



LEGAL RESPONSIBILITIES OF TCS DISTRICT BOARDS AND THEIR MEMBERS

Presented by:

**Jon E. Anderson
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
Madison, WI 53703**

Oath of Office

- A written sworn (notarized) oath of office is required for every new appointment or reappointment and must be filed with the district board secretary.
- An oral oath may be used for ceremonial purposes only.
- Failure to have a written sworn oath could result in a disqualification of the appointee to hold public office and potential impact any actions taken by district board members

Oath

I,, swear (or affirm) that I will support the constitution of the United States and the constitution of the state of Wisconsin, and will faithfully and impartially discharge the duties of the office of to the best of my ability. So help me God.

Ten Basic Board Responsibilities

- Determine mission and purposes.
- Select the chief executive.
- Support and evaluate the chief executive.
- Ensure effective planning.
- Monitor and strengthen programs and services.

Basic Board Responsibilities

- Ensure adequate financial resources.
- Protect assets and provide financial oversight.
- Build a competent board.
- Ensure legal and ethical integrity.
- Enhance the organization's public standing.

How does a Board member do this?

- Attend meetings
- Review materials
- Ask questions of Administration
- Represent the College

Duties attendant to serving on the Board

- Fiduciary Duties
- Duty of Loyalty
- Duty of Care
- Duty of Disclosure
- Duty of Obedience

Fiduciary Duties

- Being on a board creates fiduciary responsibilities, or obligations of trust. Traditionally, directors and officers owe fiduciary duties to the College.
- The boards of directors establish policies and appoint and delegate certain duties to officers.
- Officers carry out the daily operations of the College in accordance with appropriate documents.

Duty of Loyalty

- Officers and directors owe a duty of loyalty to the College.
- They are expected to put the welfare and best interests of the College above their own personal or other business interests.
- Conflicts of interest, efforts to compete with the College, or making secret profits from corporate business dealings are typical examples of disloyalty.
- Under the business opportunity doctrine, officers and directors may not secretly divert or take advantage of business options for their own personal profit.

Duty of Care

- Both officers and directors are expected to use appropriate care and diligence when acting on behalf of the College. They should exercise reasonable prudence in carrying out their duties to achieve the best interests of the College.
- An officer or director may be held personally liable for failing to exercise reasonable or ordinary care under the circumstances.

Duty of Care

- Under the business judgment rule, an officer or director may not be held liable for business decisions made in good faith and with reasonable care that turn out to harm business interests.
- Courts will defer to erroneous business judgments, provided that the officers or directors did not show gross negligence in their review and decision-making process.
- This fiduciary duty is closely aligned with the duties of care, loyalty, and obedience. Under this duty, officers and directors must act with honesty, good faith, and fairness when handling College obligations.

Duty of Disclosure

- Candor in business discussion is important between officers and directors so that they may assess material risks and make informed decisions.
- Full and fair disclosure of material facts is essential before seeking board approval of major business transactions.
- As part of their duties of loyalty and care, officers and directors should also disclose any potential conflict of interest that may arise between their individual interests and those of the College.

Statutory Directives

- TCS Boards have both Duties and Powers
 - Duties are detailed in Section 38.12 Wis. Stats. These are mandatory obligations
 - Powers are detailed in Section 38.14 Wis. Stats. They are permissive and not mandatory obligations.

38.12 DISTRICT BOARD DUTIES

- **CONTROL OF DISTRICT SCHOOLS**
- **DISTRICT FUNDS AND TREASURER**
- **DISTRICT DIRECTOR AND OTHER EMPLOYEES**
- **PUBLICATION OF PROCEEDINGS; OPEN RECORDS**
- **ANNUAL AUDIT**
- **ANNUAL BUDGET**

38.12 DISTRICT BOARD DUTIES

- **TRANSPORTATION PLANNING**
- **DISTRICT POLICIES.**
- **COOPERATION WITH OTHER STATE AGENCIES**
- **FIRE FIGHTER TRAINING PROGRAMS**
- **CONTROLLED SUBSTANCES AND CONTROLLED SUBSTANCE ANALOGS; DISCIPLINE**
- **ORIENTATION PROGRAM; INFORMATION ON SEXUAL ASSAULT AND SEXUAL HARASSMENT.**
- **SERVICE MEMBERS; PRIORITY REGISTRATION**
- **ARMED FORCES**

