



**MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT
GOVERNING BOARD WORK SESSION
MARCH 8, 2011**

MINUTES

A Work Session of the Maricopa County Community College District Governing Board was scheduled to be held at 5:30 p.m. at the Governing Board Room, 2411 West 14th Street, Tempe, Arizona to A.R.S. §38-431.02, notice having been duly given.

PRESENT

GOVERNING BOARD

Randolph Lumm, President
Doyle Burke, Secretary,
Debra Pearson, Member
Don Campbell, Member
Dana Saar, Member

ADMINISTRATION

Rufus Glasper
Maria Harper-Marinick

Lee Combs
Teresa Toney

CALL TO ORDER The information session was called to order at 5:32 p.m.

Welcome and Overview

Governing Board President Randolph Lumm welcomed those in attendance to this training session required by Governing Board Policies. He indicated that he was appreciative that 100% of the Board was present. Happy Birthday was sung to Governing Board Member Dana Saar.

Chancellor Dr. Rufus Glasper also welcomed everyone to the training session and indicated that it was required training for the Board, as well as employees, every three years. The Chancellor was hopeful that this session would help complete the Board's fiduciary responsibilities.

Biographical Information of Terri Skladany, M.S., J.D.

Terri Skladany has assisted public officers and employees in understanding and correctly applying Arizona's ethics standards for over ten years. Terri was employed at the Arizona Attorney General's Office for 21 years and served under four Attorneys General. She was most recently the Chief Deputy Attorney General and supervised the operations, personnel, and legal work of the Office and was a member of the State Bar of Arizona's Ethics Rules Review Group and Mandatory Continuing Legal Education Committee. Terri previously served the Office as Chief Counsel of the Civil Division and the Special Counsel for Ethics, Professionalism, and Training.

As the Chief Counsel of the Civil Division, Terri led the largest Division in the Attorney General's Office. She spearheaded professional leadership and team building initiatives, established senior litigation positions to handle complex and high profile cases, and invested in innovations throughout the Division. As the Special Counsel for Ethics, Professionalism, and

Training, Terri served on the Attorney General's executive staff and assisted more than 350 lawyers and 700 other employees to prevent and resolve ethical matters. Terri chaired the Office's Ethics Committee and Continuing Legal Education Committee and coordinated the Attorney General's ethics training for statewide elected officials and agency directors. The Attorney General also appointed Terri to spearhead the Office's elder issues task force and to supervise the Attorney General's Senior Projects.

Terri co-developed the Attorney General's Life Care Planning project in 2001 and has taught life care planning to over a thousand attorneys and non-attorneys since that time. The Attorney General's Office distributed more than 250,000 life care planning packets since 2001 and received awards for this innovative work from the State Bar of Arizona and the Area Agency on Aging.

Before being promoted to the executive staff in January of 1999, Terri worked in the Solicitor General and Opinions Section. She drafted formal Attorney General Opinions, taught, and provided independent advice to the directors, boards, and commissions of more than 100 State agencies. Prior to that, Terri served as the chief of the Education Unit and represented the Arizona Department of Health Services in public health and regulatory matters.

In addition to her undergraduate and law degrees, Terri earned a Master of Science Degree in Counseling. She has published a variety of works on a broad range of topics, both legal and non-legal.

**Presentation: Ethics and Public Service
Facilitated by Terri Skladany, M.S., J.D.**

Ms. Skladany expressed her appreciation in being able to conduct this training session because she felt that too little was invested in public servants, as compared to everything that public servants invest in the organizations and communities they serve. She stated that the handout she provided was meant to be used as a reference and not as something to follow during the evening's presentation. Her presentation would focus on three major categories: Approach, Perspective, and Authenticity.

As a means of introduction to her presentation, Ms. Skladany quoted from *The Leadership Challenge* by Kouzes and Posner the following statement on Ethics and Public Service: "You can resolve the conflicts and contradictions of leadership only if you establish for yourself an ethical set of standards on which to base all your actions All of your individual complexities are held together by a fundamental set of values and beliefs. Developing yourself as a leader begins with your value system."

