

Ethics for ESD Commissioners

SAFE-D
2021 Fall Event
September 16-19, 2021



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Being an open book... aka

TRANSPARENCY



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Open Meetings Act

- Chapter 551, Texas Government Code
- Applies to ESDs
- Public Officials are Required to Have Attorney General-Approved Training
- Open Meetings Handbook
 - https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/openmeetings_hb.pdf



Open Meetings

- 72 Hours Notice of meeting (unless emergency)
- Notice must state time, date and place of meeting
- Notice must describe matters to be discussed sufficiently
- Public has right to attend



Open Meetings

- What is a Meeting?
 - deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action;

OR



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Open Meetings

- What is a Meeting?
 - A gathering:
 - conducted by the governmental body or for which the governmental body is responsible;
 - quorum of members present;
 - called by the governmental body; and
 - at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.
 - The term includes a session of a governmental body.



Open Meetings Closed Sessions

- Consultation with Attorney
- Real Property Acquisition
- Personnel Matters
- Gifts to District/Corporation
- Other Exceptions



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Open Meetings Issues

- Walking Quorum
 - In Person
 - By Phone
 - Via Email, Text or Social Media
- Minutes
 - Required for all meetings
 - Must Identify subject of deliberation and vote
- Closed Sessions
 - Process
 - Certified Agenda



Virtual Meetings

- Gov. Abbot waived in person meeting requirements during COVID
- Waiver expired September 1, 2021
- No new laws passed to allow full virtual meetings



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Virtual Meetings

- Law allows participation of board member by videoconference IF:
 - Quorum of board is present at physical meeting location; AND
 - The audio and video of the board member participating virtually is available at all time.
 - Must keep at least an audio recording of the meeting.



Public Information Act

- Chapter 552, Texas Government Code
 - formerly the Open Records Act
- Applies to Districts and VFDs/Service Providers
- Attorney General Training Required Within 90 days of Taking Office
- Public Information Act Handbook
 - texasattorneygeneral.gov/publicinfo_hb.pdf



Public Information

- Entities and “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds “ are subject to the act.
 - This applies to VFDs and other contractors to the extent funded by ESD money
- Unless excluded, all public information is subject to disclosure under the act.



Public Information

- Minutes, Orders, Resolutions, etc.
- Correspondence
 - Letters, Electronic Mail, Text Messages, Instant Messages, and Social Media Postings
- Any document related to the transaction of official business of the entity



Public Information

- The AG has determined in several informal letter rulings that e-mails concerning public business in a public official's personal e-mail account are subject to the Act when the public official uses the personal e-mail account to conduct public business.



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Public Information

- The AG cautions that certain personal notes may be subject to the Act if they are made in the transaction of official business.
 - Early AG opinions excluded such notes from the Act.



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Being a good servant leader for the public...

GOVERNMENT ETHICS



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Ethical Issues

- Fiduciary Duties
- Conflicts of Interest
- Nepotism
- Dual Office Holding/Incompatibility



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Fiduciary Duties

- Position of Trust or Confidence
- Relationship is One-Sided
- Duty of Care
 - Participate and exercise independent judgment
- Duty of Loyalty
 - Put organization before own interests
- Duty of Obedience
 - Be faithful to organization's mission



Fiduciary Duties

- State Law requires a director to discharge the director's duties, including duties as a committee member,
 - in good faith,
 - with ordinary care, and
 - in a manner the director reasonably believes to be in the best interest of the corporation.



Conflict of Interest

- Common Law

If a public official directly or indirectly has a pecuniary interest in a contract, no matter how honest he may be, and although he may not be influenced by the interest, such a contract so made is violative of the spirit and letter of our law, and is against public policy.

— *Meyers v. Walker*



Conflict of Interest

- A local public official commits an offense if the official knowingly:
 - violates [Local Government Code Section 171.004](#) (Next Slide)
 - acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
 - acts as surety on any official bond required of an officer of the governmental entity.
- An offense under this section is a Class A misdemeanor – punishable by up to one year in jail and/or up to \$4000 penalty.



Conflict of Interest

- If a local public official has a substantial interest in a business entity or in real property, the official must:
 - file an affidavit stating the nature and extent of the interest before a vote or decision on any matter involving the business entity or the real property, and



Conflict of Interest

- AND
 - abstain from further participation in the matter if:
 - the action on the matter will have a special economic effect on that business entity that is distinguishable from the effect on the public; or
 - it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property that is distinguishable from its effect on the public.



Conflict of Interest

- A person has a substantial interest in a business entity if:
 - the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or
 - funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.



