

PORT COMMISSIONERS

Selected Legal Issues

American Association of Port Authorities
Commissioner's Seminar

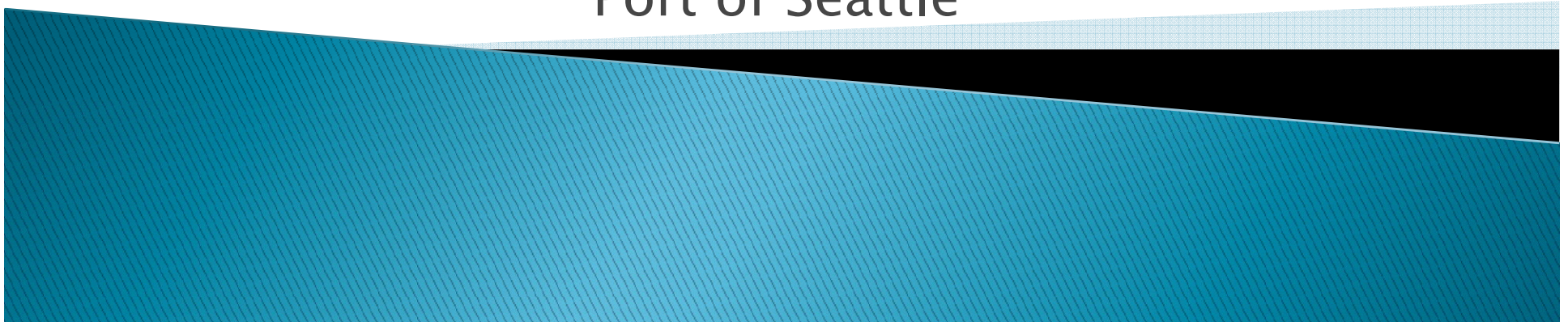
Boston, MA

May 20, 2009

Tom Tanaka

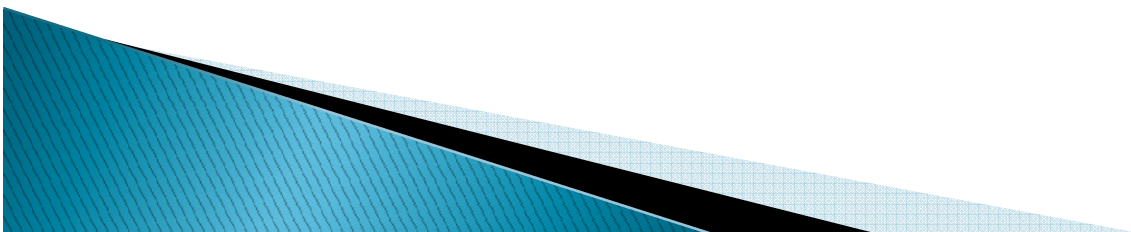
Senior Port Counsel

Port of Seattle



Outline

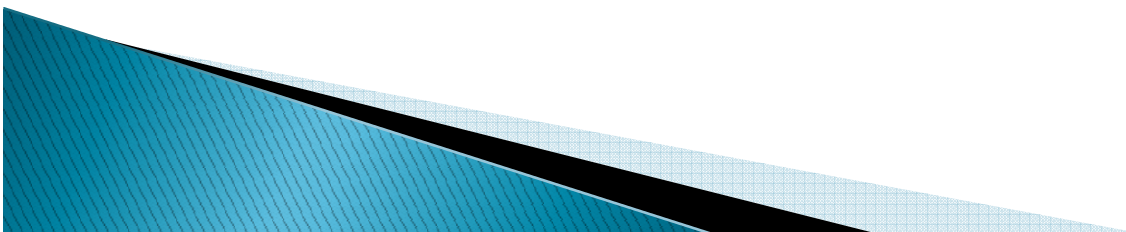
- ▶ I. Legal Issues and Governance
- ▶ II. The Law and Public Ethics
- ▶ III. The Attorney–Client Relationship



I. Legal Issues and Governance

▶ A. Don't sweat the small stuff.

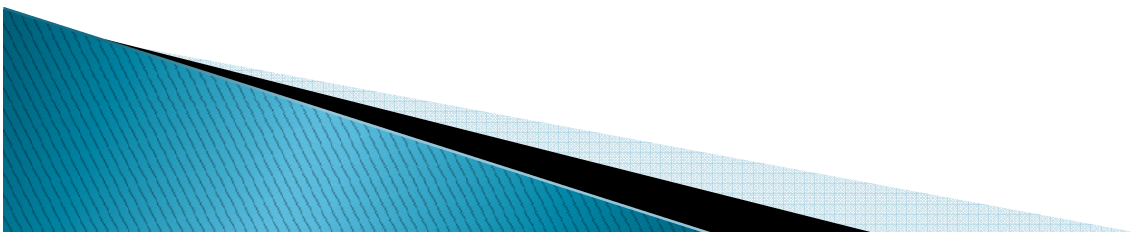
- 1. How many hours do you spend meeting in an official capacity?
 - If you average 3 public meetings per month, including committee meetings plus executive sessions, estimate 180 hours per year. [(3 x 4 hour meetings) plus 3 hours of sub-committee meetings per month] = 180 hours. That's 22.5 work days a year to oversee your port.



