2020 Town Law Conference

Issues that Arise With Public Meetings - From Current Issues with COVID-19 to Constitutional Claims

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ISSUES THAT ARISE WITH PUBLIC MEETINGS: FROM CURRENT ISSUES WITH COVID-19 TO CONSTITUTIONAL CLAIMS AND OTHER COMMON PITFALLS

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I. FIRST AMENDMENT PUBLIC INPUT ISSUES

The United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amend. I.

A. First Amendment Values Public Input:

Because it has long been recognized that discussion of public issues lies "at the heart of the First Amendment," *First Nat'l Bank of Bos. V. Bellotti*, 435 U.S. 765 (1978), public meetings of governmental bodies must comply with the First Amendment and may not discriminate based on viewpoints or speakers. Madison Sch. Dist. v. Wisconsin Empl. Rel. Comm'n, 429 U.S. 167 (1976) (finding school board meeting open to public and subject to First Amendment analysis). Free and uninhibited discussion is so essential to our constitutional system that it is considered vital to the "security of our Republic." It is "a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *N.Y Times v. Sullivan*, 376 U.S. 254 (1964).

1. *Snyder v. Phelps*, 131 S.Ct. 1207 (2011): Father of deceased military service member brought action against fundamentalist church and its members, stemming from defendant's anti-homosexual demonstration near service member's funeral. The Supreme Court affirmed dismissal because the content, form, and context of demonstrators was of public concern and therefore was entitled to special protection under the First Amendment.

2. *U.S. v. Alvarez*, 132 S.Ct. 2537 (2012): Respondent was indicted under the Stolen Valor Act after falsely claiming that he was awarded the Congressional Medal of Honor. The Supreme Court held that the Stolen Valor Act constituted a content-based restriction on free speech, in violation of the First Amendment due to it not being the "least restrictive means among available, effective alternatives."

B. Limitations on Public Input During Public Meetings

1. Closed Session Meetings: Certain types of public meetings could qualify as non-public. For example, closed sessions or other open meetings in which no comment is permitted could be non-public in several circumstances: if the public body has not opened them for public comment in the past, efficiency is at least in part the focus of the meeting and creates the need for rules about expression in the meeting, and the history and tradition of the meeting dictate that public expression is not welcomed. The government will have the clearest ability to regulate that speech through both the subject matter and the speaker's identity as long as the regulations are reasonable in light of the forum's purpose, and they are viewpoint-neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).

   a. *DeGrassi v. City of Glendora*: City council member was excluded from closed meeting sessions. In those sessions, council had discussed providing

legal representation to the complaining council member, who was engaged in slander litigation. The court noted that public bodies may confine their meetings to particular topics and to enter closed, non-public sessions to conduct business. In a closed, non-public session, council may establish reasonable and viewpoint-neutral limitations on speech. Because the council member was a party to the litigation, it was reasonable and viewpoint-neutral for council to exclude her from the meetings. 207 F.3d 636 (9th Cir. 2000).

2. Meetings with Limited Agendas & Public Speaking Topics: Other meetings that are ripe for government limitations on speech are public meetings that are generally limited to the business of a public body. Or, public hearings directed toward one topic or class of topics, such as a zoning hearing. These types of meetings can be considered a limited public forum because the government has opened up a meeting to certain speakers on a specialized topic. *See Cleveland v. City of Cocoa Beach*, 221 F. App'x 875 (11th Cir. 2007).

   a. *Mesa v. Hudson Cnty. Bd.*: Chairman of a county board meeting prevented a speaker from making his statement about the budget when the budget was not on the agenda and ordered him removed when the speaker refused to cooperate and comply; the court found there to be no violation of the speaker's First Amendment rights in finding that a governmental body may confine meetings to specified subject matter and remove a speaker who is disruptive or who otherwise fails to address the topic at issue in order to maintain orderly progression. 2011 WL 4592390 (D.N.J. 2011).

   b. *Cleveland v. City of Cocoa Beach*: Court held that a limited public forum existed at a city commission meeting that was limited to particular city business. The mayor required one public speaker to turn her political button backwards prior to making her public comment. She also required plaintiff to turn his political campaign shirt inside-out prior to speaking. The court held that the mayor was reasonable in enforcing the rule against political campaign materials at the commission meeting because the materials did not add to the meeting's purpose of discussing city business. In addition, the regulation contributed to both the legitimate government interest of limiting political influence on city employees and the interest in conducting orderly and efficient meetings. The mayor also enforced the rule in an evenhanded, viewpoint-neutral manner that passed constitutional scrutiny. 221 F. App'x 875 (11th Cir. 2007).

   c. *Curley v. Philo*: A school board limited speech about a particular topic at a meeting; the court held that a parent's First Amendment right to free speech was not violated, in that the meeting was a limited public forum, and the board had already heard many comments about the topic previously. 2009 WL 2152323 (N.D. N.Y 2009).

   d. *Jones v. Heyman*: Mayor attempted to confine a speaker to an agenda item in a city commission meeting, and had the speaker removed by police when the speaker appeared to become disruptive; the court held that the mayor's action

constituted a reasonable time, place, and manner regulation, and did not violate the speaker's First Amendment rights. 888 F.2d 1328 (11th Cir. 1989).

e. *Fairchild v. Liberty Independent School Dist.*: A former teacher's aide sued a school district, alleging that the procedures employed at a school board meeting prevented her from disclosing the name of a particular teacher; the court held that the procedures did not infringe on her constitutionally protected speech. 597 F.3d 747 (5th Cir. 2010) ("The Board policies exclude from public discourse certain topics of speech—including individualized personnel matters—which the Board channels into more effective dispute resolution arenas, before it hears the matter and resolves it….. The Board opens its meetings for a short duration to hear comments relevant to this part of its agenda. But this item of the agenda as designed and limited is not for dialogue or decision-making. Rather it is a learning and routing mechanism. By its rules, the Board does not engage the public in debate, because it may not deliberate or take action at this juncture. Instead, the Board— when prompted—can recite only policy and list facts. At the comment session, the Board is to alert a speaker to an administrative proceeding at which the speaker may be heard and seek a remedy, or the Board may put that topic on future agendas. It follows that quarrels between employees and rehearsals of disputes moving through the administrative process have no place in the comment session and are not here reflective of viewpoint preference. The Board has limited the comment session to flagging issues for potential in-depth follow-up, diverting controversies that surface to an alternative hearing path to be developed before being resolved by the Board.").

C. Meetings with Open Public Comment: Public meetings that allow a generalized public comment section on the agenda to discuss anything related to that public body would be considered designated public fora. *Surita*, 665 F.3d 860.

1. Recent Legal Developments:

a. *Surita v. Hyde*: City mayor violated the First Amendment rights of an opponent of a city towing ordinance when he intentionally barred her from speaking at a city council meeting based on her prior speech, which he claimed had addressed the city's community liaison officer in a threatening manner. The mayor barred the content of the opponent's speech, regardless of whether he agreed or disagreed with the viewpoint she was going to expound, and even if the restriction were content neutral, a total bar on her speech was not a valid time, place, or manner restriction. 665 F.3d 860 (7th Cir. 2011).

b. *Theyerl v. Paul Hansen and Manitowoc County*, 41 F. Supp. 3d 737 (E.D. Wis. 2014): Plaintiff appeared during the public input portion of a county board meeting. Specifically, Theyerl claimed that a county employee in the County Airport Office had been watching pornography on his work computer. (Notably, only one employee worked at the Airport Office.) Plaintiff informed the presiding officer that he would provide a list of 13 witnesses who could support his allegations. After the meeting, the county

investigated the allegations and discovered no evidence to support the same. Nor did plaintiff forward the list of 13 witnesses. The presiding officer feared that plaintiff would repeat the allegations during subsequent board meetings if called on to speak during public input. Consequently, plaintiff was informed that he could not speak at board meetings until he produced the list of 13 witnesses.

An initial letter was sent to plaintiff on July 11, 2012 indicating that the county "conducted a preliminary investigation into your allegation and have found nothing that leads [it] it believe that [your allegations] merit further investigation." The letter also informed plaintiff that "in order for any investigation of your allegations to proceed, you must provide me with [among other things] the name, address, and telephone number of each of the thirteen witnesses you claim to have." The letter concluded by informed plaintiff that "it is [his] responsibility to provide the information necessary to proceed with an investigation" and that if he "does not accept that responsibility," the county "cannot permit [him] to continue making unsupported, defamatory allegations at county board meetings and will not recognize you to speak during public input at any county board meeting."

