



## Remote Participation in Board Meetings

For some time, technology has provided board members with the ability to effectively participate in board meetings remotely, either by tele- or video-conference (“remote participation”). Notwithstanding this capacity, remote participation is still not in wide use. In fact, a proposal considered by the Wisconsin Association of School Boards Delegate Assembly in 2003 expressing WASB support for the legal authority to permit board members to participate remotely, including voting, was defeated by a large majority.<sup>1</sup> In addition, there has been very little statutory or other legal guidance expressly establishing the legality of remote participation and the conditions under which such participation would be appropriate.

Given this legal void, it is difficult to provide definitive answers on issues surrounding the legality of allowing remote participation and the conditions under which such participation would be permitted. While the statutes and legal authority governing board meetings suggest that remote participation is not prohibited by law, the decision whether to permit such participation and under what conditions is ultimately up to each board. This *Legal Comment* will review the limited legal authorities governing remote participation and outline the issues boards should consider when deciding whether to allow board members to participate remotely.

### ■ Is Remote Participation Legal?

Statutes and other legal authority that govern board meetings were written prior to the development and improvement of electronic means of communicating and do not directly address them. Thus, there is no definitive legal authority regarding the legality of remote participation at board meetings. However, the language used in the relevant legal authorities provides some insight into the issue.

For example, Wis. Stat. s. 120.11 states that a board shall hold a regular meeting “at a time and place” determined by the board and may hold special board meetings “at the time and place” designated by the board president. Further, this statute provides that a majority of the board members constitute a quorum “at a regular or special school board meeting.” This language suggests that, at a minimum, a quorum of the board must be present in the same physical location. It does not, on its face however, require that board members who do not constitute the quorum must also be physically present in the same location as the quorum.

The Wisconsin Open Meetings Law (“Open Meetings Law”) is similarly less than clear on this issue. On the one hand, the law requires that board meetings be held in open session (unless a statutory exception applies), which must be held “in a place reasonably accessible to members of the public and open to all citizens at all times.”<sup>2</sup> This

suggests the physical presence of board members. However, the law defines a “meeting” as the “convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.”<sup>3</sup> This language does not suggest that the physical presence of members at one location is required in order to constitute a “meeting” subject to the notice requirements of the law. This is consistent with the Wisconsin Supreme Court’s recognition that a board can violate the Open Meetings Law through “walking quorums” in which a series of communications occur between individual board members, each involving less than a quorum of the board, which results in an agreement by sufficient members of the board to determine the course of action of the board on a given issue.<sup>4</sup> The creation of a “walking quorum” is not dependent on a quorum of the board convening in one physical location.

The Wisconsin attorney general has opined that a telephone conference qualifies as the convening of members of a governmental body (which includes boards) under the Open Meetings Law.<sup>5</sup> In that opinion, the attorney general concluded that if a quorum of a governmental body is present in a teleconference, “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” and that the

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board has “convened” in the sense that the board “can effectively communicate and exercise the authority vested in the body.”

This led the attorney general to address whether boards can meet telephonically under the Open Meetings Law. In concluding that they can, the attorney general focused on the requirement that such meetings be “reasonably accessible.” The attorney general concluded that this did not necessarily require that meetings be held at a physical location and that a telephone conference meeting could be considered “reasonably accessible” if the public and news media can effectively monitor it by means of speakers. In reaching this conclusion, the attorney general noted several situations in which this form of remote access would be inappropriate, including hearings in which the ability to view the demeanor of participants or documents utilized in the discussion is an essential component of board member decision-making.

These authorities suggest that remote participation by one or more board members is not prohibited, provided that a quorum of the board is actually present at a location reasonably accessible to the public and the meeting has been appropriately noticed under the Open Meetings Law. In addition, they suggest that a remotely participating member must be able to hear the board and public dialogue, and the board and public must be able to hear the remotely participating board member.

### ■ Does the ability to remotely participate in a board meeting include the right to vote?

While board members may not decide matters via electronic voting (such as voting through email) even if the board later ratifies the result of the electronic vote at a properly noticed meeting,<sup>6</sup> there is nothing in the statutes or other authorities that suggests that the ability to participate in a discussion remotely does not include the right to vote. As a matter of best practice, however, and

given the fact that it may be difficult to distinguish the remotely participating member’s voice vote, any vote taken by the board in which remote participation is used should be by roll call to unequivocally record how that remotely participating board member voted.

### ■ Are there situations in which a board member should not be allowed to participate remotely?

As recognized by the Wisconsin attorney general, board meetings involving hearings in which the demeanor of witnesses and the review of documentary evidence is a part of the board’s decision-making process are not conducive to remote access. This would include expulsion hearings, disciplinary and personnel hearings, non-renewal conferences, and any other quasi-judicial proceedings. Such subject matters usually involve testimony and exhibits, all of which can only be properly evaluated by board members who are physically present.

Remote access is also inappropriate with respect to subject matters that involve decision-making that is aided and impacted by demonstrations, handouts, exhibits, Power-Point presentations, or videos made or used at a meeting and which a remotely participating board member cannot view or does not have access to. Remotely participating members should be provided with these documents either in advance or have access to them electronically during the course of the meeting. Any type of physical presentation utilizing documents or otherwise to which the remotely participating board members do not have access similarly creates a situation which would caution against remote participation.

