



# New Board Members Legal 101: OML, CORA, & Public Comments



Colorado Association  
of School Boards

2023 83rd Annual CASB Convention | December 7-9 | The Broadmoor

#CASBEvents

# Outline for Session

- Learn about and understand foundational legal requirements for school boards and school board members.
- Apply your understanding of these legal issues through hypothetical scenarios throughout the presentation

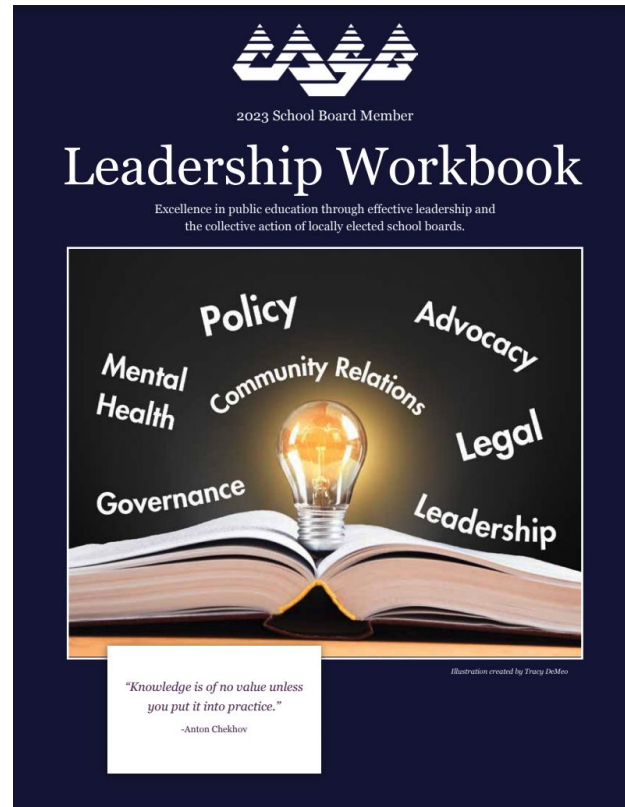


# Topics

1. Duties of a Board
2. Legally Sound Board Meetings
3. Executive Sessions
4. Colorado Open Records Act (CORA) Requests



# Leadership Workbook



# Duties of a Board

- **Board Action:**

- The board must act as a group.
- Individual members do not have individual authority.
- The board may only take action, make decisions, and direct district operations as a full board acting in its corporate role.

CASB sample policy BBA, *School Board Powers and Responsibilities*



# Duties of a Board

- **Fiduciary Duties–**

- The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state. C.R.S. §24-18-103
  - Duty of care
  - Duty of loyalty

CASB Sample Policy BC, *School Board Member Conduct*, and Sample Exhibit BCA-E-1 or BCA-E-2, *Code of Ethics*



# Duties of a Board

- **Conflicts of Interest–**

- Public Office is not to be used for any individual's profit, gain, or private interest.
- Public officers are discouraged from assisting or enabling their family members from obtaining employment, a gift of substantial value, or any economic benefit.
- Boards are legally required to adopt a policy on conflicts of interest.
- Board members must disclose potential conflict–
  - Must usually also abstain from voting and refrain from influencing other members
  - Limited exception allowing conflicted member to vote **if** specific disclosure were made

CASB Sample Policies BCB, *Conflict of Interest*; BCA-E-2, *Board Member Code of Ethics*



# Duties of a Board

- **Conflicts of Interest–**

- Employment with Board:

- The Colorado Supreme Court has held that a local board of education has the authority to adopt a conflict of interest policy prohibiting district employment while serving on the Board. *Montrose County Sch. Dist. RE-1J v. Lambert*, 826 P.2d 349 (Colo. 1992).
- Sample policy includes optional language a board may adopt if they choose to prohibit district employees from serving on the board.

CASB Sample Policies BCB, *Conflict of Interest*; BCA-E-2, *Board Member Code of Ethics*





# Question:

A school board member wants to take a part-time position at the school.

**Is this permissible?**



# Answer:

- **It depends—**
  - Check board policy BCB or other conflict of interest policy
  - Some boards prohibit district employment while serving on the board



## Question:

A school board member's husband is on the board of a land-development company that wants to purchase a building on the district's campus.

**Is this a conflict of interest?**



# Answer:

- **Most likely yes, but it depends–**
  - Did the board member recommend the purchase of the building or otherwise promote or influence the board?
  - What does the law say about family members?
  - What does board policy say?
  - What is the community impact?



## Question:

When the potential sale was on the agenda of a school board meeting, the school board member disclosed her husband's involvement in the group, and abstained from voting.