Shortly after the lawsuit was initiated, the county sent a follow-up letter explaining to plaintiff that he "may speak during public input on matters which are not the subject of your pending lawsuit against Manitowoc County… [and that] any statements you wish to make…regarding your pending lawsuit will need to be presented through the parties' legal counsel and the court."

The county noted that "the purpose of public input is not to provide a means for interactive debate, cross-examination, personal attacks, or name calling, and statements made during public input should not be disruptive or unduly repetitive."

The court first acknowledged the competing interests involved: "[a] government body like a county board has an interest in maintaining order and decorum in its meetings so it may efficiently handle the public's business. It also does not want to provide an open forum for defamatory personal accusations."

The court then held the restriction was content-based and unconstitutional under the applicable standard: "the ban here went well beyond a regulation on the manner of [plaintiff's] speech. By prohibiting [plaintiff] from speaking at all, on any subject, the restriction cannot reasonably be viewed as a regulation on the time, manner or place of the speech." It explained that the restriction was overly-broad for three reasons. First, plaintiff was denied the opportunity to speak on all topics. Second, the presiding officer could not have reasonably inferred that plaintiff would only discuss the alleged pornography because plaintiff "had a history of speaking on a wide range of topics pertaining to county government." Third, the assumption that plaintiff's speech would have been repetitive was unsound because plaintiff

may have discussed other issues relating to the county's investigation or his allegations.

The court also found the restriction was unconstitutional even if deemed content-neutral. In doing so, it noted that the restriction constituted a complete ban on anything that plaintiff might say because the presiding officer refused to recognize plaintiff until he provided contact information for the thirteen witnesses. Such a restriction was overly-broad and also failed intermediate scrutiny applicable to content-neutral restrictions.

The court explained as follows:

> Had Hansen merely told Theyerl that he could not raise the same matters he had already raised earlier, the restriction might well have passed constitutional muster. Here, however, the ban on Theyerl's speech was extended to everything. . . . As noted above, a complete ban on a speaker is essentially the broadest means available for achieving a government's purpose. A more narrowly applied restriction would have allowed Theyerl to speak with the understanding that he would be cut off if his speech were deemed repetitive or defamatory.

2. Be Careful of Overly-Broad Restrictions, even if Based on Prior Misconduct:

   a. *Brown v. City of Jacksonville, Fl.*: Speaker was banned from future council meetings as a result of misconduct during a prior meeting; the court found that banning the speaker was not a restriction that was "narrowly tailored" to achieve the significant governmental interest of running the meetings efficiently, while successfully preventing her disruptive behavior, and thereby violated her First Amendment rights. 2006 WL 385085 (M.D. Fla. 2006).

   b. *Vergara v. City of Waukegan*: A mayor refused to allow an opponent of a city towing ordinance to speak during the council meeting; the court held that the First Amendment free speech rights of the opponent were violated, in that the prohibition occurred at a designated public forum, no compelling government interest was identified to justify the speech restriction, and a complete prohibition on the opponent's right to speech could not be found to be narrowly tailored to any government interest. 590 F. Supp. 2d 1024 (N.D. Ill. 2008).

   c. *Liggins v. Clarke Cnty School Bd.*: A genuine issue of material fact existed as to whether the chairman of a school board suppressed a speaker's remarks based on viewpoint discrimination during a public meeting, thereby precluding summary judgment on a 1983 claim alleging violation of First Amendment rights. After speaker took the podium at a school board meeting, he accused the board of having violated Title VII of the Civil Rights Act.

Immediately after he made this remark, the chairman told the speaker that accusations of illegal conduct directed at the board would not be tolerated and ordered him to sit down. The fact that there was nothing in the record to suggest that the speaker was speaking off-topic, or was speaking in such a manner so as to disrupt the meeting, could lead a reasonable juror to conclude that he had been silenced as a result of his viewpoint. 2010 WL 3664054 (W.D. Va. 2010).

D. Common Issues Associated with Public Input

1. Time Limits: Limitations on the amount of time that an individual can speak during a public meeting have been considered content-neutral restrictions that satisfy intermediate scrutiny. *See, e.g., Steinburg v. Chesterfield County Planning Comm'n*, 527 F.3d 377 (4th Cir. 2008) (a public body is "justified in limiting its meetings to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forums purpose of conducting public business."); *Wright v. Anthony*, 733 F.2d 575 (8th Cir. 1984) (termination of plaintiff's testimony at public hearing after five minutes did not violate plaintiff's First Amendment right to freedom of speech; restriction could be said to have served significant governmental interest in conserving time and in ensuring that others had opportunity to speak.); *Anderson v. City of Bloomington*, Case No. 11-CV-741, 2012 WL 2034174 (S.D. Ind. June 6, 2012) (Plaintiff was removed from a meeting for refusing to stop speaking past his allotted time. The city council's rules for public comments at its meetings provided for an initial 20-minute comment period and a later 25-minute comment period. Citizens were allowed to speak at only one of the comment periods for a maximum of five minutes, unless numerous people wished to speak, at which point the time would be reduced. Furthermore, while a citizen could comment on any matter of community concern not listed on the agenda, there could be no question-and-answer exchange with the council, and speakers needed to "refrain from language which would incite an immediate breach of the peace; refrain from undo repetition, extended discussion of irrelevancies, obscenity, and personal attacks against private individuals unrelated to the operation of the city."); *Rana Enterprises Inc., v. City of Aurora*, 630 F.Supp. 912, 919-20 (N.D. Ill. 2009) (three minute time limit found to be constitutionally permissible because it served "'significant governmental interest in conserving time and in insuring that others [have] an opportunity to speak.'" Also, "[a] council does not violate the First Amendment when it limits public participants to speaking only about subject on the agenda."); *Wenthold v. City of Farmers Branch, Texas*, 2012 WL 467325 (N.D. TX 2012) (cutting a speaker off during public input was deemed constitutional when the speaker exceeded the allotted 2-minute time period, departed from the agenda topic, and caused the audience to become disruptive).

2. Irrelevant Speech: Removal of individual from a public meeting for failure to restrict comments to the only topic for consideration at the meeting has been found to be a content-neutral restriction that satisfied intermediate scrutiny. *Steinburg v. Chesterfield Cnty. Planning Comm'n*, 527 F.3d 377 (2008); *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (finding it permissible to limit public comments to only those topics on the agenda).

3. Repetitive Speech: Bans on repetitive speech during public meetings have been found to be content-neutral restrictions that satisfied intermediate scrutiny. In *Olasz v. Welsh,* A city council president had a council member removed from the meeting and filed criminal charges against him in an attempt to constrain the member's constant interruptions; the court held that these actions constituted appropriate time, place, and manner regulations, and thus did not violate the member's First Amendment free speech rights. 301 Fed. Appx 142 (3d Cir. 2008). *See also Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427 (6th Cir. 2009) (rejecting parents' request to speak at a school board meeting because the proposed topic was repetitive of the parents' comments at the previous board meeting did not constitute a prior restraint in violation of the First Amendment); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274 (3d Cir. 2004) (removal of speaker from Township Board meeting during public comment session because he was "repetitive and truculent" and "repeatedly interrupted the chairman of the meeting" did not violate the First Amendment).

4. Privacy Concerns: Rules barring speakers from discussing private issues among citizens have been found to be content-neutral restrictions that satisfy intermediate scrutiny. *See Eichenlaub*, 385 F.3d 274 (stating that "[o]ne would certainly not expect the forum of a Township meeting to include ... arguments about private disputes involving town citizens").