Conflict of Interest

- A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.
- Applies to Spouse, Child and Parent Interests Too.



Conflict of Interest

- In Harris County, person is ineligible for ESD board if person or spouse, child, parent, etc. is member of service provider (could have state-wide implications)



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Nepotism

- A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Nepotism

- the individual is related to the public official within a degree described by Texas Government Code, Section 573.002; or
- the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.



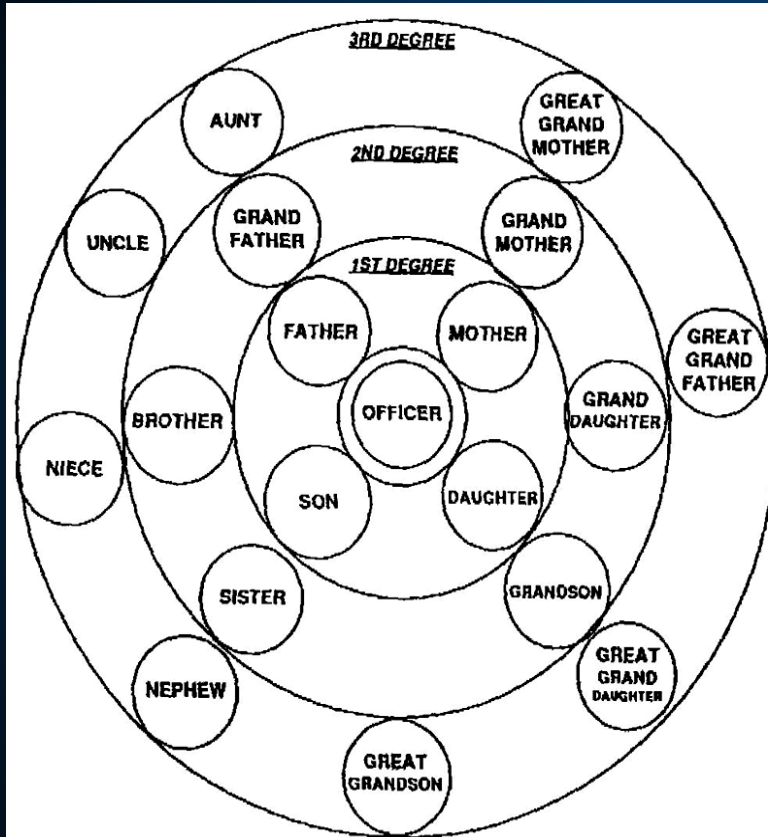
Nepotism

- Except as provided by Texas Government Code, Section 573.043, this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.

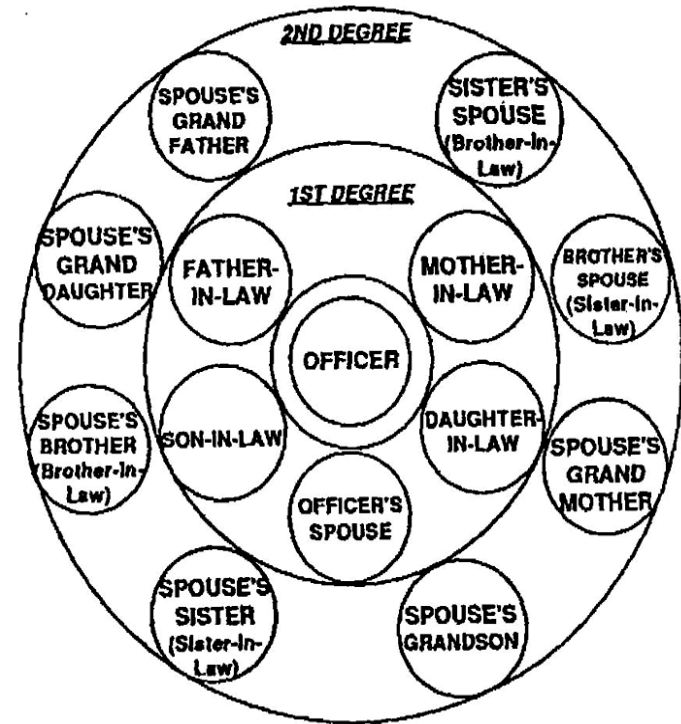


4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Nepotism



Consanguinity Kinship Chart
(Blood)



Affinity Kinship Chart
(Marriage)

Nepotism

Consanguinity Civil Law Degrees Of Relationship				
	1 st	2 nd	3 rd	4 th
Officer	Child	Grandchild	Great Grandchild	Great Great Grandchild
	Parent	Sibling	Niece/Nephew	Grand Niece/Nephew
		Grandparent	Great Grandparent	Great Great Grandparent
			Aunt/Uncle	Great Aunt/Uncle
				1 st Cousin