**Was the conflict of interest properly addressed?**



# Answer:

- **Almost!**

- The school board member also needs to file a conflict of interest disclosure with the CO secretary of state.
- [Link](#)



# Duties of a Board

- **Immunity of Board Members–**

- Board members have governmental immunity when sued in tort for acts or omissions that occurred or are alleged to have occurred during the performance of their official duties. C.R.S. § 24-10-102 et seq.
  - No immunity from claims not related to official duties
  - No immunity from alleged criminal acts
  - No immunity from claims based on civil rights violations
- A board member who commits an unlawful act by exercising powers outside of his authority may be personally liable.



# Legally Sound Board Meetings

- **Colorado Open Meetings Law–**

- *“In order to continue the public confidence in the integrity of government officials and to promote trust of the people in the objectivity of their public servants, this open disclosure law is adopted.”*

C.R.S. § 24-6-201





# Legally Sound Board Meetings

- **Colorado Open Meetings Law–**
  - All meetings of a quorum (or 3 or more members) of local public body...
    - At which public business is discussed; or
    - At which any formal action is taken; or
    - At which a majority or quorum of the body is in attendance or expected to be in attendance.
  - ... are public meetings open to the public at all times.

C.R.S. §§ 22-32-108, 24-6-401 et seq.; CASB Sample Policy BE, *School Board Meetings*



# Legally Sound Board Meetings

## Types of Board Meetings–

- Regular Board Meeting
  - Notice Required – 24 hours
  - May take action
- Special Board Meeting
  - Notice required – 48 hours
  - No business other than stated in notice, unless reasonably related and unanimous agreement
- Executive Sessions
  - A mechanism to discuss certain topics in private
  - Can occur during a regular or special board meeting
- Work session or retreat
  - May not take action
  - Notice required



# Legally Sound Board Meetings

- **Notice Requirements–**

- If a meeting must be open to the public, notice of the meeting must meet the following requirements:
  - Be posted in a designated public place within the boundaries of the school district (online posting is acceptable, and should include a link to the online meeting);
  - Be posted no less than 24 hours prior to the meeting;
  - Include a specific agenda of information where possible.

C.R.S. § 22-32-108, 24-6-401 *et seq.*, CASB Sample Policy BEDA, *Notification of School Board Meetings*



# Review

- **Question:** What is a meeting that must be open to public?
- **Answer:** Any kind of gathering convened to discuss **public business**, including—
  - In person
  - By telephone (conference call)
  - Electronically (Zoom)
  - Or any other means of communication (email)
- Does **not** include chance meetings or social gatherings at which discussion of public business is not central purpose. C.R.S. § 24-6-402(2)(e).



## Question:

**Example 1:** If all of the board members are attending a high school graduation, does that mean they are having a meeting that therefore, needs to be open to the public?



# Answer:

- **Most Likely Not–**
  - Consider the following:
    - Primary purpose of meeting– most likely social
    - Nature of communications– personal, but could involve public business discussion.
    - Focus of conversation– unknown, could involve public business.
      - Contrary to the spirit and intent of open meetings law.



# Question:

**Example 2:** Board member Anna met privately with board member Michael to discuss a recently proposed board policy change. Later, Michael relayed their conversation to board member Chelsea and asked for Chelsea's opinion on the proposed policy change.

**Has a meeting occurred?**



# Answer:

- **Possibly, yes—**

- Caselaw has held that a series of emails between more than two board members may be construed as a meeting, if the serial email communications are used to deliberate toward a decision or make a decision. Also, this is an example of a "walking quorum" where board members have not physically convened in a number that constitutes a quorum, but have, through successive communications, discussed a public matter with a quorum without public notice.





# Legally Sound Board Meetings

- **Minutes–**

- Official minutes of board meetings constitute the written record of all proceedings of the board.
- Must take minutes at any board meeting at which the adoption of any policy or formal action occurs or could occur.
- Minutes are records open to public inspection, in accordance with applicable state law.

C.R.S. §§ 22-32-109(1)(e), 24-6-402(2)(d)(II); CASB Sample Policy BEDG, *Minutes*



# Legally Sound Board Meetings

- **Documentation Requirements–**
  - Written minutes are required for all meetings.
  - Recordings are required for all meetings at which votes are taken.
    - All recordings may (and should) be destroyed after 90 days, unless Board policy requires otherwise.



