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**MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT  
GOVERNING BOARD MONITORING RETREAT  
JANUARY 9, 2009  
MINUTES**

A retreat of the Maricopa County Community College District Governing Board was scheduled to be held at 2:00 p.m. at the Rio Conference Center in Tempe, Arizona, pursuant to A.R.S. §38-431.02, notice having been duly given.

**PRESENT**

**GOVERNING BOARD**

Don Campbell, President  
Colleen Clark, Secretary  
Randolph Lumm, Member  
Jerry Walker, Member  
Debra Pearson, Member

**ADMINISTRATION**

Rufus Glasper, Chancellor  
Pete Kushibab  
Teresa Toney  
Gloria Smith

Guest:

Julia Z. Smock  
Assistant Attorney General

**CALL TO ORDER**

The retreat was called to order at 10:05 a.m. by Governing Board Secretary Colleen Clark. Ms. Clark welcomed everyone to this retreat which would include discussion pertaining to board conflict resolution policies and procedures (to include addressing Board conduct and professional manners and parliamentary process for addressing such matters), open meeting presentation by Julia Smock from the Attorney General's Office, creation of a Board "program" that will govern the Board's objectives and direction for the year (negotiating and setting goals), organizational procedures and process, a parliamentarian role and position, as well as Board Members Top Ten

**Arizona's Open Meeting Law, Executive Sessions, Public Records Presentation**

Assistant Attorney General Julia Smock provided the following biographical information to those in attendance:

- B. A., University of Cincinnati, 1973
- J.D., Indiana University, 1976
- Assistant Attorney General since 1980
- Licensing and Enforcement Section of the Civil Division, 1980-1987
- Has represented various licensing agencies including the Department of Liquor Licenses and Control, the Agriculture and Horticultural Commission, the State Chemist and the Pharmacy, Naturopathy, Chiropractic and Podiatry Boards
- Currently assigned to the Child Support Enforcement Section of the Child and Family Protection Division.
- Member of the Attorney General's Open Meeting Law Enforcement Team since 1983 and has made numerous open meeting law presentations for the Governor's Office,

state and local boards and commissions and for public and private attorneys. She is a regular presenter for the Arizona School Boards Association

- Served as a member of the Peoria Unified School District Governing Board from 1989 through 2000

The following information was included in a Powerpoint presentation:

#### Who is Covered?

- Advisory Committees/Subcommittees are required to comply with the same requirements with which the board must comply including:
  - Notice
  - Agenda
  - Minutes

#### Basic Requirements

- Notice of not less than 24 hours before the meeting starts including who, what, where, why and when
- An agenda for the meeting which cannot be changed less than 24 hours before the meeting
- Agenda must be specific enough to inform the public of the items to be discussed
- Agenda limits what can be discussed
- Resist the temptation to stray from the agenda
- An agenda posted at whatever posting location(s) the board chooses and so advises the Clerk of the County Board of Supervisors that agendas will be posted
- Agenda setting is not covered in the Open Meeting Law – board sets its own procedures
- Suggestion of possible agenda items can be made at a meeting or in an e-mail, but there can be no discussion of the substance of the item unless already included on this meeting's agenda
- Accompanying documentation must be made available to the public prior to the meeting – beware the “confidential” stamp

#### Myths of the Open Meeting Law

- Citizens have a right to participate in a meeting – wrong!
- Call to the Public – you control it by setting the ground rules for participation
- Consensus agenda – you control it by determining if and how it will be used
- Robert's Rules of Order are not required by the OML

#### What is a Meeting?

- “The gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action.  
- A.R.S. § 38-431(4)
- Regular meeting regardless of what it is called – study session, workshop, etc.

