

Wisconsin Open Meetings Law Training

ETF Board Meeting – September 16, 2021

Daniel Hayes, Attorney

David Nispel, General Counsel

Office of Legal Services



Objectives

- Illustrate Open Meetings Law concepts of interest to the board using hypothetical scenarios.
- Focus on what constitutes the convening of a meeting that would be subject to the requirements of the Open Meetings Law.



Showers Test: Purpose and Number Requirements

Scenario 1

Two members of the ETF Board go out to dinner. No governmental business is discussed. Does the dinner trigger the requirements of the open meetings law?



Answer Scenario 1

No

No governmental business was discussed and there were not enough board members at the dinner to make decisions on items within the board's authority.



Scenario 2

After dinner, the two board members go to the restaurant bar for an after-dinner drink. Discussion turns to a proposal that will be up for a vote at the next regularly scheduled board meeting.

Neither board member discusses the topic with other board members prior to the meeting. Have the requirements of the Open Meetings Law been triggered?



Answer Scenario 2

No

Although governmental business was discussed, there was not enough board members involved in the discussion to approve or prevent approval of the proposal. Meeting the purpose test alone is not enough to trigger the requirements of the Open Meetings Law.



Scenario 3

Ten ETF Board members attend a Brewers game at which no governmental business was discussed. Have the requirements of the Open Meetings Law been triggered?



Answer Scenario 3

No

Even though a quorum of the board was present, there was no governmental business discussed. Meeting the numbers test alone is not enough to trigger the requirements of the Open Meetings Law. In addition, this was purely a social gathering, to which the Open Meetings Law is generally not applicable.



Scenario 4

The board members enjoyed the Brewers game so much that two weeks later seven of them go to another game. At the pregame tailgate, they got into a discussion about an important issue that is up for a vote at the next regularly scheduled meeting. Have the requirements of the Open Meetings Law been triggered?



Answer Scenario 4

Yes, possibly.

Both the numbers and purpose tests are satisfied. But this was also a social gathering. A court may find that the discussion was intended to avoid the requirements of the Open Meetings Law. It could find that the tailgate needed to be publicly noticed and open to the public (although providing brats and beer to the public would not be required). Be careful not to discuss issues within the board's authority when at a social gathering!

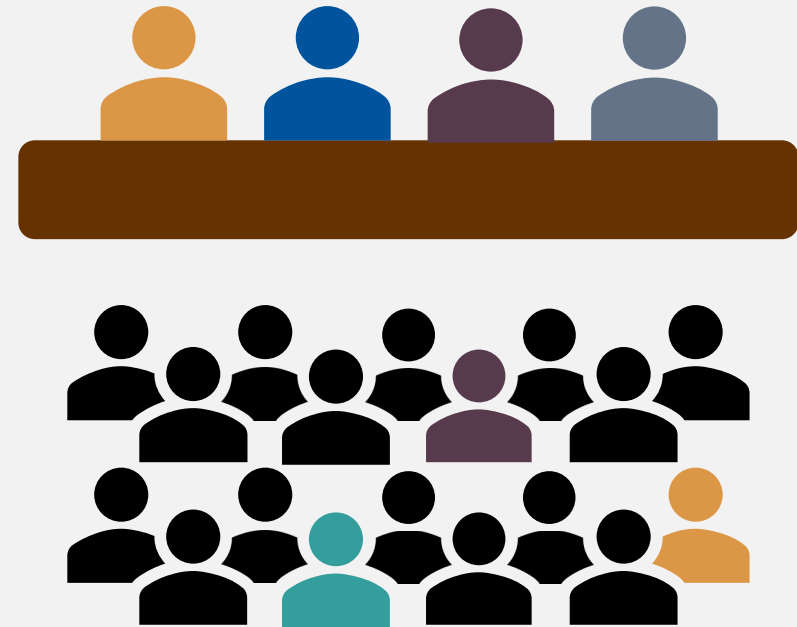




Multiple Meetings

Scenario 5

Four members of the 13-member TR Board also sit on the ETF Board and attend an ETF Board meeting. Three other members of the TR Board attend the ETF Board meeting to hear discussion of a proposal to consolidate the boards associated with ETF. None of the TR Board members in the audience participate in the discussions or interact with each other at the meeting.



