

In the Board Room: Electioneering & Political Expression of County Officials & Employees

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What is Electioneering?

For County Government



An aerial photograph of a city, likely Madison, Wisconsin, showing a mix of urban buildings and green spaces. A semi-transparent white banner is overlaid across the center of the image.


Electioneering 101

- Wisconsin law defines “Electioneering” as “any activity which is intended to influence voting at an election.” Wis. Stat. § 12.03(4).
- In Wisconsin, no person may engage in electioneering:
 - 1) during polling hours;
 - 2) on any public property;
 - 3) on election day;
 - 4) within 100 feet of an entrance to a building containing a polling place. Wis. Stat. 12.03(2)(a)2

An aerial photograph of a city, likely New York City, showing a mix of urban buildings and green spaces. A semi-transparent white rectangular box is centered over the image, containing the title text.

What Activity Counts As Electioneering?

- Electioneering includes both:
 - (1) verbal campaigning; and
 - (2) posting or distributing “election related material”
 - “Election related material” is any written material that describes, or claims to describe, voters’ rights or responsibilities.
 - E.g., signs, banners, literature



What counts as a “Polling Place”?

- “Polling Place” includes any building where polling is taking place, including:
 - Any public property
 - Any municipal clerk’s office receiving absentee ballots
 - Any nursing home or qualified retirement home or community-based residential facility while special voting deputies are present at the home or facility.
- Takeaway:
 - Anywhere where voting occurs, campaigning should not!

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Civil and Criminal Penalties For Electioneering

- It pays to be smart about electioneering conduct.
- Violation of Wis. Stat. § 12.03 (verbal campaigning within 100 feet of a polling place) can result in a \$1,000 fine and up to 6 months in prison. Wis. Stat. § 12.60(1)(b).
- Violation of Wis. Stat. § 12.035 (posting or distributing election related material) can result in a \$100 fine. Wis. Stat. § 12.60(1)(d).

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Misappropriation of County Resources

- Elected officials running for office cannot use public funds to pay the cost of materials or distribution for over 50 identical pieces of campaign material. Wis. Stat. § 11.1205(1)(a)
- No county employee or official may accept any campaign contribution during established hours of employment or when engaged in his or her official duties (e.g., during board meetings). Wis. Stat. § 11.1207(2)

Regulation of Political Expression


In County Government



An aerial photograph of a city with various buildings and green spaces. A semi-transparent white rectangular box is centered over the image, containing the title text.

Political Expression of County Employees and Officials in Board Meetings

- County officers and employees may express their political opinions and engage in political activities as protected first amendment free speech
- Some states have explicit laws regulating political expression of county board members, the public, and employees in county board meetings, but Wisconsin does not.
- That means that political expression at county board meetings (as “open meetings”) is relatively unregulated unless a county enacts an ordinance, policy, or rule governing attendee conduct
 - Any such ordinance, policy, or rule must adhere to first amendment standards

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First Amendment Standards

- Both the First Amendment and Article I, Section III of the Wisconsin Constitution prohibit governmental actors from abridging citizens' and elected officials' freedom of speech.
- The Supreme Court consistently upholds the right of publicly elected officials and political candidates to express their political views, opinions, and positions, even if unpopular, during elections and other governmental processes
- However, the context (forum) in which such speech takes place determines the degree to which a county can regulate such speech.



Recognized Public Forums

1

Traditional Public Forums

- Places that are traditionally used for assembly, debate, and other “expressive activities,” including streets, sidewalks, parks, and public thoroughfares
- County can only restrict content of speech in a traditional public forum if such restriction is narrowly tailored to serve a compelling government interest.



2

Limited/Designated Public Forums

- Any location or channel for communication that a county opens for expressive activity on a limited or permanent basis
- Includes county board meetings
- County can generally regulate the time, place, and manner of speech.

3

Non-Public Forums

- Government property that is not traditionally open to the public.
- Schools, prisons, and the inside of government buildings.
- County can restrict speech content as long as the restrictions are reasonable and do not discriminate based on viewpoint.