Approach:

Ms. Skladany commented that her goal this evening would be to assist the Governing Board Members implement board values and guiding principles when they act in their official capacities and thereby enhancing their understanding of ethical conduct. When individuals become Governing Board Members they receive governing power and authority to perform the public's business. Governing Board members are public stewards and have responsibilities that extend to the County, students, public and private sector employers, universities, as well as

primary and secondary schools, to name a few. This presentation would acknowledge the challenges the Governing Board faces in exercising its power and would address the ethical management of that power. It was also meant to cover several key ethical standards that are applicable to public officials. Effective governing is based on well-developed skills – one of which is consistent ethical action. Here at Maricopa, the organization has an Office of Public Stewardship which is there to assist in helping to maintain high standards. The Board has many challenges, some of those being the size of the district, money being tight, shifting priorities, and ensuring balance. The Board must learn to work as a team. Ethics is a skill and the more the Board exercises this, the better it will be. Every board has a personality and that personality is determined by the individuals on that board. Some boards are dysfunctional and others are very well functioning. By using good judgment and experience, the Board will build on what they have.

Perspective:

Governing Board Members are powerful people. How that power is used impacts a multitude.

Why Ethics? The Maricopa Community College Governing Board has adopted excellent values which form the core of strong ethical action – for example, honesty and integrity, stewardship, responsibility, inclusiveness, and learning. Strong ethical action enhances the credibility, strength, and reputation of the Board. The public expects consistent, meaningful ethical action from each Governing Board Member. Ethical action will forge bonds in the educational community and encourage trust, innovation, and teamwork with Governing Board partners. Ethical action will focus Governing Board work on priorities and value-added activities and will enable the Board to eliminate time wasting and power struggles. There are more rules now than in the past; however, more rules do not make good public officials. Values based on core principles enhance strength of Board.

Ethical Realities: The Governing Board deals with public money, public information, and public rights. Governing Board application of ethics standards may not be “black and white” but may often require sound judgment and high level reasoning. There may be few “correct” answers because the facts before the Board and the law do not always perfectly mesh. When decisions are called into question rarely will the Board be asked about the conditions or constraints or the information available to the Board when the decision was made or about the policies that supported the choices. Public opinion of ethical decisions may be incomplete or easily misunderstood or mischaracterized.

Safety Nets – Governing Board Tools: Among these tools are

- Having healthy debate and genuine disagreement;
- putting issues on the table; information and goals set help board members make wise decisions;
- having an open mind;
- including Legal Counsel and Office of Public Stewardship to get from Point A to Point B;
- conferring with Legal Counsel to clarify administrative or board-related responsibility;

- maintaining clear boundaries between Board authority and responsibilities and those of academic partners; comprehensive assessment/dissenting viewpoints/diversity of backgrounds/blending of political or policy views.

Decision Making Principles:

- Everyone is always learning – core concepts Ms. Skladany would speak about would not be exclusive
- Core concepts provide a sound benchmark on which to build

Ms. Skladany read from a favorite passage from a book titled *The Hero Within* that described the opportunities faced as public officials:

Heroes take journeys, confront dragons, and discover the treasure of their true selves. Although they may feel very alone during the quest, at its end their reward is a sense of community: with themselves and with other people. Every time we confront death-in-life we confront a dragon, and every time we choose life over nonlife and move deeper into the ongoing discovering of who we are, we vanquish the dragon; we bring new life to ourselves and our culture. We change the world.

Ms. Skladany stated that she believes we “vanquish the dragon” in the ethical sense when we move through our fear and make decisions from genuine values. This concept is even more critical when we apply the standards established in ethics laws. Ethics laws often speak in absolutes – what we are required to do and what we should avoid. Actual practice teaches us that life is usually lived in shades of grey. Consequently, when faced with an ethical issue, we look to the statutes as a guide but must also implement value judgments to make a decision.

Three key principles which Ms. Skladany finds to be critical to ethical decision making are:

1. *Authenticity*
2. *Awareness*
3. *Courage*

She offered these principles for board members’ consideration because it was her position that fundamental values, rather than legal technicalities, are the foundation on which our decisions should be based. Making ethical decisions is not as easy as it sounds –

Values conflict

Values may be difficult to reconcile and thus create moral dilemmas

Values may conflict with our political, interpersonal, or social priorities

No system is fail safe without good judgment and common sense.

