



**Texas Association of School Boards**

Legal Services

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*Serving Texas Schools Since 1949*

## **Working with Your School Attorney:**

How, When, and Why School Districts Seek Legal Counsel

*Published online in [TASB School Law eSource](#)*

Public schools operate in a complex legal environment. Myriad state and federal laws and regulations govern virtually every detail of school operations—who works for the district, what they teach students, what instructional materials they use, how school buildings are built, how goods and services are procured, what food is served in the cafeteria, who is eligible to attend school, how students’ academic performance will be assessed, how their misbehavior will be punished, and so on. The laws that govern public schools are constantly changing, evolving, and becoming more complicated. To stay informed and in compliance, the average public school district often requires the assistance of legal counsel.

While the cost of seeking legal advice is a concern for every public school district, the cost of not seeking timely advice may be even higher. Without adequate information and advice, a school board, a board member, a district administrator, or other district employee can expose the district to legal claims, threats of litigation, or even legal liability. In some circumstances, district personnel or board members may expose themselves to personal liability for damages. In addition, several applicable laws, including the Open Meetings Act and conflict of interest laws, carry criminal penalties for violations. A competent school attorney will advise the board and district personnel in conducting the business of the district. Working together, the attorney and school officials can ensure compliance with applicable laws and minimize the risk of litigation and liability.

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### **Finding Legal Information and Advice**

#### **When should a district seek legal advice?**

**After problems arise.** Of course, a district should call a school attorney when the district finds itself in legal trouble: if the district receives a court summons or other legal document; if the district is accused of violating the rights of an employee, student, parent, or other citizen; if the district is dissatisfied with a vendor’s performance; if a supervisor discovers a potential violation

of law by a school employee; or if an investigation is brought by a regulatory agency. See TASB Legal Services' article [We've Been Sued! Now What?](#) for steps to take if the district learns it has been sued.

**Before problems arise.** School districts also should seek legal guidance in connection with major events, such as issuing bonds, buying or selling real property, signing contracts involving large sums of money, signing certain insurance contracts, or terminating an employee. School districts are also wise to seek ongoing legal advice to spot potential problems before they develop. School attorneys can perform periodic audits of district practices to ensure compliance with legal requirements. They also can conduct training on a variety of topics.

According to a 2003 report by the Office of the Comptroller, “early consultation with legal counsel, often no more than a phone call, can save the district money in the long run by preventing the matter from developing into litigation. The district should seek legal advice when the warning signs of a conflict begin to emerge—good legal advice up front can prevent a protracted and expensive conflict in the future. When in doubt, particularly in employment, open records and special education matters, the district should seek counsel sooner rather than later.” Texas School Performance Review, [Navigating the Legal Maze: A Practical Guide for Controlling the Cost of School District Legal Services](#) (Mar. 2003)

### **Where can districts get legal information and advice?**

**District policy and regulations:** All school districts maintain policies, and all Texas districts are members of TASB Policy Service. The legal policies, provided by TASB as reference material for use by districts, comprise an abridged collection of state and federal statutes and legal authorities applicable to school districts. The local policies, on the other hand, are rules adopted by the local school board. Many districts also maintain administrative regulations. These materials address many of the day-to-day operational questions that arise in a school district. In fact, consulting applicable policies before making decisions or picking up the phone for legal advice may save legal fees. District policies will not answer every question, but they can reduce the number of calls to an attorney or make calls more productive. When new or complicated issues emerge, however, the information in a policy manual cannot replace the advice of an attorney.

In the 2003 report, the Comptroller identified writing and enforcing “effective policies” as the number one way schools can control legal expenses. TASB Policy Service provides an invaluable starting place for school districts, but TASB Policy Service and TASB Legal Services strongly encourage districts to work with their school attorneys to customize district policies as needed and to audit policy adoption and compliance regularly to ensure that policies meet the unique needs of the district and are being implemented consistently.

**State agencies:** Several state agencies may provide legal information, interpretation, or advice on specific subject areas relevant to school districts. For example, anyone can call the Texas Education Agency (TEA) and speak to a staff member about legal or regulatory issues related to the full range of education-related topics, including school finance, budget and purchasing, student attendance accounting, transportation management, grant programs, accountability and student assessment, special education, and governance. Similarly, the Secretary of State Elections Division provides information on all aspects of elections, the Texas Ethics Commission addresses questions on campaign finance and political advertising, and the Comptroller's office is a resource for property tax information.

