



Don't Do That...Do This: Open Meeting Law Best Practices

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How This Session Is Different Than Other OML Sessions

- Beyond a Coverage of What The Law Is and What Consequences for Non-compliance are
- This is intended to suggest practices that are better, more transparent and make compliance easier
 - Not black and white; goal is to stay away from “the line” not go right up to it




How This Session Will Be Structured

- Introduce a board/board member/staff common practice
- What the law is in this area/what principle covered in the law is at play
- What practice you could adopt instead to better comply with the law or the principle



Don't Do That...

Board Members Texting One Another During Board Meetings or receiving texts from others about board business during the board meeting



The Law: A.R.S. § 38-431.01 Meetings shall be open to the public...

- A. 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.
- B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings...the minutes or recording shall include... a general description of the matters considered.



Principle: The Law Favors Openness

- The public can attend meetings and see/hear discussions, deliberations and decisions done on their behalf in a public setting.
- Question: Is the public really seeing/hearing what is going on if board members are texting each other or texting others about board proceedings/issues?



Do This...

Have an accepted protocol that no board members will text each other about board business during the board meeting, nor will board members text others – staff or community members – during the board meeting about board business.



Don't Do That...

**Community members making comments during board deliberations OR
Board members asking for community input during discussions OR
Community members engaging during the call to the public with a lack of information or bad information**



The Law: A.R.S. § 15-321.

- Organization; election of officers of the board; meetings; execution of warrants; exemption
 - ...D. The board shall prescribe rules for its own government.



Important Principles

- Meetings are held IN the public; they are not meetings OF the public



Important Principles

- This is not a town hall meeting; it is a meeting of the governing board of the school district; the board is the legal representative body charged with making decisions for the district



Important Principles

- You must control your meeting to ensure fairness to all, maintain a professional decorum and establish clear lines of responsibility between the board, the staff and the public
- Everyone has a role and things go badly if everyone tries to play each other's role



ASBA Model Governing Board Policy BEDH - PUBLIC PARTICIPATION AT BOARD MEETINGS

- All regular and special meetings of the Board shall be open to the public.
- The Board invites the viewpoints of citizens throughout the District and considers the responsible presentation of these viewpoints vital to the efficient operation of the District. The Board also recognizes its responsibility for the proper governance of the schools and therefore the need to conduct its business in an orderly and efficient manner. The Board therefore establishes the following procedures to receive input from citizens of the District...”



Do This...

**Have clear rules for your meetings.
Have a speaking policy that is clear
and well publicized.**

**Ask speakers to fill out speaker
cards.**

**Follow the rules consistently every
time.**



Additional Advice...

- Follow a clear order for your order of business so that there is predictability and everyone knows what rules to follow.
- Suggested order for agenda item:
 1. Board President introduces topic
 2. Staff makes comments/gives presentation
 3. Take public comment on issue (if any)
 4. Board asks questions of staff
 5. Board discusses issue amongst themselves
 6. Motion is made and vote is taken
 7. Move to the next issue and repeat



Don't Do That...

Read the Agenda and support materials the day of the meeting




The Law: A.R.S. § 38-431.02

- H. Agendas...shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.



Important Principles

- If you don't understand the agenda, the public won't either
 - Board members have a fiduciary duty to the public they represent to engage fully in discussions and make informed decisions; they must exercise judgment that a reasonable, prudent person would in similar circumstances
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Important Principles

- Some questions can be and should be handled by direct inquiry of the superintendent or board president prior to the board meeting
- “Gotcha” questions are not appreciated by anyone; surprises should be kept to a minimum
- Some questions will take research and investigation – it is professional courtesy to give advance notice to allow that “homework” to be done



ASBA Model Governing Board Policy BCA - BOARD MEMBER ETHICS

- Board members will strive to improve public education, and to that end will...
 - A. Attend all Board meetings insofar as possible, and become informed concerning the issues to be considered at those meetings...



Do This...

Read your packet within a day of getting it

Call the superintendent with any questions you have

Notify the superintendent if there are any errors on the agenda or anything you have concerns with



Don't Do That...

**Treat “Staff Reports” the same as
Board or Superintendent Current
Event Summaries (or
“Board/Superintendent Reports”)**



The Law: A.R.S. § 38-431.02

- H. Agendas...shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.



The Law: A.R.S. § 38-431.02

- K. Notwithstanding subsection H of this section, the chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized, if:
 - 1. The summary is listed on the agenda.
 - 2. The public body does not propose, discuss, deliberate or take legal action at that meeting on any matter in the summary unless the specific matter is properly noticed for legal action.



Principles

- Arizona Attorney General Agency Handbook § 7.7.8
 - “the summary of current events consists merely of one of the above-referenced people summarizing recent occurrences without any discussion or feedback from the remainder of the public body...”
 - Reports that address matters other than a summary of current events or that are delivered by someone other than a proper official with the public body do not come within the provision authorizing current events summaries and must comply with the agenda requirements of the Open Meeting Law.”



