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VEXING STAKEHOLDERS
SCHOOL BOARD MEMBERS

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The Texas Disciplinary Rules of Professional Conduct

Challenges in Representing School Boards

Introduction

Over the last four plus decades I have observed and experienced many of the unique challenges that occur when representing a school board. Without delving purely into “war stories,” I hope this paper will provide the reader three things:

1) Offer real life scenarios that school lawyers may encounter involving challenging or renegade trustees;
2) Offer suggestions on how to address those situations; and
3) Discuss the ethical ramifications of these scenarios and how they dictate what actions, or inactions, are required of school board lawyers.

As is, or will be made clear today by my colleagues, we school law attorneys are subject to a host of disciplinary rules. But, consistent with past conference topics, we address what may be the most controversial of our ethics topics on this day, a discussion of challenging ethical issues that we sometimes face when representing schools, the unusual circumstance of a divided school board.[1]

Our discussion will center on the following:

- Rule 1.02 Scope and Objectives of Representation
- Rule 1.03 Communication
- Rule 1.06 Conflict of Interest
- Rule 1.12 Organization as a Client, and often with a connection to Rule 1.06 Conflict of Interest: General
- and the Comments subsequent to each

Those of you who have worked with experienced legal counsel will be familiar with your lawyer's first answer to any legal question. He or she will listen intently, gaze upward and to the left, purse lips, smile ever so slightly, pause—and say, "It depends." Applicability of the Texas Disciplinary Rules of Professional Conduct ("TDRPC" or "Rules") to the issues we address below are no different, and so to consider the application of the four ethical canons made subject of this paper, we present a series of scenarios to which these Rules may or may not apply.

Board Member Vexations

Despite our best efforts to defer such descriptions, lawyers are reputed to be argumentative, skeptical, defensive, zealous, and themselves, vexing. I have the perfect lawyer joke to make this point. We all do . . . and we have to admit that at times we find it difficult to work with some of our peers. But, notwithstanding that there are jerks among us, for the most part the "difficult" opposing counsel is merely a passionate advocate. So too we have found it to be with board members, and when we refer to "difficult" or "vexing" board members, this is generally not because that member disagrees with other members of the board, or even with the advice we offer, for that is the reality we accept when we take on this role. Rather, the greater difficulties lawyers will experience with school board members often arise when that member is a passionate, goal-oriented person, performing the duties and attempting the actions that inspired him or her to campaign for the board.

[1] Our directive for this panel presentation was to address "vexing" ethical issues. My appointed topic was vexing board members. Thus, this paper and our panel presentation is hypothetical and extreme in that no board member attending this Conference would be among those who could be so described.

When a member's efforts are frustrated, this passion and ambition to get things done often leads to the common “vexed” board member issues we will address below. As we all know, no individual board member can make decisions for the school independent of the rest of the board. Accordingly, whether it be a majority vs. minority situation, or a board member who is new (in the sense that the majority believes he or she has not paid their “dues”), or the board simply disagrees with the other member, the structure of school boards is that the majority can shoot down every proposed idea or action of a vexed or perplexed member. This is especially so for the new board member, juiced up and ready to change the world, who can and will often become despondent and downright ornery when confronted with the fact that he or she can't just pick up the phone and convince other members to support their item. "What, I have to do this at a meeting? In public? With a recorder running?!" Usually, new members will not be familiar with the ethical and legal responsibilities required and this presents even greater risks of legal violations and/or controversy. But, the same set of frustrations and resulting inter-member rancor can also occur when a seasoned member is constantly thwarted on the minority side of an issue and vote.

And so, the purpose of this short introduction is to say that knowledge of the law and the disciplinary rules are only the beginning of successful work with school boards. School board lawyers must actively develop interpersonal skills, empathy and diplomacy in order to recognize the sources of a member's vexation, and in doing so, attempt to avoid problems and ethical conundrums before they snowball to engulf the school board . . . and their legal counsel.

Common Issue 1: Who is the client?

Almost every time we have been engaged by a new public school client, a question from someone on the board or the selection committee has been "Who will you represent?"

Rule 1.12(a) provides that [a] lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization. Comment 9 to Rule 1.12 further clarifies that the duty defined in [Rule 1.12] applies to governmental organizations. Thus, a lawyer represents the governmental entity and provides legal advice to that entity's governing board when they act as the entity's “duly authorized constituents.” Accordingly, when working with a school district’s board, the proper answer to the selection committee inquiry of "Who will you represent?" is, "We are engaged and disengaged by the board to whom we provide advice when asked. The majority of our contact and advice will be to the superintendent or designee. Our client is this public school that we will be proud to represent."

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Title search: Vexing Stakeholders: School Board Members

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"Dealing with Vexing Stakeholders"