38.14 DISTRICT BOARD POWERS

- **LEGAL PROCEEDINGS**
- **BUILDINGS AND EQUIPMENT**
- **CONTRACTS FOR SERVICES**
- **GIFTS AND GRANTS**
- **ADVISORY COMMITTEES**
- **TRANSPORTATION**
- **SALE OF ARTICLES**
- **ACTIVITY, INCIDENTAL AND VOCATIONAL-ADULT SEMINAR AND WORKSHOP FEES.**

38.14 DISTRICT BOARD POWERS

- **BONDS FOR OFFICERS AND EMPLOYEES**
- **DISPLACED HOMEMAKERS' PROGRAM**
- **INITIATIVES TO PROVIDE COORDINATED SERVICES**
- **PARKING REGULATIONS AND FEES**
- **STUDENT IDENTIFICATION NUMBERS**

Who runs the College?

- President/District Director:
- District Director shall have general supervision and management of the development and work of the district schools.
- Board:
 - **CONTROL OF DISTRICT SCHOOLS.** Except as otherwise provided by statute, the district board shall have exclusive control of the district schools established by it and of property acquired for the use of such schools

ETHICS

- The Wisconsin Ethics Commission works to ensure that high ethical standards are met by state public officials, an essential part of assuring integrity in the policy making process.
- A code of ethics for state officials, adopted by the legislature, is used to provide guidance to state public officials and state employees to help them avoid conflicts between their public responsibilities and personal interests. See Section 19.41 – 19.58 Wis. Statutes.
- By helping to improve the standards of public service, the goal of the ethics code is to help advance and support the confidence and faith Wisconsin residents have in their state officials, state employees, and the conduct of free government.

Candidates' and Officials' Economic Interests

- State officials and candidates file Statements of Economic Interests for public inspection at the time they enter the public arena, and continue to update them annually.
- The statement's purpose is to identify to which businesses and individuals an official is tied financially, to mitigate any conflicts of interests that may exist.

Standards of Conduct

- The Ethics Code applies to state officials as specified in s. 19.42, Wisconsin Statutes.
- TCS District Board Members are state public officials under the ethics code.

Overview: Statutory Standards of Conduct

- State Public Officials should not:
 - Act officially in a matter in which s/he is privately interested.
 - Use her/his public position for private benefit.
 - Accept transportation, lodging, food, or beverage except as specifically authorized.
 - Solicit or accept rewards or items or services likely to influence her/his official duties.
 - Use confidential information to receive anything of value.

Overview: Statutory Standards of Conduct

- State Public Officials should not
 - Use her/his public position to obtain unlawful benefits.
 - Enter into public contracts without notice.
 - Charge a fee to represent a person before a state agency.
 - Offer or provide influence in exchange for campaign contributions.
 - Accept anything of pecuniary value from a lobbyist or from a lobbyist's employer

Criminal Matters 946.13 Stats.

- Any public officer or public employee who does any of the following is guilty of a Class I felony:
- **(a)** In the officer's or employee's private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer's or employee's capacity as such officer or employee in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's or employee's part; or

Criminal Matters 946.13 Stats.

(b) In the officer's or employee's capacity as such officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

Board Policies

- Local Boards often adopt policies that detail obligations on the part of Board Members. These may be found in codes of conduct or ethics and Board policies
- Policy governance
- Policy Guidance

CODES OF CONDUCT

- Honesty – to be completely honest and not engage in any manipulation, concealment, deception or misrepresentation of any kind, regardless of the situation
- Integrity – to do what is right and ethical and what has been promised.
- Conflict of Interest – to avoid any actual or apparent conflict of interest between personal and professional relationships.
- Respect and Equal Treatment – to treat everyone with dignity and not engage in or tolerate abusive conduct that is threatening, humiliating or intimidating including harassment, discrimination or bullying of any kind including physical, verbal or emotional, especially any based on protected status.