5. Harassment/Insults: Rules barring vulgar or harassing remarks about other during public meetings have been found to be content-neutral restrictions that satisfy intermediate scrutiny. In *Kirkland v. Luken*, the Mayor's direction that council meeting attendee's microphone be turned off and that attendee stop speaking after attendee used the term "Nigganati" during open forum did not violate attendee's right to free speech; mayor, charged with the duty to preserve order, had compelling state interest in conducting orderly meetings of the city council, mayor correctly construed the term "Nigganati" to be a highly offensive and degrading racial slur when used by any member of the public at a particularly heated government meeting, and mayor's actions taken against attendee were narrowly tailored to achieve compelling interest of preventing attendee from inciting those in attendance at the meeting to become unruly and to prevent the meeting from becoming disorderly. 536 F. Supp. 2d 857 (S.D. Ohio 2008). Similarly, in *Scroggins v. City of Topeka,* the court upheld a rule of decorum barring "personal, rude, or slanderous remarks" during governmental meetings. The speaker was removed from a city council meeting and barred from speaking about another citizen's recent committee appointment. Before the meeting, the speaker expressed his intent to discuss instances of adultery between his wife and another citizen. The speaker's family attended the meeting; however, when the speaker started speaking, the presiding officer silenced him and removed the entire family. Because the remarks were personal, rude, and potentially slanderous, the court dismissed the speaker's claim on summary judgment. The court also dismissed First Amendment claims brought by the speaker's family members who were also barred from speaking because the chairman could have reasonably inferred that they too would discuss the same topic as the speaker. 2 F. Supp. 2d 1362, 1368 (D. Kan. 1998). *See also, Mitchell v. Hillsborough Cnty.*, 468 F.3d 1276 (11th Cir. 2006) (maintaining that "vulgar, vituperative, ad hominem attack" against a county commissioner during the public comment session is not entitled to First Amendment protection); *Lowery*, 586 F.3d 427 (stating that "harassing" speech threatening legal

action can be excluded from public comment session of school board meeting without violating the First Amendment).

6. Residency Requirement: Courts have held that residency requirements are content-neutral restriction designed to promote orderly and efficient conduct of meetings, and that they did not violate the free speech rights of non-residents. *See Rowe v. City of Cocoa, Fla.*, 358 F.3d 800 (11th Cir. 2004).

7. Maintaining Order and Public Safety: In *Sandefur v. Village of Hanover Park*¸ a correctional officer with a handgun concealed in his jacket (Sandefur) addressed a village board at a public meeting in a "very animated" way. When village officials became aware of the handgun, two village police officers escorted him out of the meeting where they searched him, examined his credentials, and removed his handgun. During this search, Sandefur was "a bit loud," upset, and "agitated," and he was ultimately told to leave the premises under threat of arrest for trespassing and was prohibited from finishing his presentation before the board. The court noted that it was well-settled that the village had significant interest in maintaining order and public safety at its meetings, thus the initial decision to remove Sandefur was appropriate. The court also held the decision to keep Sandefur from the meeting to be appropriate because allowing a loud, agitated, and armed back into the meeting could have further disrupted the meeting. Additionally, the village left sufficient alternative channels of communication open when it told Sandefur he could speak at the next meeting or could write or e-mail the board members. 10-CV-5851, 2012 WL 2062594 (N.D. Ill. June 7, 2012).

8. Prohibiting Critical Comments: In *Baca v. Moreno Valley Unified Sch. Dist.*, a school board prohibited comments critical of school district employees at open sessions of board meetings; the court held that the policy was not narrowly drawn so as to achieve the district's purported compelling interest in regulating its own meetings, without impinging on the public's First Amendment rights, and would not pass constitutional muster. 936 F. Supp. 719 (C.D. Cal. 1996).

9. Defamatory Comments: In *Felton v. Griffin*, 185 Fed. Appx. 700 (9th Cir. 2006), plaintiff sued the City, its Mayor, and police officers challenging the validity of the City Council's decorum rule which provided as follows "BY PERSONS: Any person making personal, impertinent, or slanderous remarks, or who becomes boisterous while addressing the Council, or who interferes with the order of business before the Council, and who fails, upon request of the presiding officer to cease such activity, shall be barred from further audience before the Council, unless permission to continue is granted by a majority vote of the Council." The court held that "[t]he First Amendment does not protect slander. Thus, the Council's rule banning it is permissible." *Id.* (citing *Ashcroft v. Free Speech Coal*., 535 U.S. 234, 245–46 ("[T]he First Amendment . . . does not embrace certain categories of speech, including defamation.")) Also, in *Vultaggio v. Yasko*, 215 Wis. 2d 326, 572 N.W.2d 450 (1998), the court noted defamatory statements "are published immediately to the surrounding community—not only to those who choose to attend the meeting, but to anyone who might watch television that evening. The flow of information in today's society is virtually unimpeded—so much that scurrilous lies and defamatory statements can be heard instantaneously by the public, regardless of whether the

community deliberately seeks out that information. Such a powerful weapon can be lethal in the hands of one who chooses to defame." Allowing defamatory remarks during government meetings is bad public policy, defies common sense, and essentially enables "a witness [to] falsely and maliciously accuse[] [another citizen] of owning and operating a child pornography business, or of selling drugs from his or her home. . . . [T]he witness could continue this line of testimony by alleging that his or her neighbor is a prostitute, a sexual predator, or even a pedophile. . . ." Moreover, allowing such statements would afford an injured party little relief because "[a]s soon as the defamatory matter has been circulated, the damage has been done, regardless of counterattacks that may be made in the future. This is particularly true where, as here, the plaintiff is not present at the meeting to hear the accusations against him. Testimony at a later meeting may not be possible if that subject is not addressed again…"

10. Adjourning Public Comment: In *O'Neill v. Richland County Bd.,* the plaintiff was given an opportunity to speak near the end of the county board meeting, but was ultimately denied the opportunity because the board adjourned the meeting after prolonged discussion of other items on that meeting's agenda. The Seventh Circuit affirmed the district court's denial of the First Amendment claim, holding that adjourning a meeting when board members were tired after a long and difficult discussion was a content-neutral regulation of time and place of the plaintiff's speech and that it "was narrowly tailored to the significant government interest in the orderly and efficient management of the board's business." 114 F. App'x 745, 746 (7th Cir. 2004).

11. Ending or Removing Public Comment: Motion for Summary Judgment was granted for the defendants with respect to the plaintiff's claim that defendants ended "open discussion" at town meetings in violation of the First Amendment. The court here ruled that there was no "discriminatory effect" because the rule applied equally to all members of the public. *Hoeppner v. Town of Stettin*, 2015 WL 3658192 (unpublished).

II. RETALIATION

A. The Issues

1. Various state and federal statutes provide substantive employment rights and protections. In addition, such state and federal statutes also prohibit employers from retaliating against an employee for exercising rights or seeking protections under those statutes or assisting others in doing so.

2. State and federal agencies charged with enforcing the discrimination and antiretaliation laws in the workplace have consistently noted a steady growth of the number of retaliation claims being filed with their agencies. In August 2016, the U.S. Equal Employment Opportunity Commission (EEOC) published its enforcement guidance on retaliation and related issues and the following year noted the number of retaliation charges filed with the agency made up nearly half of all charges received. Since that time, there has been growing interest, awareness and

prosecution of sexual harassment and retaliation related thereto with the rise of the #MeToo movement and media accounts of sexual misconduct in the workplace.

3. This increase in the volume of charges does not even account for additional retaliation charges filed in state agencies, nor retaliation claims filed in court predicated under the First Amendment's protection when employers retaliate when an employee exercises free speech rights. Finally, the issue of workplace retaliation can oftentimes pose a greater litigation challenge than the underlying discrimination matter.

B. Federal Employment Laws

1. Although the full panoply of federal laws are beyond the scope of this presentation, they are generally familiar to most public employers. These federal laws are enforced by the EEOC and range from early hallmark legislation like Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans With Disabilities Act (Title I), to the Equal Pay Act, Family and Medical Leave Act, Whistleblower Protection Act and Fair Labor Standards Act, and to lesser known federal laws like the Pregnancy Discrimination Act and the Genetic Information Nondiscrimination Act.

2. The EEOC defines "retaliation" as "when an employer takes a materially adverse action because an applicant or employee asserts rights protected by the EEO laws." This may be in the form of "participation" in protected activity, or "opposition" to unlawful activity.

