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Appropriately Handling School Board Member Misconduct

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Presented by

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- I. **INTRODUCTION.** When a school board is functioning effectively, individual members are able to have respectful disagreements on various issues and still conduct the business of the school district without personally attacking others or hijacking board meetings to serve their own interests. Unfortunately, it can take only one person to turn an effective board into a dysfunctional board. This presentation will address proactive steps for setting expectations regarding board member conduct and options for responding to inappropriate board member behavior when proactive measures fail to deter inappropriate conduct.

- I. **INVESTING IN EFFICIENT GOVERNANCE AND SETTING EXPECTATIONS**
 - A. **Be Proactive.** Taking the time to establish ground rules and expectations for board member conduct both at public meetings and outside of public meetings will make it easier to address situations in which an individual board member is acting inappropriately.

NOTE: These materials and the corresponding presentation are meant to inform you of interesting and important legal developments. While current as of the date of presentation, the information that is provided may be superseded by court decisions, legislative amendments, rule changes, and opinions issued by bodies interpreting the area of law. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts addressed in this outline or discussed in the presentation, you should consult with your legal counsel.
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1. **Importance of Established Rules.**

- a. **Efficiency:** It is easier to work in a group that has rules.
- b. **Focus:** A group should only deal with one substantive matter at a time.
- c. **Equality:** Rules assure all members have a right to participate.
- d. **Consensus:** Rules allow discussion to lead to a decision reflective of the will of the majority.
- e. **Fairness:** Rules protect the rights of the minority.
- f. **Information:** Every voting member must understand what he/she is voting on, and the effect a decision will have.

2. **Parliamentary Procedure.** Many school districts have adopted *Robert's Rules of Order* as the primary rules which govern the participation of board members.

3. **Be Clear About Meeting Norms.**

- a. **Purpose.** The purpose of a school board meeting is to conduct the business of the district, which includes honors and awards. School board meetings are not meant to be a platform for board members to air personal views that do not directly relate to an item of business. Board members do not have protections for statements they make during a board meeting when those statements are not related to district business.
 - i. Board members should not grandstand or campaign during a school board meeting.
 - ii. Board members should not offer opinions as if they are fact.
 - iii. Board members must be mindful of the requirements of the Open Meeting Law ("OML") with respect to addressing personnel and student issues.

- (1) The OML requires a school board to go into closed session to discuss educational data on a particular student. *See* Minn. Stat. § 13D.05, subd. 2(a)(3).
 - (2) A discussion regarding preliminary allegations against an employee must take place in closed session unless the employee asks for the discussion to take place in public session. *Id.* at subd. 2(b).
 - (3) The OML allows school boards to discuss non-public data at an open school board meeting “without liability or penalty” if the following requirements are met: (1) the discussion must involve a matter within the school board’s authority, and (2) the discussion must be “*reasonably necessary to conduct the business or agenda item before the public body.*” Minn. Stat. § 13D.05, subd. 1(b) (emphasis added).
- iv. Board members should not make comments that unilaterally disclose confidential information. For example, legal advice provided by the school district’s legal counsel is protected by the attorney-client privilege. *See* Minn. Stat. § 13.393. Individual board members do not have authority to unilaterally disclose privileged information to individuals outside of the school board and school district administration.
- b. **Must be Recognized by the Chair before Speaking.** Board members should not interrupt each other. The school board chair may and should require that board members be recognized by the chair before speaking. Board members who violate this basic protocol should be ruled out of order and gavelled to stop speaking until recognized.
- c. **Comments Must be Germane and Limited.** Board members should not make comments that are not directly relevant to the business decision that is being considered.
- i. If a board member is prepared for a meeting, the board member should be able to explain his or her position on most agenda items in less than two or three minutes. Truly complicated issues, such as boundary line decisions, may take more time.

