

# IS THE BOARD EVER OFF THE CLOCK?



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# Legal Parameters Applicable to Board Member's Use of Social Media

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- Governmental Conduct Act confidentiality requirements Section 10-16-6
- FERPA-student records
- Personnel Code Section 22-10A-24
- IPRA Section 14-2-1(A)
- 42 U.S.C. § 1983 claim (Color of Law).

# Board Member Responsibility

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- Social media concerns regarding harassment, bullying, disruption to educational program, “leaking” of confidential information apply to board members just as they do to school employees and students.

# Examples of Bad Online Student Behavior Impacting a School

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- Student posts “for those who go to school with me... you should be very very afraid,” and other posts or memes about slaughter and ticking time-bombs
- Sexting— students sending naked or sexually explicit pictures of other students
- Student posts rap video he made to protest sex harassment of female students by coaches and includes comments about doing violence to specific coaches
- **CYBERBULLYING!**

# Examples Of Bad Online Behavior From Board Members

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- School board member tweets student is “disrespectful little s%\*#” who should be expelled for fighting with Board member’s son and that parents who are teachers at the school should be fired for bad parenting.
- Board member posts derogatory photos and statements based on sexual orientation, race or immigration status
- Board member calls the District’s use of bond funds corrupt and a waste of public money in local online newspaper

# More Examples Of Bad Online Behavior From Board Members

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- Board member tweets that other board member and school staff are “jerks”, “incompetent” and “complete morons” in hiring a coach.
- Board member who engages as above blocks public commenters from making derogatory responses about him/her on the same site.
- Board member shares a meme of a pregnant woman asking her doctor is she’s having a boy or girl, and doctor replies, “That’s for the kindergarten teacher to decide.”

# Bad Behavior on Social Media

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- Soon after Osama bin Laden was killed, a Board member posts on Facebook: “[n]ow if we could only do something about our local terrorists that destroy dreams and burn futures.” The post included a photo of the Superintendent
- School ethics commission found that the post was “undermining, opposing, compromising or harming the superintendent in the proper performance of her duties.”
- A public reprimand was reduced to a private one because he had not had prior violations.

# Social Media Posts about Board Activities

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- A board member in Virginia posted a summary of a board meeting and one of the board's votes – only one board member had been opposed to the motion. The board member shared that one member's objection
- Shared a screen shot of an email sent by a parent and commented “the pressure will be on.”
- The board voted to censure her for violating a code of conduct.



## When Is A Board Member's Social Media Use Protected By The First Amendment?

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- “Speech” encompasses verbal and written expression, as well as “symbolic speech” expressed through symbols and conduct. *See Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
- Board members, like students do not lose their free speech rights at the school house door.

# Public v. Private Speech

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- Publicly elected officials are also permitted to have a private presence and opinions but “officialdom” doesn’t always end when the board meeting adjourns.
- Board members who “chat” or “tweet” about the meeting or participants or their official duties run the risk of mixing personal opinions and official comments through social media platforms. When a Board member mixes his roles, his private speech protections may diminish.

# Conflict Between Personal Social Media and Public Office

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- Was the social media account created because of the public official's position or to highlight the public official's position?
- If the account is because of the board member's position ([jdpowers.board@miravista.net](mailto:jdpowers.board@miravista.net)), and is accessible to the general public, it is a public forum and JD's comments are likely to be considered "official" speech.

## “Open Access” to Personal Account May Create An Open Forum And “Official” Speech.

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- If it is a personal account (@jdpmiraVboard), but JD uses it for comments about persons or matters that the board has the authority to affect, and JD allows the general public to post tweets on it, JD has also created an open forum. JD enhances that perception by using an address that looks official.
- JD is now perceived in the public as speaking under his board member hat.
- JD also cannot deny access to his twitter account and prevent opponents from using bad language or posting unflattering images about him.

# Can an “Open Forum” Exist in Cyberspace?

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- The U. S. Supreme Court in *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) compared social media sites, like JD’s twitter site, to “traditional” public forums, characterizing the internet as “the most important place[] (in a spatial sense) for the exchange of views.”

## Open Forum, cont'd.

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42 U.S.C. § 1983 federal statute which most discrimination suits against public agencies and officials are based on:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ....