3. Generally speaking, an employee states a claim under the "direct method" of proof (whether based on direct evidence or circumstantial evidence), where he/she has engaged in statutorily protected activity, suffered an adverse action by the employer and a causal connection exists between the two. *See, e.g., Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006). An alternative method of proof, the "indirect method," requires the employee engage in a statutorily protected activity, suffer an adverse employment action despite meeting the employer's legitimate expectations and being treated less favorably than a similarly situated employee. *Id*. Covered conduct does not just include filing a charge of discrimination, whether written or oral, but participation as a witness in such proceedings or even internal investigations. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1 (2011); *Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271 (2009). Further, adverse employment action can be any action which a "reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

4. The Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§111.31 - 111.325, also makes it unlawful to discriminate against an employee on the basis of enumerated protected classifications ranging from age to race to genetic testing and sexual orientation. Under §111.322(3), it is unlawful to discharge or otherwise discriminate against an individual because that person has opposed any discriminatory practice or because the individual has made a complaint, testified or assisted in any proceeding

under WFEA. Also, pursuant to §111.322(2m), it is unlawful to discharge or otherwise discriminate against an individual because the individual has filed a complaint under, attempted to enforce any right under, or testified or assisted in any action or proceeding held under a number of statutes other than the WFEA, or because the individual's employer believes that the individual engaged in or may engage in any such activity.

C. First Amendment

1. The First Amendment protects public employees from retaliation by their employers when they exercise free speech rights. The United States Supreme Court has long held that public employees do not surrender all their First Amendment rights by reason of their employment. The First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

2. Governmental Employee Speaking as a Private Citizen: Over forty years ago, this body of law began with the case of Marvin Pickering, a schoolteacher in Indiana who wrote a letter to the editor of a local newspaper concerning the school board's handling of funds. In *Pickering v. Board of Education*, 391 U.S. 347 (1976), the Court held that in order to determine whether a public employer's adverse action against an employee violates the employee's First Amendment rights, courts must balance the interest of the employee in commenting as a citizen on matters of public concern, against the interest of the public employer in promoting the efficiency of the public services it provides through its employees ("the Pickering balancing test"). The Court found in *Pickering* that the teacher's letter to a local newspaper addressing the funding policies of his school board could not have interfered either with his performance in the classroom nor with the general operations of the school system, and that the school board's interest in regulating the teacher's speech did not outweigh the teacher's First Amendment rights.

3. "Public Concern": If the employee's speech touches upon a matter of public concern, then the speech may be entitled to First Amendment protection. *Connick v. Myers*, 461 U.S. 138 (1983) (an assistant district attorney in New Orleans was not protected when she distributed a questionnaire to other assistant district attorneys that was viewed as critical of management). If it is merely a matter of "personal interest" such as a personnel matter, then the speech will not be protected. *Id*. at 147. The court must consider "the content, form, and context of a given statement, as revealed by the whole record," to determine whether employee speech addresses a matter of public concern. *Id*. at 147-148.

4. Causal Connection – Motivating Factor: The plaintiff must show he suffered a deprivation that would likely deter First Amendment activity in the future and the speech activity was at least a motivating factor in the defendant's decision to take retaliatory action. Retaliatory speech is actionable "in situations of threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow." *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016) (quotation and internal marks omitted). A common fact pattern for retaliation cases is in the employment context, where an employer threatens to terminate, or actually terminates, an employee in retaliation for the employee's protected (but unpopular)

speech. *See, e.g., Valentino v. Vill. of S. Chicago Heights*, 575 F.3d 664, 674 (7th Cir. 2009) (municipal employee stated First Amendment claim against mayor, municipal administrator who terminated her, and municipality claiming she was fired in retaliation for speaking out against their practices of nepotism and ghost payrolling). If the speech was not a motivating factor, then the inquiry necessarily ends. For example, in *Doggett v. County of Cook*, 255 Fed. Appx. 88, 90 (7th Cir. 2007), the court found that even if a nurse's memoranda to superiors and union officials concerning hospital conditions were protected by the First Amendment, the record showed that the nurse was discharged due to numerous violations of rules of conduct and work policies, defeating any possible First Amendment claim. However, "retaliation need not be monstrous to be actionable under the First Amendment[.]" *DeGuiseppe v. Vill. of Bellwood*, 68 F.3d 187, 192 (7th Cir. 1995). See *Black v. Clark*, 285 F. Supp.3d 1070 (E.D.Wis. 2018) (finding actionable allegations that sheriff retaliated against plaintiff by making mocking and threatening posts on Facebook in response to a formal complaint plaintiff made to the sheriff's department about the sheriff directing deputies to question him without cause).

5. Adequate Justification / Balancing Test: Even if the speech was the basis for the adverse action, the First Amendment claim can be defeated if the public entity had an adequate justification for treating the employee differently from any other member of the general public. As noted above, the public employer must demonstrate that the employee's conduct interfered with governmental operations or that it reasonably believed that the speech would interfere with such operations. Preserving harmony within the workforce, preventing disruption due to erosion of trust, and ensuring workplace efficiency and confidentiality are all examples of legitimate governmental interests that may outweigh an employee's speech interest. The question is not simply whether an employee's speech actually disrupted the governmental workplace, but also whether the speech had the potential to be disruptive. *Connick v. Myers*, 461 U.S. 138, 152 (1983) ("We do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

6. Statements Made Pursuant to Job Duties: In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a divided Supreme Court added an important factor to the analysis, specifically whether the public employee's statements made "pursuant to the employee's official duties." That is, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Therefore, if the speech was made "pursuant to [the employee's] official duties," it is not subject to protection.

    a. *Brown v. City of Jacksonville, Fl.*: Speaker was banned from future council meetings as a result of misconduct during a prior meeting; the court found that banning the speaker was not a restriction that was "narrowly tailored" to achieve the significant governmental interest of running the meetings efficiently, while successfully preventing her disruptive behavior, and thereby violated her First Amendment rights. 2006 WL 385085 (M.D. Fla. 2006).

b. As the Court explained: The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

c. However, the Court held that when a public employee engages in speech pursuant to their official job duties, they are generally not speaking as private citizens, but as public servants, and the employer's interest qua employer is paramount. The Court rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties," concluding, "Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."

d. Examples of conduct not protected because of the scope-of-duties rule: corrections officer report to assistant superintendent of request from her supervisor not to inspect co-employee's car, *Speigla v. Hull*, 481 F.3d 961 (7th Cir. 2007); firearms instructors' sending emails and writing report concerning the hazards of an indoor firing range, *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007); memo from athletic director/head football coach to office manager and principal criticizing financial management of sports program, *Williams v. Dallas Ind. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); comments by park ranger to third-party consultant about discipline, morale and performance problems in department, *Weisbarth v. Geauga Park*, 499 F.3d 538 (6th Cir. 2007).

e. Protected conduct, after *Garcetti*, has included the allegations by a public works director that city council was violating open meeting law, *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007); allegations by an engineer that his supervisors were illegally claiming inappropriate overtime and excess pay, *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007); and by a treasurer/deputy clerk of improprieties against the administrator made to law enforcement on her own initiative, while off-duty and on her own time as shown by *Swanson v. Village of Frederic*, 341 F. Supp. 3d 965 (W.D. Wis. 2018) (a former village employee brought an action claiming she was terminated from her position in retaliation for reporting another village employee's misconduct. The village argued that the terminated employee's speech was not protected under the First Amendment and, even if it were, the village terminated her due to its lack of confidence in her ability to perform her duties, not because of her speech. The court held the terminated employee's speech was protected and that genuine issues of material fact existed regarding the village's reason for dismissal.).

III. DEFAMATION

A. Elements of a Defamation Claim. To prevail on a defamation claim, a plaintiff must prove that: 1. The defendant made a false statement of fact; 2. The statement was communicated

to a person other than the individual defamed; 3.The communication was unprivileged; and 4. The communication is capable of a defamatory meaning. That is, a meaning which tends to harm an individual's reputation so as to lower him in the estimation of the community or deter third persons from dealing with him. *In re Storms v. Action Wisconsin Inc.*, 2008 WI 56, ¶ 37, 309 Wis. 2d 704, 750 N.W.2d 739 (2008); *Mach v. Allison*, 2003 WI App 11, ¶ 12, 259 Wis. 2d 686, 656 N.W.2d 766 (Ct. App. 2002).