Principles

- Arizona Attorney General Agency Handbook § 7.7.8
 - “The only report that can be given without listing the contents of the presentation is the brief summary of current events by the chief administrator, the presiding officer of the Council, or a member under A.R.S. § 38-431.02(K).”
 - As to other reports presented to a public body, the agenda must list descriptions of the topics that will be presented and state whether the public body will discuss or take action on such matters.



Principles

- Arizona Attorney General Agency Handbook § 7.7.8
 - “A generic agenda item, such as “Police Department Report, ” “Fire Department Report,” or “Executive Director Report” does not satisfy the requirement that the agenda provide information that is “reasonably necessary to inform the public of the matters to be discussed or decided.”



Do This...

Only use current event summaries for appropriate subject-matter items

Only board members or the superintendent can utilize this exception to the notice requirement – no “handoffs”!

Do not comment on a summary/report – even clarifying questions



Do This...

Do not use your summary/report to respond to someone else's report

Principal's reports or school business reports or similar reports must summarize the content of the report



Don't Do That...

Assume that the Board President or Superintendent will police the agenda in making sure discussions don't veer off the stated agenda topic.



The Law: A.R.S. § 38-431.02

- H. Agendas...shall list the specific matters to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions only on matters listed on the agenda and other matters related thereto.



The Law: A.R.S. § 38-431.07

Enforcement

- “A. The attorney general may also commence a suit in the superior court in the county in which the public body ordinarily meets **against an individual** member of a public body for a knowing violation of this article, and in such a suit the court may impose a civil penalty against **each person** who knowingly violates this article or who knowingly aids, agrees to aid or attempts to aid in violating this article...”
- “B. A public body shall not expend public monies to employ or retain legal counsel to provide legal services or representation to the public body or any of its officers in any legal action commenced pursuant to any provisions of this article...”



Principles

- The law applies to everyone on the board and even those not on the board if they aid in violating the law.
- Discussing a matter that is not on the agenda is a violation of law and all members of the board participating in that discussion are violating the law.



Do This...

Speak up if you believe the law is being violated.

You don't have to be confrontational – ask for a point of order or ask for legal advice.

The moral: your silence will not save you.

In fact, speaking up might even if others persist in violating the law.




38-431.07 “A. If the court finds that a person who might otherwise be liable under this subsection objected to the action of the public body and the objection is noted on a public record, the court may choose not to impose a civil penalty on that person.”



Don't Do That...

Fail to have board subcommittees also follow the Open Meeting Law or create a Board Subcommittee (that has to follow the Open Meeting Law) when you didn't intend to create one.



The Law: § 38-431.01. Meetings shall be open to the public

- “A. All meetings of any public body shall be public meetings...”



The Law: § 38-431.

Definitions

- 1. "Advisory committee" or "subcommittee" means any entity, however designated, that is officially established, **on motion and order of a public body or by the presiding officer of the public body**, and whose members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.



Principle

- The public body should not be able to skirt the transparency of the OML by having a subcommittee do its work outside of public view.




Do This...

Only have a board create the committee if you want this to be an open process; if you want the superintendent to bring a recommendation to the board, allow him/her to create an administrative committee that will make a recommendation to the superintendent



Additional advice...

- Do not have the board approve committee members
 - Do not put the committee in your governing board policy
 - Best practice is not to have board members sit on these administrative committees
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Don't Do That...

Allow board members to participate in meetings electronically without any guidelines or procedures



The Law: § 38-431 Definitions

- 4. "Meeting":
 - (a) Means the gathering, **in person or through technological devices**, of a quorum of the members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to that action.



The Law: § 38-431.


Definitions

- 2. "Executive session" means a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03.



The Law: § 38-431.03. Executive sessions

- F. Disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. **Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information** except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.



The Law: § 15-321. Organization; election of officers of the board; meetings; execution of warrants; exemption

- D. The board shall prescribe rules for its own government.



Principles

- The board would like to facilitate board member participation in meetings
 - BCA - BOARD MEMBER ETHICS
 - Board members will strive to improve public education, and to that end will:
 - Attend all Board meetings insofar as possible...



Principles

- The board needs to safeguard confidential information
 - BCA - BOARD MEMBER ETHICS
 - Board members will strive to improve public education, and to that end will:
 - (R)espect the confidentiality of information that is privileged under applicable law



Do This...

Create a board policy prohibiting board members from participating in executive sessions through electronic means;



You may also want to...

- Require the board member to give advance notice of electronic participation and, to give the public other board members additional notice, state on the agenda that the board member will be participating electronically
- Create a policy that limits the frequency that a board member participates in this manner over a certain period of time.



Questions?

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