

Ethics Presentation

Department of Law 2023

Goals of this training

1. Understand that you cannot accept benefits related to your role on the board.
2. Understand when you may be biased or have a conflict and should recuse yourself. Be mindful of who your employer is, and other entities with which you may have a relationship.
3. Remember to disclose knowledge you have received about an agenda item from outside the meeting.
4. Remember to articulate the specific reasons and basis for your decision, if the matter is subject to possible further review.
5. Understand that the Open Meetings Act prohibits deliberation outside board meetings & Public Records Act makes almost all your emails open to the public.
6. Understand best practices for making informed decisions.

Goal (1): Understand that you cannot accept benefits related to your role on the board.

- * **Metro Code Chapter 2.222 is the general ethics ordinance and provides that all Metro employees (includes any official, officer, employee or servant, or any member of any board, agency, commission, or authority) shall not:**
 - Accept or solicit any benefit that might reasonably tend to influence them to act improperly in the discharge of their official duties;
 - Use Metro property, services, or funds for personal purposes;
 - Use non-public Metro information for personal gain, or for the gain of any family member or other employer;

“shall not” continued

- Use a Metro position improperly to secure unwarranted privileges or exemptions for themselves, relatives or others;
- Accept other employment which might impair their independent judgment in the performance of their Metro duty;
- Accept any benefit which the employee should reasonably believe was intended to influence any action taken in the employee’s official capacity.

Limited Exceptions

You may accept these types of benefits, if no conflict or appearance of conflict otherwise exists:

- Awards of trifling value publicly presented in recognition of public service;
- Gifts unrelated to a person's position as a metro employee;
- Meals, beverages, food, promotional items, or hand-produced items of a value of up to \$25 from a single source in any calendar year;
- Free or discounted admissions, tickets, access to events or travel expenses from any single source of an aggregate value in any calendar year of up to \$100 or tickets of a face value in excess of \$100 if the event is generally recognized as an annual fund-raising benefit sponsored by a non-profit organization.

Metro Board of Ethical Conduct

- * Metro Code 2.222.040 creates the Board of Ethical Conduct to hear complaints and render advisory opinions about the standards of conduct or an executive order which regulates the ethical standards of conduct for employees of the metropolitan government.
- * Any elected official or member of a board or commission can request an advisory opinion from the Board relating to compliance.

Ethics Complaint Procedures

- * Complaints regarding elected officials or members of boards/commissions are made to the Board of Ethical Conduct.
- * Department of Law investigates, evaluates, and makes report to Board regarding whether the facts, if proven true, would amount to an ethics violation.
- * Board decides whether to hold a hearing.
- * If a hearing is held, parties are to be given an opportunity to present their case.

Penalties for Violations

The Board of Ethical Conduct can:

- Recommend to Council that the person be censured.
- Recommend that the person resign his/her position.
- Refer matter to district attorney general for prosecution.
- Refer matter to Director of Law requesting that civil action be initiated for restitution or other relief.

Goal (2): Understand when you may be biased or have a conflict and should recuse yourself.

- **You have a duty of independence.** This means you cannot act:
 - Based on your self-interest, or
 - Based on bias against or in favor of people you know personally, or
 - Based on the interests of the director or contractors with whom your board interacts.
- You must be impartial and act based on the law and evidence presented to you.

I have a potential conflict. Should I recuse myself?

Yes, if:

- * You are biased based on a personal interest (for example, where you will gain or lose \$ fairly directly from the decision), or
- * You are biased or prejudiced for or against a party either as an individual or as a member of a group (for example, you are close friends or business partners with someone and cannot be objective), or
- * You cannot fairly or impartially weigh the evidence because you have prejudged fact issues.

Source: *Martin v. Sizemore*, 78 S.W.3d 249, 266 (Tenn. Ct. App. 2001)
(involving a decision to suspend an architect's license).

Should I recuse myself? continued

No, if :

- * You will not gain or lose \$ fairly directly from the decision, and
- * You can be objective and do not believe your participation will create an appearance of impropriety. In that case, disclose potential conflict but state that you believe you can be unbiased and will participate.

If you are uncertain, please consult with staff and/or Metro Legal, because your participation in a decision may be challenged on appeal.

Goal (3): Remember to disclose knowledge you have received about an agenda item from outside the meeting.