Three principles intrinsic to ethical decision-making.

1. Authenticity – “It is not the same to talk of bulls as to be in the bull ring.” Spanish Proverb

In the ring, controversy is heated. The Board must set the standards and play by the rules. Talk is cheap. Authenticity encompasses saying what we mean, meaning what we say, and following

through with our commitments. It gives us credibility and supports respect. Ms. Skladany provided a personal story about an instance in an executive session in which she found herself in conflict with one board member (an attorney) who proposed polling other board members about their stance on a particular issue. She counseled them not to proceed due to executive session/open meeting violation. At the point the one board member insisted moving forward again, she threatened to excuse herself from the executive session indicating they were in violation.

Commentators have described a state of “authentic presence.” It is when we are open, committed, and in touch with the possible (compared to resigning one’s life to that which has always been). *Synchronicity*, J. Jaworski (1998). The combination of authenticity and our own personal presence invites opportunities, opens possibilities, and allows us to operate with significance. Governing Board Member Debra Pearson spoke up at this time voicing that value judgments are used by people about following their heart and thinking their intentions are not wrong. The frustration enters the picture, when someone questions their value judgments, they feel their values are being questioned. Ms. Skladany responded that following your values versus following the law is not the right thing to do. The law must be followed. In her instance, if she had pleased her client versus the law, she could have lost her job. She could not pretend that they were not doing wrong. Public officials must uphold the law.

There are many challenges to being authentic. One is to recognize that the “rules” apply to each and every one of us. With the power that comes with our positions it may, at times, be convenient to deceive ourselves into believing that the legal or ethical standards we must apply should not bind us. Be wary, this is a risky delusion fraught with peril.

The second impediment is “externalization.” This occurs when we place the blame for something unpleasant on a scapegoat in trying to avoid the problem at hand. When we externalize, authenticity is lost because we make ourselves blind to the real problem and thus remove from our grasp real solutions. It is a high price to pay for temporary avoidance because, as we all know, problems allowed to fester worsen. When we shun the truth, we lose in two respects. We bypass all opportunities for resolution and effectively evade our responsibilities in the here and now. Externalization sends a message of ineffectiveness and avoidance.

When we work in a team environment, such as the Governing Board, lack of authenticity shows up as – consistently boring meetings, environments where back-channel politics and personal attacks thrive, hesitation to address controversial topics that are crucial to the group’s success, failure to tap into the opinions and perspectives of team members, wasting time and energy with posturing and interpersonal risk-management

When authenticity is practiced the situation looks different because it is different. Meetings are usually lively and interesting, the group extracts and exploits the ideas of all members, real problems are solved quickly, politics are minimized, and you get to the meat of what needs to be done because you put critical topics on the table for discussion and resolution. *The Five Dysfunctions of a Team*, P. Lencioni (2002).

Ms. Skladany charted out a matrix which consisted of the following four questions that board members must ask themselves after actions are taken:

| | |
|---------------------------------|---|
| What were our intended results? | What were our actual results? |
| What caused our results? | What we sustain and what will we improve? |

Mrs. Pearson asked if it was really necessary to discuss that to move forward or would it only hold them back? Ms. Skladany responded that a group needed to decide if they were always going to look in the rearview mirror or if they were going to reflect on results in a mature fashion.

2. Awareness – “I think self-awareness is probably the most important thing toward being a champion.” Billie Jean King

Decision-making that is aware encompasses the needs and interests of the decision-maker and others who may be impacted. It applies legal principles and considers the consequences. It includes the “big picture” and is founded on reason and wisdom rather than justification. Knowing everyone’s needs takes people’s interest into account. Smart decision making takes rationalization into play. If everyone’s voice is taken into consideration, the results will be better received.

Ms. Skladany highlighted awareness and the distinction between “aware” decision-making and “smart” decision-making. She described “smart” decision-making as application of the intellect alone. It plays the angles, it plays favorites, it plays fast and loose to stay in control and come out on top. This is the danger because when we are faced with a situation that triggers our fears, we almost instinctively drop down into our defense mechanisms to justify what we have done. These mechanisms are menacing to real awareness because they are so subtle, so pervasive, and so damaging to effective understanding, genuine resolution, and real trust.