**TASB and other associations:** Associations such as the National School Boards Association (NSBA), the Texas Association of School Boards (TASB), the Texas Association of School Administrators (TASA), and other associations serving school personnel offer legal information and advice as a benefit of membership. With their comprehensive focus on school law issues, these associations are well-positioned to offer their members training and advice about state and national trends, emerging legal issues, and local choices. The training and information provided by these associations supplement, but do not replace, the advice of a school district's private counsel.

TASB members have access to TASB Legal Services as part of their membership. This includes free telephone consultation with TASB Legal Services attorneys. TASB Legal Services provides confidential legal advice on all areas of school law to school districts across the state every day. The telephone service is available to any person calling on behalf of a member school district and representing the legal interests of the district. The service is an excellent way to obtain, at no cost, quick answers to routine legal questions and to consult with an attorney before taking an action that may have legal implications. In some instances, of course, it is necessary for a district's private counsel to consider specific facts and circumstances, as well as the political and philosophical climate in the district, before advising school officials on the best course of action. In such cases, TASB Legal Services will refer callers to the district's private school attorney to ensure the district gets appropriate advice and guidance. In addition, when a district is represented by counsel in a particular matter, TASB Legal Services will defer to the opinions and advice of that counsel on issues related to the matter. TASB Legal Services does not provide written legal opinions, contract or document review, or any sort of representation in board meetings, grievance hearings, litigation, or other proceedings.

**Private counsel:** Texas public schools are represented by attorneys all over the state with expertise in a variety of subject areas. Some are organized into law firms; others work as solo practitioners. Some are *general practitioners* who represent school districts in addition to other types of entities or individuals. Others represent school districts exclusively. Even within school law, subspecialties exist in areas such as personnel law, special education law, and constitutional law.

A school attorney generally serves in one of two roles: to advise a school district during day-to-day decision-making or to represent the district before a court or other legal authority when legal challenges are raised. A school district's attorney can consult with the board and key administrators on specific legal issues; draft and review contracts; customize, draft, and audit the district's policies and procedures; negotiate with third parties on behalf of the district; provide written legal opinions; attend board meetings; and represent the district in administrative and court proceedings.

**In-house counsel:** Some districts find it both advantageous and economical to hire one or more attorneys to work as employees of the school district as *in-house* counsel. In-house counsel usually act as general counsel to the district and provide routine legal services for the district. The district usually will retain counsel from private law firms to represent the district in litigation or on projects that require specialized legal expertise. (For more, see below at Considering In-House Counsel)

### Hiring a School Attorney

#### **How does a district select (procure) a school attorney?**

The following information is generally applicable, but certain arrangements with attorneys are subject to specific requirements. See the discussion below regarding [contingent fee](#) arrangements.

**Competitive procurement is not required.** The Texas Education Code specifically states that the competitive procurement requirements for contracts over \$50,000 do not apply to contracts for professional services rendered, including services of an attorney. Tex. Educ. Code § 44.031(f). In addition, attorneys are not listed in the Professional Services Procurement Act as professional services for which the use of competitive bidding is specifically prohibited. See Tex. Gov't Code §§ 2254.001-.006 (requiring a specific process for hiring certain professionals, including architects, engineers, and accountants). Therefore, a district may procure the services of an attorney or a law firm by any means the board deems appropriate, unless any or all of the provisions of Texas Government Code Chapter 2254, Subchapter C apply. See Contingent Fee below.

**Send a request for proposals or qualifications.** To ensure that the district is getting the best value and a well-qualified attorney, the board should use some type of procedure to elicit information from potential candidates. Most boards use either a *request for proposals* process or a less formal *request for qualifications* process, inviting firms to submit materials describing their professional qualifications to provide legal services to the district.

**Conduct interviews.** Written submissions should be followed by interviews with the top candidates. The information gathered from potential candidates aids the board in determining whether the district's needs can best be met by a local attorney or firm or by an attorney or firm in another location. For more information on the selection of a school attorney, see National School Boards Association, [Selecting and Working with a School Attorney: A Guide for School Boards](#) (1997).

