Get Your Money's Worth

Two veteran board attorneys explain how to get the most out of your board's legal counsel

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Every year at the reorganization meeting, the board of education appoints an attorney – and sometimes two or three – to serve as board counsel. Every month, the attorneys' bills arrive and are paid. Every year, the district budget includes a substantial line item for legal fees.

In many districts, board counsel works behind the scenes and, unless an attorney is needed to discuss a specific issue with the full board, they never attend board meetings and board members might never even meet them. In some districts, only the superintendent and school business administrator are permitted to contact board counsel to request services or ask for advice. In order to control costs, board counsel is expected – like a good child – to speak only when spoken to, or – like the fire department – to come only when called.

In other districts, counsel attends and participates in every public board meeting and every closed session. In some, the board attorney is the district spokesperson in negotiations and other labor relations matters. In some, at least one administrator – the superintendent, business administrator, director of human resources, director of special services, or principal – consults with the board attorney almost daily. In some, counsel is brought in on any matter involving law enforcement and any matter in which another party – a parent, employee or vendor – is represented by an attorney.

What services should you expect of the board attorney? How can boards of education and district administrators take advantage of their attorneys' knowledge and expertise, and utilize their services efficiently? What should boards not expect of their attorneys? The answer is that board counsel can play several roles – advocate, advisor, sounding board, spokesperson – but the attorney is not an educator or policy maker, and in the event of an internal board dispute, members should not expect board counsel to play the role of accomplice or mediator.

Advocate

First, board counsel should be a skilled and knowledgeable advocate. The attorney's job is to present the best possible case, in whatever forum the case must be presented. The goal is to achieve the desired outcome. That means getting all the facts, understanding the context, identifying the legal issues, and presenting the best possible argument. It means recognizing that winning isn't always possible, and when the desired outcome proves elusive, explaining what happened and why.

Advisor

Board counsel should be a trusted advisor. As Abraham Lincoln said, "A lawyer's time and advice are his stock in trade." These words are a good guide to what any client, including a board of education or school administrator, can and should expect of his or her attorney. Counsel should be available to provide legal advice on any of the myriad questions that arise in governing and administering a district. Those questions range from scheduling board meetings ("How much notice is needed?") to conducting meetings ("Can we limit public comment?") to school ethics ("Do these facts present a conflict?") to personnel matters ("How much sick leave is this employee entitled to?") to tenure ("When will this employee get tenure?") and seniority ("If we cut staff, does this teacher "bump" that one?") to employee discipline (is this "just cause"?) to student discipline ("Can we expel this student?") to residency ("Is this student entitled to attend in this district?") to special education ("Can we deny this request?") to procurement ("Can we accept this bid?").

Some questions require a quick response ("The police are on their way; should we call the parent?"). Counsel should be reachable and capable of providing at least preliminary advice on a moment's notice. The answers will not always be clear, however. When they're not, counsel should research the law, including relevant statutes, regulations, and decisions of the courts, the commissioner of education and other agencies. Legal research takes time – hence, Lincoln's "time and advice..." You should expect counsel to take the necessary time to conduct thorough research to get the best possible answer, and to provide that answer reasonably promptly.

Sounding Board

The district administration should work as a management team, and board counsel should be part of the team. Administrators should call on the board attorney before emergencies arise, to help avoid crises. Often, the attorney's perspective will differ from that of the superintendent or business administrator, and will be worth considering. The attorney may ask probing questions, such as "Do you have a legitimate pedagogical reason for that decision?" If an administrator can't persuade board counsel of his reasoning, perhaps the decision

should be reconsidered. The attorney may recommend a different course of action, and explain why the alternative is prudent or advisable. Clients often ask, "If they sue, will we win?" The attorney should give a realistic appraisal of the risks and likely outcome, and part of the answer should be, "The goal is not to win, but to avoid a lawsuit." If possible, counsel should keep the board out of trouble.

Of course, lawyers don't have all the answers, and they can't always predict the future. Situations faced by school administrators are many-faceted, involving not only legal questions but fiscal, political, ethical and educational considerations. The more complex the situation, the more valuable the board attorney can be in the role of sounding board. Even without providing specific advice, the attorney's insight and probing questions can provide invaluable assistance for an administrator.

Spokesperson

Typically, the attorney's response to an inquiry from the public, the press or a potential adversary is "no comment." That doesn't always go over well, but sometimes the risk of providing too much information outweighs the public relations backlash. When the topic is complex or controversial, the board may wish to have counsel answer the questions. If the questions are being posed by a lawyer, the board is strongly advised to have its own counsel respond on its behalf.

Not a Decision-Maker

Counsel should be a trusted advisor, but not a decision-maker. Counsel can ask for the pedagogical reason behind a decision, but shouldn't second-guess the pedagogy. The attorney can't decide appropriate discipline ("Should the suspension be five days or ten?"), or standards ("Is this employee's performance satisfactory?"), or exercise discretion in policy matters ("Should we charge activity fees?" "Should we move the school election?"), or allocate resources ("Where do we draw the line on salaries?"). All these questions involve legal issues, but ultimately they are questions of policy and administration rather than law, for the administration and board, not counsel.

Not an Accomplice

"Split boards" pose special challenges for the board attorney. There is nothing improper or unhealthy about board members aligning themselves along philosophical lines, or a majority faction exerting its will over the minority. This is the norm for public bodies at all levels, and too much unanimity can earn the board a reputation as a "rubber stamp." Parliamentary procedure allows for fair and efficient decision-making by majority rule with respect for minority rights. But when the majority attempts to enlist the board attorney as an accomplice in excluding others from decision-making, ethics problems can arise.

