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DRAFT AGENDA
ORGANIZATION MEETING OF THE VILLAGE BOARD
VILLAGE OF SUSSEX
THURSDAY, APRIL 21, 2016
5:30 PM
SUSSEX VILLAGE HALL – LOWER LEVEL

1. Roll call.

2. Discussion and possible action on Village Board Protocols and Policy.

3. Discussion and possible action of Committee appointments

4. Discussion on Legal and Risk Management Topics (Guest Presenter John Macy)

5. Adjournment

Greg Goetz
Village President

_____
Jeremy Smith
Village Administrator

It is possible that members of and possibly a quorum of members of other governmental bodies of the municipality may be in attendance at the above stated meeting to gather information; no action will be taken by any governmental body at the above stated meeting other than the governmental body specifically referred to above in this notice. Please note that, upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through appropriate aids and services. For additional information or to request this service, contact Jeremy Smith at 246-5200.

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Village of Sussex
Village Board Protocols

All Village Board Members

All members of the Village Board, including the Village President have equal votes. No Trustee has more power than any other Trustee, and all should be treated with equal respect.

All Board Members should:

- Demonstrate honesty and integrity in every action and statement
- Serve as a model of leadership and civility to the community
- Inspire public confidence in Sussex government
- Prepare in advance of Board and Committee meetings and be familiar with issues on the agenda
- Fully participate in Village Board meetings and other public forums while demonstrating respect, kindness, consideration, and courtesy to others
- Participate in scheduled activities to increase team effectiveness and review Board procedures, such as these Protocols
- Represent the Village at ceremonial functions at the request of the Village President
- Be responsible for the highest standards of civility and honesty in ensuring the effective maintenance of intergovernmental relations
- Respect the proper roles of elected officials and Village staff in ensuring open and effective government
- Provide contact information to the Village Clerk in case an emergency or urgent situation arises while the Board Member is out of town

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Board Conduct with One Another

Boards are composed of individuals with a wide variety of backgrounds, personalities, values, opinions, and goals. Despite this diversity, all have chosen to serve in public office in order to improve the quality of life in the community. In all cases, this common goal should be acknowledged even as Village Boards may "agree to disagree" on contentious issues.

<u>In Public Meetings</u>

- <u>Use formal titles.</u>

The Board Members should refer to one another formally during public meetings as Village President or Trustee followed by the individual's last name.

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- Practice civility and decorum in discussions and debate. Difficult questions, tough challenges to a particular point of view, and criticism of ideas and information are legitimate elements of a free democracy in action. This does not allow, however, Board Members to make belligerent, personal, impertinent, slanderous, threatening, abusive, or disparaging comments. No shouting or physical actions that could be construed as threatening will be tolerated.

- Honor the role of the presiding officer in maintaining order and equity. Respect the efforts to focus discussion on current agenda items. Objections or disagreements about the agenda or the actions should be voiced politely and with reason, following the parliamentary procedures of Robert's Rules of Order.

- Avoid personal comments that could offend other Board Members. If a Board Member is personally offended by the remarks of another Board Member, the offended Board Member should make notes of the actual words used and call for the other Board Member to justify or apologize for the language used. The Chair will maintain control of the discussion.

- Demonstrate effective problem solving approaches. Board Members have a public stage to show how individuals with disparate points of view can find common ground and seek a compromise that benefits the community as a whole. Board Members are role models for residents, business people and other stakeholders involved in public debate.

- Be respectful of other people's time. Stay focused and act efficiently during Public meetings, but refrain from public criticism of colleagues who are less so.

In Private Encounters

- Observe the Golden Rule. Treat others as you would like to be treated. To apply this principle, simply ask yourself how you would like to be treated in similar circumstances, then treat the other person that way.

At Public Hearings

- The Citizens have a right to be heard. But, at our Public hearings we do not enter into a debate. Rather, it is appropriate to listen to their comments, present facts and only seek clarifications.

Village Board Conduct with Village Staff

Governance of a Village relies on the cooperative efforts of elected officials, who set policy, and Staff, who analyze problems and issues, make recommendations, and implement and administer the Board's policies. Therefore, every effort should be made to be cooperative and show mutual respect for the contributions made by each individual for the good of the community.

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- Treat all staff as professionals. Clear, honest communication that respects the abilities, experience, and dignity of each individual is expected. Poor behavior towards staff is not acceptable.

- Channel communications through the appropriate senior staff. Questions of staff and/or requests for additional background information should be directed only to the Village Administrator, Assistant Village Administrator, or Department Heads. The Office of the Village Administrator should be copied on any request to Department Heads. Board Members should not set up meetings with department staff directly, but work through Department Heads and/or the Administrator, who will attend any meetings with Boards Members. When in doubt about what staff contact is appropriate, Board Members should ask the Village Administrator for direction.

- All Village Board Members should have the same information with which to make decisions. Materials and information supplied to a Board Member in response to a request will be made available to all members of the Board so that all have equal access to information.

Never publicly criticize an individual employee.

Board Members should never express concerns about the performance of a Village employee in public, to the employee directly, or to the employee's manager. Comments about staff performance should only be made to the Village Administrator through private correspondence or conversation.

- Do not get involved in administrative functions.

Board Members must not attempt to influence Village staff on the making of appointments, awarding of contracts, selecting of consultants, processing of development applications, or granting of Village licenses and permits.

- Check with Village staff on correspondence before taking action. Before sending correspondence, including e-mails, Board Members should check with Village staff to see if an official Village response has already been sent or is in progress.

- Limit request for staff support

Request for staff support should be made to the Village Administrator, who is responsible for allocating Village resources in order to maintain a professional, well run Village government.

- Depend upon the staff to respond to citizen concerns and complaints. It is the role of Board Members to pass on concerns and complaints on behalf of their constituents. It is not, however, appropriate to pressure staff to solve a problem in a particular way. Refer citizen complaints to Village Administrator, who will follow up with appropriate staff. The staff will respond to all approved requests for information in an agreed upon time frame, and it is appropriate for them to follow up with the Administrator to discuss how the concerns were resolved.

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- Do not solicit political support form staff.

Some professionals of staff (e.g., Village Administrator, the Assistant Village Administrator, Clerk-Treasurer as well as others) have professional code of ethics, which preclude politically partisan activities of activities that give the appearance of political partisanship.

Trustee Conduct with Board Committees and Commissions

The Village has established several Boards and Commissions as a means of gathering more community input. Citizens who serve on Boards and Commissions become more involved in government and serve as advisors to the Village Board. They are a valuable resource to the Village's leadership and should be treated with appreciation and respect.

- If attending Board or Commission meeting, be careful to only express personal opinions.

Village Board Members may attend any Board or Commission meeting, which are always open to any member of the public. Any Public comments by a Board or Commission meeting should be clearly made as individual opinion and not a representation of the feelings of the entire Village Board.

- Limit contact with Board and Commission members to questions of clarification.

It is inappropriate for a Board Member to contact a Board or Commission member to lobby on behalf of an individual, business, or developer, or to advocate a particular policy perspective. It is acceptable for Board Members to contact Board or Commission members in order to clarify a position taken by the Board or Commission.

- Remember that Boards and Commissions are advisory to the Village Board as a whole, not to individual Village Board Members. The Village Board appoints individuals to serve on Boards and Commissions, and it is the responsibility of the Boards and Commissions to follow policy established by the Village Board. Board Members should not feel they have the power or right to threaten Board and Commission members with removal if they disagree about an issue. Appointment and re-appointment to Board or Commission should be based on such criteria as expertise, ability to work with staff and the public, and commitment to fulfilling official duties. A Board or Commission appointment should not be used as a political "reward"

- Be respectful of diverse opinions.

A primary role of Boards and Commissions is to represent many points of view in the community and to provide the Board with advice based on a full spectrum of concerns and perspectives. Board Members may have a closer working relationship with some individuals serving on Board and Commissions, but must be fair and respectful of all citizens serving on Boards and Commissions.

- Keep political support away from public forums.

Board and Commission members may offer political support to a Board Member, but not in a public forum while conducting official duties. Conversely, Board Members may support Board

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and Commission members who are running for office, but not in an official forum in their capacity as a Village Trustee.

Electronic Communications

As society evolves in an increasingly electronic world, we need to have a reliable system to record and make public all e-mails, textings, and other forms of electronic communications to and from Board Members, staff, and the public. Staff commits to working to create and implement such a system.

Other Procedural Issues

- Don't politicize procedural issues (e.g. minutes approval or agenda order) for strategic purposes.

- Submit questions regarding the Village Board agenda items ahead of the meeting. In order to focus the Village Board meetings on consideration of policy issues and to maintain an open forum for public discussion Board Members are encouraged to submit their questions on agenda items to the Village Administrator or Assistant Village Administrator as far in advance of the meeting as possible to that staff can be prepared to respond at the meeting.

- Respect the work of the Board's Standing Committees.
The purpose of the Board's standing committees is to provide focused, in-depth discussion of issues. The Trustees should respect the work of the committees but are always welcome to ask them questions, pose thoughts and provide additional guidance on issues.

