



School Boards in the Digital Age

Do's and don'ts for school leaders' use of electronic media

July, 2015 Randall C. Farmer

Facebook. Twitter. Texting. You Tube. Blogs. If you asked someone 10 years ago what these household names were, they probably would think that you had lost your mind. But the digital age has definitely arrived. School board members have a variety of electronic media channels through which they can access their constituents and stakeholders, and through which board members themselves can be accessed by the public.

Figuring out how to use these communication tools to stay connected is doubtlessly critical to board members as community leaders, but so is understanding the legal implications of communicating in this environment. This article will review some of the legal issues that school board members face when they communicate electronically.

Your Digital Footprint is Important

Maybe you thought that you did not even have such a thing as a digital footprint, but you do if you use a cell phone, computer or tablet. So what is it? Think for a moment about your activity today on electronic media. You have probably checked your email, logged onto your Facebook account, paid some bills through online banking, read up on the latest news, and maybe watched a video on You Tube. All of this activity leaves behind a trail of electronic information known as our digital footprint, which is kind of like leaving a foot impression on wet concrete. In short, the more electronic devices we use and the more websites that we access on these, the more information we leave and the larger our digital footprint is. And like all footprints, they can be followed.

A key point for school board members to keep in mind when using electronic media is that the websites that you visit and the devices that you use as a board member can, and maybe will, be disclosed someday. For instance, the Federal Rules of Civil Procedure allow for a party to receive electronically stored information (ESI) as part of the discovery process. So if you want to try to keep your personal phone, computer, or Facebook account out of the discovery process in a federal lawsuit, be careful how big you make your digital footprint when conducting board business.

Use Caution Before You Press the “Send” Button

We've all been there before when using email. You have sent the email and then five seconds later you wish you had worded something a little differently or maybe not even sent the email in the first place. So in addition to raising basic communication issues, electronic communications pose a whole host of legal challenges, such as:

1. Confidentiality – Most board members are well aware of the confidentiality of student's educational information as defined by the Family Educational Rights and Privacy Act (FERPA). However, other federal laws, such as the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA) also apply to school districts and both laws make information about an employee's medical leave or disability confidential. Moreover, many states have laws that make certain information about employees confidential, e.g. evaluations. So board members should exercise great care in what they communicate electronically about students or employees that may be protected as confidential.
2. Board member decision-making – Most states have open meetings laws that define how and when the board as a body can gather to discuss and vote on board business items. One risk posed by electronic media is that information flows much more quickly so board members may be faced with constituent questions about employee or student misconduct within minutes of the misconduct. Not only has the flow of information increased, but some say there is now even an expectation of responding more quickly. However, it is important for board members to understand their role. When the board is acting in its judicial role as a factfinder, e.g., student or employee hearings, members should avoid communications that reflect that they already have formed an opinion on the issue and independently gained information outside of the hearing process. Board members would be prudent to consider if and how any electronic communication may impact their decision-making responsibilities.

3. Status as a board member – Board members also should be mindful when communicating with constituents that they are only one member of the board and cannot speak for the entire board.
4. Deliberating as a board – Again, most states have open meetings laws that define when a board is deliberating on public matters. Any electronic communications between board members about items coming before the school board or pending before the board should not be done in such a manner as to be considered deliberating without a quorum or outside of the public meeting process.
5. Public forum – Even though board members are public officials, some members do want to preserve a zone of privacy, particularly around their family. However, if a board member has set up a website where he or she engages constituents on school board issues, then the member may have established a public forum for purposes of the First Amendment. There are several different types of forums under the First Amendment of the U.S. Constitution: public forum, designated public forum, and non-public forum. A public forum is a place like sidewalks that by tradition or designation have been devoted to public debate. It is generally more difficult to restrain speech in a public forum. If the board member’s website or Facebook page is a public forum, then the member may not be able to exclude (or delete) material posted by others unless it serves a compelling interest that is narrowly tailored to achieve that interest. So board members should understand what type of forum their website establishes and what speech can and cannot be excluded.
6. Internal complaints – When receiving or responding to emails or texts involving employee complaints about the school district, the board member should be mindful that each individual as a public employee may have rights under the U.S. Constitution or state law to speak out on issues of public concern, e.g. whistleblower laws. The board member should take care not to respond derogatorily to such employees but to forward the issue on to the appropriate school administrator for a response. There is always the potential when commenting on an employee’s work performance in public that the employee could have claims for defamation/libel, First Amendment protected speech, whistleblower protection, or a name-clearing hearing.
7. Official board business – Use school district property to conduct board business only. The district typically issues electronic equipment and email systems to board members, which were intended to be used for the transaction of board member business. So use that equipment for that purpose. If it is not allowed for school employees to use school property for personal use, then board members should abide by the same standard.

Retain Your Electronic Records When You Have To

From time to time, you may be informed by the school district’s attorney that a hold has been placed on the electronic information on your computer or smartphone. It is important that you understand precisely what electronic information is at issue, on which devices you are to preserve it and for how long. Failure to preserve electronic documents can have consequences for you or the school district in litigation, such as being subject to payment of attorney’s fees. So you should carefully coordinate your preservation efforts with the school district attorney and school administrators to ensure the appropriate electronic documents are being preserved.

In addition to the retention requirements created by litigation, most states and school districts have document retention schedules, policies, or guidelines. Board members should become familiar with these policies/guidelines and make sure they are retaining emails and documents in compliance with them.

While the digital age surely brings with it exciting and dynamic modes of communication, it also brings with it new and complicated legal issues. So pause before you press the “send” button. You won’t regret it.

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