Answer Scenario 5

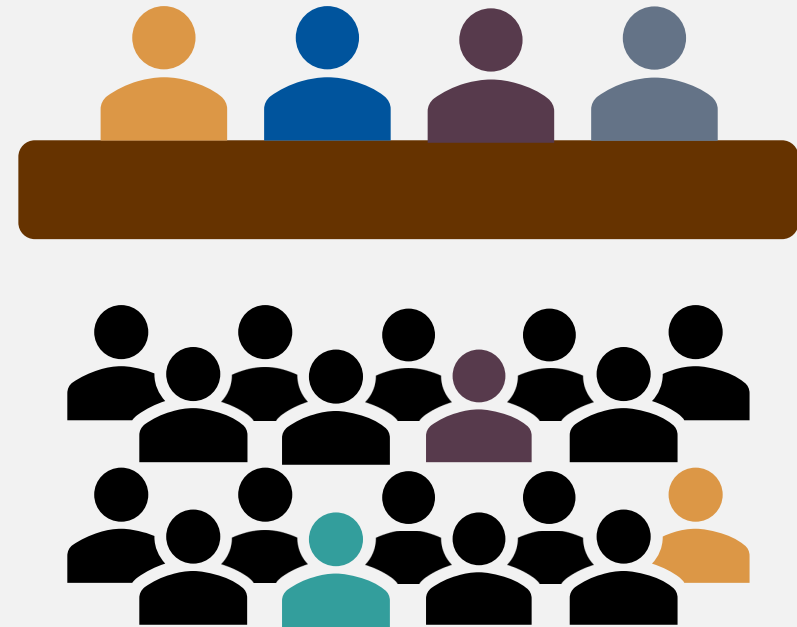
At the ETF Board meeting, was there also a “meeting” of the TR Board as that term is used in the Open Meetings Law?

Yes. A quorum of the TR board was present and conducted government business.

Must the TR Board meeting be publicly noticed?

Yes. The requirements of the Open Meetings Law were triggered.

- *Badke v. Village Board of the Village of Greendale*, 173 Wis.2d 553 (1993)