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AN EFFECTIVE PUBLIC OFFICIAL:

- Thinks and Acts in Terms of "WE" Not "I"
- Is Fair and Impartial
- Considers Only Evidence and The Law at Hearings
- Avoids Conflict of Interest and/or Recuses Himself
- Remains Impartial in Matters Where the Official is Bound to Decide Based on the Evidence Presented at a Hearing
- Does Not Act on Personal Motives or Issues
- Never Retaliates Against Someone
- Delegates Personnel Issues to Staff
- Stays Within the Scope of His Authority
- Avoids Willful and Wanton Conduct
- Participates in Municipal Training and Updates at Least Once a Year
- Sources of Help:
  - Your Municipal Attorney
  - League of Wisconsin Municipalities Staff: 608-267-2380
  - LWMMI – (For Insurance Coverage Questions): 800-236-9994

LWMMI PRESENTS: IN THE SCOPE OF YOUR AUTHORITY: PREVENTING PUBLIC OFFICIALS' LIABILITY

- *Big Box Development*
- *Plaintiff Attorney Fees in Federal Cases*
- *1st Amendment Rights*
- *Insurance Coverage*
- *Conditional Use Permits*
- *Punitive Damages*
- *Hire/Fire Issues*

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Coverage

- Open Meetings Law basics & issues
- Note on Public Records Law
- Ethics & conflicts of interest
- Making Fair Decisions
  - Policymaking (plans, ordinances)
  - Applying the law (permits, approvals)
- Liability protection

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Open Meetings Law

- "Governmental Bodies" covered
  - Local governing body
  - Committees, boards, commissions
  - E.g., plan commission, BOA
- Members covered by OML include citizen members

When There's a Meeting

- Numbers test
  - ½ of body present--meeting presumed
  - if number can determine outcome
  - "walking quorum"
- Purpose test
  - information gathering,
  - discussion OR
  - voting

  (any one meets test)

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Notice Required

- 24 hour notice required
- 2 hours minimum for good cause
- Plus any notice required by statute (e.g., a class 2 notice under ch. 985 for a public hearing on a rezoning)
- Posting in 3 public places
- Notice to media requesting notice
- Notice to official paper; if none, to a news medium likely to inform public
- Separate notice for each meeting

Notice Contents

- Time, date, place & subject matter
- Specific enough to let people know what's being covered
- Notice anticipated closed session
- May consider only noticed items

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Public Participation

- No right to participate at a meeting (in contrast to a public hearing), although it may be allowed
- May include public comment on agenda
- Meetings must be open to public (except for closed sessions) and must allow taping and photographing, if they do not interfere

Closed Sessions

- If anticipated, must be noticed
- May close only for statutory purposes
- Presumption of openness applies; closing is the exception
- Procedure to close
  - Convene first in open session
  - Presiding officer announces topic & statutory provision allowing closure
  - Motion to close and recorded vote

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- May consider only items for which session was closed
- May not reconvene in open within 12 hours, unless previously noticed
- Actions must be recorded & treated as public records

Voting & Records

- Member may require recording of individual votes
- Motion to go into closed session & individual votes must be recorded
- All motions & votes must be recorded, preserved & made available to the extent prescribed under the Public Records Law

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Open Meetings Issues

- Avoid unintended & illegal meetings
  - When tests are met
  - Presence at another body's meeting
  - Telephone calls
  - Walking quorums
  - Use of email
  - Unnoticed items & improper closed session
  - Adequate room for crowd expected
- Protect yourself

Site Visits (permits & applications)

- If a "meeting"
  - Notice
  - Open to public
- *Ex parte* problems
- Limit discussion; place evidence in the record
- Alternatives?
  - Good record
  - Diagrams, videotapes, photographs

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OML Penalties; Enforcement

- $25--$300 personal liability for forfeiture; no reimbursement
- Court orders to ensure compliance; an action in violation of the open meetings law can be voided by court, if in the public interest
- Enforced by DA, (AG); if DA does not commence the action, the complainant may

OML References

- Local Government Center Fact Sheet #1. Go to http://www.uwex.edu/lgc/ and click on "Publications"
- Department of Justice Compliance Guide. Go to http://www.doj.state.wi.us/ nd click on "Open Meetings & Public Records" in the left margin

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Note on Public Records Law

- This law applies to plan commissions & BOAs
- Voting records discussed above under Open Meetings Law
- The secretary or clerk should be the designated custodian to maintain records & respond to requests
- Records generally open to public inspection & copying, unless statute, common law or application of balancing test allows closure

Public Records Law References

- Local Government Center Fact Sheet #7. Go to http://www.uwex.edu/lgc/ and click on "Publications"
- Department of Justice Compliance Outline. Go to http://www.doj.state.wi.us/ and click on "Open Meetings & Public Records" in the left margin

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Ethics & Conflicts of Interest

- Code of Ethics for Local Officials (secs. 19.42, 19.58, 19.59, *Wis. Stats.*)
- Private interests in public contracts (sec. 946.13, *Wis. Stats.*)

Code of Ethics for Local Officials ch. 19, Wis. Stats. General Prohibition

- "Local public official" can't use office to obtain private gain for...
  - his/her own benefit
  - benefit of "immediate family" member, or
  - benefit of an "organization" with which he/she or such family member is "associated"

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Definitions

- "Local public official" includes
  - elected local officers
  - county administrator or coordinator
  - city or village manager
  - appointed local officers and employees who serve for a definite term (e.g., PC, BOA members)
  - officers and employees appointed by governing body, or executive or administrative head, serving at pleasure

- "Local public official" does not include
  - independent contractors, or those officers ...
  - appointed to indefinite terms, removable for cause

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- "Immediate family" means
  - spouse
  - relative by marriage, lineal descent or adoption who receives more than 1/2 support from official or who contributes 1/2 or more of official's support
- "Organization" is broadly defined
  - includes non-profits
  - does not include governmental units

- "Associated" means that individual or immediate family member is
  - director, officer, trustee, authorized rep or agent of the organization; or
  - owns or controls 10% or more of equity.
  - Note that employees are not covered, unless they fall under another category.

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Enforcement

- The code of ethics for local officials is enforced by the district attorney; if the DA does not prosecute, complainant may request AG to do so
- Violation subject to a (civil) forfeiture of up to $1000. Intentional violation is a misdemeanor (a crime), punishable by a fine of $100-$5,000, jail not exceeding a year, or both. (Additional provisions apply to "pay-to-play" violations.)
- The DA may also seek court orders, e.g. an injunction, to enforce the law

Accepting Gifts

- Can't accept gifts given to you because you're a public official, unless of insubstantial value
- Can receive gifts unrelated to public office
- Best to politely refuse & explain. Can turn over to unit, if useful, or donate to charity with which official and family member are not associated. (See "Disposition and reporting of gifts." Wisconsin State Ethics Board guideline "Eth 235.")
- Insubstantial" value not defined in statutes

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Business Meals

- Should not accept free meals from potential contractors or others dining you because of your public office.
- If it's for the unit's business, you can pay & seek reimbursement from the unit under its guidelines.

Conferences

- If attending a conference as a local official, you may accept refreshment & entertainment approved by sponsor.
- It's not proper to accept refreshments & entertainment in hospitality suites not part of the conference.

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Transportation & Services

- Code of ethics prohibits receiving, if of more than nominal value
- It's a felony to accept free or discounted
  - transportation
  - traveling accommodation
  - or communication services
  - for which the supplier would normally charge

Recent Prohibition— "Pay to Play"

- Created in 2003 Act 39; sec. 19.59(1)(br)
- Local official/candidate may not directly or by agent use office regarding a matter in exchange for another person providing or refraining from providing
  - a political contribution,
  - any service
  - or other thing of value

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- for the benefit of
  - a candidate,
  - a political party,
  - any person who must register under campaign finance law, or
  - for any person who makes a "communication" that refers to a "clearly defined" local elected official or candidate for such office

Contracts

- Selling goods, equipment, land, services to the local unit ...
  - is permissible
  - but must abstain (no official involvement)
  - & beware of $15,000 limit
- $15,000 limit is from felony statute (sec. 946.13)
  - You may have a private interest in public contracts, if you abstain &
  - total annual receipts & disbursements under all contracts can't exceed $15,000

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Sec. 946.13--Private Interests in Public Contracts

(complements sec. 19.59, local ethics code)

- May be violated even if you abstain!
- By having official authority re contract, private action to bid or enter into contract will violate statute
- Unless an exception applies--e.g., $15,000 annual limit on total contract amounts

Providing Services to Local Unit

- You may be an independent contractor with your local unit--supply own tools, equipment & exercise responsibility over work
- Must abstain from official involvement
- Beware $15,000 limit

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Contracts Involving Family, Associated Organizations & Employer

- Can't vote or act officially on contracts involving your immediate family & organization with which you are associated
- Lots of cracks due to definitions
- Abstain from voting on contract with your employer
- May abstain based on appearances
- Beware $15,000 limit if you have any interest

Making Fair Decisions

- Developing policy
- Applying the law

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Developing Policy

- Developing & amending
  - Plans
  - Ordinances
  - Other policies
- Should be rational, objective, informed & made with public involvement

- Code of ethics for local officials & other statutes may not apply or applicability may be unclear (e.g., ordinance amendment not covered by that code)
- Common law may prohibit official involvement by a body member on a policy matter if
  - the member has a personal interest not shared by others similarly situated, or if
  - the effect of the action is significantly different for the member than on others affected

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- Rezoning example
  - Rezonings are in a grey area.
  - Plan commission member would not vote on next door neighbor's rezoning.
  - But if rezoning is for a major project, and commission member is a member of a similarly-affected class, voting is probably o.k.