# Consequences of Misuse of Open Forums

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- When a public officer or entity creates an open forum or limited open forum, it cannot prohibit the public's right of expression (First Amendment – free speech) based on an objection to its content except in limited circumstances.
- JD cannot block opposing views or offensive responses to his own offensive comments even if he is the “owner” of the twitter account because he is a public officer “acting under color of law” to suppress or prohibit members of the public from exercising their First Amendment rights of speech.

## Consequences of Misuse, cont'd.

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JD's opinion that the commenter should not be allowed to post his unflattering remarks is no longer the opinion of a private citizen.



# Consequences of Misuse, cont'd.

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- JD has exposed himself to a federal suit.
- JD has exposed himself to claims that he has violated the Governmental Conduct Act.
- JD may have exposed the Board as a whole to being included as defendants.
- How can this be avoided?

# Social Media Best Board Practices

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1. Does the Board have a policy regarding official district social media accounts, email accounts and their terms of use?

- A policy that describes limits on personal communications by board members on official email accounts and district created Facebook or twitter accounts reduces the likelihood that the distinction between public forms (district webpages) and a board member's private accounts will be blurred.
- But board members need to comply with these restrictions.

# Social Media Best Board Practices, cont'd.

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2. Does the Board's policy on board member email accounts state that those are the accounts to be used for board business?

- Don't expose yourselves to IPRA or FOIA requests aimed at your personal emails because you have mixed usage in your personal and official accounts.

# Social Media Best Board Practices , cont'd.

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- Discussions about public business should take place only on official accounts and devices so public records will be properly preserved (and district personnel can locate them) and all citizens can view, comment, and interact with posted material on the same terms as every other citizen.

# Social Media Best Board Practices, cont'd.

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3. Does the Board's policy contain reasonable use restrictions on postings?

- Reasonable restrictions include prohibiting the use of profanity, hate speech, language inciting or advocating violence, lewd or pornographic images, gang symbols, commercial speech, clearly repetitive and off topic speech?

# Social Media Best Board Practices, cont'd.

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4. Does the Board's policy disclose it has the right to remove content that violates its use restrictions?

Content that is removed because it violates use restrictions should be printed, not just deleted, and maintained with a notice as to why it was removed. This will assist in defending against a claim of First Amendment violation.

## Social Media Best Board Practices, cont'd.

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Use restriction policies should have a progressive penalty structure. Give an offender the opportunity to re-post a conforming comment after providing notice of the nature of the violation. This shows that the penalty is reasonable. Repeated offenses should occur before a commenter is totally blocked.

# Social Media Best Board Practices

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5. Does the Board have policies that permit or prohibit a board member's use of the District's name, logo or other identifying symbols on a board member's sites that would lead the public to conclude the site is officially approved by the public entity?
- If there is approval, there should be use terms spelled out for the public site you have created.
  - If there is official prohibition, that should be stated.
  - The failure to spell out one or the other can lead to an assumption that it is an official site through custom and usage.



# Social Media Best Board Member Practices

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1. On personal sites be sure that you do not open them to the general public for comment.
2. Do not use words or symbols that identify you based on your public office or the public body you represent.
3. Do not use District resources to update your webpages.
4. Do not use the District's email for private communications or your private email for public business (this extends to any computer provided by the District for board use).

## Social Media Best Board Member Practices, cont'd.

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5. Privacy settings should be applied to limit access to the board member's personal group of family and friends. The more open access is, the more public it becomes.
6. Do not establish a quorum.
7. Direct complaints to the appropriate school official.
8. Avoid indicating you have formed an opinion about pending school business.
9. Post only information that is already public.
10. Be professional and use common sense.

# IPRA and School Board Communication

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- Yes! Some communication is subject to IPRA - Such communications include:
  - e-mail – not only School District e-mail, but also personal e-mail, if e-mail is forwarded or used for School business.
  - Text messages made or received on School District telephones are also subject to the IPRA. (even sometimes on personal phones)
- Keep Board business in an open meeting.
  - Do not risk having private or embarrassing communications disclosed in response to an IPRA request.

# Can Board Members Ever Be Off the Clock?

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- Yes, as long as you take the necessary steps to separate your public and private life, especially on social media.

# QUESTIONS?

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Thank you!

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