- ii. What is the reason for the comments that are being made?
 - (1) To sway other board members?
 - (2) To let the public know your position?
 - (3) To gather additional information?
- iii. The board chair is responsible for maintaining order and decorum during meetings.
- d. **Personal Attacks are Prohibited.** Being elected to the school board does not give a board member the right to publicly attack another person.
 - i. Personal attacks show that the board member is not focused on the issue.
 - ii. Personal attacks undermine public trust and confidence.
 - iii. Personal attacks show a lack of leadership and inability to serve as a role model.
 - iv. Personal attacks may violate the code of ethics for board members and school district policy.
- 4. **Interactions with District Administration and Staff.** The school board acts as a body. Individual school board members do not have authority to act on their own unless the full school board provides authority to an individual board member or group of board members to act on behalf of the school board. This could be done through an approved board policy or a specific delegation of authority approved by the full board. In the absence of clear policy or a delegation of authority by the full board, the following are examples of conduct that goes beyond an individual board member's authority:
 - a. Investigating allegations of staff or student misconduct.
 - b. Giving directives to a staff member.
 - c. Making unreasonable demands that administration provide information on a particular topic, especially if the topic is not

related to a matter that is likely to appear on the agenda at an upcoming board meeting.

- i. Individual board members do not have the right to demand that administration provide information in order to conduct an investigation that has not been sanctioned by the board as a whole.
 - ii. Individual board members do not have the right to access private or confidential data that is not reasonably necessary for them to perform board work. *See* Minn. R. 1205.0400, subp. 2; Minn. R. 1205.0600, subp. 2 (noting that access to private or confidential information is limited to those whose work assignments “reasonably require access”).
 - iii. Individual board members may make their own data requests under the Minnesota Government Data Practices Act, but they are subject to the same standards as private citizens when they do so. This means they may be required to pay applicable charges for copies of data and they are not entitled to private or confidential information that would not be available to a member of the public.
- d. Disclosing private or confidential information to individuals outside the school district or to individuals inside the school district who do not have a legitimate, work-related reason to access the information.
5. **Fiduciary Obligation.** School board members owe a fiduciary obligation to the board as a whole and the school district as an entity. School board members who act contrary to the school district’s interests could expose themselves to individual liability in the event of a lawsuit. While a school district is generally required to defend and indemnify school board members if they are sued based on action taken as a school board member, individual board members lose the right to a defense and indemnification if they are guilty of malfeasance in office, willful neglect of duty, or bad faith. *See* Minn. Stat. § 466.07, subd. 1.

B. Hypotheticals.

1. Board Member A feels like she is in the minority on the school board. She has had growing frustration about her inability to convince the Board Chair and Superintendent to include an item related to a curriculum issue

on an agenda for a school board meeting. She has tried to individually discuss her concerns about the item not being placed on the agenda with the Board Chair and the Superintendent without success. What should Board Member A do if she would like to continue her efforts to have the curriculum issue placed on the agenda for a board discussion?

What should Board Member A do if a majority of the school board does not agree to have the curriculum issue placed on a future board agenda?

2. Board Member B is convinced the Superintendent and Business Manager are sharing incomplete information regarding the District's financial situation and the status of negotiations with employee groups. The rest of the school board does not share this concern, as administration regularly provides financial information to the full school board and has updated the full school board on negotiations strategy during multiple closed sessions. Despite these updates, Board Member B continues to insist the Superintendent and Business Manager are hiding information. Does Board Member B have authority to demand that the Superintendent and Business Manager provide him with additional information in order for him to investigate his concerns?

3. In addition to making demands of administration, Board Member B begins publicly accusing the Superintendent and Business Manager of incompetence and fiscal impropriety on a regular basis at school board meetings every time a financial or negotiations issue is mentioned. What concerns does this raise for Board Member B and the school board as a whole?

Would it be appropriate for Board Member B to sign up to speak about his concerns during a public comment period if he clarifies for the public that he is speaking during public comment as a private citizen and not as a member of the school board?