Legal Issues and Governance

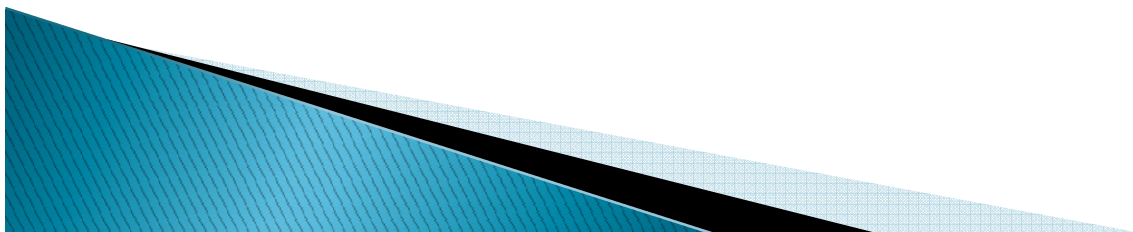
▶ *(Don't sweat the small stuff, cont.)*

- 2. Big Caveat: You never know when the small stuff explodes and it becomes your issue (and everyone's in a sweat)
- Port of Seattle holiday decoration incident: Being attacked by Rush Limbaugh is no fun (although the White House disagrees).



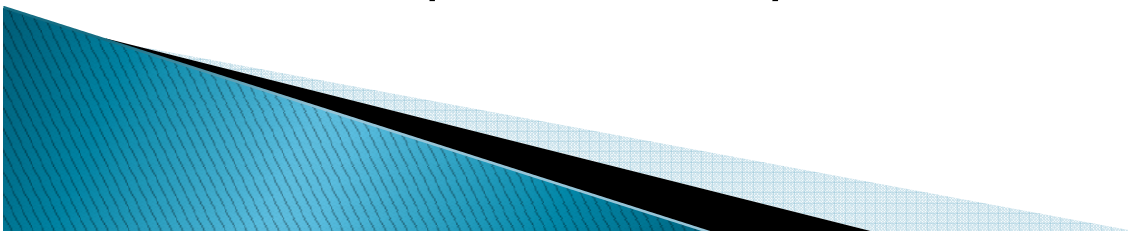
Legal Issues and Governance

- ▶ B. Observing the line between the Commission and staff.
 - 1. Most organizations have some document, often in the form of bylaws, that specify the roles of the staff and commission.
 - 2. Such lines are intended to maintain orderly operations.
 - 3. You'll be covering this issue later in the morning.



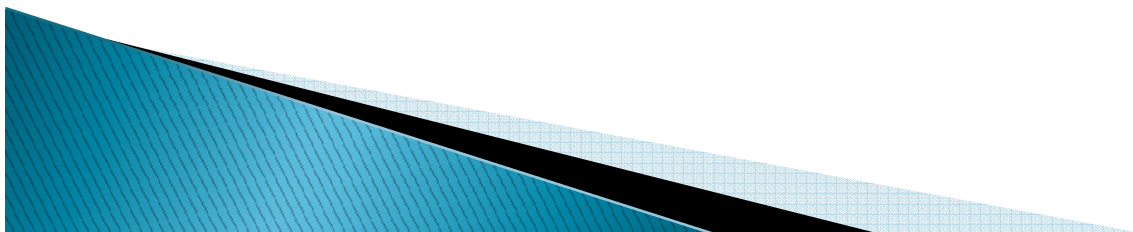
Legal Issues and Governance

- ▶ C. What is your role as Commissioner?
 - 1. What power do you as an individual commissioner have?
 - Legally speaking, it's less than you think.
 - 2. Unless your local laws provide otherwise, an individual commissioner has no legal power.
 - 3. Only the full Commission, acting as a body, has the legal authority to act, and the action must be taken as prescribed by law.



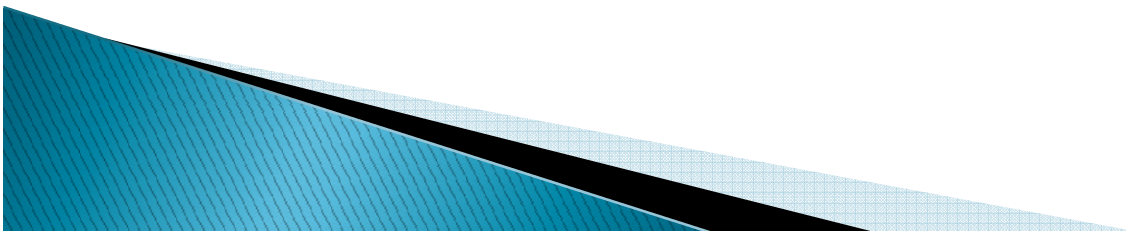
II. Commissioners and Laws Relating to Ethical Conduct

- ▶ A. The duties generally recognized for members of private boards of directors easily apply to port commissioners:
 1. The duty to govern.
 2. The duty of diligence.
 3. The duty of loyalty.
 4. The duty of obedience.



