



## Q & A ON VIRTUAL MEETINGS POLICIES AND BEST PRACTICES

January 25, 2021

With the onset of the COVID-19 pandemic, and particularly following the various county emergency orders the pandemic necessitated, many county boards moved their board and committee meetings to a virtual platform. While some in-person meetings have resumed, several counties continue to conduct at least some of their meetings virtually in light of current health and safety concerns and to comply with local health guidelines. As well, counties may wish to continue holding some meetings virtually in the future, or to simply have the option available, even after the pandemic ends.

In light of the virtual environment created by COVID-19, County boards have questions on best policies and practices for conducting virtual meetings. Counties should be cognizant of Open Meetings Law<sup>1</sup> issues and specific compliance issues surrounding virtual meetings. Now, as virtual board meetings continue, whether as a result of the pandemic or merely as a convenience, counties should take the opportunity to audit board rules and procedures.

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding policies and procedures for conducting virtual meetings. Our general counsel has prepared the Q & A below to provide information and guidance to county governments as they continue determine how to hold county board and committee meetings both during the pandemic and beyond. ***County officials are encouraged to review this guidance carefully with corporation counsel, particularly to ensure the impact of any local rules and regulations impacting the ability to hold virtual meetings.***

**Q: May counties hold virtual meetings (i.e., by teleconference, videoconference/internet streaming, etc.)?**

**A:** *Yes.<sup>2</sup> However, remote/virtual attendance at meetings is not expressly authorized under Wis. Stat. ch. 59 so there are a few procedural matters that should be addressed. Most counties have adopted Robert's Rules of Order, which defines "present" as in-person attendance. For this reason, the county's board rules must expressly permit remote attendance for a member to be considered "present" at a meeting.*

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<sup>1</sup> Wis. Stat. § 19.81, et seq.

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

*Further, some counties temporarily suspended in-person attendance requirements during the initial phase of the pandemic by use of emergency declarations. Counties that proceeded in this manner will need to amend their board rules to permanently permit remote attendance if they desire to continue utilizing virtual meetings (or simply want to preserve the option).*

*In addition, whether a board or committee meets in-person or by remote communication, accommodations must be offered and made for those persons with disabilities that are unable to monitor the meeting(s).*

**Q: How does a county comply with the Open Meetings Law if it holds meetings virtually?**

*A: For virtual meetings, a county complies with the Open Meetings Law by publicly providing remote access to the to the general public. This includes the provision of a conference line and dial-in number in order to monitor phone call meetings and/or a live-stream available for viewing by the public on a video conference platform. In both cases, the platform should only allow observation and listening, not direct participation in order to ensure an orderly meeting is held. While there is no precedent or Attorney General opinion addressing the particulars of public access to a virtual meeting, it is always the best practice to allow the public to monitor the meeting in the same format as the members participate in the meeting. In other words, it may not be enough under the Open Meetings Law to allow the public to join a videoconference by telephone.*

**Q: What if it is burdensome or infeasible for a member (or members) of the public to access a virtual meeting?**

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

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

*Ultimately, Wisconsin courts apply a reasonableness standard to the actions taken by a county board to accommodate public access. Only reasonable, not total, access by the public is required under the law.*

**Q: Is public comment and direct participation required in a meeting?**

*A: Generally, no. The Open Meetings Law requires the ability of the public to monitor meetings of governmental bodies. Direct participation and public comment is only required for certain public hearings (e.g., a public hearing for a zoning petition). Nonetheless, some counties have a requirement in their local rules or ordinances requiring a public comment period during board and/or committee meetings. Counties*

*with such rules or ordinances should consider amending their rules to make public comment periods optional for virtual meetings or require advanced notice from the members of the public wishing to provide comment so appropriate accommodations can be made.*

**Q: May the county board or a committee meet in closed session during a virtual meeting?**

*A: Yes. However, it is highly recommended that counties utilize services that allow them to control meeting participants. Counties should have the ability to drop all lines or participants that are not board or committee members (or other parties deemed necessary) from the closed session part of the agenda. There is also added difficulty if the body intends to reconvene in open session. In that case, it is recommended that the body set a time to resume in open session and tell the public to re-access the virtual meeting at the specified time via the public notice and agenda. As is the typical case, any official action on matters discussed in closed session should be undertaken in open session except in the rarest of circumstances as approved by corporation counsel.*

**Q: May board members use chat functions or communicate by text message during a virtual meeting?**

*A: All communications and discussion by board members that take place during a virtual meeting must be made public in a manner accessible to the public attendees of the meeting. Board members should avoid private texting by cell phone or internet-based chat programs and exchanging emails or other private electronic communications while participating in the meeting.*

