtained by the State Journal after an Open Records request.

"I can't always carry it all on my shoulders. I have really done nothing but help."

— Bidar-Sielaff reply to Dunn, 9:32 p.m., Nov. 15, 2011

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/ysi/news/local/govt-and-politics/city-council-emails-texts-present-challenges-for-laws-governing-open/article_89466178-96e1-11e1-a11d-0019bb2963f4.html

Open Meetings — Meeting Notices

- Meeting notices must be reasonably specific with regard to agenda items so as to reasonably apprise the public of what will occur at the upcoming meeting. *Linde Correspondence*, 2007.
- As a general rule, the Attorney General has advised posting notices at three different locations within the jurisdiction that the governmental body serves. *Id.*
- Meeting notices may also be posted at a governmental body's website and posted in at least one public place likely to give notice. Wis. Stat. § 985.02(2)(a).
- Alternatively, the chief presiding officer may give notice to the public by paid publication in a news medium likely to give notice in the jurisdictional area the body serves. 63 Op. Att'y Gen. 509, 510-11 (1974). If the presiding officer gives notice in this manner, he or she must ensure that the notice is actually published.

Notice – Special Issue

- What do we do about “tours?”
- If a governmental body (e.g., committee) is going to meet for any governmental purpose, notice must be provided.
- AND, all of the other rules relating to the conduct of the meeting must be followed.
 - Allowing the public to attend/monitor
 - Providing accommodation
- How do we handle the logistical challenges?

Open Meetings – Recording

- The Open Meetings law explicitly provides that 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. § 19.90, *Wis. Stats.*
- The same right does not extend to closed session meetings.

Open Meetings – Who Can Close?

- Only the board may exercise the right to convene into closed or executive session; the public does not have the right or power to close a meeting.
- Even under § 19.85(1)(b), *Wis. Stats.*, an employee cannot close a meeting.

Open Meetings – When May They Be Closed?

- Wisconsin Stat. § 19.85(1) contains eleven exemptions to the open session requirement which permit, but do not require, a governmental body to convene in closed session. Because the law is designed to provide the public with the most complete information possible regarding the affairs of government, exemptions should be strictly construed. *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71, 508 N.W.2d 603 (1993); *Citizens for Responsible Development*, 300 Wis. 2d 649, ¶ 8.
- The policy of the open meetings law dictates that the exemptions be invoked sparingly and only where necessary to protect the public interest. If there is any doubt as to whether closure is permitted under a given exemption, the governmental body should hold the meeting in open session. See 74 Op. Att’y Gen. 70, 73 (1985).

Statutory Exemptions Allowing for Closed Session

- Judicial or quasi-judicial hearings. Wis. Stat. § 19.85(1)(a).
- Employment and licensing matters. Wis. Stat. § 19.85(1)(b).
- Consideration of employment, promotion, compensation, and performance evaluations. Wis. Stat. § 19.85(1)(c).
- Deliberating purchasing of public properties, investing of public funds, or conducting public business with competitive or bargaining implications. Wis. Stat. § 19.85(1)(e).
- Consideration of financial, medical, social, or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations. Wis. Stat. § 19.85(1)(f).
- Conferring with legal counsel with respect to litigation in which it is or is likely to become involved. Wis. Stat. § 19.85(1)(g).
- Consideration of requests for confidential written advice from an ethics board. Wis. Stat. § 19.85(1)(h).

Open Meetings – Who May Attend Closed Session

- In general, the open meetings law gives wide discretion to a governmental body to admit to a closed session anyone whose presence the body determines is necessary for the consideration of the matter that is the subject of the meeting. *DOJ Correspondence*, December 15, 1988.
- Cannot exclude any elected or appointed member of the governmental body from a meeting of the entire body. Absent a written rule, no member of the body can be excluded from any meeting of a subunit of the governmental body (i.e., committee meetings). Wis. Stat. § 19.89.
- However, it is important to remember that where enough non-members of a subunit attend the subunit's meetings that a quorum of the parent body is present, a meeting of the parent body occurs, and the notice requirements of § 19.84, *Wis. Stats.*, apply. *Badke*, 173 Wis. 2d at 579.

What Consequences Could Result from Improper Disclosure of Closed Session Discussions?