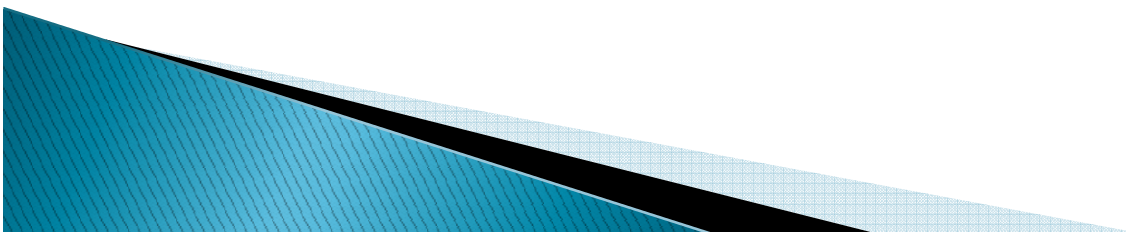
II. Commissioners and Laws Relating to Ethical Conduct

- ▶ B. On the loyalty issue: As a Commissioner, whom do you serve and where is your ultimate loyalty?
 - ▶ 1. Does it depend on where the Port sits in relation to other bodies? If the Port is part of state government, does the Commission ultimately serve the state? If part of city government, does the Commission serve the city? What if the port is a stand-alone entity?



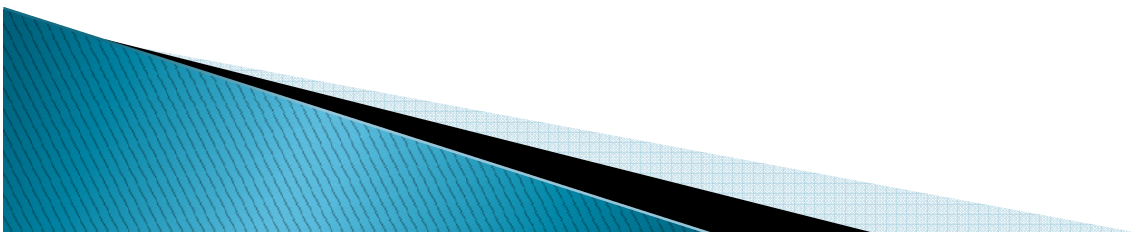
Commissioners and Laws Relating to Ethical Conduct

- ▶ *Whom do you serve? (cont.)*
 - 2. Do you serve the general public interest?
Sounds good, but who decides what's the public interest?
 - 3. Or do you serve the port itself?
 - 4. The answer may depend on the laws or ordinances applicable to each of your ports.



Commissioners and Laws Relating to Ethical Conduct

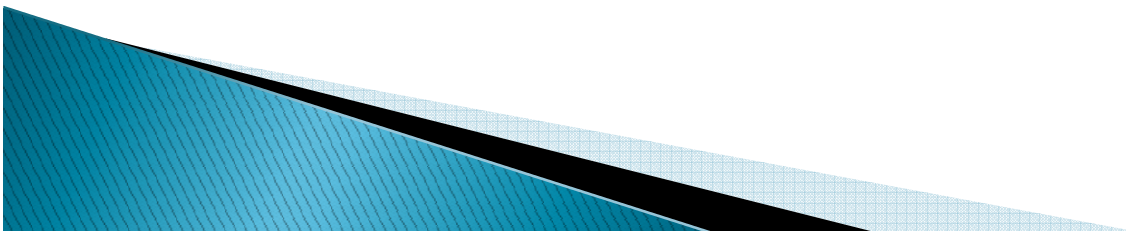
- ▶ B. Two categories of laws govern how you are expected to behave as a Commissioner.
- ▶ C. First category: Laws that aren't strictly speaking relating to ethics, but are legal requirements that prescribe how you do business as a Commissioner. (Duty to obey the laws governing your action as a commissioner)



Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business (cont.)*

- 1. Open Public Meetings/Sunshine laws.
 - a. Varies by state. Underlying policy is that citizens are entitled to know how their government is run. Some laws are very strict.
 - b. At least one state doesn't allow email correspondence between Commissioners to discuss an issue that would otherwise have to be discussed as part of business during a meeting.
 - c. Some states have strict limits on what can be discussed in Executive Sessions.



Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business (cont.)*

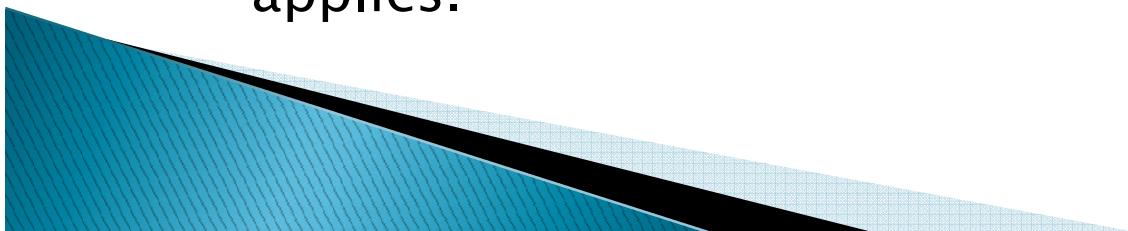
- 2. Public Disclosure/Freedom of Information Laws

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- a. The scope of these laws is often a surprise for new public officials and frequently forgotten by even experienced officials.