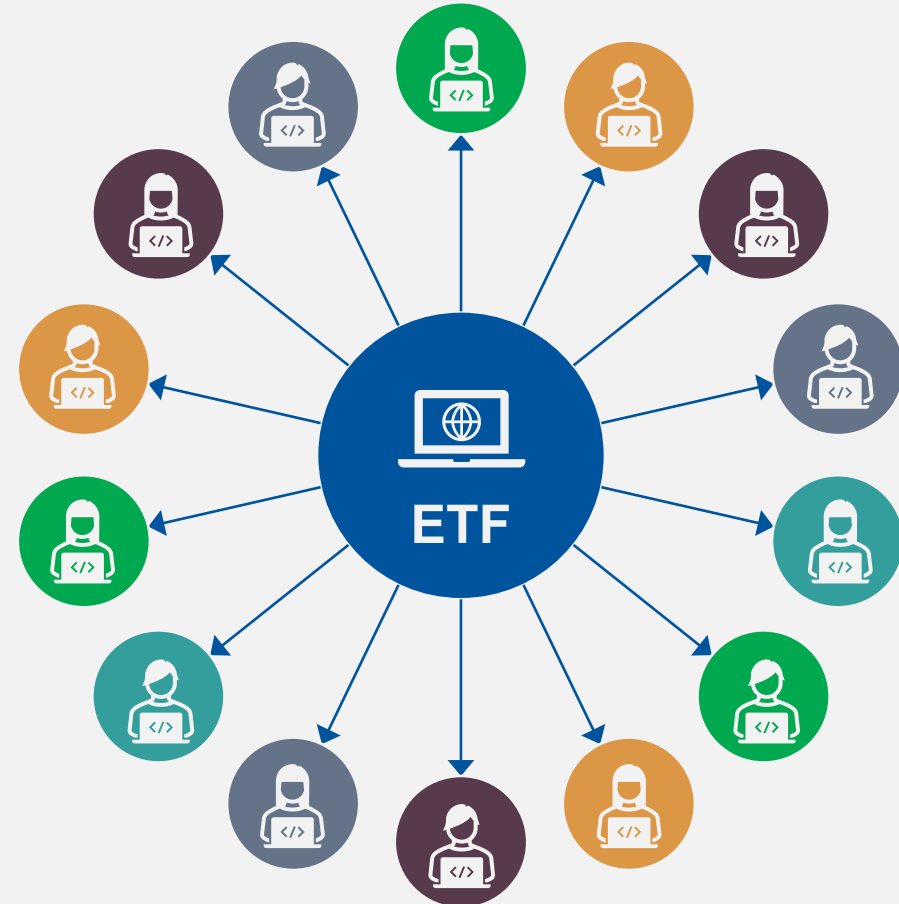


Convening of Members Electronic Communications

Scenario 6

ETF's board liaison emails all ETF Board members an amended agenda and supporting material for an upcoming board meeting. The agenda includes a crucial item of board business that has sprung up unexpectedly and will require board action. The members review the material on their own and prepare for discussion at the upcoming meeting.

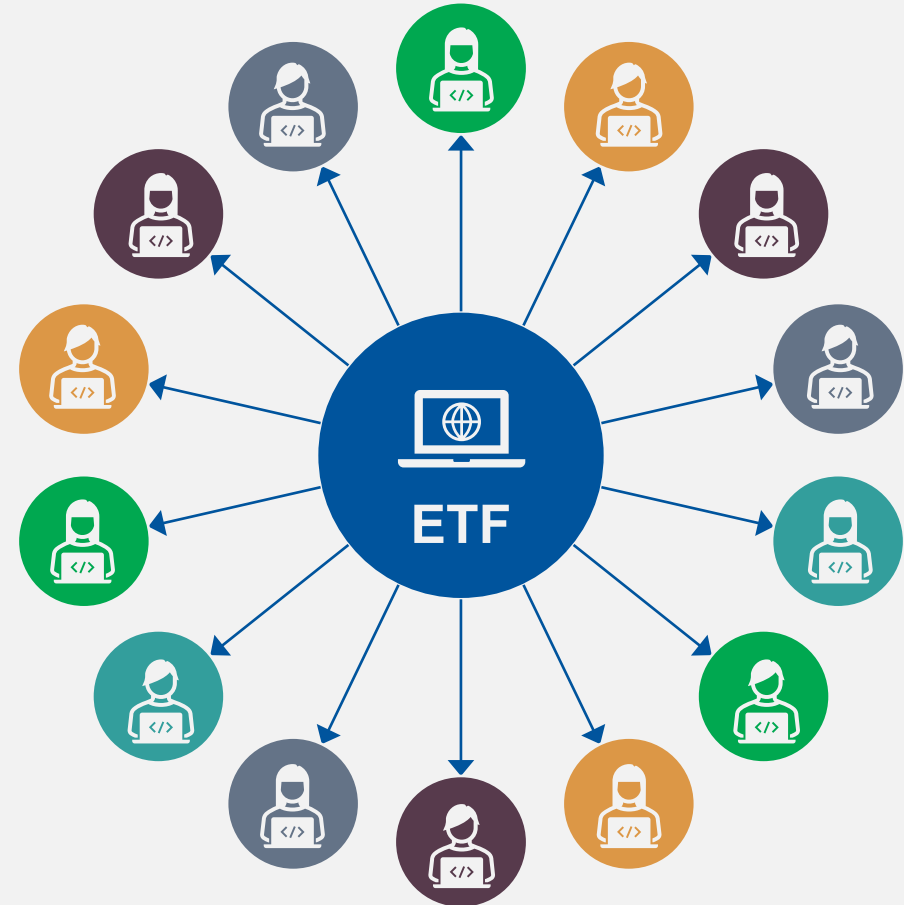
Have the requirements of the Open Meetings Law been triggered?