4. Board Member C is good friends with an employee of the school district. The employee reports to Board Member C that she is being sexually harassed by a colleague. Board Member C tells the employee she will ensure the reported sexual harassment is addressed and tells the employee she will personally handle it in a confidential manner. What concerns does this raise?

How should Board Member C proceed upon learning of the employee's sexual harassment complaint?

II. ADDRESSING INAPPROPRIATE CONDUCT WHEN PROACTIVE STRATEGIES FAIL

A. Managing Inappropriate or Disruptive Conduct During a Meeting.

1. **Ruling Out of Order.** A board member who hijacks a meeting by venturing off on irrelevant topics or personally attacking others instead of debating a motion should be ruled out of order. Debate should focus on the motion, and not the person who made the motion.
2. **Moving the Question.** A school board can immediately end all debate on a pending motion. This can be helpful if the board has one member who is using the time to “debate” a pending motion to make comments that are not constructive or are unrelated to the matter before the board.
 - a. To close debate immediately, a board member must first be recognized by the chair. The member then states: “I move the previous question.”
 - i. By moving the previous question, a board member is moving to have the board vote the pending motion immediately and without further discussion.
 - ii. It is not appropriate to interrupt a fellow board member to move the previous question. To move the previous question, a board member must first have the floor, meaning he or she has been recognized by the chair.

- b. A motion to move the previous question (i.e. to close debate or discussion) is itself not subject to debate or discussion. However, a *two-thirds vote is required* to pass a motion to move the previous question.
- 3. **Referring a Motion.** Occasionally, a board member will make a motion out of left field. When this happens, the board as a whole may be caught off guard or may lack sufficient knowledge to vote on the motion. To address this problem, any board member may move to refer the motion to a committee and to instruct the committee to report back to the board. Alternatively, a board member may move to refer the matter to the superintendent to gather additional information and to report back to the board at a later date.
 - a. A “motion to refer” is amendable. This means, for example, that another board member may move to amend the motion to add additional conditions such as: “I amend the motion to state that the superintendent must report back to the board at the next meeting rather than two months from now.”
 - b. A “motion to refer” is debatable. This means that the board members may discuss whether it is desirable to refer the matter to the superintendent or to a committee.
- 4. **Postponing Indefinitely.** When one board member makes an offensive or objectionable motion, another board member may move to postpone the motion indefinitely. A majority vote is required to adopt a motion to postpone indefinitely. The practical effect of a motion to postpone indefinitely is that the motion may not be taken up again during the meeting.

B. Other Steps to Address Board Member Misconduct.

- 1. **Reminder of Penalties and Obligations.** If there are concerns about the conduct of an individual board member, the appropriate initial intervention will in many cases be a meeting with the board chair, superintendent, and problematic board member to discuss penalties and obligations. Depending on the concerns at issue, appropriate topics to address could include the following:
 - i. Meeting norms.
 - ii. The limits of a board member’s ability to act on his or her own.

- iii. Penalties for violating laws such as the Open Meeting Law and Minnesota Government Data Practices Act.
- iv. An individual board member's fiduciary obligation to the board as a whole.
- v. The limits of the school district's obligation to defend and indemnify a board member under Chapter 466.
- vi. Potential consequences for ongoing inappropriate behavior, such as censure, consideration of removal from the board (in extreme cases), liability for the school district based on the individual board member's actions, etc.

The benefit of this type of initial meeting is it will help establish a board member has been put on notice of concerning behavior and provided an opportunity to show improvement before more significant responsive action is taken.

2. **Responses to Repeated or Significant Inappropriate Conduct by a Board Member.** When a board member persists in engaging in inappropriate conduct or engages in significant misconduct, the chair and superintendent should contact legal counsel to discuss options for next steps. Options for next steps include, but are not limited to the following:

- i. Conducting an investigation to establish the facts regarding allegations of misconduct. An investigation into allegations against an individual board member should be authorized by the full school board.
- ii. Adopting new standards governing school board member conduct. For instance, a school board could take action to address the circumstances in which individual board members may ask administration to provide information and clarifying when administration may decline to respond to unreasonable requests or requests that are not related to board business.
- iii. Censuring the board member.
- iv. Formally disavowing a board member's conduct.
- v. Asking for the board member's resignation.