- A. How often have we rationalized our actions to minimize the chicanery of what we have done? It goes like this:

- “It was only a white lie.”
- “I didn’t break a promise. He didn’t expect me to follow through.”
- How about – “Why criticize me? What I did was not as bad as what Bob did.”

Rationalization avoids personal responsibility and deprives us of our freedom to learn and take action on the truth.

A survey conducted by Manchester Consulting indicates that trust in the workplace is on the decline. They discovered that the five quickest ways leaders lost the trust of their people in the work place were: acting inconsistently in what they say and do, seeking personal gain above shared gain, withholding information, lying or telling half-truths, and being closed-minded. *Leadership Gold*, J. Maxwell(2008) In contrast, the survey found that the best ways for leaders to *build* trust were to: maintain integrity, openly communicate their vision and their values, show respect for fellow public servants as equal partners, focus on shared goals more than their personal agendas, do the right thing regardless of personal risk.

B. Denial is also a popular way of squeezing out of a tough situation. How often have we heard or used excuses to evade taking responsibility for actions that may prove to be embarrassing or to avoid making tough decisions. Denial occurs when we do not allow ourselves to see or know what is actually happening. Denial is a phenomenon that progressively pervades the process of a public entity and can dishonor the processes that ethics laws are meant to foster. Honorable processes are an integral part of awareness and contribute to ethics because they support and provide the components of fairness and consistency to the actions that we take. At times, the correctness of the outcome is less important than the integrity of the process that led to the outcome. Honorable processes include such practices such as providing the public with sufficient notice, not settling for anything less than public discussion and decision-making, giving interested parties the opportunity to listen to your deliberations, and not favoring speakers according to their viewpoints. Honorable processes also encompasses honoring boundaries—know where your authority ends and respect the chains of command and power of your academic and legal partners. Work in concert, not in a tug of war. If denial or “smart” decision-making invade our actions as public officials, they will decrease our effectiveness because they keep us from reality and thereby contribute to actions and decisions that are not well grounded, are not fully based on facts, or do not reflect sound legal reasoning.

3. Personal Courage - “Courage is resistance to fear, mastery of fear – not absence of fear.” Mark Twain

Personal courage is the ingredient that ensures ethical action. It doesn't mean courage where you take on an external enemy. It is the courage necessary to transcend inner fears, the courage necessary to see, know, and act on the truth, the courage necessary to hear, understand, and respect other viewpoints.

Ethics is not a concept but a life choice that will lay a foundation of depth, quality, and substance for us and for our communities. Both individual and group actions divulge personal honor codes, insecurities and fears, as well as the scope of courage and integrity. The atmosphere that we create in conducting the public's business, the respect that we extend to each other and the public, and the openness with which we consider options expose a truth that words cannot camouflage.

There are many standards that public officers are required to follow. Three of the most important are open meeting law, conflicts of interests, and public records law.

Open Meeting Law

Purpose -- Arizona's Open Meeting Law has two purposes: to protect the public and to protect public officials. The Legislature enacted the Open Meeting Law to protect the public by opening "the conduct of the business of government to the scrutiny of the public and to ban decision-making in secret." *Karol v. Board of Educ. Trustees*, 593 P.2d 649, 651 (Ariz. 1979)

The Open Meeting Law protects public officials by requiring that for each meeting, members of the public body receive advance notice, an agenda, and minutes. This allows public officials to be alerted to the meeting, be prepared for the meeting, and have an accurate account of what happened at the meeting.

Official Policy – It is the official public policy in Arizona that "all meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. 38-431.01(A). Furthermore, the Legislature also required that "meetings of public bodies be conducted openly and that notices and agendas be provided for such meetings which contain such information as is reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. 38-431.09(A). The Legislature has made it clear that any doubts should be resolved in favor of open meetings.

The Legislature requires that anyone "elected or appointed to a public body shall review the open meeting law materials" approved by the Attorney General at least one day before the person takes office. A.R.S. 38-341.01(G). The Open Meeting Law chapter of the Agency Handbook has been approved for this purpose. The Agency Handbook is on the Attorney General's web site.