**Consider recommendations and other resources.** When searching for the right attorney or law firm, the board should seek recommendations from other school districts. In addition, the board should consider the experience of district personnel who have worked with attorneys representing the district in the past; they may be able to identify areas where legal services have been most necessary and useful, as well as characteristics that made a lawyer or firm a particularly good fit for the district. Most law firms maintain websites that may provide additional information for a board to consider.

Although TASB Legal Services does not recommend specific attorneys or firms, the membership list of the [Texas Council of School Attorneys](#) (CSA) is available [by name](#) or [by region](#) on the TASB Legal Services website. CSA is an organization of attorneys who represent at least one Texas public school district and avoid representing parties whose interests are adverse to a district. Together, these attorneys represent over 90 percent of the school districts in Texas. CSA promotes relationships among school attorneys and offers continuing legal education programs and other assistance to its members.

In addition, [Martindale-Hubbell](#) provides a database of background information on attorneys, and the [State Bar of Texas](#) provides information regarding an attorney's license and any disciplinary history.

### **What qualities should a district look for in a school attorney?**

In interviewing and evaluating prospective counsel, the board should consider relevant factors, such as the following:

#### **Experience and expertise:**

- How much experience and expertise does the attorney have in the major areas of school law?
- What expertise and experience could be provided by other members of the attorney's firm, if any?
- What percentage of the attorney's time is spent representing school districts?
- If the attorney is hired for a particular purpose, such as bond counsel or collection of delinquent taxes, what is the attorney's expertise in that area? Note that both of these areas of representation may implicate some of the requirements of Texas Government Code Chapter 2254, Subchapter C, discussed below at Contingent Fee.

**Quality:**

- What is the quality of the legal services provided by the attorney or firm?
- What other clients does the attorney represent?
- What do those clients say about the attorney?

**Cost:**

- Are the fee arrangements offered flexible enough to provide the services the district needs while remaining sufficiently economical for the district's budget?
- Can the attorney and district arrive at a mutually agreeable fee arrangement? (For more, see information below on fee arrangements.)

**Accessibility:**

- Is the attorney available and willing to attend board meetings or hearings at the district's request, either in person or by telephone or videoconference?
- Will the attorney be easy to reach by phone, email, or other electronic communication?
- Is the attorney committed to keeping the appropriate district representatives fully informed about developments in matters involving the district?
- Will the attorney personally perform or supervise the district's legal work?
- What role will be played, if any, by other attorneys, law clerks, and legal assistants?

**Conflicts of interest:**

- Does the attorney or firm represent any other clients that might present a conflict of interest in the future?
- Does the attorney have a family or other relationship with a board member or administrator that may present a conflict between the interests of the district and the interests of the individual board member or administrator?

**Personality:**

- Will the attorney's personality and manner complement those of the board, the administration, and staff?

**Professional organizations:**

- Does the attorney participate in professional organizations, such as the State Bar of Texas School Law Section, the Texas Council of School Attorneys, or the NSBA Council of School Attorneys?
- Has the attorney demonstrated a commitment to public education through involvement in these or other activities?

**How does a district finalize its choice of a school attorney or law firm?**

**The board decides.** The board, acting as a body corporate, selects and retains the district's attorney. While the superintendent's recommendation is valuable, the board represents the district that will be the attorney's client.

**Discuss in open session.** Discussions and deliberations regarding the retention of an attorney, interviews with prospective counsel or discussions of their qualifications, and discussions or negotiations of the contract between the district and its attorney may *not* be conducted in closed meetings. All such discussions and deliberations must be conducted in properly posted open meetings. An outside attorney or law firm is an independent contractor; therefore, the personnel exception in the Open Meetings Act does not apply. Tex. Gov't Code § 551.074; Tex. Att'y Gen. Op. No. MW-129 (1980). Of course, if the district is employing an attorney to serve as a member of its staff, then the attorney will be an employee of the district and his or her employment may be discussed in closed session pursuant to the personnel exception.

**Nepotism laws may apply.** According to the attorney general, the nepotism laws applicable to school districts apply to independent contractors as well as to employees. Tex. Att'y Gen. Op. No. DM-76 (1992). Accordingly, a school district may not hire an individual related to a board member within a prohibited degree to provide legal services, regardless of whether the individual is hired as a regular employee or as an independent contractor. The attorney general has opined, however, that the nepotism laws may not apply to prohibit the retention of a law firm in which a board member's relative owns an interest. Tex. Att'y Gen. LO-97-028 (1997).