B. Truth is a Defense. The substantial truth of any statement is an absolute defense to a defamation action. *Schaefer v. State Bar*, 77 Wis. 2d 120, 125, 252 N.W.2d 343 (1977). The burden of proving the substantial truth of a statement is placed on the defendant. *Denny v. Mertz*, 106 Wis. 2d 636, 661 n. 35, 318 N.W.2d 141 (1982).

1. Fact v. opinion. Although the First Amendment provides no protection for factual statements couched as opinions, a "statement generally is actionable only when it contains or implies a statement of provably false fact." *Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994). Courts have explained that:

> A statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' but if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993).

C. Capable of a Defamatory Meaning. Not every word or phrase alleged to be defamatory is, in fact, actionable. The communication must be "reasonably interpreted and [] construed in the plain and popular sense in which [it] would naturally be understood in the context in which [it was] used and under the circumstances [it was] uttered." *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 259 (1966); *see also Lathan v. Journal Co.*, 30 Wis. 2d 146, 153, 140 N.W.2d 417 (1966). The communication must be "reasonably capable of conveying a defamatory meaning to the ordinary mind. . . ." *Kaminske v. Wisconsin Cent. Ltd.*, 102 F. Supp. 2d 1066 (E.D. Wis. 2000).

1. In *Greenbelt Co-op Publ. Assn v. Bresler*, 398 U.S. 6 (1970), for example, a local real estate developer and builder was engaged in negotiations with the City Council to obtain zoning variances that would allow the construction of high-density housing on his land owned. *Id*. at 7. The negotiations between Bresler and the City "evoked local controversy" and during several "tumultuous city council meetings," members of the community spoke out. *Id*. It was reported that Bresler's negotiating position was characterized by some as "blackmail." *Id*. The Supreme Court first determined that Bresler fell within "even the most restrictive definition of a 'public figure'" because he was "deeply involved" in the city's property development and engaged in negotiations regarding developments of "significant public concern." *Id*. at 8-9. Having determined that Bresler was a public figure, the Court went on to find that the use of the word "blackmail" was not actionable. The Court's reasoning:

> It is simply impossible to believe that a reader [of the News Review's reports] who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. [E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable.

398 U.S. at 13-14.

2. *Waldo v. Journal Co.*, 45 Wis.2d 203, 207, 172 N.W.2d 680 (1969). Alleged defamatory words flowing from the context of a lawsuit may not be actionable. "It is not unreasonable to say that every lawsuit tends to harass the defending party, and if the defending party should be victorious it is not unusual to describe the other side's action as a nuisance. To impart any defamatory meaning to these words would result in a strained and unnatural construction."

3. *Madison v. Frazier,* 539 F.3d 646 (7th Cir. 2008). Defendant used the phrase "real men don't lie" in a publication relating to plaintiff's conduct. The court held that the phrase "real men don't lie" could be deemed defamatory. In doing so, it explained that "referring to someone as one who lies has a clearly precise meaning – to create a false or misleading impression or to make an untrue statement with intent to deceive."

4. In *Theyerl v. Manitowoc County*, 2015 WL 7779210, Theyerl alleged that a county employee was viewing pornography on a work computer. He made this allegation, recklessly and unsupported by evidence, in a public fashion at the Manitowoc County Board meeting. Subsequently, the Board barred him from speaking at the meetings. Theyerl brought a lawsuit, and this court found that his First Amendment right to speak during the meetings had been infringed. The county and Theyerl settled that lawsuit. In the resolution approving the settlement, the Board stated that Theyerl had made defamatory statements about a county employee, which was echoed in a radio interview with the county executive. In response, Theyerl brought a new federal action alleging that the statements were defamatory and made in retaliation for his earlier lawsuit against the county. The court stated defamation plaintiffs, who are public figures, must prove by clear and convincing evidence actual malice. Actual malice requires that the allegedly defamatory statement be made with "knowledge that it was false or with reckless disregard of whether it was false or not." The court found that the Plaintiff could not prove that the defendants acted with actual malice when they made any of their statements.

D. <u>Privileges.</u>

1. <u>Public Figures.</u> Alleged defamatory remarks made about a public figure may be privileged unless they were made with actual malice. *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis.2d 524, 535-536, 563 N.W. 2d 472 (1997).

In Wisconsin, "[t]here are generally two ways to obtain the label 'public figure': (1) a person may receive the label for all purposes due to general fame or notoriety; or (2) a person may become a public figure for a limited purpose because of involvement in a particular public issue or controversy." *Maguire v. Journal Sentinel, Inc*., 232 Wis.2d 236, 243, 605 N.W.2d 881, 886 (Ct.App.1999); *Bay View Packing v. Taff*, 198 Wis. 2d 653, 543 N.W.2d 522 (Ct. App. 1995). The latter is known as a limited purpose public figure.

2. Test. A two-prong test exists to determine whether a plaintiff qualifies as a limited purpose public figure. *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d (1982). First, there must be a public controversy. *Id.* Second, courts must look at the nature of the plaintiff's involvement and determine whether the plaintiff has injected himself so as to influence the resolution of the issue. *Id.*

   a. It is important to note that actual malice is not synonymous with "hatred" or "malevolence." Rather, a statement made with "actual malice" is a statement made with knowledge of its falsity or reckless disregard for its truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964); *Erdmann v. SF Bd.*, 229 Wis. 2d 156, 169, 599 N.W.2d 1 (Ct. App. 1999). Reckless disregard for the truth is not measured by what a reasonably prudent person would publish or investigate. It is instead a subjective standard which requires proof that the false statement was made "with a high degree of awareness of . . . probable falsity . . . or that the [speaker] in fact entertained serious doubts as to the truth of his publication." *In re Storms v. Action Wis. Inc.*, 2008 WI 56, ¶ 39, 309 Wis. 2d 704, 750 N.W.2d 739; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *Garrison v. Louisiana*, 379 U.S. 64, 74, (1964).

3. Absolute Privilege. An absolute privilege provides complete protection and has been extended to judicial officers, legislative and judicial proceedings, and to certain governmental executive officers. For the privilege to apply, the communication must be made as part of a legislative or judicial proceeding and must have "some relation to the proceeding." *Churchill v. WFA Econometrics Corp.*, 2002 WI App 305, ¶10, 258 Wis. 2d 926, 655 N.W.2d 505.

   a. A Communication made in the course of judicial or quasi-judicial proceedings is protected by an absolute privilege if it "bears a proper relationship to the issues." *Bergman v. Hupy*, 64 Wis.2d 747, 750, 221 N.W.2d 898 (1974). This privilege provides litigants with freedom to access the courts "to preserve and defend their rights and to protect attorneys during the course of their representation of clients." *Rady v. Lutz*, 150 Wis.2d 643, 648, 444 N.W.2d 58 (Ct. App. 1989). A defendant claiming an absolute privilege is shielded from liability if the communication: is made in a procedural context that is recognized as affording the privilege; and is relevant to the matter under consideration. *Id*. To be relevant, the communication must be made in reference to the subject matter of the

litigation, although it need not be strictly relevant to any issue involved. *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 265, 258 N.W.2d 712 (1977); *Rady v. Lutz*, 150 Wis. 2d 643, 648 444 N.W.2d 58 (Ct. App. 1989).

b. Wisconsin courts have recognized that absolute privilege applies during government meetings. *See Werner v. Ascher*, 86 Wis. 349, 56 N.W. 869 (1893); *DiMiceli v. Klieger*, 58 Wis. 2d 359, 365, 206 N.W.2d 184 (1973).

c. In Wisconsin, there is no absolute privilege granted to one testifying voluntarily at city council meetings.

i. In *Vultaggio v. Yasko*, 215 Wis. 2d 326 (1998), a property owner brought a defamation action based on statements made by a witness at a city council hearing regarding owner's upkeep of properties. The court ultimately held that statements made during hearings by witnesses, who were not subpoenaed or sworn and who are not being directly questioned by council, are not absolutely privileged, rather they are conditionally privileged.

ii. In *Churchill v. WFA Econometrics Corp.*, 258 Wis. 2d 926 (2002), an expert hired in divorce proceedings filed a defamation suit against opposing counsel's expert and his employer, predicated on allegedly defamatory statements made by opposing counsel's expert in letter to opposing counsel regarding the qualified domestic relations order. The court held that the opposing counsel's expert's allegedly defamatory statements were absolutely privileged.