Notices – A minimum of 24 hour advance notice of all meetings (including subcommittee and advisory committee meetings) must be given to the members of the public body holding the meeting and to the public. A.R.S. 38-431.02(C).

A public body must ensure that notices of its meetings are correctly posted. The public body must have a statement on its web site stating where all public notices of its meetings will be posted, including the electronic and physical locations. The public body is also required to give whatever additional notice is reasonable and practical. A.R.S. 38-431.02(A)(2). The notice must either be combined with the agenda or give the public information about where they can obtain a copy of the agenda.

There are three exceptions to the 24 hour notice requirement: actual emergency (A.R.S. 38-431.02(D)), recess and then resumption of a properly noticed meeting (A.R.S. 38-431.02(E)), and a seventy-two hour notice when the public body wants to ratify an action taken at a meeting held in violation of the Open Meeting Law, it must give 72 hour notice. A.R.S. 38-431.05(B)(4).

Agendas – Agendas must contain information "reasonably necessary to inform the public of the matters to be discussed or decided." A.R.S. 38-431.09(A). The agenda must describe the

specific matters to be discussed, considered, or decided at the meeting and must be available at least 24 hours before the meeting. A.R.S. 38-431.02(G), (H). For executive sessions, the agenda can describe the matter to be discussed more generally to preserve the confidentiality of the topic to be discussed. A.R.S. 38-431.02(I). However, the agenda must give more information than merely reciting the statute that authorizes the executive session.

Executive Sessions – During executive sessions the public is excluded. There are several very limited situations in which an executive session is allowed. In the executive session, the public body is not allowed to vote or poll the members or otherwise take final action on any matter.

Examples of authorized executive sessions are:

1. Discussion or consultation for legal advice with the attorney of the public body;
 2. Discussion or consideration of records exempt by law from public inspection;
 3. Discussion of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining, resignation of a public officer, appointee or employee of the public body. Except for salary discussions, a public officer, appointee, or employee may demand that the discussion occur at a public meeting. The public body is required to provide the officer, appointee, or employee with written notice of the executive session at least 24 hours before the meeting so that the officer, appointee, or employee can decide whether the discussion should occur at a public meeting;
 4. Discussion with the public body's attorneys to consider its position and instruct its attorneys regarding contracts that are the subject of negotiations, in pending or contemplated litigation, or in settlement discussions to avoid or resolve litigation;
 5. Discussions with designated representatives of the public body to consider its position and instruct its representatives regarding negotiations with employee organizations regarding salaries, salary schedules or compensation paid as fringe benefits of employees of the public body;
 6. Discussions with designated representatives of the public body to consider its position and instruct its representatives regarding negotiations to purchase, sell or lease real property;
 7. Discussion of international or interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representative, of an Indian reservation located within or adjacent to the city or town.
- A.R.S. 38-431.03(A).

A special note on voting: A public body must vote in the public part of the meeting to enter executive session. A.R.S. 38-431.03(A). Going into an executive session is a matter of discretion – just because a public body is authorized to go into an executive session does not mean it must. As you see, certain executive session exceptions allow a public body to instruct its attorneys or representative. This may not be done by a vote in executive session. A public body must properly set the agenda and publically vote before any legal action binds the public body. A.R.S. 38-431.03(D). Finally, all executive session discussions must be kept confidential.

Minutes – The Open Meeting Law requires that a public body keep minutes of all meetings, executive sessions, advisory committees, and subcommittees. Minutes may be recorded or written (although the public records law may require that the minutes be eventually transcribed). Minutes must include: the date, time and place of the meeting, the names of the public body members who were present and absent, a general description of the matters considered, an

accurate description of all legal actions proposed, discussed or taken and the members who propose each motion. If members of the public make statements or provide materials, the minutes must include their name and a reference to the legal action which they addressed.

The minutes or a recording must be available to the public no later than three working days after the meeting, except as otherwise authorized by statute. A.R.S. 38-431.01(D).