Answer Scenario 6

No.

While there is no court guidance on electronic communications, it is likely that a court would consider whether the communications are similar to an in-person discussion. There was no discussion here.



Scenario 7

Same facts as Scenario 6, except this time a board member hits “reply all” and asks two questions regarding the new item to the other board members. This leads to an extended email chain with members using the “reply all” function throughout. By the time the email chain stops, it is clear that a majority of the board members will not be supporting the new proposal.

Have the requirements of the Open Meetings Law been triggered?

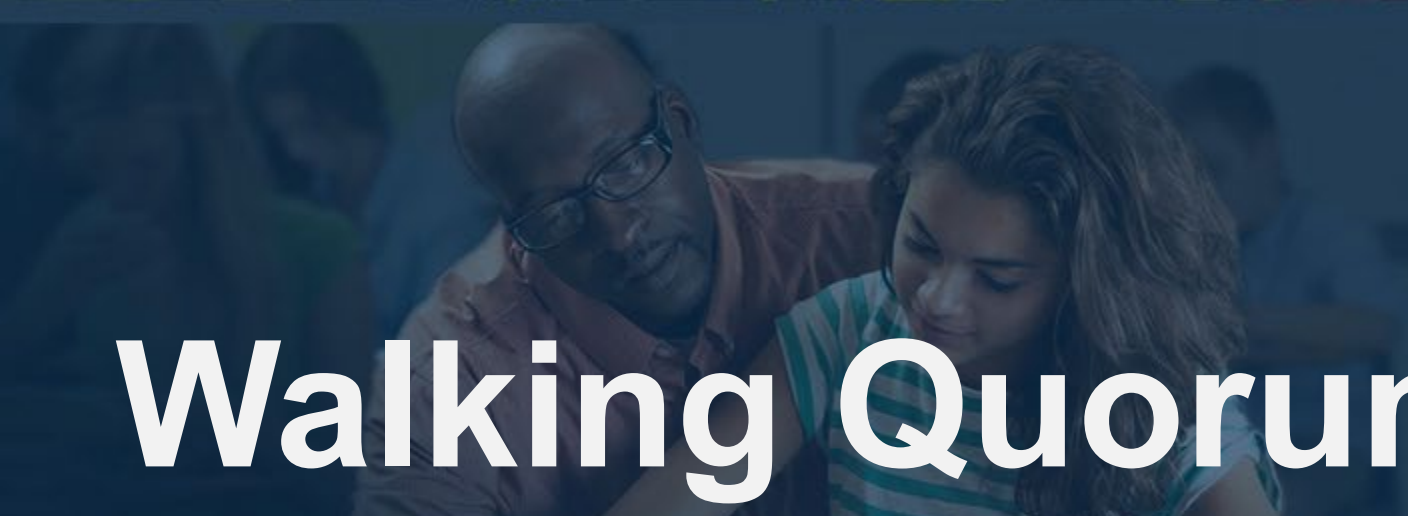


Answer Scenario 7

Very likely yes.

The “discussion,” via email, resembles what would occur at a board meeting. Board members should be cautious about discussing any board business with the purpose and numbers requirements satisfied, regardless of the electronic or social media platform on which it occurs.





Walking Quorum

Scenario 8

The ETF Board is voting to approve actuarial assumptions at its next meeting. A board member calls each of the other board members and explains why she is concerned with a set of assumptions and the contribution rates that depend on them. The board member simply states her position and asks the other board members to give it some thought. She does not ask how the board members plan to vote, and the board members do not discuss the issue with other board members prior to the meeting. Has a walking quorum occurred that triggers the Open Meetings Law?



Answer Scenario 8

No.

The essential feature of a walking quorum is the element of agreement among members of a body to act uniformly in sufficient numbers to reach a quorum. Where there is no such express or tacit agreement, exchanges among separate groups of members may take place without violating the open meetings law.