Applying the Law (permits & approvals)

- Known as "quasi-judicial"
  - When general law is applied to specific fact situations by a body
- Examples
  - Variances, administrative appeals
  - Conditional use permits
  - Land divisions
  - (Rezonings viewed as legislative, but…)

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- Ethics & contracts laws (above) provide a threshold
- Due process & fairness also apply—stricter standards
- Abstain if you have a conflict based on
  - Personal interest
  - Interest of a family member
  - Interest of a business or organization you're associated with

- Abstain if you are not impartial with regard to the applicant or the issue, although it is permissible to have an opinion on a matter.
- BOA alternates (2005 WI Act 34)
  - Recent law *requires* county and municipal BOA's to have 2 alternates
  - Have alternate lined up if you will be abstaining

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- Examples
  - In one case the BOA chair called the standard a loophole in need of closing and disparaged the applicant. *Marris v. City of Cedarburg*, 176 Wis. 2d 14 (1993).

  - In a recent case a planning body member's letter in the record in support of a CUP applicant showed "an impermissibly high risk of bias." *Keen v. Dane County Bd. of Supervisors*, 269 WI 2d 488 (Ct. App. 2004). But an unrelated prior business transaction with the applicant did not disqualify another member.

  - Remedy is to send the matter back to the body to be reheard without the biased member's participation.

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- Make decisions based on applicable legal standards & evidence in the record
- Avoid trying to "get" someone
- Avoid comments showing bias
- Avoid *ex parte* contacts
- Note: there are lots of grey areas. Therefore, anticipate these issues and prepare in advance.

Ex Parte (outside) Contacts

- Personal contact: politely
  - explain problem
  - ask to submit for record
  - ask to appear at public hearing
- Receipt of information
  - place in the record
  - decide if need to abstain

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To abstain or not?

- Anticipate & look into the issue; get necessary advice
- If minor & plan to proceed
  - note for record
  - see if objection by party or anyone present
  - problem: absent persons can appeal to court
- Consider abstaining if you keep wondering

Abstentions/"Recusals"

- If abstain
  - It's more than just not voting
  - Also means not acting in *official* capacity by
    - providing information
    - discussing the matter
    - sitting at commission table
- Minutes must reflect
  - Absence or
  - abstention/recusal

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Ethics & Conflicts of Interest References

- State Ethics Board publications (e.g., Eth 219, 235, 240) and links. Go to http://ethics.state.wi.us/.
- Local Government Center FAQs paper

Liability Protection

- Notice of claim for damages cases under state law required
- Liability limits
  - $50,000 per cause of action for damages
  - $250,000—if motor vehicle involved

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- Immunities
  - quasi-legislative
  - quasi-judicial
  - civil rights-limited
  - for public policy reasons

- Indemnification for damages
  - Official covered if acting within scope of duty
  - Legal representation covered
  - Official must inform local unit & cooperate

General Reference Note

- The Center for Land Use Education at UW-Stevens Point has on-line plan commission (2002) and BOA (2006) handbooks

- Go to http://www.uwsp.edu/cnr/landcenter/ and click on "Publications"

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PRIVATE INTEREST IN OFFICIAL ACTION

The Wisconsin Legislature recently enacted changes to the State Ethics Code which imposed certain legal requirements upon local public officials. These requirements are statewide in nature and are in addition to any local ethics code adopted by the municipality. The Wisconsin Ethics Board is charged with interpreting the provisions of that Code. In response to this, the Wisconsin Ethics Board has drafted and distributed certain statements regarding the Code in an attempt to explain the provisions of the same.

A public official really has two roles, those roles being the role as a public official and the role of a private individual. The state law impacts upon the official's actions in both of these roles.

According to the Wisconsin Ethics Board, the public official should not, in an official capacity, participate in or perform any discretionary action with respect to the making, grant or imposition of an award, sanction, permit, license, contract, offer of employment or agreement in which the official has a private financial interest, either direct or indirect. This also applies to a business or organization with which the official is associated. Section 19.59, Wis. Stats., expands this restriction to include not only the official but also members of the official's immediate family. Furthermore, these restrictions extend to not only a financial interest but also the provision of anything of substantial value or the production of a substantial benefit. The State Ethics law, therefore, goes beyond mere financial gain and includes any substantial benefit. When acting in an official capacity, therefore, a public official must not participate in or perform any discretionary action which might provide a financial gain or substantial benefit, either direct or indirect, to the official, a member of his immediate family or a business or organization with which the official is associated.

The Wisconsin Ethics Board has provided certain explanatory opinions to clarify some of the above-noted provisions. For example, according to the Wisconsin Ethics Board, the word "associate", when used in connection with a "business" or "organization" refers to an organization of which an individual or a member of the individual's household or immediate family is an officer, director, fiduciary, authorized representative or owner of a 10% or greater interest. According to the Ethics Board, an individual is not associated with an organization merely because the individual is a member or employee of an organization or business. In other words, a public official, when acting in an official capacity, should refrain from participating in or performing a discretionary action which would provide a benefit to a business or organization only if that public official is an officer, director, fiduciary, authorized representative or owner of 10% or greater interest in the particular business or organization in question. Otherwise, there is no restraint upon official action unless restrained under some other provision of the Ethics Code.

The Wisconsin Ethics Board has also provided an opinion regarding the creation or modification of policy. According to the Ethics Board, a public official <u>may</u> participate in either a proposal or action on legislation, the promulgation of a rule, or the issuance of a general policy, even though the above-noted actions will affect the official, a member of his immediate family or an organization with which the official is "associated", as long as:

a. the official's action affects a whole class of similarly-situated interests,

b. neither the official's interest nor the interest of a business or organization with which the official is associated is significant when compared to all affected interests in the class, and

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c. the official's actions effect on the interests of the official or of the related business or organization is neither significantly greater nor less than upon other members of the class.

According to the Ethics Board, then, a public official, acting in an official capacity, may participate as noted above as long as the above-noted criteria are all satisfied. If there is a question as to whether the above-noted criteria are satisfied, of course, then the official should take a conservative approach and refrain from participation.

If a public official is required to withdraw from participation in a particular matter, it is the opinion of the Ethics Board that the official should leave that portion of the meeting involving discussion, deliberations or votes related to that matter. In other words, it is not enough that the official remains silent, but rather the official should actually physically leave the room for the entire time that the matter is before the Board. According to the Ethics Board, the remaining members of the public body may then review the matter and take whatever action is appropriate. Furthermore, whenever a public official does withdraw from the room, the minutes of the public body should reflect the member's absence.

When acting in a private capacity, a public official should not apply for, negotiate or bid for or receive any award, sanction, permit, license, contract, offer of employment or agreement in which the official has a private financial interest, direct or indirect. As noted, this would also extend to any receipt of a substantial benefit or anything else of substantial value. These restrictions only apply only if the public official is authorized, in the capacity as a public official, to participate in the above-noted award, etc. This applies even if the official does not actually participate in the decision or exert any influence on his or her own behalf.

As an example, if a board has the authority to award a contract for a specific project, a public official sitting on that board should not apply for or bid for that particular contract. This applies even if the public official withdraws from consideration of the contract award and actually exits the room at the time that the contract is considered. The public official has already violated the ethics law by applying for a contract to be awarded by the public body that the public official is a member of.

The above-noted comments are meant only as a general overview of the Wisconsin Ethics law. Specific questions should be addressed on a case-by-case basis. Our office stands willing to assist in providing opinions for any specific situations.

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CODE OF ETHICS/CONFLICT OF INTEREST

"No Man Can Serve Two Masters"
Mathew 6:24

Public Officials owe an undivided loyalty to the public he/she serves - - The Public Official must not place himself or herself in a position that will subject him or her to conflicting duties.

I. CODE OF ETHICS FOR LOCAL GOVERNMENT OFFICIALS AND EMPLOYEES (§ 19.59, WIS. STATS).

A. Who Is Covered By The Code Of Ethics?

1. Elected local government officials (school board members, village trustees, county board members, town supervisors).

2. Appointed government officials (police and fire chiefs, school superintendents).

3. Public employees.

B. Prohibited Conduct.

1. **USE OF OFFICE FOR PRIVATE BENEFIT** No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the benefit of:

   a. The official;

   b. The official's immediate family (spouse, son, daughter); or

   c. An organization with which the official is associated.