- vi. Removing the board member from all committees or removing compensation.
 - vii. Removing the board member in accordance with law.
3. **Data Privacy Considerations.** When allegations are made against a school board member, the Minnesota Government Data Practices Act (“MGDPA”) does not clearly address whether a board member is considered an “employee” for purposes of Minnesota Statutes section 13.43. The Commissioner of the Minnesota Department of Administration has issued advisory opinions stating that it is up to a school board to determine whether its elected officials are employees for purposes of the MGDPA. *See, e.g.,* DPO Adv. Op. 12-018 (December 5, 2012).
- i. A best practice is for the board to adopt a resolution stating whether board members are considered employees for MGDPA purposes.
 - ii. If a board member *is* considered an employee for MGDPA purposes, data regarding the nature of allegations against the school board member is treated as private, as it is for other employees, until there is a final disposition of disciplinary action. Minn. Stat. § 13.43, subd. 2(a)(5).
 - iii. If a board member *is not* considered an employee for MGDPA purposes, data related to allegations against the board member would be public data. However, private data on other individuals, such as employees and students would remain private and would need to be redacted from any information that is shared publicly.
4. **OML Considerations.** The OML does not allow a school board to close a meeting unless there is a statutory basis for doing so. Minn. Stat. § 13D.05, subd. 1(a). As noted above, there is protection from liability if a board has to discuss private or confidential data to conduct board business at an open meeting if there is no legal basis to go into closed session. When there are allegations against a board member, the OML does provide a basis to go into closed session.
- i. The OML provides that a school board “shall” close a meeting for preliminary consideration of allegations against an individual subject to its authority. Minn. Stat. § 13D.05, subd. 2(b).

However, the subject of the closed session has the right to ask for an open meeting discussion. *Id.*

- ii. If educational data is intertwined with allegations against a board member, the OML requires a school board to go into closed session to discuss educational data. Minn. Stat. § 13D.05, subd. 2(a)(3).

C. **Removal Standard.** Minnesota law provides a mechanism for removing an elected school board member. The relevant statute provide as follows:

The board may remove, for proper cause, any member or officer of the board and fill the vacancy; but such removal must be by a concurrent vote of at least four members, at a meeting of whose time, place, and object the charged member has been duly notified, with the reasons for such proposed removal and after an opportunity to be heard in defense against the removal.

Minn. Stat. § 123B.09, subd. 9. The statute itself is vague as to the exact standard for removal or the type of hearing that is required in order to remove a school board member. Cases have interpreted the standard to be very high.

1. **Constitutional Standard.** Article Eight, Section Five of Minnesota’s Constitution contains the following provision: “The legislature of this state may provide for the removal of inferior officers for *malfeasance or nonfeasance* in the performance of their duties.” The Minnesota Supreme Court has determined that this applies to all elective municipal officers. *Sykes v. City of Minneapolis*, 144 N.W. 453, 455 (Minn. 1913).
2. **Malfeasance Defined.** “Malfeasance” generally means misconduct in office and:

refers to and includes only such misdeeds of a public officer as affect the performance of his official duties, to the exclusion of acts affecting his personal character as a private individual; the character of the man must be separated from his character as an officer.