Calls to the Public – A public body may include a call to the public as an agenda item. The public may then address the public body on issues of concern within the public body's jurisdiction even though the topic is not on the agenda. Public officers must be cautious in responding to the issues raised. A public officer may respond to criticism, ask a staff member to review an item, or ask that the topic be added to a future agenda. Public officers may not discuss the issue with the presenter or with each other and they may not decide an item that is not listed on the agenda. A public body may impose reasonable time, place, and manner restrictions on the speaker but it may not impose restrictions that are content based. Finally, a member of the public body may not knowingly instruct a staff member to communicate in violation of the Open Meeting Law. A.R.S. 38-431.01(I).

Pitfalls – The most common Open Meeting Violations are easily avoided, they are:

1. Discussing and deciding matters outside of a public meeting – in social settings, in private meetings
2. Voting on matters not on the agenda
3. Deciding matters in executive sessions
4. Discussing matters not on the agenda in executive session
5. Splintering a quorum
6. Using e-mail or an intermediary to circumvent the Open Meeting Law

Mr. Combs asked if the Attorney General had developed any policies on social media. Response was that policies were being developed.

Investigations – The County Attorney or the Attorney General may investigate on their own initiative or if they receive a signed, written complaint. The County Attorney or the Attorney General may issue investigative demands, examine people under oath, review records, computers, recordings, and require any person to file a written statement or report under oath of all facts. A.R.S. 38-431.06. So the investigative authority is broad and deep.

Sanctions – The Attorney General, County Attorney, or any interested person may file suit to enforce the Open Meeting Law. The court can assess civil penalties of \$500 per violation, attorney's fees and costs, removal from office and other equitable relief. The Open Meeting Law authorizes sanctions against individuals who violate the law and those who knowingly aid, agree to aid, or attempt to aid another person in violating the Open Meeting Law.

Action taken at a meeting at which an Open Meeting Law violation occurred is null and void

unless ratified at a properly noticed meeting held within thirty days after discovery of the violation. A.R.S. 38-431.05(A) and (B). Ratification requires the public body to prepare and provide to the public a detailed written description of the action to be ratified and all deliberations, consultations and decisions by members of the public body that preceded and related to such action. This description becomes part of the official minutes. A.R.S. 38-431.05

Be Alert –

1. Be Prepared by reviewing your agenda
2. Know the Open Meeting Law
3. Stick to the agenda, don't wander into unauthorized topics
4. Don't let your discomfort about the topic motivate you to violate the law by trying to handle it in secret
5. Refrain from activities that call your activities into question – primarily communicating through computers, discussions about Board business at social events, many executive sessions and very little public discussion before a public vote

Mistakes occur. If you believe your public body violated the law, get legal help and take action to correct the mistake, and, prevent future violations.

Conflict of Interest

Arizona's conflict of interest laws apply to all public officials – elected, appointed, full time or part time, paid and unpaid. Conflict of interest laws prevent public officers from participating in a decision or contract in which the public officer or a close relative (spouse, child, grandchild, parent, grandparent, brother or sister and their spouses, or the parent, brother, sister, or child of their spouse) has a direct or indirect financial or ownership interest. The purpose of conflict of interest laws is to “remove or limit the possibility of personal influence which bear upon an officer's decision.” *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (App. 1972). The reason for the conflict of interest law is the recognition that a public officer cannot serve two masters when the officer conducts government business.

There are several conflicts to be aware of:

1. Decision-making – “Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.” A.R.S. 38-503(B).
2. Contracting – “Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.” A.R.S. 38-503(A).
3. Supplying Materials or Service – “Notwithstanding the provisions of subsections A and B of this section, no public officer or employee of a public agency shall supply to such public

agency any equipment, material, supplies, or services, unless pursuant to an award or contract let after public competitive bidding.” A.R.S. 38-503(C).

4. Post-Public Employment – “No public officer may represent another person for compensation before a public agency by which he or she was employed within the preceding twelve months or on which the officer or employee serves or served within the preceding twelve months concerning any matter with which such officer or employee was directly concerned and in which he personally participated during the officer’s or employee’s employment or service by a substantial and material exercise of administrative discretion.” A.R.S. 38-504(A).
5. Incompatibility Doctrine – The common-law doctrine of incompatibility provides that a conflict of interest exists when a public officer accepts an additional public position and that second position has duties that either conflict with the first position or render it physically impossible to perform the duties of both positions. *Coleman v. Lee*, 121 P.2d 433 (Ariz. 1942). Under this doctrine, the public officer is deemed to have automatically vacated the first position once the second position is accepted.
6. Nepotism – It is unlawful for a public officer to appoint, vote for, or agree to suggest, arrange or be a party to the appointment of a relative within three degrees of marriage or blood. A.R.S. 38-481.