2. **INFLUENCE OR REWARD** No local public official may solicit or accept from any person, directly or indirectly, anything of value if:

   a. It could reasonably be expected to influence the official's vote, actions or judgments; or

   b. It could reasonably be considered as a reward for any official action or inaction on the part of the local public official.

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3. **CONFLICTING INTERESTS AND USE OF POSITIONS FOR SUBSTANTIAL BENEFIT** No local public official may take any official action substantially affecting a matter in which the official, a member of the official's immediate family, or an organization with which the official is associated has a substantial financial interest.

4. No local public official may use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

C. Penalties.

1. Forfeiture of not more than $1,000 for each violation.

2. Legal or equitable relief.

3. Reasonable costs.

D. Prosecution.

The District Attorney upon the complaint of any person may prosecute violators. The Attorney General may get involved if the District Attorney refuses to take action

E. Advisory Opinion.

Public officials/employees may make a written request for a confidential advisory opinion from the Ethics Board or an attorney for the local governmental entity.

II. CONFLICTS OF INTEREST (§ 946.13, WIS. STATS.)

Any public official or public employee who does any of the following is guilty of a Class I felony punishable by a fine of up to $10,000, imprisonment for up to three years and six months, or both.

A. Private Conduct.

In his or her private capacity, negotiates or enters into a contract in which he or she has a private pecuniary interest direct or indirect, if at the same time he or she:

1. Is authorized to participate in the making of a contract; or

2. Is required to perform in regard to that contract some official function requiring the exercise of discretion.

B. Public/Official Conduct.

In his or her official capacity, participates in the making of a contract if he or she:

1. Has a direct or indirect pecuniary interest; or

2. Performs some function requiring the exercise of discretion on his or her part.

C. Exceptions.

1. Contracts that do not exceed $15,000 annually;

2. Contracts with a corporate body in which a public officer or public employee holds no more than two percent (2%) of outstanding capital stock;

3. Contracts including the deposit of public funds in public depositories;

4. Contracts for the issuance of tax titles or tax certificates.

D. Remedies.

1. A contract entered into in violation of § 946.13, Wis. Stats., is void and the political subdivision in whose behalf the contract was made incurs no liability for the contract.

2. If the public body declares the contract void, other parties to the contract may attempt to hold the interested public official/employee personally liable for repayment of any money obtained under the void contract.

III. COMMON LAW DOCTRINE OF INCOMPATIBILITY OF OFFICE.

A. Purpose.

Prohibits an individual from holding two offices or an office and a position where the conflicting nature and duties of the offices or office and position make it impossible for the person to perform both with undivided loyalty.

B. Application.

Where there are substantial potential areas of conflict between two offices or an office and a position of public employment, the common law doctrine of incompatibility of office precludes the same person from holding both.

C. Determining Applicability.

Two offices or an office and a position are incompatible if there are substantial potential conflicts of interest between the duties of the offices or positions, such as salary negotiations, supervision and control of duties, appointment, removal or discipline and the obligation to the public to exercise independent judgment.

D. *Otradovac v. City of Green Bay*, 118 Wis.2d 393 (Ct. App. 1984).

E. Remedies.

1. Vacate the first office.

2. Choose office or position.

IV. EXAMPLES

1. An accounting firm sponsors a two-day seminar/golf-outing (day 1-seminar and day 2 – golf outing) and invites members of a city's common council to attend.

2. A Lawyer has tickets to a Packer game and offers them to a County Board member.

3. A School Board Member's Spouse (Son/Daughter) is employed by the School District as a Teacher.

4. The Director of Public Works is elected to the Village Board.

5. School Board member is a retired teacher who substitute teaches/receives health insurance benefits.

AGENDA

Wisconsin Government Accountability Board

For legislators, legislative employees, and executive branch officers elected in state-wide elections

Officials' receipt of food, drink, favors, services, etc.

ITEMS SPECIFICALLY AUTHORIZED

Consistent with the statutes administered by the Government Accountability Board, ***an elected state official or legislative employee*** **may** ***accept and retain*****:**

FROM ANY ORGANIZATION (EVEN A LOBBYING ORGANIZATION):

a. **EXPENSES FOR TALKS AND PROGRAMS.**
Payment or reimbursement by a meeting's sponsor of expenses an official or employee incurs for presenting a talk or program about state issues (including meal and travel costs)[1] [§ 19.56(3)(a)];

b. **ITEMS AND SERVICES MADE AVAILABLE TO THE GENERAL PUBLIC ON THE SAME TERMS.**
Food, drink, transportation, lodging, items, and services at the same price, if any, charged others, when each of the following applies:
(i) the admission, items, or services are available to anyone who wants them at the same price;
(ii) the official is not given a preference or advantage in obtaining the items; and
(iii) there is no offer or notice of the event, item, or service directed to an official that would confer an advantage to the official. [§13.625(2), *Wisconsin Statutes*];

c. **FOOD AND DRINK THAT THE OFFICIAL PURCHASES AT AN EVENT INTENDED FOR AND CONDUCIVE TO THE DISCUSSION OF STATE GOVERNMENTAL PROCESSES, PROPOSALS, OR ISSUES.**
Food and drink that an official purchases at an event intended for and conducive to the discussion of state governmental processes, proposals, or issues if the official pays the highest of (i) the price charged others; (ii) the food and drink's true value, or (iii) the sponsor's cost; [2]

d. **EXPENSES PROVIDED BY OR TO THE STATE.**
Food, drink, transportation, lodging, or payment or reimbursement of costs that the official can clearly and convincingly demonstrate are provided by or on behalf of the state and primarily for the state's benefit, not for a private benefit[3] [§ 19.56(3)(c)]; and

e. **INFORMATION.**
Informational materials of unexceptional value [§§ 13.625(6t) and 19.45(2)].

FROM AN INDIVIDUAL OR ORGANIZATION OTHER THAN A LOBBYIST OR LOBBYING ORGANIZATION:

f. **ITEMS AND SERVICES UNRELATED TO PUBLIC POSITION**.
Food, drink, transportation, lodging, items, and services which the recipient can clearly demonstrate are received for a reason unrelated to the recipient's holding or having held *any* public position [§§ 19.45(3m) and 19.56(3)(b), *Wisconsin Statutes*];

g. **ITEMS AND SERVICES FOR WHICH THE RECIPIENT PAYS THE FULL COST**.
Food, drink, transportation, lodging, items, and services if the official pays either (a) the price charged all others, if the event is open to the general public, or (b) the highest of (i) the price charged others; (ii) the item's or service's true value, or (iii) the furnisher's cost [§§ 19.45(3m) and 19.56(3)(b) *Wisconsin Statutes];*

h. **ITEMS, SERVICES, AND REIMBURSEMENTS FROM CAMPAIGN COMMITTEES.**
Services, items, and reimbursements from campaign committees as permitted and reported under campaign finance laws [§ 19.56(3)(d)].

See other side

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1 In addition to expenses, an elected state official may also accept reasonable compensation for a talk from the organizer of an event, as long as the organizer is not a lobbyist or lobbying organization.

2 Minutes, open session, Ethics Board, March 8, 1995.

AGENDA

Wisconsin Government Accountability Board

For legislators, legislative employees, and executive branch officers elected in state-wide elections

Restraints on officials' receipt of food, drink, favors, services, etc.

STATUTORY RESTRAINTS

Except as noted on the other side of the page, ***an elected state official or legislative employee should* not *accept:***

1. **TRANSPORTATION, TRAVELING ACCOMMODATIONS, OR COMMUNICATION SERVICES.**
   Discounted transportation or traveling accommodation for which the supplier would usually charge [§946.11; Art. 13, §11, Const.].
2. **ITEMS OR SERVICES FROM LOBBYISTS.**
   Food, drink, transportation, lodging, employment, or any other thing of pecuniary value from a lobbyist[4], either directly or through an agent [§ 13.625(1)-(3)];
3. **ITEMS OR SERVICES FROM ORGANIZATIONS THAT EMPLOY LOBBYISTS.**
   Food, drink, transportation, lodging, employment, or any other thing of pecuniary value from an organization that employs a lobbyist unless also made available to the general public on like terms and conditions[5] [§ 13.625(2)]; and
4. **FOOD, DRINK, OR TRAVEL OFFERED FOR A REASON RELATED TO HOLDING ANY PUBLIC POSITION.**
   Food, drink, transportation, or lodging offered for a reason related to the recipient's holding or having held *any* public position. [§§ 19.45(3m) and 19.56(3)(b)];
5. **OTHER ITEMS OR SERVICES OFFERED BECAUSE OF STATE POSITION.**
   Any item or service of more than nominal value offered because of the person's holding a state public office [§ 19.45(2), *Wisconsin Statutes*];[6]
6. **REWARDS FOR OFFICIAL ACTION.**
   Anything of value that could reasonably be considered as a reward for the official's action or inaction [§ 19.45(3), *Wisconsin Statutes*];
7. **ITEMS AND SERVICES THAT COULD INFLUENCE OFFICIAL ACTION.**
   Anything of value that could reasonably be expected to influence the state public official's vote, official actions or judgment [§ 19.45(3), *Wisconsin Statutes*].

