



# School Board Member Communications

Primary among school board members' duties is voting on matters at properly noticed school board meetings. In order to effectively discharge that duty, board members must be able to communicate facts and opinions on those matters and other issues relating to district operations. This not only includes discussion and information sharing at board meetings, but also involves communications outside of board meetings with administrators, staff, board members and members of the public. With increasing frequency, board members are also maintaining official social media pages to communicate with the general public.

As a general proposition, the First Amendment to the United States Constitution provides broad protections for board members to engage in such communications. However, there are limits to those protections as they apply to communications of board members acting in their official capacity. Additionally, board policies and procedures frequently establish rules regarding board member communication. This *Legal Comment* will review some of the common issues surrounding board member communications and the potential limitations on those communications.

## ■ Communication at Board Meetings

Board members have great latitude

to express their opinions during board meetings. This type of expression is known as "pure speech," and it receives the greatest protection under the First Amendment. Pure speech falls outside the protection of the First Amendment only if it is established that such speech constitutes a clear and present danger to society and that danger outweighs the interest in allowing the speech, or pure speech can be regulated if that regulation is narrowly tailored to serve a compelling government interest.

Boards sometimes experience challenges with certain board members because of the content or manner of their speech. As set forth above, boards generally cannot restrict or regulate the content of a board member's speech. For example, in one case, a federal court ruled that a city council could not suspend a member because that member accused the council president of receiving a bribe with respect to an issue before the council. In doing so, the court concluded that suspending the member was an unconstitutional intrusion on the right to freedom of speech guaranteed by the First Amendment and that the allegation of bribery did not give rise to a clear and present danger to society justifying such an imposition on pure speech.<sup>1</sup>

Boards have greater latitude under the First Amendment in

regulating the time and manner of board member speech as long as they are not attempting to regulate the content of that speech. Any regulation of pure speech based on its content must be narrowly tailored to serve a compelling government interest; a standard that, in practice, is rarely met. However, a board member who continues to speak after a parliamentary motion to close debate has passed is not engaged in pure speech but rather is engaged in a type of action known as "speech plus," which is entitled to a lower degree of protection than pure speech.<sup>2</sup> One common way boards can regulate "speech plus" to ensure efficient and orderly meetings is to adopt rules of procedure and decorum, such as *Robert's Rules of Order*.<sup>3</sup> If a board enforces these rules consistently and not based on the content of the speaker's communication (including the speaker's viewpoint), such enforcement is unlikely to violate any board member's First Amendment rights.

Another way board member communications are regulated is by operation of the Wisconsin Open Meetings Law, which permits discussion of certain topics in closed session, including certain matters involving personnel issues, negotiations, competitive contracts and legal advice.<sup>4</sup> Boards can limit board member discussion of such issues to properly noticed closed sessions related

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to the statutory basis for the closed session without infringing on board member First Amendment rights. In addition, individual board members generally do not have the right to unilaterally decide to disclose the contents of closed session discussions without authorization from the board. For example, the Wisconsin Attorney General has opined that no one, including a member of the board, has the right to violate the private and secret nature of a closed session by recording the proceedings.<sup>5</sup> Disclosure of the contents of closed sessions not only violates the purpose for holding such discussions in closed session, it can be detrimental to the trust of the other board members and can impair board members' willingness to discuss such topics candidly. A board member who discloses confidential information without authorization, including the contents of closed session meetings, potentially faces serious consequences, including criminal felony prosecution for misconduct in office<sup>6</sup> and the loss of statutory immunity from legal action, district insurance coverage and the right to reimbursement for legal costs.<sup>7</sup>

The Wisconsin Open Meetings Law permits board members to discuss, but not take action on, any matter raised by the public during a properly noticed public comment period.<sup>8</sup> However, the Wisconsin Attorney General advises that any such discussion should be brief with more extensive deliberation being deferred to a later meeting when more specific public notice can be provided.<sup>9</sup>

### ■ Communications Outside of Board Meetings

Board members have a similar First Amendment right to engage in discussion about district matters outside the scope of properly noticed board meetings. However, this right also has limitations. For example, board members must speak only in their individual capacities and not on behalf of the board unless specifically authorized by the board to speak on its behalf. Additionally, the

Wisconsin Open Meetings Law places a number of limits on the ability of board members to communicate outside of board meetings.<sup>10</sup>

Under the Open Meetings Law, a meeting of a governmental body occurs whenever there is a purpose to engage in governmental business and the number of members present is sufficient to determine the body's course of action.<sup>11</sup> In such cases, that meeting cannot take place unless it has been properly noticed. Thus, board members cannot engage in discussion of district matters with a quorum or negative quorum of the board present when that "meeting" has not been properly noticed. A negative quorum of the board is the number of board members necessary to defeat an action that is likely to come before the board.