4. Conditional Privilege. A conditional privilege is based on public policy recognizing the social utility of encouraging the free flow of information with respect to certain occasions and persons, even at the risk of causing harm by the communication. *Lathan v. Journal Co., 30 Wis. 2d 146, 152, 140 N.W.2d 417 (1966)*.

a. Matters of Public Concern. Communication on matters of public concern must be proven false before there can be liability. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). In *Hepps*, the Supreme Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777. The Court fashioned a constitutional requirement that the plaintiff bear the burden of establishing falsity before recovering damages. *Id.* at 776; *Milkovich v. Lorian Journal Co.*, 497 U.S. 1, 20 (1990); Wis. JI-Civil 2500 ("At least in cases involving a media defendant, this holding changes Wisconsin common law which had placed the burden of proving that the statement was true on the defendant as an affirmative defense.").

In the *Hepps* concurrence, Justice Brennan and Justice Blackmun specified that the rule should also apply in cases involving nonmedia defendants:

> I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. I write separately only to note that, while the Court reserves the question whether the rule it announces applies to nonmedia defendants, I adhere to my view that such a distinction is 'irreconcilable with the fundamental First Amendment principle that [t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.' *Id.* at 779–80.

b. *Richards v. Gruen*, 62 Wis.2d 99, 214 N.W. 2d 309 (1974). In *Richards*, the defendant was a real estate broker, an alderman and a mayoral candidate. *Id*. 101, 110. In a dispute about the public purchase of plaintiffs' blighted property, the plaintiff attended a public meeting and stated that the city was obligated to buy the property, that there was delay and that the defendant acted unethically. *Id*. at 102. The defendant responded with a prepared statement which stated the plaintiff "apparently hoped to use the fear of blackmail against me, to cause me to urge purchase of his property." *Id*. at 104. Defendant also stated that plaintiff was "a character-thief, and should be watched closely, as in his frustration, he is a desperate man." *Id*. at n. 1. The court held that the defendant was "cloaked with a conditional privilege." *Id*. at 110. The "expenditure of public funds under almost any test is a matter of public or general interest." *Id*. Similarly, matters of ethical conduct "are also matters of public or general interest." *Id*.

c. "An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions who is not entitled to an absolute privilege makes a defamatory communication required or permitted in the performance of his official duties." A conditional privilege may be lost if a plaintiff can show that: (1) the defendant did not believe in the truth of the defamatory matter, or, if it believed the defamatory matter to be true, had no reasonable grounds for believing so; (2) the defamatory matter was published for some purpose other than that for which the particular privilege is given; (3) the publication was made to some person not necessary for accomplishment of the particular privilege; or (4) the publication included defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the privilege is given. *See Ranous v. Hughes*, 30 Wis. 2d 452, 141 N.W.2d 251 (1966).

IV. AMERICANS WITH DISABILITIES ACT

A. Accessibility: In addition to requiring advance public notice of every meeting of a

governmental body, the open meetings law also requires that "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." Wis. Stat. § 19.81(2). Similarly, an "open session" is defined in Wis. Stat. § 19.82(3) as "a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times." Every meeting of a governmental body must initially be convened in "open session." See Wis. Stat. §§ 19.83 and 19.85(1). All business of any kind, formal or informal, must be initiated, discussed, and acted upon in "open session," unless one of the exemptions set forth in Wis. Stat. § 19.85(1) applies. Wis. Stat. § 19.83.

B. Reasonable Accommodations: The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities." *Rappert Correspondence* (Apr. 8, 1993); *Musolf Correspondence* (July 13, 2007). In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility without assistance. 69 Op. Att'y Gen. 251, 252 (1980). In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility with assistance. *See* Wis. Stat. §§ 19.82(3), 101.13(1); 69 Op. Att'y Gen. 251, 252. In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible *without* assistance. 69 Op. Att'y Gen. 251, 253. The Americans with Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities[1].

C. Americans with Disabilities Act and Local Governments: The Federal Americans with Disabilities Act ("ADA") governs the rights of persons with disabilities and may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities. Some common problem that arise under the ADA's general requirements include:

1. Issue: "Grandfather" Clause or Small Entity Exemption: Municipal governments may believe that their existing programs and facilities are protected by a "grandfather" clause from having to comply with the requirements of Title II of the ADA. Small municipalities may also believe that they are exempt from complying with Title II because of their size.

[1] Wis. Dep't of Justice, Wisconsin Open Meetings Law Compliance Guide 11 (May 2019), https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf

Result: Because municipal governments wrongly believe that a "grandfather" clause or a small entity exemption shields them from complying with Title II of the ADA, they fail to take steps to provide program access or to make modifications to policies, practices, and procedures that are required by law. People with disabilities are unable to gain access to city facilities, programs, services, or activities because of a public entity's reliance on these common misconceptions.

There is no "grandfather" clause in the ADA. However, the law is flexible. Municipal governments must comply with Title II of the ADA and must provide program access for people with disabilities to the whole range of city services and programs. In providing program access city governments are not required to take any action that would result in a fundamental alteration to the nature of the service, program, or activity in question or that would result in undue financial and administrative burdens. This determination can only be made by the head of the public entity or a designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The determination that undue burden would result must be based on all resources available for use in a program. If an action would result in such an alteration or such burdens, a city government must take any other action that it can to ensure that people with disabilities receive the benefits and services of the program or activity. 28 C.F.R. § 35.150(a)(3).

Similarly, there is no exemption from Title II requirements for small municipalities. While public entities that have less than 50 employees are not required to comply with limited sections of the Department of Justice's regulations, such as maintaining self-evaluations on file for three years and designating a grievance procedure for ADA complaints, no general exemption applies. All public entities, regardless of size, must comply with Title II's requirements. 28 C.F.R. § 35.102(a).

2. Issue: Program Accessibility: Municipal governments often have failed to ensure that the whole range of the municipalities' services, municipal buildings, and programs meet Title II's program access requirements. People with disabilities are rendered unable to participate in the activities of municipal government such as public meetings.

Requirement: Title II requires municipal governments to ensure that all of their programs, services, and activities, when viewed in their entirety, are accessible to people with disabilities. Program access is intended to remove physical barriers to city services, programs, and activities, but it generally does not require that a municipal government make each facility, or each part of a facility, accessible. For example, each restroom in a facility need not be made accessible. However, signage directing people with disabilities to the accessible features and spaces in a facility should be provided. Program accessibility may be achieved in a variety of ways. Municipal governments may choose to make structural changes to existing facilities to achieve access. But municipal governments can also pursue alternatives to structural changes to achieve program accessibility. For example, municipal governments can move public meetings to accessible buildings and can relocate services for individuals with disabilities to accessible levels or parts of buildings. When choosing between possible methods of program accessibility, however, municipal governments must give priority to the choices that offer services,

programs, and activities in the most integrated setting appropriate. In addition, all newly constructed municipal facilities must be fully accessible to people with disabilities. 28 C.F.R. §§ 35.149, 35.150, 35.151, 35.163.

3. Issue: Historically Significant Facilities: Municipal governments may believe that they have no duty to make changes to historically significant buildings and facilities to improve accessibility for people with disabilities. Many municipal programs, services, and activities are conducted in buildings that are historically significant. In addition, many cities operate historic preservation programs at historic sites for educational and cultural purposes. If no accessibility changes are made at these facilities and locations, individuals with disabilities are unable to visit and participate in the programs offered.

   Requirement: Historically significant facilities are those facilities or properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law. Structural changes to these facilities that would threaten or destroy the historical significance of the property or would fundamentally change the program being offered at the historic facility need not be undertaken. Nevertheless, municipalities must consider alternatives to structural changes in these instances -- including using audio-visual materials to depict the inaccessible portions of the facility and other innovative solutions.

   If alterations are being made to a historically significant property, these changes must be made in conformance with the 2010 ADA Standards for Accessible Design (the "2010 ADA Standards") to the maximum extent feasible. If following the 2010 ADA Standards would threaten or destroy the historical significance of the property, alternative standards, which provide a minimal level of access, may be used. 28 C.F.R. §§ 35.150(b)(3); 35.151(b)(3). This decision must be made in consultation with the appropriate historic advisory board designated in the Standards. 2010 ADA Standards § 202.5. If these lesser standards would threaten or destroy historically significant features, then the programs or services conducted in the facility must be offered in an alternative accessible manner or location.

