

**School Board
Meetings and
Social Media
Communications
– From the
Constitutional to
the Practical**



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Introduction

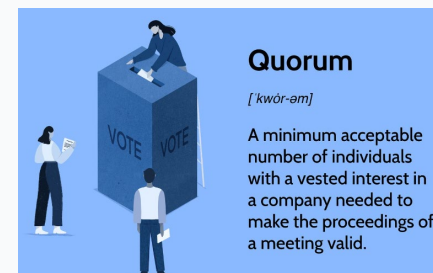
- Our Focus – Issues Causing Boards Difficulty Currently
 - Procedural Matters
 - The Open Meetings Law
 - The Constitutional Overlay
 - Policies on Meetings
 - Videoconferencing
 - Committees
 - Availability of Documents
 - Public Participation
 - Use of Social Media and Liability
 - Cases Pending Before SCOTUS





What if the Quorum Dissolves?

- Quorum (i.e., simple majority of whole Board) must be maintained
- If a Board member leaves:
 - Decisions can be made if remainder = quorum
 - Departure of multiple members can terminate meeting
 - Remaining members can continue discussion, but can't make decisions
- If Quorum dissolves temporarily, meeting should be suspended, pending members' return



What if Board Member Recuses?

- Recusal (i.e., abstention) usually relates to particular issue
- Same as absence relative to quorum
- If necessary, matters should be delayed



When Does (and Doesn't) a Vote Constitute a Decision?

- A motion or resolution properly introduced
- Affirmative vote by majority of entire Board
- E.g., on a 7-person Board, 4 out of 7, but not 3 out of 4



What About “Off-Site” and/or Informal Gatherings?

- OML not limited to meetings in the “Board Room”
- Meeting “elsewhere” can’t avoid the OML
- Social functions are not meetings, but temptation to discuss business must be resisted





What About Committees?

- 3 OML Sections
 - §100 – Policy
 - §102 – “Meeting” & “Public Body” defined
 - §104 – Notice
- Courts and Committee on Open Government (“COG”) have interpreted §102
- Result unclear
 - COG = open, if committee primarily of Board members and others; and necessary functions performed; e.g., audit, shared decision-making
 - Courts = generally, advisory committees not open unless comprised of Board Members

What About Site Inspections?

- Can be invaluable to decision-making
- Can the whole Board attend?
 - Sure, but
 - Purpose must be to gather, **not discuss**, information





What About Executive Sessions?

- A “Quick Guide”, including “The 8 Reasons” – Handout
- Grounds are limited and narrowly construed
- Executive sessions are not mandated by the OML
- OML §105 does not contain “personnel” or “contract”
- Can an executive session be prescheduled?
- Are they privileged?
- How “confidential” are they really?
- What about meetings with counsel?



The Constitutional Overlay

- The First Amendment to the U.S. Constitution reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the government for a redress of grievances.

- In addition, Article I, Section 8 of the NYS Constitution states:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.



Policy on Meetings

- Purpose = provide for conducting meetings so that:
 - Business addressed in an orderly and efficient manner
 - Public will have reasonable opportunity to be heard
 - Performance of legal duties maximized; and
 - Board members can participate fully
- Should contain rules on agenda setting, order of business, agenda packet, omnibus motion, executive sessions, confidentiality, public participation, and rules of procedure
- N/B: Contrary to Roberts Rules, a supermajority requirement for changing bylaws and policies or passing resolutions cannot be required



Availability of Information to Board Members

- If information accessible under FOIL, any board member has equal rights to same without restriction or filing a FOIL request
- If an information request requires creating a report, then direction from the Board may be required
- Access to personnel files (in executive session) requires compliance with Part 84 of the Commissioner's Regulations, including a legitimate business purpose for such a review



What About Videoconferencing?