See other side ☞

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3 Normally, in the case of a legislator, the certification of the committee on organization or the presiding officer of the appropriate house of the legislature that attendance at the event and the receipt of items is primarily for the benefit of the state, not for a private benefit.

4 Unless the lobbyist and recipient are married to each other, are engaged to be married, reside in the same household, or are close relatives [§ 13.625(6)].

5 In the case of an official who also holds an *elected* position in a local government that employs a lobbyist, the local government may furnish the individual anything it normally furnishes to its other similarly situated elected officials. [§ 13.625(6g)(a)] If an official is *appointed* to a local government position compatible with the state position, the local government may furnish the individual a per diem or reimbursement of expenses up to the amount furnished to its other similarly situated elected officials. [§ 13.625(6g)(b)]

6 For more detailed information about **attending conferences, seminars, and receptions**, see Government Accountability Board Guideline Eth 1222.

AGENDA

Wisconsin Government Accountability Board

For local officials and citizens

Citizens' guide to standards of conduct for local government officials

Wisconsin Statutes establish standards of conduct for all of our state's governmental officials, including local officials. These legal requirements apply to elected and key appointed officials of our state's counties, cities, villages, towns, school boards, and sewerage and other special districts.[1]

Standards of conduct. In general, a local public official should not:

- ***ACT OFFICIALLY IN A MATTER IN WHICH THE OFFICIAL IS PRIVATELY INTERESTED***
- ***USE GOVERNMENT POSITION FOR PRIVATE FINANCIAL BENEFIT***
- ***ACCEPT TRANSPORTATION, LODGING, FOOD, BEVERAGES, OR ANYTHING ELSE OF MORE THAN TOKEN VALUE OFFERED BECAUSE THE OFFICIAL HOLDS A GOVERNMENT POSITION***
- ***SOLICIT OR ACCEPT REWARDS OR ITEMS OR SERVICES LIKELY TO INFLUENCE THE OFFICIAL***
- ***OFFER OR PROVIDE INFLUENCE IN EXCHANGE FOR CAMPAIGN CONTRIBUTIONS***
- ***BE FINANCIALLY INTERESTED IN A GOVERNMENT CONTRACT THE VALUE OF WHICH EXCEEDS $15,000 AND FOR WHICH THE OFFICIAL IS AUTHORIZED TO TAKE SOME DISCRETIONARY ACTION (EVEN IF THE OFFICIAL ABSTAINS)***[2]

Financial disclosure. Some local governments make available a list of the employers and financial interests of their government's officials.[3] Most do not. The decision to collect this information is one that the legislature has left to each unit of government. To learn if your county, municipality, or town provides this information, ask your county, municipal, or town clerk.

Addressing issues before they become problems. To deal with a conflict between a private interest and governmental responsibilities before an official takes a vote or enters into discussions on a matter, the official can either resolve the matter by relinquishing the private interest or mitigate the problem by temporarily withdrawing from exercise of governmental responsibilities. By seeking advice beforehand, an official can determine whether statutory restrictions permit the official to participate in a matter or to accept items or services of value.

Ordinarily, the legal advisor for the unit of government of which the official's position is a part is in the best position to advise the government official about a matter involving ethical standards of conduct. Sometimes, a statewide association of local governments will advise an official.[4]

See other side

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[1] §19.59, *Wisconsin Statutes*.

[2] §946.13, *Wisconsin Statutes*. See text of statutes for exceptions to general rule.

[3] Among the local governments requiring their officials to identify information about their sources of income and investments are the cities of Madison and Milwaukee and the counties of Dane, Milwaukee, and Wood.

[4] Examples include Wisconsin Counties Association, League of Wisconsin Municipalities, Wisconsin Towns Association, Wisconsin Association of School Boards.

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If, after studying the legal standards and gathering the pertinent facts, the legal counsel is uncertain about what advice to offer, the lawyer may direct a letter to the Wisconsin Government Accountability Board stating the pertinent facts and law, tentative conclusion, and basis for it, and ask that the Wisconsin Government Accountability Board issue an opinion concerning the interpretation of §19.59, the Code of Ethics for Local Government Officials, Employees and Candidates. Written requests for advice are confidential. No member or employee of the Government Accountability Board may make public the identity of anyone requesting an advisory opinion or of persons mentioned in an opinion. Periodically, the Board publishes summaries of its opinions after making sufficient alterations to prevent the identification of the requestor and persons mentioned in the opinions. The *Statutes* do not authorize the Board to issue an opinion to a citizen or to an official or representative of a local government other than the local government's legal counsel.

Complaints. If you believe that an official of a county, city, village, town, school board, or special purpose district has violated a standard of conduct that state law requires the official to observe, you may file a complaint with the district attorney for the county in which the activity occurred.

Your complaint should describe the pertinent facts succinctly. State that you swear or affirm that the information you are providing is true to the best of your knowledge, information, and belief. Have a notary or other person authorized to administer an oath witness your signature to the complaint. Deliver the complaint to the district attorney, in person, or by mail, or other appropriate way you find convenient.

Allow the district attorney a reasonable length of time to look into the matter. The district attorney may need several weeks to look into the facts and law in order to make a good decision about how to proceed.

In any event, if the district attorney has not filed a complaint or replied to you within 20 days of your filing a complaint with that office, you may send a copy of your complaint to the Attorney General's Public Integrity Unit[5], explaining that the district attorney, after considering your complaint for 20 days or more, has not begun an action against the person you complained about, and ask the Attorney General to enforce the complaint. If the Attorney General also declines to prosecute the matter, you will at least have the satisfaction that two law enforcement agencies have had the opportunity to review your complaint and act upon it. The Government Accountability Board cannot overturn the decisions of the district attorney or Attorney General or, independent of them, enforce standards of conduct for local government officials.

See other side

[5] You may file a complaint with the Public Integrity Unit by downloading a form from the Department of Justice's website and mailing it to Administrator Michael Bauer, Wisconsin Department of Justice, Division of Legal Services, 17 West Main Street, P.O. Box 7857, Madison, WI 53707-7857.

AGENDA

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WISCONSIN OPEN MEETINGS LAW

As your Municipal Attorney, I believe it is my obligation to advise you of your duties regarding Wisconsin's Open Meeting Law. Over the years my office has had extensive experience with this law. Our experience, regrettably, includes defense of municipalities and elected officials who have been accused of violating the law. We prefer to avoid those accusations, if it is possible to do so. Therefore, we regularly try to educate relevant personnel of the requirements of the law. With this objective in mind, I have prepared the following Memorandum. I hope that this will assist you in complying with Wisconsin's Open Meeting Law, in order to prevent inadvertent violations of the law, and to preserve good government. As always, I am available to describe these obligations in further detail, or to answer any specific questions you may have, on your request.

M E M O R A N D U M

The Wisconsin Open Meetings Law is found in Sections 19.81 through 19.98 of Wisconsin Statutes. In this memorandum I will discuss seven aspects of the law: (1) The general purpose of the law; (2) *Who* is subject to the law; (3) *What* is subject to the law; (4) Special rules for closed session; (5) Avoiding violations related to public comments; (6) Notice requirements; and (7) Penalties that apply for violations.

(1) The general purpose of the law.

The purpose of the law, in general, is to ensure citizens full and complete access to the affairs of government:

> "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 government business." (Section 19.81(1), Stats.)

This statement of purpose is very important, as courts refer to it often. The provisions of the Open Meetings Law are required to be interpreted broadly to accomplish this purpose. (Section 19.81(4), Stats.) In furtherance of this purpose, the state legislature requires that all meetings of governmental bodies be open to the public:

> "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." (Section 19.81(2), Stats.)

As a general rule, you ought to presume in every case that the public is entitled to receive full and complete information (including prior notice, and ability to attend) anytime a governing body engages in

government business, unless a specific exception applies. I will define particular applications of this general rule in the remaining sections of this Memorandum.

(2) Who *is subject to the law.*

The law applies to all "governing bodies". This term is specifically defined in the law, and it is defined very broadly to include much more than only the primary governing body:

> "Governing Body" means any local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinances, rule or order... or a formally constituted subunit of any of the foregoing ... (Section 19.82(1), Stats.)

It also applies to any committees, park commissions, zoning boards of appeals, boards of review, and planning commissions, and you may have other committees or boards that may be subject to the law. If you have a question regarding a particular entity is a "Governing Body" that is subject to the law, please advise and I will attempt to answer that question for you. Generally, I advise municipal officers, if they appoint advisory committees such as a building committee or salary review committee, these committees are subject to the law also because they are created by order of the Chief Presiding Officer and/or Governing Body.