Elements to Evaluate

Conflicts of interest require a public officer to assess the facts. Consider the various ways that a conflict of interest could occur. Think about your interests and those of your relatives. As a public officer you have the responsibility to inquire into the facts and inform yourself. When determining if a conflict of interests exists, public officers should evaluate three questions:

1. Will the decision affect, either positively or negatively, an interest of the officer or a relative? Remember that “relative” is defined as a spouse, child, grandchild, parent, grandparent, brother or sister of the whole or half blood and their spouses, and the parent, brother, sister, or child of a spouse. A.R.S. 38-502(9).
2. Is it a pecuniary or proprietary interest? The interest can be direct or indirect and refers to something a person will gain or lose as contrasted to general sympathy or bias. A.R.S. 38-502(11) and *Yetman v. Naumann*, 16 Ariz. App. 314, 317, 492 P.2d 1252, 1255 (App. 1972).
3. Is the interest one that does not fall under the definition of “remote” interest? The Legislature listed ten “remote” interests that do not trigger the conflict of interest prohibition. They are listed in A.R.S. 38-502(10). They include (i) non-salaried officer of a non-profit corporation, (ii) landlord/tenant of a contracting party, (iii) attorney of a contracting party, (iv) member of a non-profit cooperative marketing association, (v) insignificant stock ownership of less than 5% of the person’s annual income, (vi) reimbursement of expenses incurred in the performance of official duties, (vii) recipient of public services generally available, (viii) relative of School Board members, (ix) interests of other public agencies or political subdivisions, and (x) class interests.

If the answer to all three questions is “yes” the public officer has a substantial interest that requires disclosure of the interest and disqualification of the public officer. File a conflict of interest form with the person designated to maintain them. The forms are available for public

review so be thoughtful about how you describe the conflict. It may be helpful to obtain legal advice before finalizing or signing the form. Then, refrain from any involvement in the matter – before, during, and after a decision has been made.

Penalties for Violating the Conflict of Interest Laws

Intentional or knowing violation (A.R.S. 38-503 to -505) – class 6 felony

Reckless or negligent violation (A.R.S. 38-503 to -505) – class 1 misdemeanor

If there is a criminal finding of guilt, the public officer forfeits the public office. A.R.S. 38-510(B).

Civil penalties and reasonable attorneys' fees

If a conflict of interest exists, contracts are voidable at the discretion of the public agency. However, if a public officer or employee who was significantly involved with drafting or negotiating the contract becomes an employee or agent of the other party to the contract within three years of the execution of the contract, the State may cancel the contract. A.R.S. 38-511(A).

Mr. Lumm asked about how to build relationships among board members. Ms. Skladany responded that a board member must be accountable to self but also accountable to approach others about their conduct. She also commented that if a board member is facing a conflict of interest, the board member should speak to Legal Counsel. The question as to whether being a taxpayer living in Maricopa County presented a conflict in being a board member, the response was it is okay as long as the amount was reasonably the same or less, then it was okay to participate. Ignorance is not a defense. Mr. Combs commented that if you gain a short term gain, but you lose your good standing as a board member, it not worth it.

Tips to avoid problems:

1. Review your agendas in time to evaluate conflicts, investigate the facts, and get advice if you need it. Satisfy yourself that either there is no conflict or complete a conflict of interest form and recuse yourself
2. Avoid circumstances in which people may question whether you are exercising independent judgment in the best interests of the public
3. Leave your seat or leave the room during agenda items where you have a conflict
4. Don't take chances – undisclosed conflicts harm your reputation and put the public body on which you serve in an awkward position
5. If there may be an appearance of a conflict you may recuse yourself to avoid any "appearance of impropriety" -- make sure the record is clear on this point. A cautious approach helps to avoid problems
6. Periodically check and update all conflict of interest forms you may have on file

Public Records Law

Arizona's public records law applies to the activities of this Board. As a public officer, you are required to keep records reasonably necessary to provide an accurate accounting of your official activities and any government activities. A.R.S. 39-121.01(B). This information must be made available to the public if they make a public records request.