While a board member may discuss matters that might come before the board with other individual board members so long as the members do not constitute a quorum or negative quorum, such discussion must avoid resulting in a "walking quorum." A walking quorum occurs when board members participate in a series of meetings or communications with less than a quorum or negative

quorum of the board, but as a result of these meetings, a sufficient number of members to determine the board's course of action come to a tacit or express consensus over an issue that is likely to come before the board. A walking quorum can be created through a series of in-person meetings or when board members communicate with each other through the phone, text messaging or email. A walking quorum violates the Open Meetings Law, and any board action that is taken at or following a walking quorum is potentially voidable.<sup>12</sup>

It is generally not a violation of the Wisconsin Open Meetings Law for a board member or administrator to provide one-way information to the rest of the board through email. However, these emails should caution against using the "reply all" function so that a board member does not inadvertently create a walking quorum by responding to all recipients of the email.

### ■ Electronic Communications and Social Media Use

In addition to other types of records, the Wisconsin Public Records Law applies to any email sent or received

by a board member regarding matters within the board's authority, and these emails must be maintained and disclosed as required by law and applicable board policy.<sup>13</sup> The subject matter of the email, not the location where the email is stored, determines whether an email is a public record. If board members use their personal email addresses to discuss district business, those personal emails become public records subject to retention and disclosure. Text messages also must be retained and disclosed if they pertain to district business. For this reason, the best practice is for board members to use only district-provided means of electronic communication for district business, such as a district-provided email address that can be backed up, retained and disclosed pursuant to the district's adopted records retention schedule and the Wisconsin Public Records Law.

By contrast, an email that is purely

personal to the board member is not subject to retention and disclosure regardless of whether the email is stored on a personal email account or a district-provided email account.<sup>14</sup> However, the Wisconsin Attorney General has cautioned that messages that contain any material relevant to governmental functions and responsibilities are public records subject to retention and disclosure. Record custodians can, however, redact the purely personal information from these emails prior to disclosure in response to a public records request.<sup>15</sup>

If a board member creates a personal blog, that blog can be a public record subject to retention and disclosure if the content of the blog pertains to matters within the board's authority. Similarly, a Facebook group can be a public record, even if the group is private or only available to the board member's Facebook "friends." The Wisconsin Attorney General opined

that a Google group website called "Making Salem Better" that was maintained by the Salem town chair was a public record even though the group was only accessible to certain individuals. It was the content of the record and not its form that determined whether it was subject to retention and disclosure.<sup>16</sup>

If board members use social media sites for public purposes, they likely cannot block members of the public from their sites based on the viewpoints the members of the public express. In *Knight First Amendment Institute at Columbia University v. Trump*,<sup>17</sup> President Donald Trump was sued by seven named plaintiffs when he blocked them from interacting with his Twitter account because they disagreed with his policies.<sup>18</sup>

The Second Circuit Court of Appeals concluded that, because the president used the account on a daily basis to communicate and interact with the public about his

administration, the president was acting in his official capacity when he blocked users from his account. In addition, the account was open to the public and had features that encouraged public interaction. By opening this account for use by the general public, the president created a public forum, and he violated the First Amendment rights of those users who he blocked from accessing it based on the viewpoints those users expressed. The court also held that, while the president retained his First Amendment right to control the content of his own Twitter messages, blocking the plaintiffs from the interactive elements of his Twitter account, such as users' ability to "like" and reply to messages, violated the plaintiffs' First Amendment rights.