Nepotism

Affinity Civil Law Degrees Of Relationship			
	1 st	2 nd	3 rd
Officer	Spouse	Spouse's Sibling	Child of Spouse's Sibling
	Spouse's Parent	Spouse's Grandparent	Spouse's Great Grandparent
	Child's Spouse	Parent of Child's Spouse	Grandparent of Child's Spouse
		Sibling's Spouse	Parent of Sibling's Spouse
			Spouse's Aunt/Uncle

Dual Office Holding

- Article XVI, Section 40, of the Texas Constitution prohibits a person from holding or exercising more than one civil office of emolument at a time.
- SB 917 specifically prohibits fees of office for office held on second ESD board, making emolument prohibition not applicable



Incompatibility

- Self Appointment
- Self Employment
- Conflicting Loyalties



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Incompatibility

- Self Appointment
 - “It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.”
 - Ehlinger v Clark, 8 S.W.2d 666 (Tex. 1928).



Incompatibility

- Self Employment
 - Ordinarily, self-employment incompatibility will arise only where one position is an office and the other an employment.
 - But, can arise when position is subordinate to the governing body in some of its principal duties.



Incompatibility

- **Conflicting Loyalties**
 - both positions must be “offices”
 - the relationship between the positions creates conflict
 - if authorized to contract with each other
 - if both have the power of taxation
 - even if one district imposes an ad valorem property tax and the other imposes a sales tax that must be approved by the voters.
 - if boundaries overlap
 - whenever one governmental body has authority to impose its will on the other in any matter whatsoever.



Incompatibility

- **Conflicting Loyalties**
 - SB 917, adopted in 2011, specifically states that holding positions on two ESD boards is not incompatible, whether they overlap or not.



“What can happen when you mess up... BAD?”

LIABILITY AND REMOVAL



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

LIABILITY FOR ACTIONS



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Governmental Immunity

- Districts enjoy certain immunity from suit under Texas law that private entities do not.
 - Can be liable for property damage, personal injury, and death caused an employee acting within his scope of employment while operating a motor-driven vehicle or equipment and if the employee would be personally liable according to Texas law; and
 - Can be liable for personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.



District Tort Liability

- Districts otherwise immune from liability for torts.
- District tort claims limited to \$100,000 to single person and \$300,000 per occurrence for personal injury or death and \$10,000 per occurrence for property damage.



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Board Member Liability

- Ministerial Acts vs Discretionary Acts
- Generally, board members are not personally liable for torts resulting from their official actions, so long as those actions were made in good faith
 - that is, without willful or malicious intent to do harm.
- Tort Claims Act limits liability amount



Board Member Liability

- However, liability is still a possibility
- Things to consider:
 - Take actions only if authorized by law
 - Use best judgement
 - Gather facts
 - Do not act in violation of the law
- There is criminal Liability for violations of the law



REMOVAL



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

Removal

Appointed Commissioners

- Section does not apply unless adopted by the county commissioners court by resolution.
- Grounds for removal of an appointed board member by Commissioners Court:
 - Incompetency
 - official misconduct
 - misconduct



Removal

- Removal deliberation subject to 551.0745, Government Code (providing for closed meeting to discuss certain personnel matters).
- Opportunity is provided for the board member to show cause why the board member should not be removed.



Grounds for Removal

- Incompetency
 - No training as required
 - Definition in Chapter 87 of Local Gov't Code:
 - gross ignorance of official duties;
 - gross carelessness in the discharge of those duties; or
 - unfitness or inability to promptly and properly discharge official duties because of a serious physical or mental defect that did not exist at the time of the officer's election.



Grounds for Removal

- Official misconduct
 - “intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law”, including “an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.”



Grounds for Removal

- Misconduct
 - violating a law relating to the office of director;
or
 - misapplying any thing of value belonging to a special district that has come into the custody or possession of a director by virtue of the director's office.



Removal

Elected Commissioners

- Section requires use of the procedures set forth in the Local Government Code for removing county officers (Chapter 87 of Local Government Code).
- Provides the grounds for removal:
 - incompetency
 - official misconduct
 - intoxication
 - misconduct
- Removal process initiated by filing of petition in court



Questions?



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021

John J. Carlton

The Carlton Law Firm, P.L.L.C.

4301 Westbank Drive

Suite B-130

Austin, Texas 78746

(512) 614-0901

john@carltonlawaustin.com



4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
www.carltonlawaustin.com
©2021