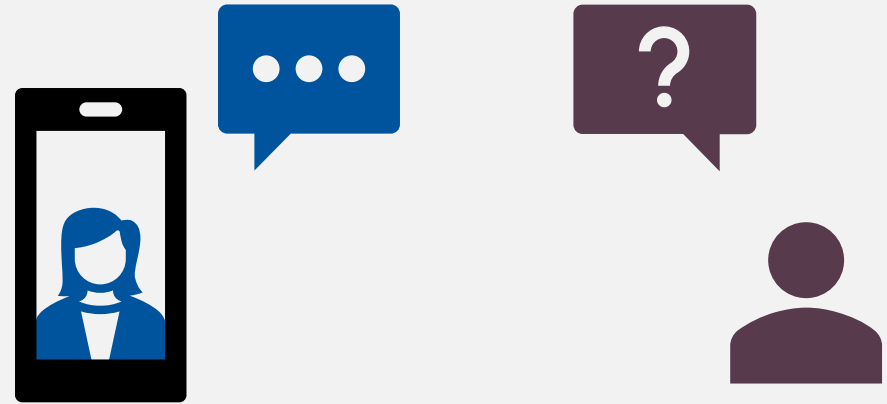
State ex rel. Zecchino v. Dane Co. Bd. of Supervisors, 380 Wis. 2d 453 (2018).



Scenario 8 – When it Becomes an Open Meeting

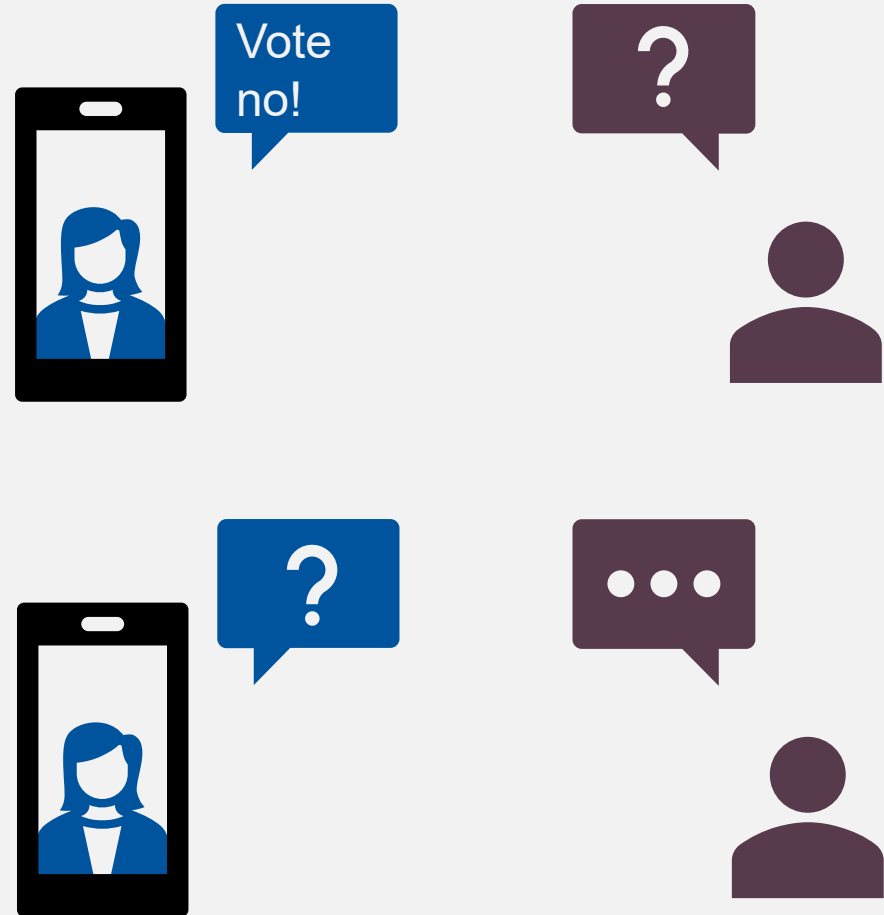
But be wary!