- Most significantly, disclosing matters discussed in closed session is very likely to undermine the trust placed in the Board or a Committee by County employees and the public.
 - This is because disclosure of sensitive information that pertains to a specific individual or information that, if disclosed, would irreparably harm the interests of tax payers is not looked upon favorably. Employees and the public trust that the Board will act professionally and ethically in protecting their collective interests. Disclosing closed session discussions undermines this goal.
- Improperly disclosed closed session information may also create flash point issues that become impossible to combat in the public arena.
 - This is because, if one member discloses closed session discussions, which, in turn, leads to a flurry of rumors in the community, the Board is unable to publicly confirm or deny such rumors without likely further disclosing additional closed session discussions.
 - This could lead to improper conclusions about specific individuals, such as employees, which could result in lawsuits for violation of privacy, reputational damage, or defamation.

“Virtual” Meetings

Virtual Meetings

If a governmental body holds a remote meeting by teleconference or videoconference, the body is able to comply with the OML by publicly providing remote access to the general public. This includes the provision of a conference line and dial-in number in order to monitor phone call meetings and/or a live-stream available for viewing by the public on a video conference platform. In both cases, the platform should only allow observation and listening, not direct participation in order to ensure an orderly meeting is held.

Some Practical Pointers

- **Notice of the Meeting**
 - The notice should explicitly provide the option for the public to access the remote means of communication and the access should be of similar quality to that of the body. In other words, if a body is meeting by video conference, a telephone line only option for the public may not suffice.
 - Provision should be made for members of the public who, for whatever reason, cannot access the remote means.
 - If the body will meet in person, the public should also be allowed to attend in person. If, however, the body decides not to allow the public to attend for safety reasons, the public must be provided the opportunity to monitor the entire meeting by virtual means in real time.

Practical Pointers – Running the Meeting

- Advise members of the body to mute/unmute at appropriate times.
- Proceed SLOWLY – avoid talking over one another.
- Use headsets if available or in a non-private space.
- Ask permission of the chair to exit the meeting to ensure quorum and meeting voting requirements.
- Avoid using chat function. Speak up to be acknowledged/raise hand.
- Chair has discretion to use technology features to ensure that all members have a fair chance to speak.

Closed Sessions in a “Virtual” Environment

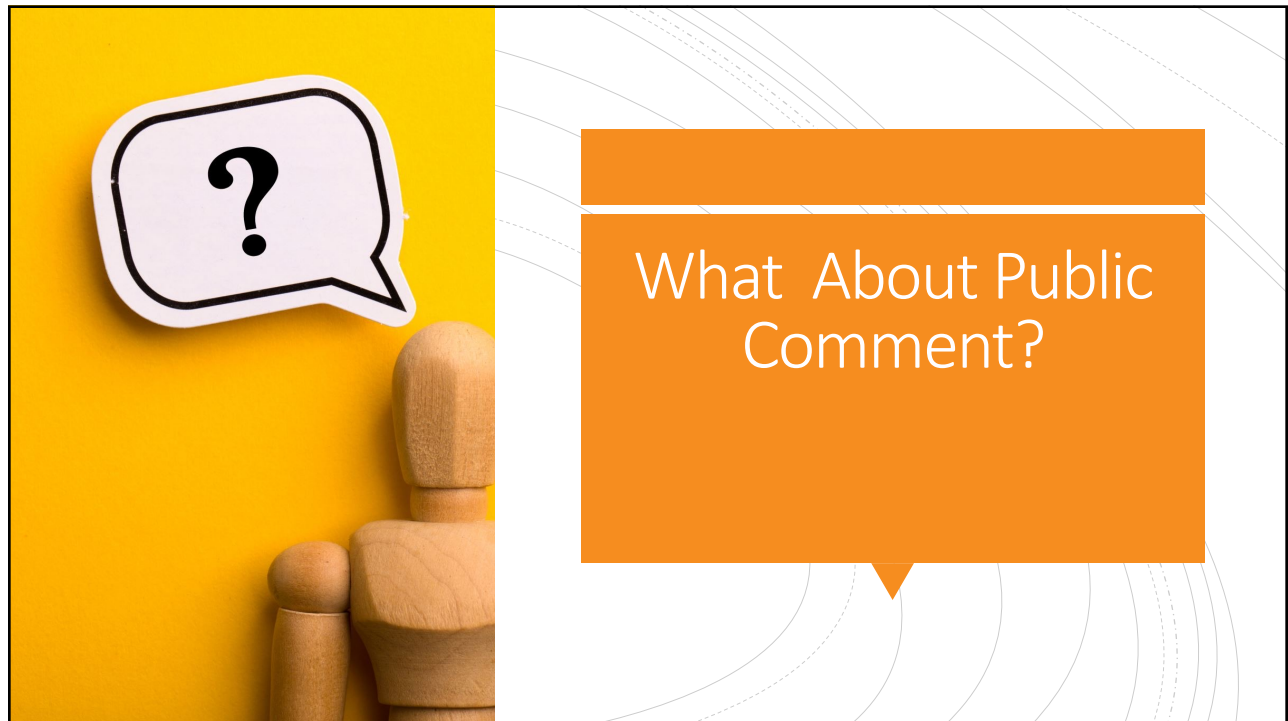
- All of the procedural rules still apply:
 - Agenda must identify the anticipated closed session and reasonably apprise the public as to what will be discussed in closed session. Most of the legal concerns surrounding a closed session relate to specificity (or lack thereof) in the agenda and closed session discussions deviating from the agenda.
 - Members of the body must vote to convene in closed session. It is a roll call vote.
 - Members of the public are not permitted in closed session unless granted the ability to attend by the body.
 - No official action taken in closed session except in very rare circumstances.

