



You Have Been Sued!

Boards in Litigation

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Goals

- Duties of a Board
- Avoiding Claims
- Early Activity Before a Claim
- Lawsuit
- Resolution
- Trial

What is Your Obligation in Litigation?



- **Fiduciary Duty**
- **Protect the Fisc**
- **Ensure the Mission**
- **Protect confidentiality/privilege**
- **Consider Long Term Implications**



Do You Have Personal Exposure to Damages?

The Board is the only entity with the power to sue and be sued.

- **But it is not unusual for individual board members to be named**

Key Question: Are you acting the course and scope of your duties?

Doing what a board member would regularly do?

- **But if you are outside the course and scope, then maybe no coverage**

- **NMSU case example**

Poor decision-making doesn't mean your personal assets have exposure (but it may make exposure for the district more likely!)

Ultimately, little risk that your own assets are in jeopardy.

Avoiding Claims: What Mistakes Do Boards Typically Make That Create Risk

- **Ignoring the District's Processes and Chain of Command**
 - Being an audience for staff/parent issues
 - Undermines administration
 - Creates the claim that District does not follow its policies
 - Some receive different process than others
- **Failing to Send Constituents Back to the Chain of Command**
 - Undermines lowest possible resolution
 - Creates exposure for whistleblower and civil rights claims
- **Improper Use of Authority**
 - Duties that don't belong to you
 - Operational issues and Investigation
 - Insisting on particular hiring/firing, student discipline
 - Volunteering
- **Access**
 - Records
 - Control over purchases where there may be conflict of interest
- **Failing to Train (board and staff)**
 - Process
 - Evaluation and Discipline
 - Avoiding legal claims



What are the considerations when a threat of litigation arises?

- Public Records
 - **Be careful about putting things in writing to each other**
 - **Concerns, opinions, strategies --- likely all public**
 - **Phone, text, email --- whether private or school based.**
 - **Even in Executive Session**
 - Heightened awareness about publicly discussing the matter with anyone. Your statements can and will be quoted and used against you to incriminate the board.
 - Avoiding any temptation to try to “hear out” the employee/parent/community member
 - **No, you should not invite them into executive session or give them their own agenda item**
 - Scrupulously abiding by the chain of command.
 - Executive Session: make sure that you are listing matters under “pending or threatened litigation.”
 - **In subsequent litigation, a lawyer can ask about what was said in executive under other OMA exceptions (“matters of opinion in a personnel file”)**
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Early Investigations

- Complaints against a superintendent
 - Involve counsel
 - Consider outside investigator
 - If investigator is hired by counsel, that report can be privileged
 - Can a superintendent be reviewed by someone within the District?
- What about if you have a claim against a principal, teacher or director? Options?

When the lawsuit hits....

- Reflect on what your obligations now must be:
 - **Public fisc; interests of the district; minimizing damage; ensuring the district's long-term goals and interests.**
- Remember that all communication now **MUST** be viewed through the lens of attorney client privilege.
 - **No discussion about the case, even amongst two of you.**
 - **No texts, calls, emails about the case, unless it is to your lawyer.**
 - **All subject lines titled: "attorney client privilege"**
 - **Your superintendent similarly should advise core administration to be mindful.**
- Insurance Coverage
 - **Let NMPSIA know of the claim.**
 - Request for counsel.
 - **So what gets covered? Typically, no coverage for wage claims, attorney fees, punitive damages.**
 - Discharge example.
 - Co-pay
 - Request for Contribution
 - Right to settle

When the lawsuit hits....(continued)

- IPRA: there may be record requests for all kinds of records. Make sure that your IPRA custodian is working with counsel.
 - **Plaintiffs are increasingly looking to see if IPRA responses track what is provided in discovery.**
- Distraction and Public Consumption
 - **Mission**
 - **Public investment (bond elections)**
 - **Confidence**
 - **Social Media**
 - **What is the role of press management and statements?**
 - **“no comment” versus “acknowledgment”**

When the lawsuit hits....(continued)

Answering the Lawsuit

Providing materials that you may have that are relevant

Depositions

You will not be alone in this

Counsel should prepare you

Review of relevant documents

Discussion of likely questions and “tricks”

What can the board do in executive session? (pending/threatened litigation)

Strategy

Directives

Authority

Do you have to vote? Consensus?

What if you do not like your assigned lawyer? Or you feel like he/she is beholden to the insurance company?

Contract counsel is paid by the insurer, so sometimes it feels like that lawyer doesn't “have your back”

It's fair to ask your regular board counsel to look at matters or to be involved

QUIZ QUESTION:

You suspect a board member is aligned with a party suing the District.

What do you do?	What can you ask?
What are the obligations of a board member who is suing his/her own district?	How can you meet to discuss?



Quiz Question: Discussion

- **What is a board member's obligation? To whom?**
 - Board, Fisc, Long-term interests
 - A board member cannot be a "mole" for parties adverse to the board
 - So, if that board member leaks or does ANYTHING that violates those duties, then:
 - Violation of code of ethics
 - Governmental Conduct Act (fourth degree felony)
 - Misfeasance/Malfeasance worthy of removal
 - **One option: handle it like a conflict**
 - Publicly announce; state no involvement; avoid any statements, meetings or votes
 - Resign?
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Suits from Superintendents

- Particularly disruptive
 - Administrative leave with pay
 - Assessment of claims and discharge options
 - This is an important consideration in deciding on pay/term of contract.
 - Also, such problems are a good reminder to take evaluation and discipline of superintendents seriously
 - Consideration of appointment of interim or acting superintendent
 - **What are a board member's boundaries?**
 - **Should a board member be negotiating directly?**
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