- There's a new process – Public Officers Law §103-a
- Boards may only conduct virtual meetings in “extraordinary circumstances”. To do so:
 - The Board must adopt an authorizing resolution
 - At least a quorum must be in the same physical space accessible to the public
 - The Board must establish and post written procedures
 - The public must be given the opportunity to both view and participate
 - The public notice of the meeting must state:
(a) videoconferencing will be used; (b) where the public can view/participate; (c) the physical location of the meeting; and (d) where required documents will be posted
 - The meeting must be recorded and posted on the website within 5 business days, available for 5 years and transcribed upon request
- The Board member with extraordinary circumstances does not have to provide access to their personal location



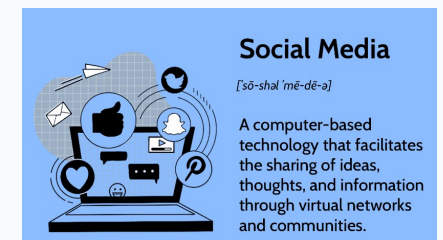
Public Participation

- Board meetings “take place in public, but are not public meetings”
- The rules should be contained in a formally adopted policy
- What can be done about the disruptive speaker?
 - Remind speaker about the policy
 - Brief recess to restore order
 - Request speaker to leave the podium and forfeit right to continue
 - If otherwise justified, recess to executive session
 - Request intervention from law enforcement
 - Adjourn to another date and time
- Cutting off a speaker because of the content or viewpoint of the speech will likely result in First Amendment violation and liability



Use of Social Media

- Case involving two Board members pending before SCOTUS
 - Garnier v. O’Conner – Ratcliff, 41 F 4th 1199 (9th Cir. 2022)
 - Two Board members created public Facebook and Twitter campaign pages
 - Once elected, they continued to use these pages to inform constituents about Board activities
 - Two district parents frequently left critical comments and disparaging remarks



Use of Social Media (continued)

- The Board Members blocked the parents from the pages
- The parents sued
- Both the trial and appellate courts found first amendment violations
- This is opposite the result of another federal case involving a city manager
- The Supreme Court granted certiorari





Use of Social Media and Liability

- The Main Question = whether the act of posting on social media constitutes “state action”?
- Factors to be considered
 - Whether the social media page was used to communicate about official duties and responsibilities
 - Whether the Board members were performing a “public function”
 - Whether the Board, through its two members, became a joint participant in a private activity
 - Whether the Board’s influence or encouragement converted a private action into government action
 - Whether there was a close nexus between the Board and its 2 members as private individuals to fairly consider them to be intertwined



The Lower Courts' Findings and Conclusions

- A school district officer, even when off-duty, can create liability, when there is a substantial relationship between off-duty conduct and performance of the officer's duties
- Both Board members actively solicited constituent input about school district matters
- They also asked citizens to apply for positions on volunteer committees
- The First Amendment was violated when the Board members blocked individuals from expressing their dissatisfaction because the social media pages had become, in essence, an arm of government



Some Ideas for a Good Social Media Policy

- Exercise care and good judgment when posting on social media sites
- Use of social media shall not damage the reputation of the District, its employees, students, or their families
- Everyone must uphold the district's value of respect for individuals and avoid defamatory statements
- Confidential information may not be disclosed
- Recognize that school personnel are held to a higher standard than the general public
- The district must not be presented in a negative light

Excerpted from Toms River Board of Education Policy



Things to Remember Before Using Social Media

- Social media can be an effective tool for communication
- An individual school board member does not have any decision-making authority
 - Social media posts made on a personal account are not considered school district records BUT
 - Social media posts made in a school board member's official capacity about school district business are school district records and may be subject to discovery
- Refrain from responding to complaints or inflammatory/untrue remarks by members of the public
- Be mindful of social media etiquette and how your digital statements or behaviors reflect on the school district



Some Conclusions

- The law applicable to Board meetings can be intricate
- “Real life” application can be difficult
- “The Law isn’t always right, but it always is the law”

-- Anonymous



Questions?



HODGSON RUSS

Thanks!



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