“Virtual” Closed Sessions cont’d.

- Questions a body convening in “virtual” closed session must confront:
 - How will we ensure that the “virtual” communication is closed to the public?
 - How will we let the public know that we are reconvening in open session following closed (if that is noticed on the agenda)?
 - How do we verify that nobody is “listening” to the closed session in the background of a member of the body who is entitled to be in closed session?

Some Practical Pointers

- Designate a person to monitor the meeting and the technology.
- If using a video conference, ensure that the cameras are “on” so as to allow for easy identification of the participants.
- If using a telephone conference, ask participants to verify that they are alone and that nobody other than authorized participants are able to hear the meeting.
- Avoid recording the closed session part of the meeting – this may become a public record.



Public Comment Basics

The public has no statutory or constitutional right to participate in a meeting of a governmental body

HOWEVER, board rules may provide a right to public comment, in which case constitutional issues come into play

Public comment often presents challenges to the orderly transaction of business and maintenance of order at a meeting

Public
Comment-
Constitutional
Considerations

- School board and committee meetings are considered “limited public forums.”
- A school board may enact viewpoint-neutral “place, time, and manner” restrictions on speech during a board or committee meeting if there is a “legitimate government interest.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983)
 - Viewpoint-neutral means we cannot discriminate on the basis of the message advocated
 - Is the interest in an orderly meeting a “legitimate government interest?” (YES!!)

*Steinburg v.
Chesterfield Cty.
Planning Comm’n*,
527 F.3d 377 (4th
Cir. 2008)

- “[I]mposing restrictions to preserve civility and decorum [are] necessary to further the forum’s [i.e., board’s] purpose of conducting public business.” *Id.* at 385.
- In *Steinburg*, the court upheld the validity of a rule requiring a speaker during public comment to address only items germane to the agenda.

What About Obscene Or Disruptive Speech?

- Speakers during public comment can be silenced if they are being disruptive or threatening, but there is some ambiguity in how courts view speech to be disruptive or threatening.
- If you do NOT have a rule against the use of profanity, can you prohibit it?
 - What if a member of the board/committee uses profanity?
- Can “obscenity” be defined by the board/committee chair or should you define it in the board rules?

Time Limits

- Imposing a time limit on a speaker during a public comment period is permissible within the “reasonable time, place, and manner” standard. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).
- When can time limits be imposed?
 - BEST – in the board rules
 - PROBABLY OKAY – at the beginning of a meeting (and announced)
 - NEVER – in the middle of when a person is speaking

Signs, T-shirts And Banners

- This is a very complicated issue.
- The analysis is the same as it relates to speech:
 - Time, place, and manner restrictions are legal
 - Content neutral restrictions
- A board rule establishing parameters is very helpful
- But what is “disruptive?”
 - (This area is a minefield – work with corporation counsel extensively.)

Example of a Rule Upheld by a Court

It shall be unlawful for any person in the audience at a council meeting to do any of the following ... (1) Engage in disorderly, disruptive, disturbing, delaying or boisterous conduct, such as, but not limited to, handclapping, stomping of feet, whistling, making noise, use of profane language or obscene gestures, yelling or similar demonstrations, which conduct substantially interrupts, delays, or disturbs the peace and good order of the proceedings of the council.
(But notice the room for interpretation within this rule...)

WE HAVE TO STOP MEETING THIS WAY



Questions? Comments?

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