4. Issue: Effective Communication: municipalities often fail to provide qualified interpreters or assistive listening devices for individuals who are deaf or hard of hearing at public events or meetings. In addition, municipalities often fail to provide materials in alternate formats (braille, large print, or audio cassettes) to individuals who are blind or have low vision. Individuals who are deaf or hard of hearing are unable to participate in government-sponsored events or public meetings and unable to benefit from city programs and services when they are not provided with appropriate auxiliary aids and services. Likewise, people who are blind or have low vision are unable to benefit from city government services when printed materials are the only means of communication available.

   Requirement: Title II requires that municipalities ensure that communications with individuals with disabilities are as effective as communications with others. Thus, municipalities must provide appropriate auxiliary aids and services for people with disabilities (e.g., qualified interpreters, notetakers, computer-aided transcription services, assistive listening systems, written materials, audio recordings, large print,

and braille materials) to ensure that individuals with disabilities will be able to participate in the range of city services and programs. municipalities must give primary consideration to the type of auxiliary aid or service that an individual with a disability requests. The final decision is that of the municipality.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the length and complexity of the communication involved and the needs of the individual. For example, sign language interpreters are not required for all interactions with people who are deaf or hard of hearing. Employees can often communicate effectively with individuals who are deaf or hard of hearing through standard written materials and exchange of written notes. For simple transactions like paying bills or filing applications, these methods may be sufficient. For more complex or extensive communications, however, such as court hearings, public meetings, and interrogation by police officers, interpreters or assistive listening systems are likely to be necessary.

Municipalities should ensure that auxiliary aids and services are also provided for individuals who are blind or have low vision. Alternate formats, such as braille or large print materials, qualified readers, or audio recordings are examples of appropriate auxiliary aids.

Municipalities are not required to take any actions that will result in a fundamental alteration or undue financial and administrative burdens. 28 C.F.R. §§ 35.160-35.164.

V. COVID-19 & OPEN MEETINGS LAW

COVID-19 has imposed a number of new challenges for municipalities in regard to how they go about holding public meetings. In response, in March 2020, the Wisconsin Attorney General issued two directives regarding COVID-19 and open meetings laws. Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 16, 2020); Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 20, 2020). These directives were meant to provide guidance to governmental bodies so that they can continue to comply with the open meetings laws while at the same time adhering to state and local public health directives. The Attorney General acknowledged in the first directive that municipalities generally "can meet their open meetings obligations, while practicing social distancing to help protect public health, by conducting meetings via telephone conference calls if the public is provided with an effective way to monitor such calls." Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 16, 2020).

A. Publicly Held Meetings: "[I]t 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 governmental business." Wis. Stat. § 19.81(1). To that end, the law requires that "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." Wis. Stat. § 19.81(2). A meeting must be preceded by notice providing the time, date, place, and subject matter of the meeting, generally, at least 24 hours before it begins. Wis. Stat. § 19.84.

The open meetings law "does not require that all meetings be held in publicly owned places but rather in places 'reasonably accessible to members of the public.'" 69 Op. Att'y Gen. 143, 144 (1980). As such, the Wisconsin Department of Justice's ("DOJ") longstanding advice is that a telephone conference call can be an acceptable method of convening a meeting of a governmental body. *Id.* at 146. More recently, DOJ guidance deemed video conference calls acceptable as well[2]. Many municipalities have held meetings over popular video conferencing (Zoom and Microsoft Teams).

B. Monitoring the Meeting: When an open meeting is held by teleconference or video conference, the public must have a means of monitoring the meeting. The DOJ concludes that, under the present circumstances, a governmental body will typically be able to meet this obligation by providing the public with information (in accordance with notice requirements) for joining the meeting remotely, even if there is no central location at which the public can convene for the meeting. A governmental body conducting a meeting remotely 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—for example, for people without telephone or internet access or who are deaf or hard of hearing—and appropriate accommodations should be made to facilitate reasonable access to the meeting for such individuals. Providing multiple methods of access and being flexible is key to meeting reasonable access requirements. Another method for improving the quality of access is for, at the beginning of each meeting conducted remotely, the chair of the governmental body should encourage all body members to identify themselves before they begin speaking and not to speak over one another. This will help all those listening to the meeting better understand who is speaking. Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 20, 2020).

C. Additional Access Concerns: The DOJ has further noted that providing only remote access to an open meeting is *not* always permissible. Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 16, 2020). The appropriateness of a remote meeting hinges on whether that meeting can still provide reasonable access to the public. The DOJ opined that "[w]here 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 'reasonably accessible' to the public because important aspects of the discussion or deliberation would not be communicated to the public." Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 16, 2020) (citing 69 Op. Att'y Gen. at 145). However, the type of access that constitutes reasonable access in the present circumstances, in which health officials are encouraging social distancing (including avoiding large public gatherings) in order to mitigate the impact of COVID-19, may be different from the type of access required in other circumstances. Ultimately, whether a meeting is "reasonably accessible" is a factual question that must be determined on a case-by-case basis. *Id.*

D. Reasonable Notice: Another concern that governmental bodies must ensure that they address is that they follow the notice requirements of Wis. Stat. § 19.84 for all public meetings. Proper notice should inform the public that the meeting will be held remotely and provide

[2] Wis. Dep't of Justice, Wisconsin Open Meetings Law Compliance Guide 11 (May 2019), https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf

all information necessary for the public to monitor the meeting. Office of Open Government Advisory: *Coronavirus Disease 2019 (COVID-19) and Open Meetings* (March 20, 2020). Additionally, proper notice should provide instructions for how the public may access the remote meeting, whether it is to be held via telephone conference call or video conference call. This includes providing the telephone number, video conference link, and any necessary passcodes or other login information.

E. Preserving Access: When possible, a governmental body may wish to consider recording the meeting and posting it on its website as soon as practicable after the meeting concludes. *Id*. Being consistent and diligent in posting and preserving meeting recordings allows for better access throughout the community.

F. Reasonable Accommodations: The public accessibility requirements of the open meetings law have long been interpreted by the Attorney General as meaning that every meeting subject to the law must be held in a location that is "reasonably accessible to all citizens, including those with disabilities." *Rappert Correspondence* (Apr. 8, 1993); *Musolf Correspondence* (July 13, 2007). In selecting a meeting facility that satisfies this requirement, a local governmental body has more leeway than does a state governmental body. For a state body, the facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility without assistance. 69 Op. Att'y Gen. 251, 252 (1980). In the case of a local governmental body, however, a meeting facility must have physical characteristics that permit persons with functional limitations to enter, circulate, and leave the facility with assistance. *See* Wis. Stat. §§ 19.82(3), 101.13(1); 69 Op. Att'y Gen. 251, 252. In order to optimally comply with the spirit of open government, however, local bodies should also, whenever possible, meet in buildings and rooms that are accessible *without* assistance. 69 Op. Att'y Gen. 251, 253. The Americans with Disabilities Act and other federal laws governing the rights of persons with disabilities may additionally require governmental bodies to meet accessibility and reasonable accommodation requirements that exceed the requirements imposed by Wisconsin's open meetings law. For more detailed assistance regarding such matters, both government officials and members of the public are encouraged to consult with their own attorneys or to contact the appropriate federal enforcement authorities[3].

VI. RECENT CASELAW DEVELOPMENTS CONCERNING OPEN MEETINGS

A. State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ., 2017 WI 70.

1. Parent of public-school student brought action against school board and the district's curriculum materials review committee, alleging that committee violated open meetings law by holding meetings that were not open to the public. The Circuit Court granted summary judgment for board, and parent appealed. The Court of Appeals affirmed. The Supreme Court reversed the decision of the Court of Appeals holding that the committee was a state or local committee created by rule and therefore met the definition of "governmental body" under the open meetings law. See Wis. Stat. § 19.82(1). The Supreme Court further stated that "[w]here a governmental entity adopts a rule authorizing the formation of committees and conferring on them the

[3] Wis. Dep't of Justice, Wisconsin Open Meetings Law Compliance Guide 11 (May 2019), https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf

power to take collective action, such committees are 'created by ... rule' under § 19.82(1) and the open meetings law applies to them."