(3) What *is subject to the law.*

The law applies to "meetings" of governing bodies. This also is a term that is defined in the law, and is defined very broadly. This term includes the kind of activity that you normally think of as meetings, such as your regular meetings, but it also can include much more, as I will discuss below. The definition is:

> "Meeting" means the convening 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 the 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. The term does not include any social or chance gathering or conference which is not intended to avoid this Subchapter ... (Section 19.82(2), Stats.)

Wisconsin courts have interpreted this definition as having two components, one related to purpose, and the second related to number. First the *purpose* of the gathering must be to engage in government business, be it discussion, decision or information gathering. Second, a sufficient *number* of members of the body must be present to determine the outcome of the matter in consideration. (*Newspapers Inc. v. Showers*, 135 Wis.2d 77 (1987).) If the purpose and number requirements are met, it is a meeting that is subject to the open meetings law.

Before I analyze this further, note first that this definition contains a presumption that any time one-half or more of the members of a governmental body are present, they are presumed to be meeting for the purpose of exercising their governmental duties. This means that, if the governing body's activity were challenged, the person making the challenge only needs to allege that more than half of the governing body is present; upon that allegation (assuming one half or more were actually there) the governing body would have to try to prove to the court that it was not exercising the responsibilities, authority, power or duties of the office, at all, at the time. This is often a difficult burden to meet.

Moreover, the case law and Attorney General opinions that have interpreted the law result in even more stringent requirements for you to follow. I will discuss three such matters, regarding a "negative quorum", "walking quorum" and the applicability of these rules to telephone and e-mail conversations.

(a) <u>Negative quorum.</u>

In many situations, the number of members who may control the outcome of particular issues may be less than a quorum of the governing body. For example, some issues require a two-thirds vote to pass. If two thirds vote of a seven member body is required, then 5 votes are needed to pass. In that situation, three votes against would control the outcome (i.e. a "negative quorum"). Therefore, on issues that are subject to a two-thirds vote, a gathering of three members is subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

Likewise, as to matters that are subject to a three-fourths vote of the governing body, two members of a seven member governing body can control the outcome, because six votes are needed to pass. On those issues, communication between two members is subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

Some governing bodies, and numerous committees, have fewer than seven members, so the above-described analysis will need to be modified in accordance with the number of members on the Board or committee. For example, if there are only six members, then three votes against any motion would prevent passage of the motion, regardless of whether a simple majority or two-thirds vote is required. Because three votes would control the outcome, a gathering of three members would be subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue.

To complicate matters even further, in some situations, often less than the full membership of the governing body will make the final decision, as some members may be absent or may recuse themselves. This affects the numbers that apply to the negative quorum. For example, suppose a governing body consists of seven members, but one of the seven member board will not be taking part in the decision. In that situation, three members of the six who can vote on the issue can control the outcome, even if only a simple majority is required to pass. A gathering of three members is then subject to the open meetings law, if it is for the purpose of discussion, decision or information gathering related to that issue. To take this point even further, as few as four members may make the ultimate decision, because it is possible that the bare minimum will take part in any given issue, which is four of the seven member board (assuming four is a quorum, which is usually the case with a seven member board). This means that as few as two members can in fact be a controlling number of votes.

This leads to a complicated and somewhat unpredictable analysis that must be made in every case to determine whether the open meetings law applies in particular situations. As a practical matter, if you are unsure of the number of votes that may control the outcome in a particular situation, obviously the prudent course of action is to avoid discussing governmental business outside of a properly noticed meeting, even with only one other member of the governing body.

(b) <u>Walking quorum.</u>

It is possible that the law may also be violated by a series of gatherings, each one of which includes fewer than a controlling number of members. For example, if three persons can control the outcome of the matter, you may violate the law if you are a member of a governing body and you discuss the issue with one member, and then later discuss the issue with a third member. That series of discussions could constitute a "meeting" of three members, even though not all three were present at the same time. (*Showers*, 135 Wis.2d at 100.) The courts refer to this as a "walking quorum", and subject it to the same notice requirements that apply to other meetings of governing bodies, to ensure that the purpose of the open meetings law is not violated.

(c) Telephone.

The attorney general has given an opinion that even a telephone call that is made for the purpose of engaging in government business can be a meeting, if a controlling number of members participate in the call. The attorney general has also concluded that a series of telephone calls can result in a "walking quorum", which constitutes a meeting that is subject to open meetings law requirements. Telephone calls, therefore, are indistinguishable from face-to-face conversations.

(d) E-mail.

In recent years, the technological changes that have brought e-mail into our daily lives have resulted in new concerns about whether the use of e-mail constitutes a meeting, for purposes of the Wisconsin Open Meetings Laws. This technology was certainly not contemplated when the laws were created, and therefore it is difficult to apply these laws in this context. At the same time, there has been a consensus growing on this issue over recent years among practitioners of municipal law, guided in part by the Wisconsin Attorney General's Office, and I will turn to that emerging interpretation next. (Note that for convenience I will use the word "quorum" in the following analysis, but I mean for that to also include a "negative quorum" and a "walking quorum," as discussed above.)

Analysis of E-mail Issue. Two bodies of law come together in this e-mail issue. One is the Wisconsin Public Records Law, and the other is the Wisconsin Open Meetings Law. As to the first of these issues, keep in mind that e-mail messages relating in any way to governmental business are all public records. You are obligated to maintain those public records when you receive them for a period of seven years unless local ordinances have been created to establish a different retention period. You should never delete an e-mail message that relates to governmental business, therefore, unless you are sure that the retention period has lapsed.

The *open meetings* issue arises when e-mail is used more like a conversation than it is used like a letter. Frequently these conversations on e-mail will go back and forth and essentially are indistinguishable from a conversation. If such a communication involves a quorum of the governmental body, it is likely a violation of the law.

I find the Attorney General's description of these open meetings issues to be particularly persuasive, and I believe this analysis is likely to be followed by a court. In the "Wisconsin Open Meetings Law Compliance Guide, 2009" published by the Wisconsin Department of Justice, Office of the Attorney General, the Attorney General gives the following guidance on this issue:

> Because the applicability of the open meetings law to such electronic communications depends on the particular way in which a specific message technology is used, these technologies create special dangers for governmental officials trying to comply with the law. Although two members of a governmental body larger than four members may generally discuss the body's business without violating the open meetings law, features like "forward" and "reply to all" common in electronic mail programs deprive a sender of control over the number and identity of the recipients who eventually may have access to the sender's message. Moreover, it is quite possible that, through the use of electronic mail, a quorum of a governmental body may receive information on a subject within the body's jurisdiction in an almost real-time basis, just as they would receive it in a physical gathering of the members.

E-mail to a Quorum of the Governmental Body. I suggest, therefore, that e-mail message should not be sent back and forth among a quorum of the governmental body. The same can be said regarding copying e-mail messages to a quorum of a governing body, and forwarding e-mail messages to a quorum of a governing body.

The key issue is not whether a quorum of members have actually participated in the discussion by saying something, the issue is whether a quorum of the members have been privy to the discussion as it is taking place. If it appears to be an ongoing discourse between only two individuals, but the messages are copied to the full governing body, this can certainly have the appearance of a conversation that involves the full board. Consider this: What is the purpose of copying the other members if it is not to involve the other members in the conversation? If the purpose in fact is to involve the other members in the conversation, this should be done only at a properly noticed meeting.

Easy Target. As a practical matter you need to be aware that you can easily become a target and could be exposed for violating these laws by media companies which closely watch these issues. Email leaves a trail that is easy to follow. Numerous articles have appeared in the Milwaukee Journal Sentinel from time to time, which show how use of e-mail could come back to haunt you. I hope that you never have to face the scrutiny and ridicule that can arise in that regard.

Practical Suggestions for E-mail. I realize that the foregoing analysis leaves you with some rather vague rules of law. Unfortunately, that is the state of the law as it exists today. My recommendations to you are as follows:

- <u>One-way Communication</u>. I recommend that e-mail be used, if it is used, for one-way communication only. If you receive a one-way communication that was delivered to a quorum of the governmental body, do not “reply all” to it, and do not forward it to other governmental body members. If you have thoughts you would like to express regarding the matter, I recommend that you follow your procedures for placing that issue on an upcoming meeting agenda.

- <u>Keep Private conversations private</u>. From time to time you may engage in e-mail conversations back and forth with municipal staff, or a single

member of the governing body. In those circumstances, you should not expand that conversation to include other members of the governing body.