Such a presentation of information to each board member could go “off the rails.” Discussion could ensue. Board members could ask about specific issues related to the assumptions and why they are so concerning to the member who is calling. Discussions could become similar, or even a replacement, to what should occur in open session at the board meeting.



Scenario 9

Same facts as scenario 8. But this time the board member calls six of the other members that she believes may be sympathetic and actively attempts to convince them to vote against the actuarial assumptions. She argues “voting for the assumptions will cause contribution rates to rise too steeply for strapped local employers to handle” and “to do so would be needlessly punitive.” She asks how the board members plan to vote. Discussion ensues. For board members who are unsure of their vote, follow-up contacts are made to see if a decision on the vote has been made. In the end, all six members agree to vote against the assumptions. Has a walking quorum occurred that triggers the Open Meetings Law?



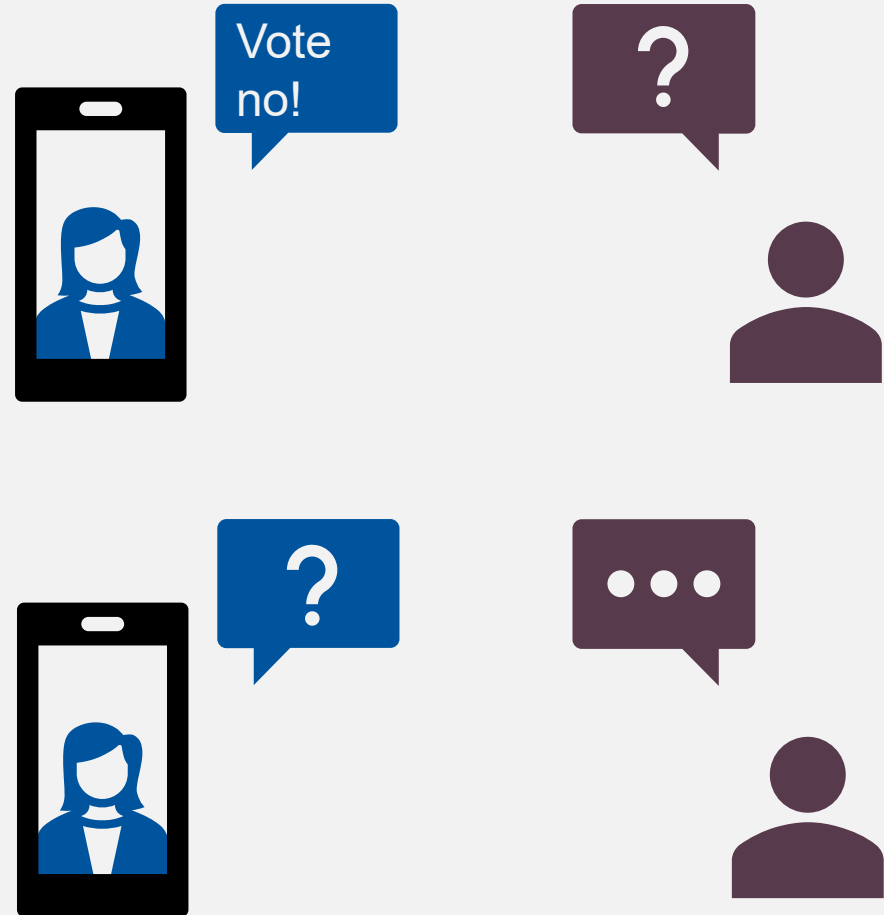
Answer Scenario 9

Yes.

In this example, the active board member is explicitly attempting to influence the vote and is also polling enough board members to influence the vote. A court may find that there was express or tacit agreement among the members to take action and that a quorum of the board agreed on a uniform course of action regarding the actuarial assumptions.

State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77 (1987)

State ex rel. Holmes v. City of Rhinelander City Council, 397 Wis.2d 244 (2021 – Unpublished)





Questions?

Thank you



[wi_etf](#)



[etf.wi.gov](#)



ETF E-mail Updates



608-266-3285
1-877-533-5020