- Chance or planned meeting outside of the board room at which school business is discussed by a quorum
- E-mail
- Virtual meeting
- If it is a meeting, then the notice, agenda and minute requirements of the OML must be followed
- Subterfuge, scheme, fraud or device to circumvent the OML will result in serious consequences
- If you cannot follow the law, you are in the wrong kind of public service
- Remember that any actions leading up to a decision, no matter how long before the decision is made, are considered a meeting that must be posted

#### The E-Mail Opinion

- I05-004
- Use of e-mail by a quorum of the board can constitute a meeting, even if you all do not “talk” together in the same room at the same time
- Hypotheticals in the opinion are very instructive
- Discussion between less than a quorum that are forwarded to a quorum by a board member or at a board member’s direction violates the OML
- If a staff member or board member e-mails a quorum and there are no further e-mails among the members, there is no violation
- Member A on a 5 member board cannot e-mail members B and C and communicate to them what members D and E have said on the topic
- This would be considered a “chain of improper serial communication” among a quorum
- A board member may e-mail staff and a quorum asking that a matter be placed on a future agenda
- Without more, this does not “propose legal action”
- No discussion back and forth about the merits of the proposed items is permissible
- E-mail from superintendent or staff to quorum – no violation
- If a board member replies to the superintendent, that’s OK
- If a board member replies to all or a quorum, that’s a violation
- If the superintendent forwards a board member’s response to a quorum, that’s a violation
- A board member may send a “cc” to all or a quorum on a response to a constituent
- That constitutes a one-way communication that is not a discussion, deliberation or taking legal action
- But other board members may not reply
- A board member may ask staff for specific information and “cc” other board members
- Staff may reply to all so long as there is no communication of opinions to other board members
- Board members may not reply to enough to make a quorum because that becomes a discussion or deliberation
- A board member may send an article, report or factual information and ask that it be included in an agenda packet

- Staff may distribute agenda packets via e-mail
- But board members may not discuss the information via e-mail

#### Public Records

- “Public records and other matters in the custody of any officer shall be open to inspection by any person at all office hours.” A.R.S. § 39-121
- “Officer means any person elected or appointed to hold any elective...office of any public body...superintendent or chairman of any public body.” A.R.S. § 39-121.91(A)(1)
- “All officers and public bodies shall maintain all records...reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from the state and any political subdivision of the state.” A.R.S. § 39-121.01(B)
- Your school board related e-mails are public records, even if you use your personal computer at home
- That means it must be produced if there is a public records request
- Your district must have a public records retention policy and you must know what it is and how it works

#### Comments to the Media

- I07-013
- Board members are not prohibited from speaking to the media about board matters
- Although a board member’s proposal of legal action through e-mail involves a gathering of a quorum, a comment to the media does not involve a “gathering”
- Virtual Board Meetings
- I08-008
- OML allows a board to conduct deliberations and discussion in an online or “virtual” meeting through technological devices
- Opinion specifically deals with board members contributing comments or editing a document on-line

#### Virtual Board Meetings

- Public must be given notice of meeting – including beginning and end times
- Public must have access to entire course of discussion or deliberation between board members
- Public must be able to identify which members contributed which comments and/or edits
- Virtual Board Meetings
- Board must have a public records retention policy to cover maintenance and preservation of electronic documents
- Board must facilitate public access to the on-line meeting, including providing free internet access at or near board offices
- Board must provide instruction for accessing and operating software to access on-line meeting
- Virtual Board Meetings

- This type of meeting is fraught with possible OML violations
- Do not take this lightly
- This opinion does not permit an unending chat room for board members

#### Executive Sessions

- A.R.S. § 38-431.03 – provides exceptions to need for meeting open to the public
  - Personnel
  - Real Estate
  - Interstate, international or tribal negotiations
  - Negotiations with employee organizations
  - Confidential information
  - Pending/Contemplated litigation or contracts under negotiation
  - Legal Advice
- Requires notice on public meeting agenda as well as a motion and a vote by the board
- Board president may not just announce that the board is going into executive session
- Specific reason(s) for executive session must be included on the agenda by statutory subsection