CODES OF CONDUCT

- Compliance with Laws – to comply fully with all applicable laws and governmental rules and regulations.
- Preserve confidentiality of College meetings and documentation
- Support decisions of the whole board.
- Respecting rules and relationships.

SUNSHINE LAWS

- OPEN MEETINGS
- PUBLIC RECORDS

Open Meetings

- The policy of the law is open government. (When in doubt)
- Notice meetings not only to comply with the law, but to let the public know what you are up to.
- You can discuss items brought up in the “public comments” section of your agenda, but should you?
- The law applies to committees established also by the board.
- Only you can close a meeting. The union can't. Neither can your employees.

Open Meetings

- If you oppose a closed session, you need not vote with your feet.
- When is the public's business not the public's business? (Closed sessions)
- Voting in closed session should be the exception and not the rule.
- The minutes of your board meetings not be as long as War and Peace.
- Remember it is your meeting.
- Meetings can be unknowingly held.

Public Records

- The policy of the law is open government.
- The definition of a “record” is broad; electronic records are included.
- Nearly everything you have bearing some relation to your office is a record.
- The real issue is whether a record must be released and when.
- Personnel records are records under the law.

Public Records

- The higher up the food chain, the less the privacy interest.
- You don't have to create a record.
- The law compels the release of records, not comments about records.
- Managing the records law is public relations at its finest.
- Your phone or computer may contain public records.

Board Member Frequently Asked Questions Discussing things “Off the Record”

- Board members need to take great care to ensure that “off record” discussions involving other members of the board do not violate the open meetings law.
- Although two members of a governmental body larger than four members may discuss the body’s business without violating the open meetings law, board members need to be careful that such discussion does not involve a sufficient number of board members to violate negative quorum or walking quorum rules.

“Off the Record”

- People often assume that the open meeting law applies only to gatherings of one-half or more of the members of a governmental body. That is not the case. The Wisconsin Supreme Court has held that the open meeting law applies whenever a gathering of members of a governmental body satisfies two requirements
- (1) there is a purpose to engage in governmental business and,
- (2) the number of members present are sufficient to determine the governmental body’s course of action. *State ex rel Newspapers v. Showers*, 135 Wis. 2d 77 (1987).

Negative Quorum

- When a governmental body operates under a supermajority rule (a two-thirds majority rule for example), less than half of the members of the body could block a proposal by agreeing to vote in opposition to the proposal. A group of sufficient size to block a proposal is called a negative quorum.

Walking Quorum

- The requirements of the open meeting law also extend to walking quorums. A walking quorum is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.

Electronic Communications

- Board members must also be aware that their use of e-mail to communicate regarding district business could be considered to violate the open meeting law again depending on the application of the *Showers* test.

Telephone Calls

- Telephone conference calls among members of a governmental body fit the definition of a “meeting” subject to the open meetings law.
- To comply with the open meeting law relating to telephone conference calls, a governmental body conducting a meeting by telephone must notice the meeting and provide the public with an effective means to monitor the conference.
- A walking quorum or negative quorum by telephone is also governed by the open meeting law.

Board Members Gathering Information

- As a general rule, board members should not gather information from outside sources relating to a certain topic.
- To the extent appropriate, board members should be working through the administration in obtaining the information that they need to make decisions.
- Working through the administration assures that the information will be received and put in a form that would be most useful to the board in its consideration of a particular topic.

Board Members Gathering Information

- Board members also need to be respectful of the administration's time.
- Working through the President in requesting information is the most efficient way to operate as a board.
- This will help to avoid multiple contacts from numerous board members seeking the same information
- Discussing items needed at open board meetings also ensures that the administration is only responding to requests for information that the board, as a corporate body, wants the administration to research.

Let's "meet and discuss" board business

- Board members can meet and discuss ideas. This can be done in one of two ways.
- The first way, and the one that is preferred under the policy underpinnings of the open meeting law, is for board members to do this in the context of lawfully noticed open board meetings.
- Board members also have the opportunity to meet and discuss as long as they are meeting and discussing in small groups that do not have the ability to affirmatively influence or negatively influence the outcome of a particular decision before the board.

Do I have to keep all of this stuff?