State v. Burnquist, 141 Minn. 308, 321, 170 N.W. 201, 203 (Minn. 1918). There is not a bright line rule for determining what type of conduct would be considered malfeasance. *Collins*, 518 N.W.2d at 842. Malfeasance “has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official

capacity that is wholly illegal and wrongful.” *Id.* Bribery and unduly profiting from one’s position as an elected official has been considered “malfeasance.” *Jacobsen v. Nagel*, 255 Minn. 300, 304, 96 N.W.2d 569, 573 (Minn. 1959). On the other hand, the following conduct has been determined by Minnesota courts not to meet the malfeasance standard:

- i. Making comments supporting Germany and criticizing the U.S. President during World War I.
 - ii. Violating the Open Meeting Law on three separate and unrelated instances. (Note: The OML separately addresses a consequence for three intentional violations of the OML. *See* Minn. Stat. § 13D.06, subd. 3.)
3. **Nonfeasance Defined.** “Nonfeasance” means “neglect or refusal, without sufficient excuse, to do that which is the officer’s legal duty to do.” *Claude v. Collins*, 518 N.W.2d 836, 842 (Minn. 1994). In *Collins*, the Minnesota Supreme Court held that three separate and distinct violations of the OML was not “malfeasance,” but that it *was* “nonfeasance” warranting removal from office. General incompetency and neglect of duty can constitute sufficient ground for the removal of an elected official. *State v. Eberhart*, 116 Minn. 313, 322, 133 N.W. 857, 861 (Minn. 1911).
4. **Hearing Required.** Subdivision 9 of Minnesota Statutes section 123B.09 clearly requires that a hearing take place prior to any decision to remove a board member. Moreover, the statute affords significant due process protections in that it requires a school board to inform the member proposed for removal of the time, place, and object of the meeting where removal will be considered and it requires the school board to provide advance notice of the reasons for the proposed removal. As a result, school boards should hire an independent hearing officer to preside over a removal hearing and the proceeding should contain the following elements:
- i. The board member proposed for removal must be notified of the grounds for removal, as well as the time and place of a hearing.
 - ii. The hearing should allow for the parties to present witness testimony and evidence in the form of exhibits.

- iii. The hearing should either be recorded or a court reporter should be hired to create a transcript.
- iv. The independent hearing officer should issue a written recommended decision to the school board. The recommendation should explain, in detail, the basis for the hearing officer's decision.
- v. The full board should wait to take final action on the proposed removal until it receives the hearing officer's recommendation.

D. Case Studies.

1. ***Houston Community College System v. Wilson*, 142 S. Ct. 1253 (2022).** This case is a U.S. Supreme Court decision involving the Board of Trustees of the Houston Community College System and its decision to censure of one of its members after years of disagreements. Trustees served a six-year term. The plaintiff, David Wilson, was elected to the Board of Trustees in 2013. From the beginning, his relationship with the Board was strained. He frequently criticized his colleagues about the direction of the college system and initiated various lawsuits challenging the Board's actions. In 2016, the Board issued Wilson a public reprimand. Wilson responded by declaring the Board would "never ... stop him." In response to the reprimand, Wilson went to the media to claim the Board violated its bylaws and ethical rules; arranged robocalls to the constituents to share his views; hired a private investigator to surveil another board member to in an attempt to show she did not reside in the district that elected her; filed two new lawsuits, costing the community college over \$270,000 in legal fees from all of his litigation combined. At a 2018 meeting, the Board adopted a public resolution "censuring" Wilson for his conduct. The resolution stated his conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible." In addition to the censure, the Board penalized Wilson by stating he was ineligible to be elected to Board officer positions that year, could not receive reimbursement for work travel and needed Board approval before receiving access to Board funds, and recommended additional training on ethics. Wilson then amended one of his lawsuits to include a claim that the Board violated his First Amendment rights by censuring him.
 - i. The Supreme Court ruled that the Board's decision to censure Wilson did not violate Wilson's First Amendment rights. Notably,

the Court recognized that the Board had its own right to express its views on Wilson's performance as a public official through a censure.

- ii. In the lower court decision, the Fifth Circuit Court of Appeals determined that the other actions taken by the Board did not violate Wilson's First Amendment Rights because (1) he was not entitled to a position as an officer of the Board, and (2) nothing in state law or the community college system's bylaws entitling him to any funds, such as travel expenses, without approval.