B. Shipley v. Chicago Bd. of Election Commissioners, 947 F.3d 1056 (7th Cir. 2020).

1. Election monitors filed § 1983 action against city board of election commissioners and its general counsel alleging, among other things, that the board's refusal to permit the monitors to publicly comment about alleged fraud at proclamation meeting violate their right to petition. The Seventh Circuit Court of Appeals held that the refusal by the board to permit the monitors to publicly comment about alleged post-election audit fraud at proclamation meeting did not violate the monitors' First Amendment right to petition government for redress of grievances, even though board took no action on their allegations, because the monitors were allowed to voice their objections to board shortly after audit and before meeting, and to submit their observations in writing in advance of public meeting.

VII. COMMON PITFALLS

A. Closed Session Issues:

There are defined and limited reasons for going into closed session, and you must follow those reasons exactly. Any doubts about whether a closed session is permitted must be resolved in favor of requiring an open session.

The notice provision in Wis. Stat. Section 19.84(2) requires that if the chief presiding officer knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1). The AG has advised that notice of closed sessions must contain the specific nature of business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session. In *State ex rel. Schaeve v. Van Lare,* the court held that a notice to convene in closed session under Wis. Stat. § 19.85(1)(b) "to conduct a hearing to consider the possible discipline of a public employee" was sufficient.

The following are some of the more frequent exemptions that raise questions:

1. Employment and Licensing

a. Consideration of Dismissal, Demotion, Discipline, Licensing, and Tenure.

i. Two of the statutory exemptions to the open session requirement relate specifically to employment or licensing of an individual. The first, Wis. Stat. § 19.85(1)(b), authorizes a closed session for:

> "Considering dismissal, demotion, licensing or discipline of any public employee or person licensed

> by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter . . . ."

ii. If a closed session for such a purpose will include an evidentiary hearing or final action, then the governmental body must give the public employee or licensee actual notice of that closed hearing and/or closed final action. Evidentiary hearings are characterized by the formal examination of charges and by taking testimony and receiving evidence in support or defense of specific charges that may have been made. Such hearings may be required by statute, ordinance or rule, by collective bargaining agreement, or by circumstances in which the employee or licensee is the subject of charges that might damage the person's good name, reputation, honor or integrity, or where the governmental body's action might impose substantial stigma or disability upon the person.

iii. Where actual notice is required, the notice must state that the person has a right to request that any such evidentiary hearing or final action be conducted in open session. If the person makes such a request, the governmental body may not conduct an evidentiary hearing or take final action in closed session. The body may, however, convene in closed session under Wis. Stat. § 19.85(1)(b) for the purpose of deliberating about the dismissal, demotion, licensing, discipline, or investigation of charges. Following such closed deliberations, the body may reconvene in open session and take final action related to the person's employment or license.

iv. Nothing in Wis. Stat. § 19.85(1) permits a person who is not a member of the governmental body to demand that the body meet in closed session. The Wisconsin Court of Appeals held that a governmental body was not required to comply with a public employee's request that the body convene in closed session to vote on the employee's dismissal.

b. Consideration of Employment, Promotion, Compensation, and Performance Evaluations.

i. The second exemption which relates to employment matters authorizes a closed session for "[c]onsidering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility."

ii. The Attorney General's Office has interpreted this exemption to extend to public officers, such as a police chief, whom the governmental body has jurisdiction to employ. The Attorney General's Office has also concluded that this exemption is sufficiently

broad to authorize convening in closed session to interview and consider applicants for positions of employment.

iii. An elected official is not considered a "public employee over which the governmental body has jurisdiction or exercises responsibility."237 Thus, Wis. Stat. § 19.85(1)(c) does not authorize a county board to convene in closed session to consider appointments of county board members to a county board committee.

iv. The language of the exemption refers to a "public employee" rather than to positions of employment in general. The apparent purpose of the exemption is to protect individual employees from having their actions and abilities discussed in public and to protect governmental bodies "from potential lawsuits resulting from open discussion of sensitive information." It is not the purpose of the exemption to protect a governmental body when it discusses general policies that do not involve identifying specific employees. Thus, Wis. Stat. § 19.85(1)(c) authorizes a closed session to discuss the qualifications of and salary to offer a specific applicant but does not authorize a closed session to discuss the qualifications and salary range for the position in general. The section authorizes closure to determine increases in compensation for specific employees. Similarly, Wis. Stat. § 19.85(1)(c) authorizes closure to determine which employees to lay off, or whether to non-renew an employee's contract at the expiration of the contract term, but not to determine whether to reduce or increase staffing, in general.

2. <u>Consideration of Financial, Medical, Social, or Personal Information.</u>

a. The exemption in Wis. Stat. § 19.85(1)(f) authorizes a closed session for:

> "Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations."

b. An example is where a state employee was alleged to have violated a state law. This exemption is not limited to considerations involving public employees. For example, the Attorney General concluded that, in an exceptional case, a school board could convene in closed session under the exemption to interview a candidate to fill a vacancy on the school board if information is expected to damage a reputation, however, the vote should be in open session.

c. At the same time, the Attorney General cautioned that the exemption in Wis. Stat. § 19.85(1)(f) is extremely limited. It applies only where a member of a

governmental body has actual knowledge of information that will have a substantial adverse effect on the person mentioned or involved. Moreover, the exemption authorizes closure only for the duration of the discussions about the information specified in Wis. Stat. § 19.85(1)(f). Thus, the exemption would not authorize a school board to actually appoint a new member to the board in closed session.

3. Legal.

a. The exemption in Wis. Stat. § 19.85(1)(g) authorizes a closed session for "[c]onferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved."

b. The presence of the governmental body's legal counsel is not, in itself, sufficient reason to authorize closure under this exemption. The exemption applies only if the legal counsel is rendering advice on strategy to adopt for litigation in which the governmental body is or is likely to become involved.

c. There is no clear-cut standard for determining whether a governmental body is "likely" to become involved in litigation. Members of a governmental body should rely on the body's legal counsel for advice on whether litigation is sufficiently "likely" to authorize a closed session under Wis. Stat. § 19.85(1)(g).

B. Agenda.

1. Basics.

a. "Our Agenda Notice Says Tuesday April 27, but April 27 is a Friday."

i. Answer: Re-notice. If it is too late to re-notice (less than 24 hours), so sad – you need to set a new meeting date and try again.

ii. The basics to an agenda notice are simple, but we see this a few times each year, where the basics are not there, and meetings are cancelled as a result. Every agenda notice must show, unambiguously, the date, time, and location of the meeting.

2. Setting the Agenda.

a. "Agenda! Agenda? Who Sets the Agenda?"

i. Each meeting must be preceded by public notice.

ii. "Public notice of all meetings of a governmental body shall be given in the following manner: by communication **from the chief presiding officer** of the governmental body or such person's designee to the public, to those news media who have filed a written request for such

notice . . . and to the official newspaper designated . . . or, if none exists, to a news medium likely to give notice in the area." Wis. Stat. Section 19.84(1).

iii. As a result, the presiding officer sets the agenda.

iv. Even so, we recommend you establish a process for other members of the Board to set future agenda items.

v. If your process requires two Supervisors to request that a matter be placed on an upcoming agenda (which is common), you have a problem if you are a three-member Board.

vi. May have served on other private boards, where the first thing on the agenda is to 'approve the agenda'. That does not work in the public setting.

vii. Reconsideration issues.

a. Reconsideration must be done, generally, at the same meeting or the next meeting of the governmental body.

b. If this issue is not on the agenda, this presents a difficult procedural issue.

c. If you know or suspect that reconsideration will come up at a subsequent meeting, you should place the issue on the agenda to avoid any open meetings law concerns.

d. We recommend that reconsideration motions can be made at a subsequent meeting even if it is not on the agenda, provided that action on the matter is not taken until the following meeting that is properly noticed.

3. <u>Content.</u>

a. Show on the Agenda What You Will Be Talking About.

i. This can be particularly important internally, with staff. If you have "staff reports," and the like, require each department head to tell you in advance what issues they will be bringing forward, and list those issues on the agenda.

ii. If you allow elected officials to give announcements, try to reign in that time, and describe the limits within the agenda.