- Disclaimer. When you send an email in your official capacity, I recommend that you add a disclaimer to the end which prohibits further distribution of the e-mail message. While that disclaimer might not necessarily prevent a recipient from forwarding it, if ultimately an open meetings violation occurs as a result of your email, the disclaimer may shield you from liability for having sent it initially. The disclaimer that I recommend could read substantially as follows:

  > *This message originates from_____ . It contains information that may be confidential or privileged and is intended only for the individual named above. It is prohibited for anyone to disclose, copy, distribute or use the contents of this message without permission, except as allowed by the Wisconsin Public Records Laws. If this message is sent to a quorum of a governmental body, my intent is the same as though it were sent by regular mail and further distribution is prohibited. All personal messages express views solely of the sender, which are not attributed to the municipality I represent, and may not be copied or distributed without this disclaimer. If you receive this message in error, please notify me immediately. You could go even further than this, for that matter.*

  One of our clients routinely provides the following disclaimer, which I offer to you as a second example for your consideration:

  > *Open Meetings Disclaimer: The email below contains the thoughts, opinions, and commentary of the author alone. It is intended as a one-way transmission of a thought, idea, or information related to my role as municipal official or issues within the municipality, but is not intended to serve as an invitation for reply, rebuttal, discussion, debate or responsive commentary. Please do not respond to this email as it is the author's intention to utilize the informality and convenience of this electronic message while simultaneously avoiding any and all violations of the Wisconsin Open Meetings Law contained in Section 19.81 of the Wisconsin Statutes or elsewhere within Wisconsin law, as applicable to this municipality as described in 66 Op. Att'y Gen. 237 (1977). Specifically, there is no intention on the part of the author to engage in or foster any "governmental business" as defined in State ex.rel. Newspapers v. Showers, 398 N.W.2d 154 (Wis. 1987). You are specifically requested to refrain from forwarding or "replying to all" with*

regard to its contents, so as to avoid the possible "walking quorum" proscriptions, including those considered in State ex.rel. Lynch v. Conta, 239 N.W.2d 313 (Wis. 1976). It is the author's motive and intent to comply with the overriding policy of the open meetings law - to ensure public access to information about governmental affairs. Your cooperation in accomplishing this end is most appreciated.

- Retention Policy. If you do not have a clearly established retention policy for e-mail messages, I recommend that you consider establishing one. This policy would apply to computers within the municipality, and also for any computer that you use for receipt or mailing e-mail communications relating to your official capacity. At a minimum, I suggest that all e-mail communications that you send or receive should be copied to the municipal Clerk so that the Clerk can maintain the record. If you have a particular reason why the message should not be sent to the municipal Clerk, keep in mind that you then have a larger responsibility for that record given that it will not be maintained by the Clerk. Please keep in mind that in general most public records are required to be retained for seven years, though there are exceptions, and there is a very intricate procedure to change record retention periods. You should contact us if you want to explore reduction of applicable records retention requirements.

- Use Discretion. One important difference between e-mail and an in-person discussion is that e-mail messages leave a trail which is open and available to the public. You need to keep this in mind at all times if you intend to use e-mail. The statement you may make over the telephone may not have any forethought and may be forgotten forever, but an e-mail message made without forethought can be located later, printed in the newspaper, used against you in litigation, and etc. Always keep in mind that your e-mailed messages might be broadcast to the world.

(4) Special rules for closed Session

As you know, you occasionally will have a lawful reason to meet in closed session. Closed session, however, is an exception to the general rule, which generally requires that meetings be in open session. Consider, first, therefore, what is meant by "open session":

> "'Open Session' means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times. ..." (Section 19.82(3), Stats.)

The phrase "open to all citizens at all times" is an unambiguous general prohibition against holding closed, or secret meetings. However, this does not necessarily require that meetings be held at the Municipal Hall. The attorney general has stated that governmental bodies may meet in private buildings, even private homes, if the location is reasonably accessible and properly noticed. However, if a private

building, such as the clerk's home is used, the public must be allowed to enter the home to observe the meeting.

Occasionally, you will face sensitive issues that you would like to discuss privately, without members of the public being present. Even so, you still must meet in open session unless there is an applicable statutory exemption which allows you to go into closed session. Section 19.85 of the Wisconsin Statutes describes all such lawful exemptions. One exemption, for example, is for conferring with legal counsel who will advise the governing body regarding strategy to be adopted regarding current or likely litigation, namely section 19.85(1)(g). Obviously, in that situation, the municipality would have an unfair disadvantage in the litigation if the opposing party could sit in and observe the municipality's legal strategies, and therefore the legislature created this statutory exemption to the open meetings law.

The statute contains several other specific exemptions, which arise out of similar concerns that the municipality's interests cannot reasonably be discussed or pursued in open session. Rather than attempt to summarize all of the lawful reasons for going into closed session, I merely wish to point out that there are only a few specific lawful reasons for going into closed session, which are all contained in section 19.85, Wisconsin Statutes. Whether closed session is appropriate must be considered on a case-by-case basis, often in consultation with counsel if you have questions regarding particular situations. Any doubts about whether a closed session is permitted must be resolved in favor of requiring an open session.

If you have a lawful basis for holding a closed session, the next issue is the several technical procedural requirements that apply. The governing body must first convene in open session. Thereafter, a motion may be made to go into closed session, which must then be seconded. Prior to voting on the motion, the presiding officer must publicly announce the nature of the business to be considered in closed session, and the particular statutory exemption which authorizes the closed session meeting, which must be recorded and reflected in the minutes. The motion must then be approved by a majority roll call vote, and the vote of each member must be recorded and reflected in the minutes.

The governing body may then exclude all members of the public from closed session. This includes the governing body's right to exclude the clerk, treasurer, assessor, municipal employees, etc., because they are not members of the governing body. However, if the governing body is a sub-unit of a parent governing body (e.g. a sub-committee of the governing body), then members of the parent body shall not be excluded from the meeting, unless the rules of the parent body provide otherwise. §19.89, Stats. I also do not encourage the governing body to exclude the clerk because minutes of formal actions taken in closed sessions should be recorded. If the governing body feels compelled to exclude the clerk for whatever reason, one of the governing body's members should be designated to take minutes of the meeting. The closed session need not be tape recorded nor must every word said be recorded in the minutes. Formal actions in closed session should be recorded.

You need to be careful that the people who are invited into closed session do not defeat your lawful basis for the closed session. For example, if you intend to go into closed session for competitive or bargaining reasons (19.85(1)(e)) you should not have the party you are negotiating with in the closed session. The intent is to prevent the party you are negotiating with from knowing your negotiation strategy. You cannot keep the matter secret from others if you let the ones hear it which the law protects you against.

During the closed session meeting, the only issue that may be considered is the specific issue that was announced by the chief presiding officer prior to going into closed session. When consideration of that matter is complete, the governing body then has two options, depending upon the contents of the meeting notice. If the notice of the meeting advised that the governing body may reconvene in open session, then the governing body may do so and proceed in open session to consider such matters as were properly noticed. On the other hand, if the meeting notice did not give notice that the governing body would reconvene in open session, then the governing body is prohibited from doing so, and they must adjourn.

Formal voting in closed session is generally discouraged, although occasionally it may be necessary to do so. In one reported case, the Court of Appeals commented that formal votes must be made in open session. *Shaeve v. Van Lare*, 125 Wis.2d 40 (Ct. App. 1985). Since that time, however, commentators including counsel for the Wisconsin League of Municipalities, have concluded that the Court of Appeals' comment in this regard was not a necessary part of the decision, and is probably not a requirement that need be followed in every case. I believe that there are times when a vote must be taken in closed session, rather than open session, because of confidentiality or competitive reasons that are an integral part of the closed session deliberation, and in those circumstances I recommend that you vote in closed session. Also, obviously, if you are prohibited from re-convening into open session, due to failure to notice that fact, then the vote to adjourn must be in closed session.

The minutes of the closed session, and the tape of the closed session if one was made, are public records, but access to these public record should be carefully considered by the records custodian. As with all public records, when a request for a record is received, the records custodian must perform a balancing test prior to releasing the record. If the reasons which justified going into closed session are still applicable, e.g. legal counsel discussed strategy regarding litigation in closed session and the litigation is continuing at the time of a public records request, then the reasons for preventing access will probably outweigh the public's interest in the record, and the custodian will not disclose the record. Once the litigation is over, however, the public's interest in the record may outweigh the reasons to prevent disclosure, and in that event the record must be released.

You should not expect that statements made in closed session are completely private, or that nobody will ever know what was said in closed session. Our courts have allowed litigants to pursue discovery against municipalities, in some limited situations, to find out what was said in closed session, e.g. in the case of *Sands v. Whitnall School District, 754 N.W.2d 439 (2008).* The court held "we conclude that Section 19.85 does not create a privilege shielding contents of closed meetings from discovery requests." This does not mean that all closed session information must be released whenever it is requested, or that it must be released during litigation. There is ample existing case law unaffected by this case, which often times would prevent the statements made in closed session from being disclosed, depending upon the circumstances existing at the time that the request is made. Even so, it is important to remember that you are conducting governmental business in closed session and you should conduct yourself appropriately in that regard, including exercising your best judgment and maintaining proper decorum. If you do so, there is really no cause for concern if at some time in the future, when there is no longer a need for confidentiality, the statements that were made in closed session might reach the light of day.