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Guidelines for Rules/Polices Enacted to Govern Board Meeting Conduct & Expression

- A county board's rules governing board meetings may place:
 - (1) reasonable restrictions;
 - (2) on time, place, and manner of speech
 - (3) that are *content/viewpoint neutral*
- However, *content-based restrictions* on free speech in public meetings and debates are subject to *strict scrutiny* (i.e., any restriction must be narrowly tailored to serve a compelling government interest)

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Guidelines for Rules/Polices Enacted to Govern Board Meeting Conduct & Expression

- 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



Guidelines for Rules/Polices Enacted to Govern Board Meeting Conduct & Expression – the Legal Foundation

- A local government 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!!)



Guidelines for Rules/Polices Enacted to Govern Board Meeting Conduct & Expression (cont.)

- *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.

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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 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?
- An unpopular or polarizing political stance in and of itself is NOT obscene or disruptive per se, so be careful with how board rules treat differing political ideas...err on the side of broad prohibitions (much easier to administer)

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Signs, T-Shirts and Banners At Board Meetings

- 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 counsel extensively.)

An aerial photograph of a city, likely Costa Mesa, showing a mix of urban buildings and green spaces. A semi-transparent white rectangular box is centered over the image, containing the title text.

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.

Acosta v. City of Costa Mesa, 718 F.3d 800 (9th Cir. 2013)

(But notice the room for interpretation within this rule...)



What's Good for the Goose Is...

- Remember that the rules surrounding decorum, debate and conduct at meetings are designed to provide for the orderly conduct of governmental business.
- Conduct, speech, expressions, etc., may cause disruption if engaged in by the public OR members of the body.
- Rules surrounding such matters should be evenly applied to all meeting participants and attendees.
 - (PLUS – it would not look good to have one set of rules for the public and another for members of the Board.)
- And what about situations where a Board member steps away from his/her seat and offers “public comment?”

Campaign and Election Related Issues

For County Employees



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Guidelines: Rules Governing the Workplace for County Employees

- Less red tape around county's right to regulate speech in county facilities that constitute "non-public forums"
- Remember, these are settings in which public speech is not traditionally invited, nor did the government express any intention of inviting speech.
- Examples include:
 - offices of county officials and employees or other county-owned spaces maintained for conducting or facilitating government business instead of to promote public expression
- Rules governing non-public forums must only bear a rational relation to a legitimate governmental interest

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County Employees During Campaign Season

- Generally, and subject to local county policies, ordinances, and rules for employee conduct:
 - work-related activity should (to the extent possible) remain separate from personal/political activity
 - campaigning is not work-related activity; despite that elected officials are an integral part of the workplace at county facilities
 - county employees should not use county facilities for campaigning (includes use of county property such as computers)



Political Expression: “Do’s” for County Employees

- **Feel free to:**
 - Apprise yourself of local county rules, ordinances, and ethics policies
 - Sign for or express support of a candidate or cause outside of work or on personal time
 - Put a bumper sticker on your vehicle regardless of where parked
 - Post support or criticism of a candidate or party on personal social media

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Political Expression: “Do’s” for County Employees; cont.

- **Feel free to:**
 - Campaign on behalf of a candidate outside of work on personal time not using county resources
 - Discuss an election in a *neutral* manner.
 - Distribute *neutral* information about an election while “on the clock” (if it is part of your work duties.)
 - Produce materials to disseminate *neutral* information.



Political Expression: “Don’ts” for County Employees

- **Unless allowed by local rule, ordinance, or policy, don’t:**
 - Wear a campaign button, logo, shirt, or hat at work
 - Display a political sign on a county vehicle if a reasonable on-looker would readily identify the vehicle as being owned or operated by or for the county
 - Display or don support or criticism of a key political or campaign issue at work (such as abortion or immigration)
 - Actively discuss campaign-related plans, issues, or objectives with candidates while at work
 - Endorse expressly or by reasonable inference any candidate or party on social media if posting on social media is part of your job duties

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Cautionary Point

- **Exercise caution!!** It may be very difficult for the public to separate a county official or staff member's personal opinion from that staff member's image as an employee of the county.
- Create clear separation between personal political affiliation and employment affiliation with county.



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EMBRACING CHALLENGE.
DELIVERING OPPORTUNITY.

THANK YOU

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