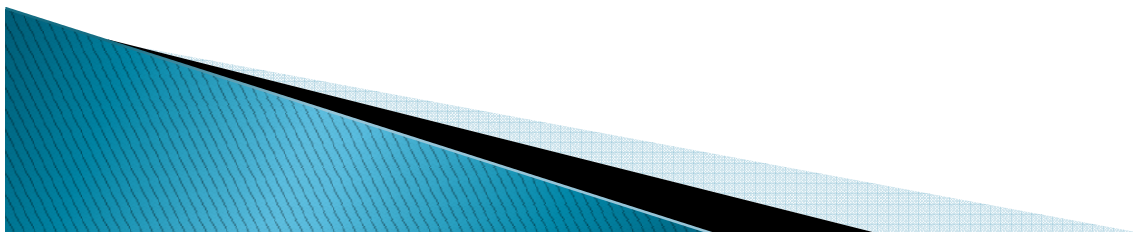
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- b. The laws vary by state, but generally, all documents (broadly defined to include any record in any medium, whether hard copy, digital, electronic, etc.) is subject to disclosure unless a specific narrow exemption applies.



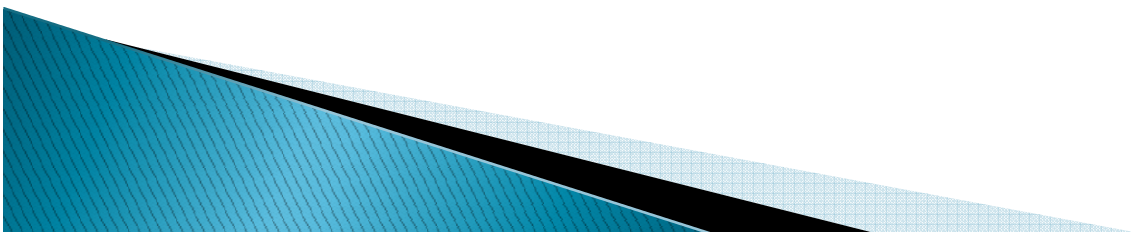
Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business—FOIA requirements (cont.)*
 - c. The law in your state may be broad enough to include any messages on your blackberry/pda, home computer (to the extent messages on your personal pc relate to port work), voice mail, or text messaging on your cell phone.



Commissioners and Laws Relating to Ethical Conduct

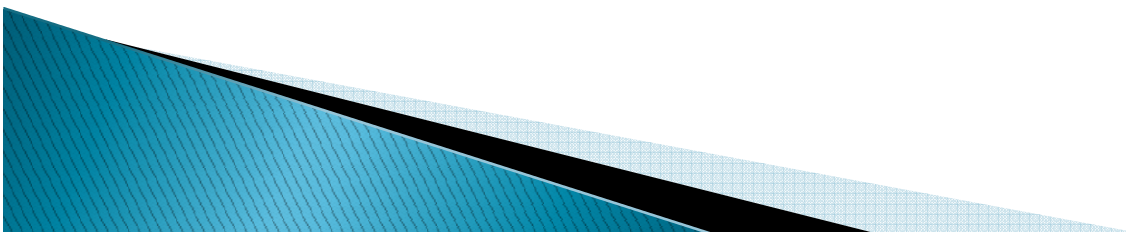
- ▶ *Legal requirements for conducting business—FOIA requirements (cont.)*
 - ▶ d. In some places, voice mails are digitized and maintained as public records.



Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business—FOIA requirements (cont.)*

- e. In sum, we're all human, but before you send that red hot smokin' email, or leave that blistering voice mail, ask yourself: How would I feel having this on the front page of the newspaper?

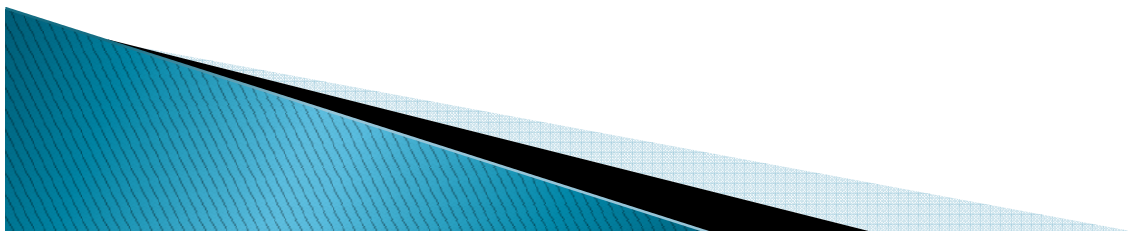


Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business (cont.)*

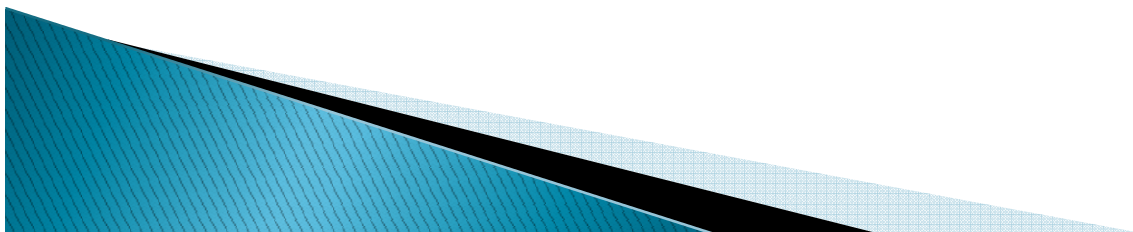
- 3. Confidentiality.

- a. A Commissioner should not disclose confidential information gained by reason of the Commissioner's position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (i) the Port and (ii) the person or persons who have authority to waive the confidentiality of the information.



Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business—
–Confidentiality (cont.)*
 - b. A port commissioner should not accept employment or engage in any business or professional activity that he or she might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the commissioner by reason of the commissioner's official position.