- * Disclose knowledge from outside the meeting - or recuse.
- * Knowledge can include attempts to lobby you, outside the meeting.
- * Knowledge can include your expertise or experience with this type of issue or area of town when making a decision.

Source: *Byron Ave. 3501, LLC v. Metro. Historic Zoning Comm'n*, 2011 WL 2112774, at *9 (Tenn. Ct. App. 2011) (involving a decision to demolish Ransom School in West Nashville).



Goal(4): Remember to articulate the specific reasons and basis for your decision.

Acceptable reasons:

- * Criteria in the relevant guidelines or laws.
- * Applying these criteria to:
 - * Facts presented at the meeting.
 - * Past, specific experience with similar issues.
 - * Studies by experts or first-hand observations or experience of the public.

Specific reasons, continued

Unacceptable reasons:

- * Sympathy for the applicant or for people who are opposed to the approval.
- * Opposition that is not based on the relevant guidelines or laws (“this project may be noisy and we already have too much traffic”).

Source: *Demonbreun v. Metro. Bd. of Zoning Appeals*, 2011 WL 2416722 (Tenn. Ct. App. 2011) (overturning the BZA’s denial of a permit to operate a historic home event site).



Goal (5): Understand that the Open Meetings Act prohibits deliberation outside board meetings & Public Records Act makes almost all your emails open to the public.

- * Board members should absolutely avoid the use of email to discuss board issues or to invite comments from other Members concerning any public business.
- * It does not matter whether the email is a Metro email address or private email address.
- * Violations of the Open Meetings Act make decisions based upon these deliberations void. A judge may also order court-supervision of a board.



Source :Johnston v. Metro. Gov't of Nashville & Davidson Cty., 320 S.W.3d 299 (Tenn. Ct. App. 2009) (finding an open meetings violation when councilmembers deliberated about whether to adopt the Belmont-Hillsboro historic overlay through emails prior to their meeting).

The duty to vote

- It is the duty of every board or commission member who has an opinion on a question to express it by his vote.
- Tennessee law disfavors abstentions. This is because abstentions are essentially a vote for the prevailing side; but they are purposefully being kept out of the public record.
- And board members who abstain because they do not believe the law is correct are, in essence, legislating. This is not the role of board or commission members – this is the role of the legislative body.
- Abstaining to “let the courts decide” is also impermissible, because it defeats the purpose of having an administrative body make an initial review.

Source: Hoover, Inc. v. Metro Bd. of Zoning Appeals, 924 S.W.2d 900, 906–07 (Tenn. Ct. App. 1996).

What's a “meeting”

- A meeting is when two or more members of a governing body, with the authority to make decisions for or recommendations to a public body, meet and **make a decision or deliberate toward a decision**. T.C.A. § 8-44-102.
- Adequate public notice must be given for all meetings. T.C.A. §8-44-103.
 - Notice informs affected parties of their opportunity to be heard and gives them time to prepare for and anticipate the meeting.
 - Tennessee courts have determined that adequate public notice is sufficient notice under the circumstances that would fairly inform the public of the meeting. *Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

What's not a “meeting”

The following are not considered meetings, as long as there is no decision made or deliberation toward a decision:

- * On-site inspection
- * Chance meeting/informal assemblage
- * Attorney-Client Executive Sessions
 - * Executive sessions with attorneys regarding anticipated or ongoing litigation are exempt from the Tennessee Open Meetings Act, but actual decisions regarding litigation must be made at an open public meeting.

Goal(6): Understand best practices for making informed decisions.

* Best practices for staff:

- Provide a detailed agenda for each meeting, ideally at least a week ahead of the meeting, so that
 - The public may be informed of issues to be deliberated or decided.
 - The board may review relevant documents or contracts in preparation for the meeting.
- Provide a staff report or recommendation for each agenda item, in written or oral form, with the reasoning behind this recommendation.
- Start each meeting with a declaration by any board members of conflicts and or recusals on agenda items.

Best practices, continued

* Best practices for board members:

- Make sure you understand the work of the department staffing your board – for example, meet the leadership, ask for a tour, review key organizational documents and contracts and understand the board’s legal role and some history of past decisions.
- Before each meeting, review the agenda and copies of the relevant documents or contracts that you will need to make an informed decision. Ask questions about anything you don’t understand. Note any conflicts that should be disclosed or warrant recusal.
- Consider adopting metrics for your board to measure whether you are acting timely or in accordance with your board’s duties.

Questions:

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