# Legally Sound Board Meetings

- **Recording Meetings–**

- Boards must take a recording of “each regular and special meeting at which votes are taken and recorded.” C.R.S. §22-32-108(5)(b).
  - At a minimum, the board must make an audio recording and retain it for at least 90 days
- Executive sessions also must be electronically recorded, except for—
  - Discussion of individual students
  - Attorney-client privileged communications



# Legally Sound Board Meetings

- **Voting–**

- State law provides– “All voting at any meeting ... shall be called alphabetically, and each member present shall orally vote ‘Aye’ or ‘No’ upon each question unless excused from voting by the board for good cause.” C.R.S. § 22-32-108(6).
- Board members are excused from voting only when–
  - There is a conflict of interest, or
  - The board votes to excuse the member for “good cause.”

CASB Sample Policy BEDF, *Voting Method*



# Legally Sound Board Meetings

- **Electronic Participation in board meetings is permitted if authorized by board policy**
  - Requirements–
    - Quorum of the board, including members physically and virtually present
    - Only when there are extenuating circumstances, as described in the board's policy
    - Policy must outline methods for participation (video, phone, etc.)
    - Must have technology in place to ensure all (members and audience) can hear and participate
    - Members who participate electronically must have real-time access to any materials that are presented and available to members who are physically present at the meeting

CASB Sample Policy BEAA, *Electronic Participation in School Board Meetings*



# Legally Sound Board Meetings

- There is no Colorado law that requires boards to allow for public comment at board meetings, but most boards have policy related to—
  - When public comment will be heard
  - How much of the meeting is set aside for public comment, including a time limit for individual speakers
  - What agenda items or subjects speakers may comment on at a board meeting

CASB Sample Policy BEDH, *Public Participating at School Board Meetings*



## Question:

Assume the board allows for a general public comment period at its meetings. During public comment, a parent speaks to complain about a board member, state that certain school board policies are discriminatory, and state that the board member is discriminatory as well.

**Can the board interrupt the parent's speech and prevent her from continuing?**



# Answer:

- **No–**

- The board cannot impose content-based/viewpoint restrictions or impede the public’s ability to offer criticism.
- This is First Amendment constitutional law, which offers additional protections for speech in school board meetings as they are “public forums.”
- Most speech, excluding threats and other violent speech, is protected
- *Remember*, board members are not personnel and the board cannot convene in executive session to discuss board members.





# Executive Session

- **Executive Session—**

- Pursuant to the Open Meetings Law, boards can meet privately, without the public, only in limited circumstances - called an “executive session.”
  - There are nine circumstances in which it is permissible to convene an executive session—
    1. Purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest;
    2. Consult with board attorney for the purpose of receiving legal advice on specific legal questions;
    3. Matters required to be kept confidential by state or federal law, rules, or regulations;



# Executive Session

4. Specialized details of security arrangements or investigations;
5. Determining positions relative to matters that may be subject to negotiations, developing strategy for negotiations, including strategy for negotiations relating to collective bargaining or employment contracts, and instruction of negotiators;
6. Personnel matters;
7. Consideration of any documents protected by CORA;
8. Discussion of individual student matters;
9. Superintendent finalists interviews (must also be public interview forum and more than one named finalist), rank finalists, and discussing employment contract negotiations.

C.R.S. §§ 22-32-108(5)(a), (d), 24-6-402(4)(a)-(i); CASB Sample Policy BEC, *Executive Sessions*



# Executive Session

- **Steps for entering executive session–**
  - Announce the topic of the executive session and the specific statute authorizing the board to meet in executive session
  - Identify the matter(s) to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized (this information should be incorporated into the board motion to convene an executive session)
  - Requires an affirmative vote by at least 2/3 of the quorum to convene in executive session



# Executive Session

- **Rules for executive session–**

- Stay on topic; only discuss the matter(s) stated as the purpose(s) for entering executive session.
- Discussion only; cannot adopt proposed policy, resolution, regulation, or take any formal action.
- Maintain a log of the amount of time spent on each topic during executive session.
- Electronically record discussions in executive session and retain for 90 days (\*except discussions concerning students and attorney-client privileged matters).
- Return to open session to announce new matters (e.g. if need to confer with legal counsel) and vote to reconvene in executive session.
- Post minutes of board meeting where convened in executive session within 10 business days following the meeting at which the minutes were approved by the board.



## Question:

The Board wants to convene in executive session to discuss complaints against a teacher who is known for his unconventional lesson plans. The teacher requests that the board hold its discussion in an open meeting.

**Can the board meet in executive session?**



# Answer:

- **No—**
  - The board can meet in executive session to discuss personnel matters **except if** the employee who is the subject of the session has requested an open meeting, or if the personnel matter involves more than one employee, all of the employees have requested an open meeting.  
C.R.S. § 24-6-402(4)(f)(I).