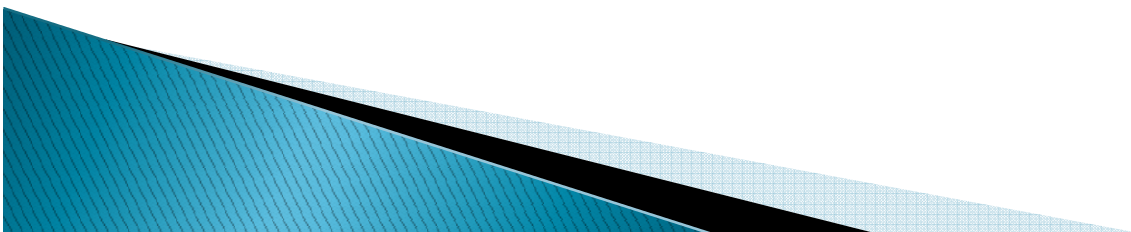


Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business--
--Confidentiality (cont.)*

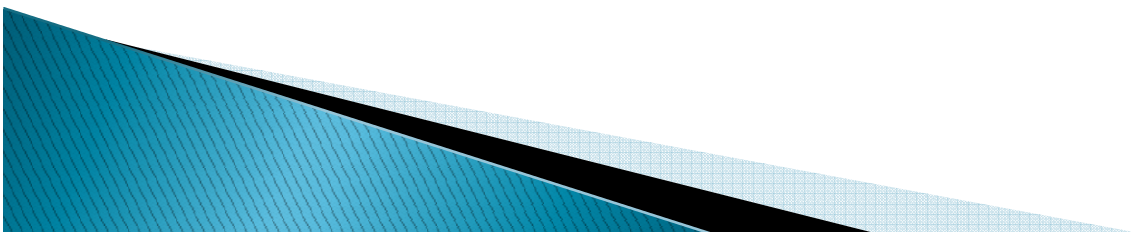
- c. A Port Commissioner should not disclose confidential information to any person not entitled or authorized to receive the information.

Think about this in the context of executive session information. If you hear information that would affect Group XYZ, is it OK to share this information with them? Ask the question we discussed earlier- Whom do you serve?



Commissioners and Laws Relating to Ethical Conduct

- ▶ *Legal requirements for conducting business (cont.)*
- ▶ D. The second set of laws involves issues of personal integrity and what probably falls closest to the everyday understanding of what would be ethical behavior.



Commissioners and Laws Relating to Ethical Conduct

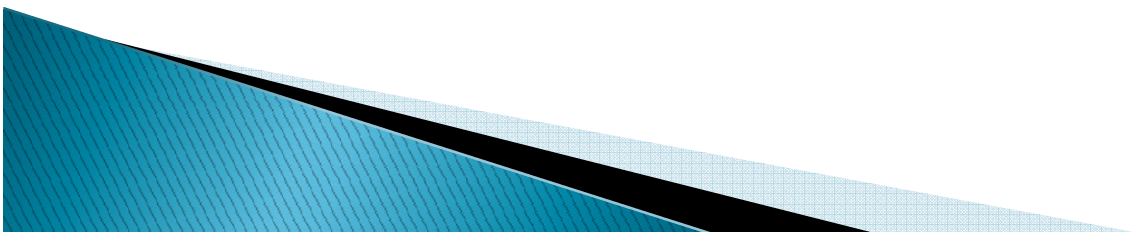
- ▶ *Legal requirements for conducting business—Ethics rules (cont.)*

- 1. Consider this statement from the preamble for Washington state's ethics laws:
- “Government derives its powers from the people. Ethics in government are the foundation on which the structure of government rests. State officials and employees of government hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed. Paramount in that trust is the principle that public office, whether elected or appointed, may not be used for personal gain or private advantage.” (RCW 42.52.900)



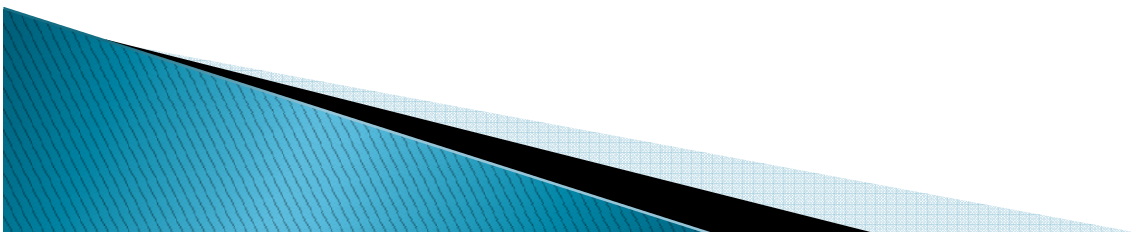
Commissioners and Laws Relating to Ethical Conduct

2. This statement is typical of the language found in many states and local governments' ethics rules. The public expects a certain level of conduct from you in carrying out their business.
3. Appearance matters. Credibility and integrity are the coins of your realm.
4. Don't overlook common sense and reality checks.



