

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: October 8, 2019

**FORMAL OPINION 2019-003
ON NEGATIVE AND WALKING QUORUMS**

TO: Mayor Rhodes-Conway
All Alders

FROM: Michael P. May
City Attorney

RE: Negative and Walking Quorums under the Open Meeting Law

Recently, a number of Alders have asked our office about potential violations of the Wisconsin Open Meeting Law due to Negative and Walking Quorums. We have not addressed this issue formally since 2004:

<https://www.cityofmadison.com/attorney/documents/2004opinions/2004-001.pdf>

This opinion will update members of the Common Council and committee staff on these concepts under the Open Meeting Law. We advise those staffing committees to refer all Open Meeting Law questions to our office.

Question Presented.

How do the concepts of a negative quorum and a walking quorum apply in the Open Meeting Law context?

Brief Answer.

Under Wisconsin's Open Meeting Law, any meeting of a governmental body held without adequate notice or without access by the public is illegal. While we normally think that a quorum of a body is necessary for a meeting, the Wisconsin Supreme Court has held that a "negative quorum" also is a meeting. A negative quorum occurs when sufficient member of the body meet so that they may determine the outcome of a vote on a particular matter. The Court has also held that a "walking quorum," when sufficient members of a body are consulted individually to determine the outcome of a matter, violates the Open Meeting Law.

Discussion.

A. The Basics.

The Wisconsin Open Meeting Law (OML) is found at Wis. Stat. § 19.81 et seq. The very first section of the law (Wis. Stat. § 19.81(1)) sets out the important policy to guide interpretation of the law:

In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.

The OML applies whenever there is a “meeting” of a governmental body, and requires that such a meeting be open to the public, Wis. Stat. § 19.83, and be preceded by a notice that tells the public when and where the meeting will be held, and the matters to be discussed at the meeting. Wis. Stat. § 19.84. Thus, when members of a governmental body have a meeting without providing adequate notice and providing access to the public, they have engaged in an illegal meeting and may be liable for a violation of the OML.

It seems obvious that if a quorum of a governmental body gathers to conduct business, including gathering information related to the duties of the body, there is a “meeting” that must be noticed. In fact, the OML presumes that if a quorum of a governmental body gathers in one place, it is a meeting unless it can be shown otherwise, such as a chance social gathering or clear evidence that no government business was discussed. Wis. Stat. § 19.82(2).

However, the Wisconsin courts have expanded the definition of “meeting” to other situations. This opinion will focus on two of the most difficult of those situations, a negative quorum and a walking quorum.

B. Further Definition of “Meeting.”

Wis. Stat. § 19.82(2) provides in part:

“Meeting” means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, powers or duties delegated to or vested in the body.

Wisconsin courts have explained, and expanded upon, the definition of meeting in the statutes. A critical case is *State ex rel. Newspapers Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W. 2d 154 (1987). The Milwaukee Metropolitan Sewerage District had 11 members, split between the city of Milwaukee and the suburbs. They had met several times to adopt a budget, but due a 2/3 requirement to approve a budget, none had been approved. The 2/3 vote required eight votes out of eleven.

After another failed meeting, four (4) commissioners met privately to discuss the budget impasse. The meeting was not noticed. At the next full meeting of the District Commissioners, the budget was approved by a 9-1 vote.

The Wisconsin Supreme Court put the question, and answered it (135 Wis. 2d at 79, 80):

Does Wisconsin's Open Meeting Law apply when the number of members of a governmental body present at a meeting constitute less than half the membership of the full body?

We hold that whenever members of a governmental body meet to engage in government business, be it discussion, decision or information gathering, the Open Meeting Law applies if the number of members present are sufficient to determine the parent body's course of action regarding the proposal discussed at the meeting. Because the purpose of the meeting was to engage in government business, i.e. the discussion of the capital and operating budgets, and because the number of commissioners at the meeting were sufficient in number to block any proposed budgets, the Open Meeting Law applied.

While not the birth of the “negative quorum”¹, *Showers* greatly expanded what could constitute a meeting. *Showers* created a purpose test, and a numbers test. If both tests are met, the meeting is subject to the OML and is subject to the notice and openness rules.

The “purpose” test is whether the members gathered to “engage in government business,” with the Court noting that it could be “discussion, decision or information gathering.” The “numbers” test is whether there are sufficient members of the body present “to determine the parent body’s course of action regarding the proposal discussed at the meeting.”

Applying those tests to the facts of the *Showers* case, the Court found that the meeting of the four members of the District Commissioners violated the OML. They met to discuss the budget, and the four were sufficient to control any budget vote, since it needed eight of the eleven members to approve the budget.

In a subsequent case, *State ex rel. Badke v. Village of Greendale*, 173 Wis. 2d 553, 494 N.W. 2d 408 (1993), the court interpreted the “purpose” requirement. In *Badke*, a controversial development was before the Plan Commission. Two members of the seven-member Village Board sat on the Plan Commission. Over a series of meetings,

¹ In *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313 (1976), the court held that if half the members of a body met without compliance with the OML, it was a violation since half the body could always block action.

at least four members of the Village Board were present at the Plan Commission meetings to listen to arguments about the development.

The Wisconsin Supreme Court held that meetings of the Village Board had occurred, and were illegal since they were not noticed. This was because a majority of the Board was present to engage in government business, namely, gathering information about the development. The Village Board meetings should have been noticed, the court ruled.

This second ruling leads to a number of notices which state things like “a quorum of the Common Council may be present at this meeting.” We refer to such notices as *Badke* notices.

C. Application of the Negative Quorum Rulings.

Application of the negative quorum rules is difficult. Our office often gets questions such as, “How many members of the committee/task force/common council may meet privately without violating the Open Meetings law?” The answer is the lawyer’s best friend, “It depends.”