#### Exception for Personnel Matters

- Individual being discussed must be advised in writing more than 24 hours before the meeting that s/he is being discussed
- Individual being discussed must be given opportunity to have discussion held in public
- Individual being discussed is not required to be permitted in executive session
- Exception for Personnel Matters
- If individual is permitted in executive session and has counsel , counsel must be permitted in executive session as well
- Individual being discussed in executive session has access to executive session minutes whether or not s/he was permitted to attend the executive session

#### Discussing Salaries

- A.R.S. § 38-431.03(A)(1) permits discussion of salaries to take place in executive session
- Discussion must include the salary of a specific individual – there can be no general discussion of salary increases for classes of employees
- A.R.S. § 38-431.03(A)(1) creates exception to general rule that individual who is subject of discussion in executive session can demand that discussion be held in public but employee still must be notified that discussion will be held
- And remember that your board is not required to allow the employee to attend executive session
- Discussing Salaries

- Setting a range before a position is posted requires an executive session notice that indicates the board will consider the salary of new executive director who will be recruited
- But discussion in executive session may not become a general discussion of the budget
- “Salary” is not limited only to money – it includes perks and benefits as well
- Board may not conduct negotiations in executive session – it may instruct its representative in executive session A.R.S. § 38-431.03(4) for contract negotiations/ A.R.S. § 38-431.03(5) for negotiations with employee organizations
- No decision is made in executive session, but if negotiation is occurring, Board may give “parameters” to individual(s) who are negotiating with chosen candidate
- Nothing is binding until there is final vote in public session to adopt a contract that includes salary figure

#### Evaluations

- A.R.S. § 38-438.01(A)(1) permits evaluation of employees in executive session
- The employee must be notified in advance in writing that s/he will be discussed in executive session and that employee may choose to have discussion held in public
- Evaluation instrument should be created in public session
- Evaluation instrument may be discussed with the employee in executive session
- Written notice must be provided to the individual even if the individual is the employee who normally sets the agenda
- Board should discuss evaluation process with attorney so that attorney can advise in advance on issues of notice and agenda
- Employee may be excluded from executive session
- But executive session minutes must be made available to the targeted employee whether s/he is present at executive session or not – A.R.S. § 38-431.03(B)(2)
- Evaluation
- If rating instrument is used, quorum of Board may not exchange ratings or discuss the evaluation through e-mail. A.G. Opinion I05-004
- Best practice is for all members to provide ratings to individual who will compile and report at another meeting
- Should the attorney for the board be present during the evaluation process?
- Board cannot avoid individual notice by noticing the executive session for legal advice instead of evaluation
- Board cannot use evaluation as an excuse to chart the Board’s course for the next 5 years – A.G. Opinion I96-012
- No general information gathering masquerading as an evaluation or performance review – that takes place in public session

#### Executive Sessions

- Confidential information must be confidential by law – this exception may not be used to discuss information that makes you squeamish or happens to be stamped “confidential”

- Legal advice requires an attorney – this exception may not be used to discuss general legal matters without counsel present
- Executive Session
- Negotiations with representatives to consider board’s position and instruct regarding employee organizations
- This exception does not allow a board to negotiate with employee organizations in executive session
- Minutes
- Public session requirements
- Date, time and place of meeting
- Members recorded as present or absent
- General description of matters considered
- An accurate description of all legal actions proposed, discussed or taken and the names of members who propose each motion

#### Minutes

- Names of persons as given making statement or presenting material to the board and reference to the agenda item each is addressing
- Note that this is the only reason you can require a member of the public to identify him/herself as attending a meeting
- Minutes
- Executive Session
- First three items above
- Accurate description of all instructions given to attorneys, representatives negotiating with employee groups and representatives negotiating regarding real estate transactions
- Minutes
- Public session minutes or a recording of the minutes must be available to the public within 3 business days of the meeting
- Executive session minutes are not available to the public
- If you review executive session minutes, you should turn them in to your superintendent after review to avoid inadvertent disclosure
- Minutes
- Executive session minutes should not be transmitted to board members via e-mail or fax because of possible confidentiality “leaks”
- All executive session minutes must be made available to board members after taking office
- Sanctions
- Meeting held in violation of OML must be done over
- Item improperly noticed and discussed anyway must be done over
- Law says discussion/meeting held in violation of OML is “null and void”
- Ratification is difficult process