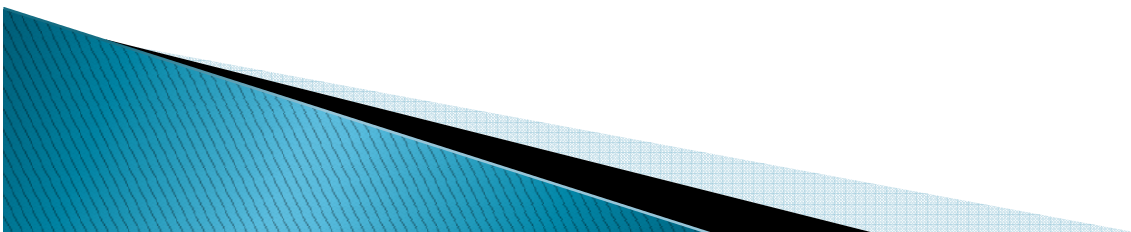
Commissioners and Laws Relating to Ethical Conduct

- 5. Conflicts of Interest. If you or any member of your family stand to gain an economic benefit by an action of your port, that is a conflict of interest.
- Recuse yourself from any deliberations or vote on the subject.



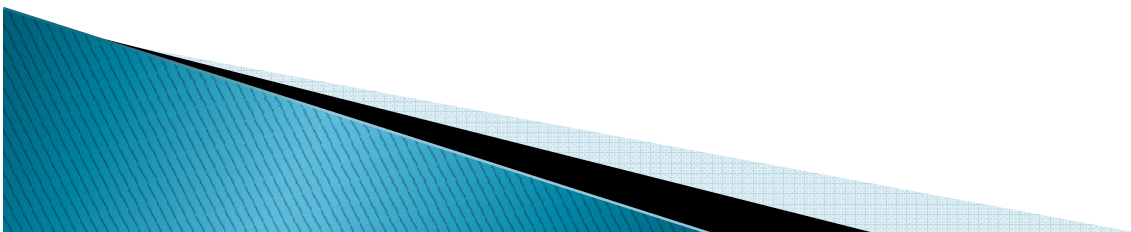
Commissioners and Laws Relating to Ethical Conduct

- 6. Special Privileges. You cannot use your position to obtain any special privileges or exemptions for yourself, your friends, or your family that are not otherwise available to the general public unless it's in the conduct of your duties for the Port.
- If you can keep in mind the admonition against using your office for “personal gain or private advantage,” you can avoid many potential problems.



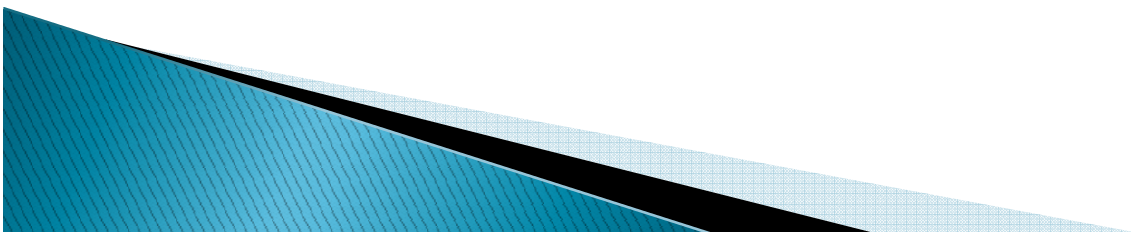
Commissioners and Laws Relating to Ethical Conduct

- 7. Gifts. You shouldn't on your own behalf accept or solicit any thing of economic value as a gift, gratuity, or favor from a person if it could be reasonably expected that the gift, gratuity, or favor would influence your vote, action, or judgment or be considered as part of a reward for action or inaction. You can accept a gift on behalf of the port, but you can't keep it.



Commissioners and Laws Relating to Ethical Conduct

- 8. Political campaigns. You should not use or authorize the use of port facilities for the purpose of assisting any political campaigns. “Facilities” include use of stationery, postage, machines, and equipment, use of port employees during working hours, vehicles, and office space.

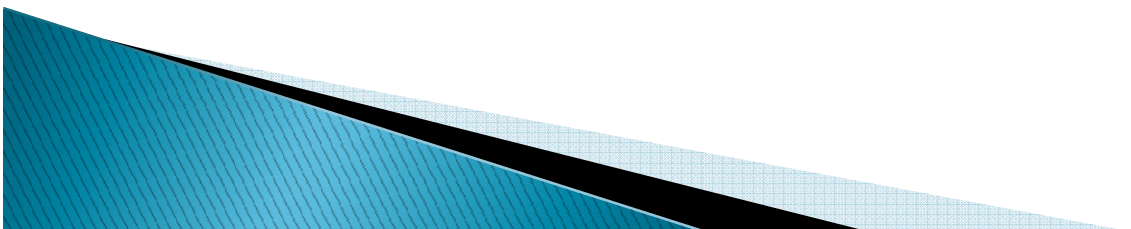


Commissioners and Laws Relating to Ethical Conduct

▶ *Political Campaigns (cont.)*

a. Exceptions to the political campaign rules:

- 1. Actions taken at an open public meeting by the port commission to express a collective decision, or to vote upon a motion to support or oppose a ballot proposition.