Take the Common Council, with 20 members (plus the Mayor, who only votes in the event of a 10-10 tie). Since Madison requires 11 votes for any item to pass, you might think any 10 members of the Council would be the negative quorum. But if only 17 members are present, and it still takes 11 members to approve an item, then 7 members would constitute a negative quorum for that meeting. I referred to this problem, in Formal Opinion 2004-001, as the “floating” negative quorum. A member of a governmental body may not know whether prior discussions were a negative quorum until the member gets to a meeting and sees the number of members present.

Now assume the matter before the Council is a budget amendment, which by Madison’s rules requires 15 votes. One might surmise that any six members of the Council constitute a negative quorum. However, if only 17 members of the Council are at the meeting, any prior meeting on the topic by 3 members of the Council may have constituted a negative quorum, and a violation of the OML. And if only 16 members of the Council are present on the item? Then if an alder discussed the issue with another alder, a negative quorum and a possible violation occurred.

As the City Attorney, I err on the side of caution, so you do not err on the side of violation. This led our office to develop a chart which we presented in Formal Opinion 2004-001, showing the smallest meeting possible for bodies that had standard majority voting rules.

That chart looked like this:

Size of Governmental Body	Quorum	Smallest Possible Negative Quorum (for majority votes)
Seven or Less	Four or Less	Two
Eight to Eleven	Five or Six	Three
Twelve to Fifteen	Seven or Eight	Four
Sixteen to Nineteen	Nine or Ten	Five

One can carry forward the chart as needed.

When special voting rules apply, such as at the Common Council, the negative quorum issues become, as noted above, more complex.² In consultation with the Common Council office, we have established a rule that if five or more Council members plan to meet on City business, the meeting should be noticed. As detailed above, this may not always avoid a negative quorum, but it is a good start.

The problem of the “floating” negative quorum applies in small committees also. Take an eleven-member committee, where 3 members discussed in private a matter coming before the committee. Upon arriving at the meeting, the three private meeting members are chagrined to notices that only a bare majority, six members of the committee, are present. Those three members now are a negative quorum, as they can block any action.

Because of the complexities of the negative quorum rule, we urge Council members and all members of Boards, Commissions and Committees (BCC) to be very cautious in meeting with members of your governmental body.

D. The Walking Quorum.

A walking quorum is created when several groups, of two or more members of a governmental body, meet through one or more proxies and arrive at a consensus for a decision. Although there was never a quorum or negative quorum meeting at one time, a meeting effectively occurred. For example, one member of an eleven-member body may meet individually with the other members of the body, and obtain agreement or acquiescence on a course by the body from five other members. The polling member has effectively conducted a secret meeting.

The *Showers* court recognized this possibility, quoting favorably from the *Conta* ruling (135 Wis. 2d at 100):

² There are additional complexities with meetings of members of the Council because, although the group may not constitute a negative quorum of the Council, it may (depending on who is meeting) be a negative quorum of the Finance Committee or Common Council Executive Committee.

In addition, the language in Conta regarding groups consisting of less than a quorum was before them:

“It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule.” Id. at 687, 239 N.W.2d 313.

The legislature did nothing to step back from that conclusion found in Conta. Common sense also tells us, and the Commissioners here agree, that if proxies are present so as to realistically make-up a majority, the Open Meeting Law applies.

Walking quorums are very difficult to prove, and run into the practical fact that members of a legislative body will discuss issues before the body outside of a meeting. Our office, nonetheless, urges caution on use of polling to in effect conduct a meeting without proper notice and access.³

E. Practical Reactions to Negative or Walking Quorum Issues.

Assume you have somehow engaged in a discussion that may have violated the OML. What do you do?

The first step is to admit what happened and be public about it. Prosecutions under the OML are rare, and the major result is a sort of public shaming. The same result comes from a public admission of some culpability. Admission of error also supports the belief that you were not intending to do an end run on open government.

If you arrive at a meeting, and realize that the number of members present may mean that you engaged in a negative quorum, you should point out the concern to the chair of the body. If possible, you could ask that the matter you discussed be referred to a future meeting where a greater number of members are in attendance, and your private meeting no longer constitutes a negative quorum. If referral is not possible, you should refrain from voting on the matter.

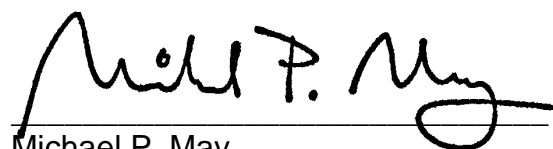
³ As noted in Formal Opinion 2004-001, a walking quorum or a meeting may be created by use of email or other electronic communication. This is why we counsel the use of “Do Not Reply All” whenever a majority of a governmental body is being addressed.

Conclusion.

Members of governmental bodies may violate the Wisconsin Open Meetings Law in a variety of ways. If members of a body gather in an unnoticed, private meeting to undertake the business of the body, the Law is violated if the number of members could control the outcome of a vote on the matter discussed. This is a “negative” quorum.

Calculating whether a negative quorum has been achieved is difficult, depending on the size of the governmental body, the vote needed to approve the matter at issue, and the number of members of the body present at the subsequent legal meeting.

Members of governmental bodies should avoid meetings that may constitute a negative quorum or a walking quorum, and if they inadvertently engage in these activities, they should take steps to remedy the situation.

A handwritten signature in black ink that reads "Michael P. May". The signature is written in a cursive style with a large, sweeping initial "M".

Michael P. May
City Attorney

SYNOPSIS: The concepts of a negative quorum and walking quorum, in the context of Wisconsin’s Open Meetings Law, are analyzed.