#### Sanctions

- Violations can result in:
  - Investigations
  - Lawsuits

- \$500 civil penalty per event
- Assessment of attorneys fees and costs
- Resignation/removal from office
- Recall/no re-election

### Closing Comment

#### **Lighting Fires**

*I have never settled for better when best was within reach. I have no interest in okay.  
I have never mistaken listening for understanding. I have frustrated cynics.  
I have been difficult when necessary. I have been easy when faced with perfection.  
I have lit fires.*

### **Board Conflict Policies and Procedures, Parliamentary Role and Process Discussion**

Board Member Debra Pearson led discussion pertaining to unprofessional comments and behavior by board members and how these should be addressed from this point forward. She explained that she had attended a few board meetings prior to her election to the board and had witnessed unprofessional comments from one board member to another. She stated that the Attorney General's Office provides avenues for filing behavioral complaints. She explained that she was interested in the implementation of an ethics policy which would prevent the escalation of negative comments made by board members. This policy would provide for impugning motions where the action or comment was called attention to and followed by a board vote and would ask for a public apology by the responsible board member. Attacks by one board member towards another should not be allowed. There is a desire that board decorum be raised and reach an understanding that any unprofessional comments by board members are unacceptable. The Board should decide how they want to handle these situations. The intent here is to preempt this from happening.

Options offered:

1. Handle from within

Parliamentarian (board member, attorney, or legal counsel) would make motion to the board as a matter of impugning or improper behavior. Statute in Arizona does not allow censuring. To recognize that a Board Member who feels impugned is to call a "point of order" and call for the Board to recognize and offer relief and a Board vote that then is made a matter of public record that the Board recognized and did not condone the impugning behavior or comments, the Board agrees that an apology was or is in order, is all that we as a Board are discussing to be made a part of the Board Policy. In the adoption of Roberts Rules, it was to be a modified Roberts Rules. The position of Parliamentarian is for the purpose of walking and assisting members through the motions of Roberts Rules so that they know what they can do when they feel a meeting or member is imposing on them or offending them.

2. Parliamentarian can make a statement as a point of order or that someone is taking the board in a direction they do not want to go. The board can then vote to close conversation. If a specific board member impugns another board member by calling them a name then a point

of order can be made and an apology requested. As a board, one can recognize that a board member has been impugned. One can talk through the Board Chair in dealing with a board member. If we cannot resolve, can the Parliamentarian raise discussion to have this mediated? Need to be careful if you use public funds. Perception of using public meeting to mediate conflict. If no agreement can be reached, who will mediate the issue because it can be resolved privately? Mediation would be for conflict resolution. In a board meeting you can raise the statement, "I feel impugned and ask for apology." Motion can be made to close and proceed with other business. Parliamentarian or individual board members can call attention to calling off topics or personalities.

3. Adopt Robert's Rules of Order?

Dr. Campbell: no

Mr. Walker: yes

Ms. Clark: yes

Mr. Lumm: needs more information

Mrs. Pearson: yes

**Concluding Comments:**

Recommendation was made to have a mock process training and how to apply Robert's Rules of Order. Create Parliamentarian position. Parliamentarian never takes a position and doesn't make judgments.

Decision made to hold another session to discuss. Table Board Member Top Ten. Session to be held after Special Board Meeting of January 13.

**Adjournment:** Retreat adjourned at 2:30 p.m.

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Colleen Clark  
Governing Board Secretary