To qualify as a “public record” the record must relate to the official duties of the public officer. It can be a book, paper, map, photograph or any other documentary material regardless of physical form or characteristic. It includes film and electronic media. Emails on a government system are not necessarily public records. Only those e-mails that relate to government business are public records. *Griffis v. Pinal County*, 215 Ariz. 1, 5, 156 P.3d 418, 422 (2007). Be cautious and don’t make assumptions. The best strategy is to ensure that all of your communications are professional and that you would not be embarrassed to see anything you wrote in the newspaper.

The public has a right to inspect public documents. The public’s right may be limited if confidentiality restrictions, privacy interests, or the best interests of the State outweigh the public’s right to know. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). The State has the burden to overcome the legal presumption favoring disclosure. *Cox Arizona Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993). Under the public records law, the public agency must make a good faith effort to search for the requested records and the burden is on the agency to demonstrate that its search was adequate. *Phoenix New Times v. Arpaio*, 217 Ariz. 533, 177 P.3d 275 (App. 2008).

Denying Access to Records – Access to records may be denied based on confidentiality, privacy interests, or the best interests of the State. If a statute makes a record confidential, the public records request may be denied based on the statutory confidentiality. (example, birth and death records, minutes of executive sessions, home address of a police officer) If disclosure of a public record would invade a person’s privacy, and the invasion outweighs the public’s right to know, a request may be denied. If the best interests of the State outweigh the public’s right to know the request may be denied. The public body must determine it will be seriously impaired in the performance of its duties if the information is disclosed. (example, ongoing investigations) The fact that the information may be embarrassing to the agency or an individual is not a basis to refuse to disclose the information.

If an agency fails to disclose the requested public records any person who is wrongfully denied may bring an action to obtain the records. If successful, the public officer or agency may be liable for legal costs and attorneys’ fees, as well as bad publicity and negative public opinion.

Once the request is made, the public is entitled to inspect the documents promptly. If a record is not available on the public body’s website, the requestor can request that a copy be mailed. The requestor may be required to pay postage and the cost of the copy.

What do you do if there are legitimate reasons for not disclosing certain information in a document? Can you withhold the entire record? No. You redact those portions that may be confidential, private, or harmful to the best interests of the state.

Charges for copies depend on whether the request is made for a commercial or a non-commercial purpose. The agency can establish a reasonable fee that includes the cost of time, equipment, and personnel needed to produce the copies. The agency may not charge for the time it took to search for the records. A.R.S. 39-121.01.

If a requestor will use the records for a commercial purpose, the requestor must submit a certified statement identifying the commercial purpose. A commercial purpose includes: selling or reselling a public record, obtaining the names and addresses from public records for solicitation purposes in which the requestor can reasonably anticipate monetary gain. A.R.S. 39-121.03(D). Obtaining information from public records to include in a newspaper or other publication is not a commercial purpose. If the custodian of the record determines that the commercial purpose is a misuse of public records the custodian may apply to the Governor requesting an executive order prohibiting the release. A.R.S. 39-121.03(B).

Tips:

1. Always take the time to evaluate the content, tone, and language of your written materials
2. Evaluate which information needs to be in writing and which information is better made orally face to face
3. Remember that your written notes, memos, and calendars kept in your role as a public official are public records
4. You should have a schedule for maintaining public records – you must follow that schedule before you destroy public records

Best Practices of Public Service

1. Respect people, employees, colleagues, and yourself and value your role as a public trustee
2. Be a problem solver through understanding the facts, the Board's goals, and the views of those who have something at stake
3. Promote the common good by valuing the chain of command and the authority and support of your academic and legal partners
4. Be aware of your attitudes and how you approach issues you must decide – how you arrive at your decision makes a difference
5. Promote respect and civility

Adjournment of Work Session: The work session adjourned at 7:45 p.m.

Doyle W. Burke
Governing Board Secretary