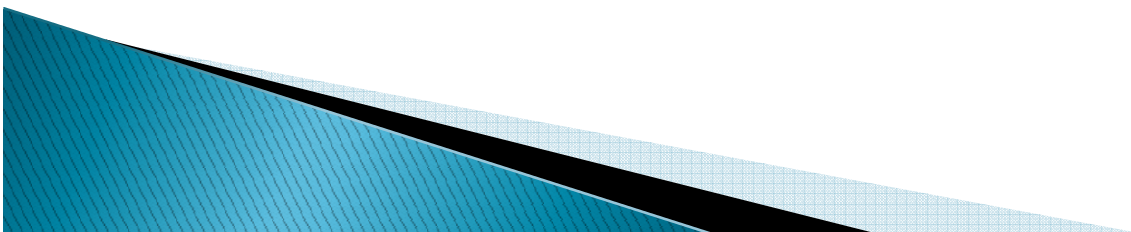
Commissioners and Laws Relating to Ethical Conduct

▶ *Political Campaigns (cont.)*

- 2. A statement by a commissioner in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry.

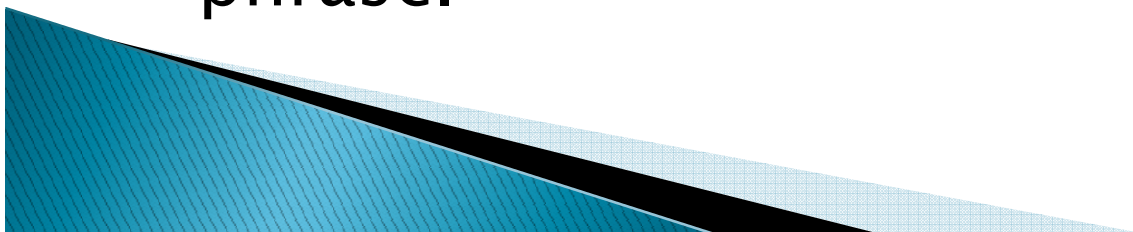


- 3. Activities that are part of the normal and regular conduct of the port;



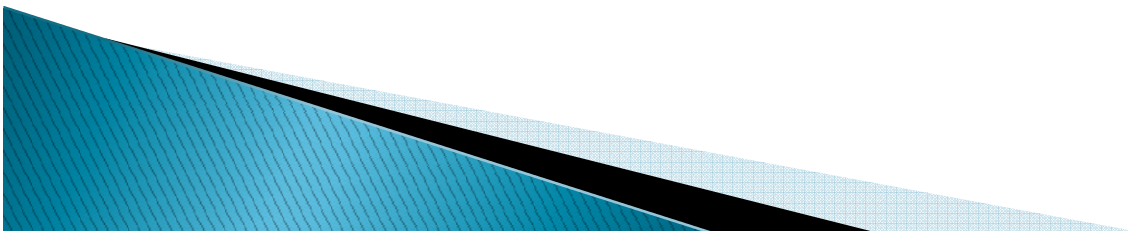
III. The Attorney–Client Privilege

- ▶ A. How often do we see this at the top of a memo from your port attorney addressed to Commissioners?
- ▶ **“ATTORNEY–CLIENT COMMUNICATION**
- ▶ **PRIVILEGED AND CONFIDENTIAL”**
- ▶ What’s surprising is how so many people don’t understand the significance of this phrase.



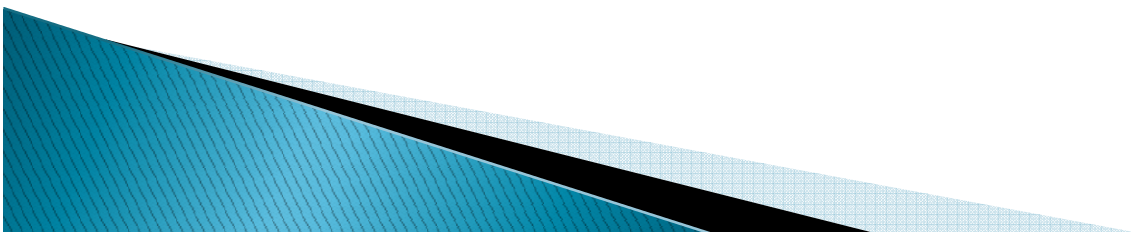
The Attorney–Client Privilege

- ▶ B. What’s so special about a privileged communication with your lawyer?
 - Answer: The content of the communication remains confidential between you and your attorney—UNLESS the privileged is waived.



The Attorney–Client Privilege

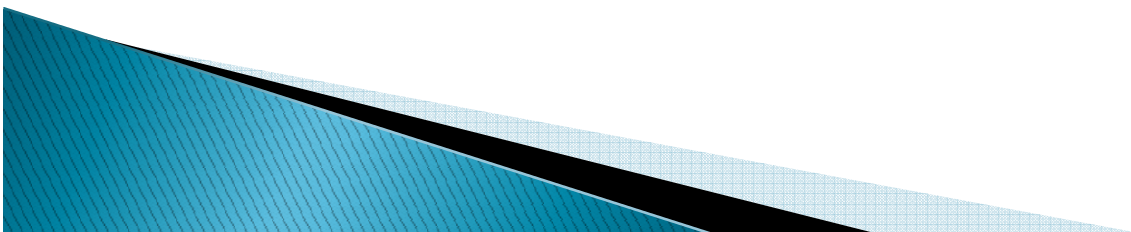
- ▶ C. Why does the privilege exist?
 - For the same reason that the law recognizes privileged communication between a doctor and her patient: If there is no guarantee of confidentiality, the person with the information will not give the full story. In the case of the doctor/patient privilege, that can be dangerous.