Finally, remote access is problematic with respect to closed sessions. The concern in this situation is whether remotely participating members are located at a place where no one else is able to hear what tran-

spires during the closed session. One way to address this confidentiality concern is to preclude remote participation for closed sessions. However, the confidentiality of every closed session depends upon, in large measure, the integrity, credibility, and veracity of the board members present to ensure that confidentiality. Another way to address the issue is to require a remotely participating member to verbally affirm on the record that no one else is present with the board member at the remote access location who can hear the closed session proceedings.

### ■ Are boards required to adopt a policy specifically permitting remote access?

A board should, as a matter of proper governance, adopt a policy if it wants to permit remote access participation and may be required to do so. Many boards designate by policy Robert’s Rules of Order (“Robert’s Rules”)<sup>7</sup> as their governing rules for board procedures. Under Robert’s Rules, a board may only permit remote participation if its policies specifically permit the board to do so. Even in the absence of a policy establishing Robert’s Rules as the board’s parliamentary guidelines, a board should have in place a policy addressing whether remote participation is permitted and under what terms.

Robert’s Rules suggests several topics that should be addressed by board policy. For example, meetings must be conducted in such a way that all members participating can hear each other at the same time, and Robert’s Rules recommends that board policies be adopted to specify the equipment required to participate as well as the methods for seeking recognition, obtaining the floor, submitting motions in writing, determining the presence of a quorum, and taking and verifying votes.<sup>8</sup> Robert’s Rules emphasizes that to preserve the deliberative nature of a board meeting, the remote participation must be such as to allow simultaneous interaction between the

participants. Thus, under Robert's Rules, remote participation by emails or chat rooms is not recommended.

### ■ When and how often should board members be allowed to participate remotely?

The circumstances under which a board may allow its members to remotely participate is for each board to determine. However, notwithstanding technological advances that have made it easier to conduct board business remotely with quality sound and images, the statutes governing board meetings, while not expressly prohibiting remote participation, contemplate the physical presence of members accessible to the public. The fact that the 2003 WASB resolution failed by a large margin and the lack of legislative or other legal authority addressing this issue further suggests a preference for actual physical attendance at board meetings.

Given that background, boards can adopt policy guidelines that permit remote participation in limited circumstances and establish board expectations for regular physical attendance at board meetings for all board members. Such a policy could limit remote attendance to circumstances in which a board member is unable to be physically present because of (1) personal illness or disability, (2) employment or district business, (3) a family member illness or emergency, or (4) other circumstances in which the board approves remote attendance by majority vote. In addition, boards could adopt a policy in which individual board members are limited in the number of times in a given time period that they can participate remotely absent extenuating circumstances. For example, one such policy might state that a "member shall not participate remotely more than two (2) times during a calendar year; however, the board, by majority vote, may allow a board member to participate remotely more than two times when circumstances justify such added

remote participation." Board policy should also consider who determines whether the board member has satisfied the policy requirements for remote participation. That determination could be made by the board president, subject to any board member raising a point of order seeking consideration of that decision by the full board (other than the remotely participating member).

### ■ What process should be followed to allow remote participation?

In order to make sure that the necessary technology and contact information is in place, a board member who desires to remotely participate should provide advance notice to the board president and district superintendent. Board policy could require that the board member provide notice of the member's intent to participate remotely at least one business day in advance of the meeting. That time frame mirrors the 24-hour posting requirement of the Open Meetings Law, and boards should consider whether to note on the board agenda the fact that a member may participate remotely in the meeting.

At any meeting in which a board member is participating remotely, the board president should announce before the roll call that a board member has requested to participate remotely pursuant to board policy. The roll call of the board members physically present should then be taken and a determination made that there is a quorum of the board physically present at the meeting. If so, the board president should confirm that the remotely participating member is present remotely and can hear all the other board members and that the other board members can hear the remotely participating board member, and that the board member has received all the material received by the other board members. The meeting minutes should reflect these facts and other prerequisites adopted

by the board for remote participation. During the meeting, the board president bears the burden of making sure that the remotely participating board member has the opportunity to provide input and ask questions at the times that those members who are physically present are able to do so.

### ■ Conclusion

We interpret the statutes and other legal authority governing board meetings as requiring a quorum of board members to be physically present at the place of the meeting, but not prohibiting other members from remotely participating. However, whether to allow board members to remotely participate at board meetings is a policy decision for each board and is not, in our opinion, required by statutes, parliamentary procedure, or any other legal authority. If a board decides to allow remote participation, the board should adopt a policy to that effect and identify the circumstances under which such participation would be permitted. ■

### ■ End Notes

1. WASB Resolution 03-15, "School Board Communication."
2. Wis. Stat. ss. 19.82(3) and 19.83(1).
3. Wis. Stat. s. 19.82(2).
4. *State ex. rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987); *State ex. rel. Lynch v. Conta*, 71 Wis. 2d 662, 239 N.W.2d 313 (1976).
5. 69 Wis. Op. Att'y Gen. 143 (1980) (OAG 39-80).
6. *Informal Opinion of Wis. Att'y Gen to Stephanie Jones*, I-01-10 (Jan. 25, 2010).
7. Henry M. Robert III et al., *Roberts Rules of Order, Newly Revised* (11th Ed. 2011).
8. *Id.* at 97-99.

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*For additional information, see Wisconsin School News, "Board Agendas, Voting and Minutes" (April 2017) and "Wisconsin's Open Meetings Law and Communicating with Technology" (November 2001).*