## Question:

The board properly convened in executive session to discuss a real estate matter. While in executive session, the board calls the school district's attorney to obtain legal advice on an employee's termination.

**Is this permissible?**



# Answer:

- **No—**
  - Board must limit its discussion to the real estate matter, conclude the executive session, and return to open session to announce a new topic and follow the steps before reconvening in executive session. Remember, the board must also note how much time is spent on each topic in executive session.





# Executive Sessions

- What happens if a board violates the Open Meetings Law, which includes all board meetings, including executive sessions?
  - Liability for reasonable attorneys' fees and costs;
  - Board action is invalid;
  - Media, public criticism;
  - Erosion of public trust.



# Colorado Open Records Act (CORA)

- **Colorado law establishes the presumption that all public records should be available to the public–**
  - *“It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times...”*
    - Public records include all writings made, maintained, or kept for use by the public entity in exercise of functions required or authorized by law.
    - All “public records” must be made available to the public for inspection or copying - unless there is a specific legal exception that permits or requires the district to deny access.

C.R.S. § 24-72-200.1 et seq.; CASB Sample Policy KDB, *Public’s Right to Know/Freedom of Information*



# Colorado Open Records Act (CORA)

- **What are considered “public records”?**
  - All writings made, maintained, or kept by the school district (including emails and texts), and
  - Involving the receipt or expenditure of public funds or exercise of the school district’s functions.
    - Law specifies timelines, fees, and format for responding to CORA requests.
  - School district’s financial information must be posted online in accordance with the *Public School Financial Transparency Act*.



# Colorado Open Records Act

- In June SB23-286 was passed, which makes changes to the Colorado Open Records Act.
- The most important change for board members is that the public can request records of sexual harassment complaints made against elected officials and the results of any investigation, if the investigation concludes that the elected official is culpable.
  - The identity of accusers, victims, and witnesses must be redacted from the records.
- The bill includes other administrative changes designed to make it easier for the public to file a request—
  - Eliminating per page fees for digital records;
  - Ease of digital access;
  - No requirement for an ID.



# Colorado Open Records Act

- **Common CORA Exceptions–**

- Personnel Records (confidential information, letters of reference)
- Teacher evaluations
- Student educational records
- Sexual harassment investigations
- Medical records
- Work product prepared for public officials
- Specialized details of security arrangements
- Safe2Tell records



## IV. Colorado Open Records Act

- **Boards in the Digital Age—**

- The increasing use of email, text, and social media by school board members potentially poses issues under the OML and CORA.
- Also has implications under the First Amendment, campaign finance laws, and record retention requirements.
- A new bill allows a state or local elected official to block other individuals on their private social media account—
  - The social media account must be the official's private account meaning—
    - Not supported by state government resources
    - Not required by state law to be used by a state elected official.
  - This bill is currently being challenged by a lawsuit filed in federal court.



# Tips for Boards in the Digital Age

## Do

- Maintain a wall between personal and public social media and email accounts
- Be clear to state that the opinions expressed are your own and not that of the board
- Understand that emails, texts, or other electronic writings could be public records subject to disclosure
- Monitor content on all accounts

## Don't

- Use electronic communication as a substitute for deliberation at publicly held meetings
- Avoid back and forth discussions between more than two board members
- Block people you disagree with
- Delete public posts



# Hypothetical I

Alice is the president of the ABC school board. She is active on Twitter and frequently posts updates regarding school district news and board updates. Alice decides to use her Twitter account to inform the public about an upcoming special meeting focused on superintendent selection. She posts the agenda on her Twitter account two days before the meeting. After receiving several inflammatory comments about one of the superintendent finalists, Alice deletes the comments.

**Using the information you just learned about the Colorado Open Meetings laws, what issues can you identify in this scenario?**





# Hypothetical I Debrief

- **Posting Requirements–**

- [Notice is full and timely] if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. C.R.S. 24-6-402(2)(c).
- Notice can also be posted “on a public website of the local public body... accessible at no charge to the public.” C.R.S. 24-6-402 2(c)(III) .

- **Free Expression–**

- Encourage the free expression of opinion by all board members and seek systematic communications between the board and students, staff and all elements of the community. Policy Exhibit BCA-E-1.

- **Open to the public–**

- All meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times. C.R.S. 24-6-402(2)(b).



# Hypothetical 2

The board has named three finalists for superintendent. The board wishes to enter executive session to discuss the finalists. Alice introduces the executive session, and cites the correct subsection. The board enters executive session. During executive session, the board comes to a consensus regarding their preferred superintendent finalist and their second choice. Following this, Amy moves to discuss a pending proposal to buy a piece of land for a new sports field. After calling their board attorney for some clarifying questions, most board members agree with the proposal, and the board votes 4-1 for the purchase to be approved.