2. ***Kleis v. City of Becker*, No. CV 16-1005 ADM/JSM, 2016 WL 4007573 (D. Minn. July 26, 2016).** Plaintiff Jerome Kleis was the mayor of Becker and also sat on the City Council. While Kleis was mayor, he was critical of the operation of the city golf course and requested an investigation into the management of the golf course. The City Council issued a censure against Kleis in 2013, barring Kleis from (1) talking about the golf course outside of city council or the Golf Committee, (2) serving on the Golf Committee, and (3) participating in city employment decisions. In 2014, Kleis introduced a resolution to lift the censure, but it did not pass, and the censure remained effective. In 2015, Kleis was interviewed about the golf course on a local radio station. After this interview, the City Council announced that Kleis would be censured again and Kleis himself attempted to introduce a censure resolution involving another City Council member. The City Council passed another censure against Kleis in 2016 prohibiting: (1) his ability to interact with people without another City Council member present, (2) copying the mayor on emails to city staff, (3) submitting data requests or attempting to get data prior to public meetings instead of requesting the data during the meetings, and (4) raising employment concerns during public meetings. Kleis then sued the City, alleging violations of his First Amendment and due process rights.

- i. The U.S. District Court for the District of Minnesota ruled in favor of the City. It noted that the censures essentially involved an expression of the City Council's disagreement with Kleis' continued criticism of how the golf course operated. The Court noted that the two censures did purport to restrict certain things Kleis could discuss and do, but that the censures did not include an enforcement mechanism and ultimately would not "chill a person of ordinary firmness" from exercising First Amendment rights.

- ii. Citing other cases, the Court also noted three ways “intra-council” disputes differ from ordinary First Amendment retaliation cases. Those are the following:
 - (1) The adverse action of being censured by one’s political peers is “a rather minor indignity” compared to the “prototypical plaintiff” in a First Amendment case who loses a job or business license or is otherwise subjected to harassment or less favorable treatment.
 - (2) The Court recognized that “more is fair in electoral politics than in other contexts” and there is “little difference between what [a censure] accomplished and what voters in a general election might do if they too were dissatisfied by [the plaintiff’s] advocacy.”
 - (3) Like in *Wilson*, the Court recognized that other City Council members had a “protected interest in speaking out and voting their conscience” regarding Kleis’ conduct.

E. Hypotheticals.

1. Board Member D is the Vice Chair. She is a frequent critic of the Superintendent, who has served the school district for ten years. Board Member D has repeatedly questioned the Superintendent’s integrity and competence and has insinuated that he is defrauding the school district through requests for expense reimbursement. Board Member D is the only board member who has concerns about the Superintendent and has stated she has no desire to stop criticizing his performance. May the full school board strip Board Member D of her role as Vice Chair?

2. The entire school board voted to authorize a referendum seeking \$30 million for improvements to school facilities after extensive discussions regarding facilities issues related to aging buildings and growing enrollment. Due to public pressure from the “vote no” group, Board Member E is now opposed to the referendum. On the day before the vote, Board Member E ran a full-page advertisement in the local paper opposing the referendum and inaccurately stating enrollment in the school district had decreased and that the school district’s existing facilities were the equivalent of having new schools. May the school board vote to censure Board Member E?

- 3. Would it be permissible for a school board to do the following as part of a censure in response to inappropriate conduct by an individual board member:
 - i. Restrict a board member's ability to request information from administration? _____
 - ii. Restrict the frequency with which a board member may e-mail or call administration? _____
 - iii. Restrict the time of day a board member may e-mail or call administration? _____
 - iv. Prohibit a board member from contacting staff other than the Superintendent? _____
 - v. Require a board member to request information through a data request under the MGDPA and to pay for copies as permitted by the MGDPA? _____

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