*Many videoconferencing platforms include chat functions that are viewable by all meeting attendees if the attendee clicks on the chat box. In the interest of openness and efficiency, county boards should minimize or avoid the use of the chat function during the meeting. Not all users may be familiar with the nuances of the platform and may not be aware that information is being communicated in the chat box. Additionally, messages exchanged on the chat platform, by text message, or through other transmissions may constitute records under Wisconsin's Public Records Law.<sup>3</sup> In turn, such messages must be appropriately retained by the elected official or the county and produced if requested and subject to disclosure by law. Many virtual platforms may not allow for retention of messages exchanged on them, making compliance with Wisconsin's Public Records Law difficult as it relates to retention and production of such messages.*

**Q: If a county typically records meetings, should the county continue doing so if it holds virtual meetings?**

*A: Yes. Additionally, counties that are not recording virtual meetings are highly encouraged to do so. While real-time monitoring is required under the Open Meetings Law, the Attorney General is recommending that governmental bodies post recordings on their websites as soon as practicable after the meeting concludes if a board or committee meets by remote communication. Again, posting a recording is not a substitute for real-*

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<sup>3</sup> Wis. Stat. § 19.21, et seq.

*time monitoring, but still provides an additional level of access to the public showing a good faith attempt to maintain openness.*

**Q: Is any additional language necessary for the public notice and posted agendas for a meeting held by teleconference or videoconference?**

*A: Yes. Notices should follow typical practice but should also affirmatively state the meeting will be held virtually and include instructions for how the public may access the meeting. This includes providing the telephone number, video conference link, and any necessary passcodes or other login information. Agendas should also include this information to help ensure the meeting's accessibility to the public.*

*Best practices dictate that the notice contain a name and contact number for a designated staff member that can be contacted in the event that a member of the public is unable to participate in the virtual meeting to allow the board or committee an opportunity to evaluate its potential obligation to accommodate participation.*

**Q: Are county supervisors entitled to a per diem when attending a virtual meeting?**

*A: Yes, unless a board rule or resolution specifically provides otherwise. The per diem provided to a county supervisor is paid for each day that he or she attends a meeting of the board. The per diem is not a reimbursement (e.g., for travel). County supervisors should still be paid the county's set per diem for meeting attendance in accordance with the county's set amount. Of course, if a county has elected self-governance, it may modify its board rules relating to eligibility for per diem payments and the amount of such payments.*

**Q: Are there any other special procedures or practices that county boards and committees should follow when holding virtual meetings?**

*A: There are no required additional or special practices or procedures that are required to be implemented for virtual meetings. The following are several best practices for counties and corporation counsel to consider when holding virtual meetings:*

- County boards should thoroughly vet the technology used for virtual meetings. Some platforms provide better security than others. Likewise, some platforms are more effective at controlling participation of both government officials and the public (mute, unmute, chat features, etc.).*
- The public meeting notice should contain a name and contact number for a designated staff member that can be contacted in the event that a member of the public is unable to participate in the virtual meeting to allow the board to evaluate its potential obligation to accommodate participation.*
- It is important that the board chair maintain decorum and order to allow for the orderly transaction of business. Best practice dictates that the board chair (in consultation with others) develops a script to announce meeting procedures prior to taking up the order of business so the members of the board and the public will have a better understanding of how to conduct themselves.*

- *All members should identify themselves before speaking and to avoid speaking over one another. This will help both members and the public to hear speakers clearly and follow the progression of the meeting.*
- *Votes on any matters other than the truly routine should be conducted by roll call vote.*
- *Members should be encouraged to announce when they are temporarily absent from a virtual meeting.*

**Q: Are there situations where virtual meetings may be inappropriate?**

*A: While virtual meetings that otherwise comply with the Open Meetings Law requirements are permissible, the DOJ has cautioned that remote access to an open meeting is not always appropriate.*

*For example, where a complex plan, drawing, or chart is needed for display or the demeanor of a witness is significant, a meeting held by telephone conference likely would not be appropriate because important aspects of the discussion or deliberation would not be communicated to the public (or the elected officials). Best practices prescribe that any meeting that requires the use of plans, drawings, or charts be conducted by videoconferencing means featuring a “screen-share” option so that viewers and meeting participants can follow the discussion meaningfully. Handouts or materials that are relevant to the discussion should be distributed electronically in advance of the meeting to all participants upon request, and this should be set forth in the notice. County boards should consult with legal counsel if any doubtful situations arise.*

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

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

**Questions?**

If you have any questions related to meetings, Open Meetings Law requirements, or any other government law needs, please contact the Wisconsin Counties Association or any member of the von Briesen & Roper Government Law Group ([www.vonbriesen.com](http://www.vonbriesen.com)).