**Using the information you just learned about Executive Sessions, what issues can you identify in this scenario?**



# Hypothetical 2 Debrief

- **Meeting w/ board counsel**– Legal advice on specific legal questions. C.R.S. 24-6-402(4)(b).
- **Entering Executive Session**– Upon the announcement by the state public body to the public of the topic for discussion in the executive session, including specific citation to the provision of this subsection (3) authorizing the body to meet in an executive session and identification of the particular matter to be discussed. C.R.S. 22-32-108(5)(a).
- **Executive Session approvals**– No adoption of any proposed policy, position, resolution, rule, regulation, or formal action, except the review, approval, and amendment of the minutes of an executive session. C.R.S. 24-6-402(4).
- **Consideration of land**– The purchase of property for public purposes, or the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive. C.R.S. 24-6-402(4)(a).
- **Executive Session Purposes**– “Negotiations concerning the terms of an employment contract with one or more finalists for the position of Chief Executive Officer if: “The Board or governing body has named more than one candidate as a finalist for the position of CEO...and the Board holds a forum open to the public to conduct interviews with each of the finalists.” C.R.S. 24-6-402(4)(i)(I)(A), (B).



# Hypothetical 3

The board then schedules and properly notices a public interview with their preferred finalist the following week, to take place during a regular board meeting. At the board meeting, the interview is conducted with several members of the public in attendance. After the public interview is over, Alice announces an executive session to interview the finalist in private and the board votes and enters executive session.

The next day, a local journalist submits a CORA request for any emails between Alice and the other board members about the superintendent search. Citing the personnel exception, the board refuses the CORA request.

**Using the information you just learned about the Colorado Open Records Act, what issues can you identify in this scenario?**



# Hypothetical 3 Debrief

- **Open to any person**– All public records shall be open for inspection by any person at reasonable times. C.R.S. 24-72-203(1)(a).
- **Procedures:** the official custodian of any public records may make such rules with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office. C.R.S. 24-72-203(1)(a).
- **Allowance or denial**– Allow any person the right of inspection... unless an exception applies. C.R.S. 24-72-204(1).
- **Executive Session**–“Board or governing body may, in addition to interviewing finalists in a public forum, interview finalists in executive session.” C.R.S. 24-6-402(4)(i)(B)(II).



## Question:

A board that livestreams its meetings posts the recordings of the livestream to the district website and considers the video/audio recording as the official meeting minutes.

**Can the recording of the entire meeting be considered the official minutes?**



# Answer:

- **Probably not–**
  - It is understood that public meeting minutes must be written.
  - Minutes ≠ transcript
    - The minutes does not need to be a strict regurgitation of everyone's words during the meeting, rather an overview.

CASB sample policy BEDG, *Minutes*



# Question:

A board member would like to add an agenda item after the board meeting has already started.

- **Is this permissible?**
- **Does it matter if it's a regular or special meeting?**
- **Who makes this decision?**
- **Does it matter what the topic of the proposed agenda item is?**





# Answer:

- **It depends–**

- At regular and special meetings, the Board may add to or take action on matters not appearing on the posted agenda **IF** the item is reasonably related to the subject matter on the posted agenda or if an exigency exists. CASB sample policy BEDB, *Agenda*.
- Amending the agenda of a regular meeting requires a majority vote of Board members present. All Board members must be present and cast a unanimous vote to amend the agenda of a special meeting.
- Notice of the meeting “shall include specific agenda information where possible.” C.R.S. 24-6-402(2)(c).



## Question:

Several months later, the board would like the new superintendent to facilitate an upcoming board meeting.

**Is this permissible?**

**Who is responsible for presiding over board meetings?**



# Answer:

- **Probably not–**
  - The Board President generally presides
    - The board Vice president will preside in the president's absence.
  - However,
    - Any board member can make a motion during the meeting, including the president.
    - The board president may temporarily step down if presenting certain motions.
      - In the case of a tied vote on a motion, the motion fails.



# Questions? Contact the CASB Legal Team

- Our website provides many legal resources at [www.casb.org/legal](http://www.casb.org/legal). If you need further assistance, don't hesitate to reach out through email or phone—
  - [303.832.1000](tel:303.832.1000) or [800.530.8430](tel:800.530.8430)
  - Rachel Amspoker, Staff Attorney
    - [ramspoker@casb.org](mailto:ramspoker@casb.org)
  - Hilary Daniels, Staff Policy Attorney
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Thanks!



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