The Attorney–Client Privilege

▶ D. Waiver of the Privilege

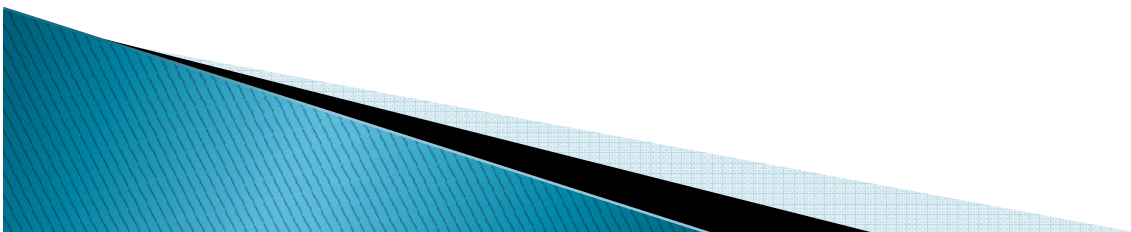
1. To waive the privilege means to surrender it. When it's gone, it can never be recovered.
2. Waiver can be done on purpose or it can be accidentally waived.
3. An organization like a port can be a client for purposes of the privilege and therefore the port as an entity enjoys the privilege like any regular person.



The Attorney–Client Privilege

▶ *Waiver of the Privilege (cont.)*

- 4. How can waiver occur?—Waiver can occur through accidental means:
 - a. Talking about privileged information in a setting where it's obvious it could be overheard (like in an elevator).
 - b. Forwarding an email with privileged information to someone who is not covered by the privilege.
 - c. Leaving copies of privileged memos in places where they can be found by people not subject to the privilege.



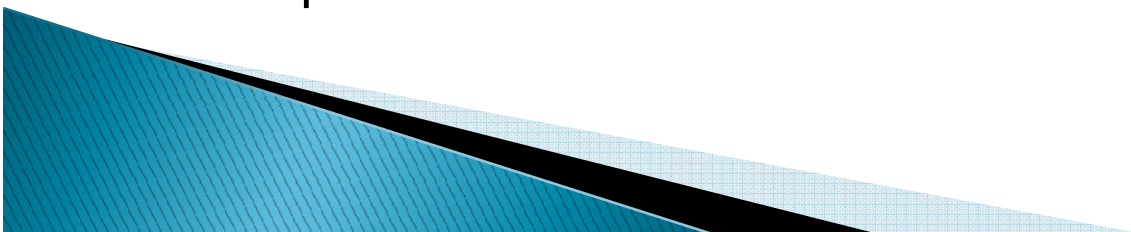
The Attorney–Client Privilege

▶ *Waiver of the Privilege (cont.)*

- 5. Waiver can also be achieved by deliberate actions of those holding the privilege.

6. What is the effect of a single Commissioner who accidentally or deliberately waives privilege on a port matter?

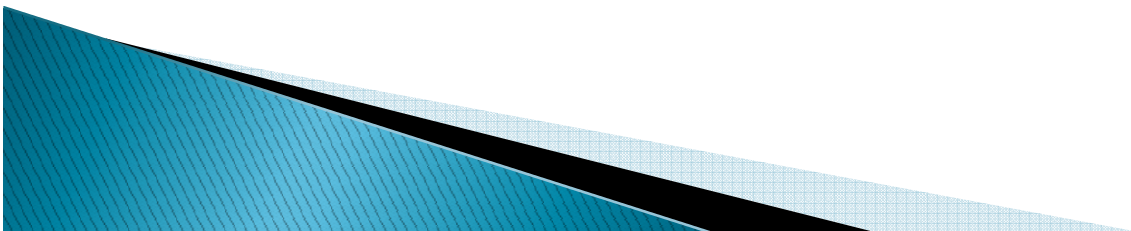
- a. If the Commissioner did so with knowledge that he or she was waiving the privilege to the Port's detriment, then the Commissioner may have violated certain laws or bylaws. (see previous discussion on confidentiality)



The Attorney–Client Privilege

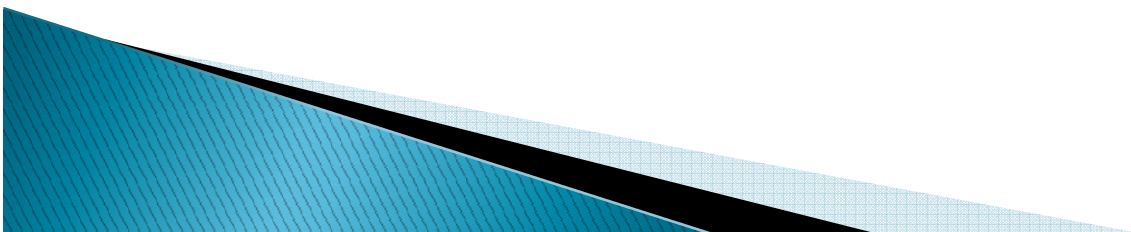
▶ *Waiver of the Privilege (cont.)*

- b. If the Commissioner was not authorized to speak on behalf of the Commission as a whole (eg, the Commission President), then the waiver is probably limited to the specific communication.
- c. If the Commissioner is authorized or recognized as representing the Commission, then it may be that the Commissioner has waived privilege not just for the communication in question, but has effectuated a general waiver (a huge nightmare for the port's attorney).



The Attorney–Client Privilege

- 7. If you have questions about privilege, consult your port attorney.



Questions?