Board attorneys are bound by the Rules of Professional Conduct, the ethics code governing the practice of law. These rules provide that attorneys for institutional clients, like corporations or public bodies,

owe their professional duty to the entity itself, not to any faction or member of the leadership team. The board attorney may have day-to-day contact only with the superintendent, business administrator or board president, but those dealing with the attorney must be mindful that the attorney deals with them solely in their capacity as agents of the client, the board. Attorneys have an ethical obligation to assure that board members and administrators are aware that the client is the board, not them, when necessary to avoid confusion. In a split board scenario, a board attorney who takes up sides with one faction against another creates an unethical conflict of interest.

Dealings between the board attorney and members of a split board also have implications for the attorney-client privilege. New Jersey law generally protects the confidentiality of communications between an attorney and her client. This privilege belongs to the client which is the board as a whole, not any individual member or faction. A member who communicates with the board attorney on district business has no reasonable expectation of privacy in that conversation vis-à-vis the rest of the board.

Board members who forget that the client is the board, and attorneys who fail to remind them when necessary, can face embarrassing consequences. A case in point is a 1976 opinion, New Jersey Advisory Committee on Professional Ethics Opinion 327 (Apr. 8, 1976), involving a board member who sought the attorney's help in drafting a resolution censuring a fellow board member, but asked the attorney to keep it confidential as he was not sure he was going to introduce it. The attorney did as requested, and the resolution was never introduced but, when the board later got wind of it and directed the attorney to share what he had drafted, he sought guidance from state attorney ethics authorities.

The ethics panel observed that "the board member did not consult [the board attorney] as his individual attorney, but rather as the attorney for the board, to have the attorney draft a resolution for the board[,]" and held that "[t]he member was not, therefore, in a position to demand secrecy or confidential treatment as to matters germane to the board's business. If the attorney had understood that the member was demanding secrecy or confidential treatment as against the board, he should have made it clear that he could not accept such confidences."

Split board majorities also should be mindful of a School Ethics Commission case, *In the Matter of Paul Schaeder; New Jersey School Ethics Commission Docket Nos. C03/C04/C06/C07/C12-03* (September 23, 2003), where the chairperson of a three-member charter school board confronted the school's director with a severance agreement that he demanded she sign or face termination. The chairperson had instructed the board attorney to prepare

continued on page 44

Legally Speaking continued from page 14

the agreement in advance, and had shared his intentions ahead of time with one other board member, but not with the third member, whom he did not trust to keep the matter confidential. The Commission held that "under New Jersey's Code of Ethics for School Board members, one board member does not have the right to determine that another board member will be denied access to the same information as the other board members." Although the board attorney's behavior was not directly implicated, he clearly placed himself in a position of peril by unwittingly aiding the board chairman in the commission of an ethics violation.

Attorneys for split boards may learn of actions by the majority or the minority that are unlawful or contrary to the interests of the board as a whole. An attorney's right or obligation to blow the whistle on a client's misconduct has received much attention in the wake of corporate scandals over the past few decades, and the Rules of Professional Conduct reflect this. Board members should know that, under the rules, the board attorney may disclose confidential attorney-client information to outside authorities when the board "has acted to further the personal or financial interests of members of [the board] which are in conflict with the interests of the organization," and "revealing the information is necessary in the best interest of the organization."

In summary, the board attorney is the board attorney. Members and administrators should utilize counsel's skills and knowledge to their full advantage for the benefit of the board, bearing in mind the attorney's proper role and relevant ethics considerations.

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Erosion continued from page 35

the aisle, and that support likely points to a need for a re-tooling of the relationship among the federal government, the states, and local school districts.

The Board-Superintendent Relationship

Legislative developments have also affected the relationship between school boards and their superintendents.

In the early 1990s, the state Legislature replaced lifetime tenure for superintendents with contractual tenure of three- to five-year duration (*N.J.S.A.* 18A:17-20 *et seq.*). That same legislation placed in statute the requirement for annual evaluations of the superintendent by the school board. Since then, the relationship between chief school administrators and their local school boards has been evolving, hopefully toward one that strengthens the respective roles as leaders and policy-makers.

That's critical. For the local school district to retain the essential connection between the classroom and the public from which it draws its support, sound, healthy and effective relationships between school boards and their chief school administrators are critical.

Last year, I spoke before a group at Monmouth University on the topic of board-superintendent relations. In developing my presentation, I drew upon three sources:

- First, my personal experience as a local school board member for 20 years.
- Second, the New Jersey School Boards Association's Board Member Academy, which emphasizes the development of effective school leadership.
- And third, the thoughts of a former dean of the School of Education at Rider University, who served on local boards of education for more than 11 years.

Based on these resources – and with apologies to author Steven Covey – I developed the following "Seven Habits of Highly Effective School Districts."

1. The board of education makes the rules and regulations for the district. But it does not administer the schools. Professional educators are hired to do that.
2. Individual board members exercise no authority outside of the legally constituted meeting. In a school district, the policy-making authority rests with the board, not with the individual member.
3. Board members fulfill their duties in a responsible manner. It is the board member's responsibility to prepare for meetings and be knowledgeable about the items that will be under discussion, so he or she can provide an informed viewpoint.