5) Avoiding violations related to public comments

The open meetings laws specifically allow a governing body to receive public comments at meetings. The law states, in relevant part:

> "The 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." (Section 19.84(2), Stats.)

Also, the governing body may discuss the public comments:

> "During a period of public comment under s. 19.84(2), a governmental body may discuss any matter raised by the public." (Section 19.83(2), Stats.)

Therefore, if proper notice is given, the governing body may "receive information from members of the public" and "discuss any matter raised by the public".

Several issues arise regarding this law, which I want to briefly address. First, keep the notice requirement in mind. You should not allow members of the public to speak at a meeting regarding matters that are not specifically included in the meeting notice, unless the meeting notice describes a period of public comment.

Second, you must not take action on any matters that arise during this public comment period. The law only allows you to "receive information" and "discuss" those matters, it does not allow you to take action.

Third, in my opinion, which counsel for the League of Municipalities shares, members of the governing body may not make public comments during the public comment period. By this I mean, the governing body members cannot use this public comment period as a means to bring up for discussion issues that were omitted from the meeting notice. That practice would clearly violate the intent of the open meetings law, which is to provide the public with full and complete access to the affairs of government, and also would violate the requirement that notice of the subject of a meeting be provided in advance of the meeting. Instead, all public comments during this portion of the meeting must be initiated by persons who are not members of the governing body. If the members of the governing body have issues that they would like to discuss at the meeting, they should be sure that those matters are specifically included in the agenda ahead of time, so that appropriate notice of those matters can be given.

(6) Notice requirements

One of the key components of the open meetings laws is the notice that you are required to give prior to any meeting. I will discuss three aspects of the public notice requirements, namely: (a) *How* must the notice be given; (b) *When* must the notice be given; and (c) *What* should the notice contain?

(a) <u>*How* must the notice be given</u>?

Wisconsin Open Meeting Law

There are two general requirements regarding public notice. First, the open records law requires that other applicable statutory notice requirements must be met. For example, Board of Review has its own notice requirements, as stated in §70.47, and the open meetings law requires that statutory notice to be given prior to any meeting of the Board of Review. While this results in several different notice requirements being required depending upon the particular issue involved, that complexity is not due to the open meetings law itself, but is due to the particular notice requirements of other statutes. Therefore I will not discuss this first general requirement further in this context. The more complicated notice requirement that is directly related to the open meetings law, is this: each meeting must be preceded by a communication from the chief presiding officer or his or her designee to all of the following: (a) the public; (b) to those news media who have filed a written request for such notice; and (c) to the official newspaper (if one is designated) or if none exists to a news medium likely to give notice in the area. I will discuss these three communications from the chief presiding officer further, in turn.

First, the chief presiding officer or designee must communicate notice to *the public*. This may be done by posting the notice in one, or preferably several places in the municipality where it is likely to be seen by the public, or it can be done by publication. The Attorney General has suggested that it is prudent to post the meeting notice in three separate places in the municipality, and that would be my recommendation as well. Some municipalities use publication in a newspaper but this is not required if notice is posted. One of the problems with using publication exclusively is that if a weekly newspaper is used, often the deadline is early in the week. If a matter requires a meeting on 24 hours notice, the newspaper is not published until a week later. Also, if the newspaper fails to publish the notice for some reason, the meeting cannot be held. On the other hand, the three postings can be made completely within the control of the municipal officers.

If you provide notice to the public by posting, you need to consider what locations in the municipality are likely to give adequate notice. The Municipal Hall door is, of course, one of the most common locations. You could also post in other public places such as a municipal park or fire station, where you believe the notices are likely to be seen by the public. Posting at private businesses is also proper, including taverns. However, we would encourage the municipality to place a bulletin board outside of any such private business (especially at taverns) with the owner's permission, to avoid any improper appearance. The key to the use of three locations is to establish the locations, let the public know where they are, and use the same ones consistently so the information can be communicated to the public.

The chief presiding officer, secondly, must communicate the notice to the *news media who have filed a written request*. As you know, many news media have a standing request to receive all meeting notices of certain governing bodies. You are required to give notice to those news media. As with the other notices you are required to give, I recommend that you provide this notice in writing.

Finally, the chief presiding officer is also required to communicate the notice to the official newspaper, or if there is none, to a news medium likely to give notice in the area. This section warrants more discussion. First, some municipalities are not required to designate an official newspaper, although they may do so by formal action of the governing body. Many municipalities have determined what newspaper or newspapers are likely to give notice in the area, and use that newspaper or newspapers when they publish notice, but have not taken the formal action to designate an official newspaper. This is perfectly okay under the law. However, even if the governing body has not designated an official

newspaper, the municipality still must give the notice to a news medium likely to give notice in the area. This notice is for the news media's information and is available for them to publish or broadcast if they choose to do so. This phrase in the statute does not require a paid publication.

Some municipalities have special general publication requirements, because a newspaper is published in the municipality. Special publication rules may apply to a municipality if a newspaper is published in the municipality, per Section 61.32 and 61.50, Stats. In that event, however, the newspaper that is published in the municipality is not the same as the "official newspaper", unless the designation has been made by the governing body. Therefore, the notice requirements described above are the same for all municipalities, regardless of whether a newspaper is published in the municipality.

(b) *When* must the notice be given?

The timing of the notice is critical. Section 19.84(3), Wisconsin Statutes requires that the public notice must be given at least 24 hours prior to commencement of such meeting with one exception. The exception applies when it is impossible or impractical to provide 24 hours notice, in which case shorter notice may be given, but in no case less than two hours in advance of the meeting. The emergency provisions of less than 24 hours should be used only in the most extreme of situations.

Keep in mind that the 24 hour time period is measured from the time the notice is communicated to the relevant party. So, for example, it is not enough to drop the notice in the mail 24 hours prior to the meeting; instead, it must be received by the relevant person 24 hours prior to the meeting. The notice can be communicated by fax, however, and when you are faced with a short time for the notice, fax is a recommended method.

Finally, do not try to combine separate meetings into one notice. Each meeting must be preceded by a separate notice.

(c) *What* should the notice contain?

Every public notice must set forth the time, date, place and subject matter of the meeting, including the subject of any contemplated closed session, in such form as is reasonably likely to apprise members of the public and news media of the subject of the meeting. The time, date, and place are obvious in any meeting notice. However, I must encourage all municipalities to be more careful to detail the subject matter of their meeting. Each item must be stated. It is not enough to say "committee reports" or "highway report" in many cases. The Attorney General has also cautioned against including agenda items like "Staff comments" or "Chair's Comments" on the agenda, because specific notice should be given of the subject of such comments. Especially if the municipality is going to receive a report from a committee on a particular subject and take action, it should be spelled out. For example, a park committee recommendation to purchase a piece of equipment such as a truck, should state "consideration and action on purchase of truck for park purposes". On subjects relating to highway projects, the specific nature of the project should be spelled out such as "discussion and action on seal-coating Jones Road". Even when no action is to be taken, but information is gathered, or discussion is held, notice should be provided so that all interested persons can choose to attend.

If any item is anticipated to be considered in closed session the notice should state that the governing body may go into closed session. For example, the notice should say that the governing body may go into closed session to receive advice from counsel regarding strategy to be taken in pending litigation related to the Jones Road seal-coating project, pursuant to Section 19.85(1)(g). If the governing body intends to return into open session after the closed session, the notice must so indicate, and should also indicate the subjects of the ensuing open session.

(7) Penalties that apply for violations.

Any member of the governmental body who knowingly attends a meeting held in violation of this law could be ordered by a court to forfeit not less than $25 no more than $300 for each violation. This is not reimbursable from the municipal treasury. You are deemed to know that a violation is taking place if you act "with an awareness of the high probability" that a violation is occurring.

In addition to the personal monetary penalty, any action taken at any improperly noticed meeting may be voided by a circuit court judge. Moreover, the attorney general or the district attorney may also bring actions for injunction, mandamus and/or declaratory relief against the governing body, or members thereof.

You may have a limited ability to protect yourself, if you are concerned about whether a violation will occur in a particular situation. In some circumstances, if you vote in favor of a motion to prevent the violation from occurring, you may be exempt from liability, even though a violation later occurs. Also, if you are prosecuted for a violation, and you successfully defend against that prosecution, you may seek reimbursement for costs incurred in the defense (which the governing body may, or may not, grant).

Probably the worst effect of an open meetings law violation, though, is the public embarrassment and criticism that come with such charges of violations of the law. These charges often make the newspaper and media and become campaign issues. As with the direct penalties that may be imposed, we certainly want to avoid these less tangible consequences.

Conclusion.

I hope that this Memorandum will be useful to you as an overview of this important area of law, and also as a document that you can refer to in the future when particular issues arise. After you have had an opportunity to review this Memorandum, if you have any questions or concerns, please do not hesitate to contact me. Even more importantly, when particular issues arise in the future that cause you to question or be concerned about the applicability of the open meetings law, I urge you to contact me immediately to ensure that violations do not occur.