Similarly, in a case decided by the U.S. District Court for the Western District of Wisconsin, several Republican legislators were sued by One Wisconsin Now for blocking the

organization from their Twitter pages.<sup>19</sup> The court held that the legislators acted under the color of state law in creating and maintaining their respective Twitter accounts in their capacity as state legislators, the interactive portion of the legislators' Twitter accounts were designated public forums, and the defendants engaged in content-based discrimination when they blocked One Wisconsin Now from their Twitter accounts.

The court emphasized that a non-interactive medium of communication, such as a blog, might not create a designated public forum. However, Twitter, like other social media platforms, contains numerous inherent interactive features that reflect an intent to designate a public forum for interaction with and between the public. The court held that the legislators blocked One Wisconsin Now based on the content of the organization's messages.

However, in order to regulate the organization's speech based on content, the legislators had to present the court with evidence that blocking One Wisconsin Now from their Twitter accounts was necessary to serve a compelling state interest and that blocking the organization was narrowly tailored to achieve that interest. The legislators did not meet that burden and could only present unsubstantiated claims that the organization made crude and offensive comments on their Twitter accounts.

Both courts stated that their rulings do not apply to private, personal social media accounts of public officials. Nevertheless, a board member who maintains a presence on social media should be cautious of using his/her private social media account for official business because it could convert that account into an official account, which would limit the board member's right to deny access to it.

## Conclusion

Board members must communicate through a variety of means and to a variety of constituents to effectively discharge their duties. Those communications are generally protected by the First Amendment, but there are limitations on such communications. Board members should be familiar with their obligations under the law and under board policies and procedures regarding their communications. In addition, boards that wish to limit a board member's communications should consult with legal counsel to assess that action within the confines of the First Amendment, board policy and procedures, and other applicable laws. ■

## End Notes

1. *Kucinich v. Forbes*, 432 F. Supp. 1101 (N.D. Ohio 1977).
2. See *United States v. O'Brien*, 391 U.S. 367 (1968).
3. *Sarah Corbin Roberts et al.*, ROBERT'S RULES OF ORDER (11th ed. 2011).
4. Wis. Stat. s. 19.85.
5. See 66 Wis. Op. Att'y Gen. 318 (1977) (OAG 97-11).
6. Wis. Stat. ss. 946.12, 939.50(3)(i).
7. Wis. Stat. ss. 893.80(4), 895.46(1)(a).
8. Wis. Stat. s. 19.83(2).
9. Letter from Paul M. Ferguson, Assistant Att'y Gen., to Dean Y. Sales (Aug. 4, 2017), [www.doj.state.wi.us/sites/default/files/dls/ompr/20170804-sayles.pdf](http://www.doj.state.wi.us/sites/default/files/dls/ompr/20170804-sayles.pdf).
10. Wis. Stat. ss. 19.81-98.
11. *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 398 N.W.2d 154 (1987).
12. Wis. Stat. s. 19.97(3).
13. Wis. Stat. ss. 19.21-39.
14. *Schill v. Wis. Rapids*. Sch. Dist., 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177.
15. Memorandum from J.B. Van Hollen, Att'y Gen., to Interested Parties (July 28, 2010), [www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf](http://www.doj.state.wi.us/sites/default/files/dls/memo-ip-schill.pdf).
16. Letter from J.B. Van Hollen, Att'y Gen., to Gail A. Peckler-Dziki (Dec. 23, 2009), [www.doj.state.wi.us/sites/default/files/informal/20091223-peckler-dziki.pdf](http://www.doj.state.wi.us/sites/default/files/informal/20091223-peckler-dziki.pdf).
17. 928 F.3d 226 (2d Cir. 2019).
18. @realDonaldTrump is a separate Twitter account from the official Twitter account of the president of the United States, @POTUS. @POTUS is passed from one president to the next, whereas @realDonaldTrump was used by Trump prior to his decision to run for office and will likely be used by him after he leaves office.
19. *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019).

This *Legal Comment* was written by Michael J. Julka, Steven C. Zach, and Brian P. Goodman of Boardman & Clark LLP; WASB Legal Counsel. For additional information on related topics, see Wisconsin School News "Closed Sessions" (Aug. 2018), "Remote Participation in Board Meetings" (Oct. 2018), and "Board Duties and Obligations and Potential Ramifications for Non-Compliance" (Apr. 2016).

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