- Materials that you receive that relate to your office as a board member are clearly “public records.” The board packet you receive each week contains numerous items that are “records” under the law.
- The College, however, likely maintains a copy of everything it sends to you in the packet. As such, you are not likely required to keep a copy of such material.
- As a Board member, you are, however, required to maintain the records you have in your possession consistent with the law.
- As a general rule, you will be required to maintain any document that is not otherwise maintained by the College, either in electronic or paper form.

Do I need to be concerned about e-mail communications?

- E-mail is a convenient way to communicate. While e-mail is a valuable, timesaving device for quick and incidental communication, it should not be used to carry on private debate and discussion which belongs at a public meeting subject to public scrutiny.
- E-mail communications of governmental officials and employees are clearly public records, just like letters, other documents or computer data.
- Whether or not e-mail communications implicate open meeting law issues is a much more complicated question.

Email as a meeting

- The answer to the question can best be described as depending on whether or not the e-mail exchange more closely resembles “correspondence” or a “conversation.”
- When e-mails are exchange in close proximity and time to each other among a group of officials, they can become much more like a phone conference, a personal conversation or meeting, than a group of letters.

Examples

- An open meeting law violation may occur if officials are instant messaging or contacting each other by e-mail within a close timeframe if (1) enough of them are involved in the messaging to determine the body's course of action; and (2) there is a purpose to engage in governmental business.
- An open meeting law violation could also occur if a single official were to e-mail other officials in succession, asking for their support for a particular matter or position. If the sender (or others forwarding the mail) were to reach enough officials to constitute a quorum necessary to take the action contemplated in the e-mail, or to block a contemplated action, then a "walking quorum" or a "negative quorum" violation may occur.

Best Practices for Meeting Board Duties

- Do your homework before board meetings.
- Keep abreast of current educational issues and trends.
- Devote sufficient time, thought and study to proposed actions.
- Make every attempt to attend all board meetings.
- Express yourself clearly to make sure that others understand what you are saying.
- Adhere to the Code of Ethics or conduct established by the board.

Best Practices for Meeting Board Duties

- Don't surprise the administration at board meetings with resolutions, problems and issues without prior notice.
- Evaluate your own performance.
- Take no private action that would compromise the board or the administration.
- Respect the confidentiality of information that is privileged, including the confidentiality of information discussed in the closed session.

Best Practices for Meeting Board Duties

- Publicly support decisions made by the entire board.
- Attempt to avoid over-reaction to district problems and board disagreements.
- Respect other people's skills and abilities.

Working with the A TEAM

- Know their job and don't interfere with that of the administration.
- Devote the time needed to do a good job. Read the background materials the administration prepares.
- Admit what you don't know.
- Don't jump to conclusions; instead, hear and weigh all the facts. Keep an open mind to change.
- Understand that the administrator is practicing a career.

Working with the A TEAM

- Communicate with the staff through the administration as much as possible.
- Don't make promises outside board meetings, not only for legal reasons, but also out of respect for the ethics of the situation and record for the other board members and the administrator.
- If someone complains to you about a member of the administration, listen but don't agree. Being supportive of the administration shows that you have confidence in yourself and in the district management team
- Don't surprise the administration at a board meeting with resolutions, problems and issues without prior notice.

CHALLENGE OF PUBLIC SERVICE

- Base your decision on the available facts and your independent judgment. Refuse to surrender your judgment to individuals or special interest groups.
- Take no private action that will compromise the board, or the administration.
- Respect the confidentiality of information that is privileged.
- Share the responsibility for all board decisions, regardless of how you voted.

Thank You

Legal Responsibilities of TCS District Boards and their Members

GODFREY & KAHN S.C.

www.gklaw.com

OFFICES IN MILWAUKEE, MADISON, WAUKESHA, GREEN BAY AND APPLETON, WISCONSIN
AND WASHINGTON, D.C.

The presentation and materials are intended to provide information on legal issues and should not be construed as legal advice. In addition, attendance at a Godfrey & Kahn, S.C. presentation does not create an attorney-client relationship. Please consult the speaker if you have any questions concerning the information discussed during this seminar.