**Should a district sign a contract with its school attorney or firm?**

Although it is not legally required, school districts are strongly encouraged to retain an attorney or law firm pursuant to a written agreement. This agreement should include the effective dates of the contract; a description of the fee structure, including terms related to the provision of cost or fee estimates; the attorney's duties; the positions or persons within the district with whom the attorney is authorized to communicate; insurance requirements; billing and payment schedules, including the level of detail expected on invoices; the conditions under which the contract may be cancelled; and any other terms or conditioned agreed to by the parties.

## What are the possible fee arrangements for legal representation?

**Hourly rate:** Some attorneys or firms charge an hourly rate for all legal services provided to school district clients. In this case, a district should inquire about the hourly rates for other firm personnel who may perform legal services for the district, such as consulting attorneys, legal assistants, and law clerks.

**Retainer:** Many firms that specialize in school law offer a retainer agreement under which a district pays a set amount for certain specified services, such as phone or email consultation, periodical subscriptions, policy drafting or review, agenda preparation or review, or limited in-service training. Additional services, like attending hearings, advice on complex or open-ended legal issues, or significant training events may be provided at an additional hourly rate. A retainer agreement should define clearly the legal services covered by the retainer and those services covered by an hourly rate.

The retainer may be a fixed monthly or annual rate or a *not-to-exceed* fee. A fixed rate remains the same no matter how much work the attorney or firm performs under the retainer in a particular period. Under a not-to-exceed fee, the attorney or firm bills the district at an hourly rate up to a predetermined maximum. If the bill for the month does not reach the maximum, the district pays only for the hours of legal services provided. If the bill exceeds the maximum, the district pays only the agreed maximum for services covered by the retainer; other services are billed at an hourly rate.

**Flat fee:** A district may enter into a flat fee arrangement where the board agrees to pay a fixed amount for legal services without regard to the actual number of hours of worked. A flat fee arrangement may be appropriate for such legal services as an in-service training, a response to a demand letter, a written legal opinion, service as a hearing officer, attendance at a set number of board meetings, or representation in a contested matter.

The attorney general opined that a flat fee arrangement is not a gift of public funds in violation of the Texas Constitution, article III, section 52, if the board determines that the fee arrangement accomplishes a public purpose, the board retains sufficient control over the expenditure to ensure that the public purpose is accomplished, and the district receives a return benefit. The fact that board membership may change over the period of representation does not result in a lack of sufficient control to ensure the public purpose is accomplished. Whether the fee will return a *sufficient* benefit to the district depends on such factors as the complexity and quality of the representation, as well as the number of hours of legal services provided. The benefit received and the expenditure need not be equal; however, gross disparity that suggests unconscionability, fraud, or bad faith could raise questions as to the sufficiency of the benefit received. Tex. Att’y Gen. Op. No. KP-99 (2016).



**Contingent fee:** A contingent fee contract is a contract for legal services under which the amount or payment of legal fees is contingent on the outcome of the matter for which legal services were obtained. Tex. Gov't Code § 2254.101. For example, they are frequently used when a client who is a plaintiff in a legal proceeding agrees to pay an attorney a share of any award recovered in the proceeding.

**Selection:** As of September 1, 2019, a school district procuring legal services under a contingent fee contract must select a well-qualified attorney or law firm on the basis of demonstrated competence, qualifications, and experience in the requested services; and attempt to negotiate a contract for a fair and reasonable price. Tex. Gov't Code § 2254.1032.

**Public Notice & Meeting:** A district may enter into a contingent fee contract only after giving written notice, at or before the time required for notice of the meeting described below under the Open Meetings Act (OMA), to the public stating the following:

- the reasons for pursuing the matter for which the attorney or firm is retained and the desired outcome;
- the competence, qualifications, and experience demonstrated by the attorney or firm selected;
- the nature of any relationship between the district and the attorney or firm;
- the reasons the legal services cannot be adequately performed by attorneys and supporting personnel of the district (if any);
- the reasons the legal services cannot be reasonably obtained by attorneys under a contract for an hourly fee; and
- the reasons that the contingent fee contract is in the best interest of the residents of the district.

The board must approve the contingent fee contract in an open meeting called for the purpose of considering the matters listed in the public notice. Tex. Gov't Code § 2254.1036(a). A contingent fee contract approved under these provisions is public information under the Public Information Act and may not be withheld from a requestor. Tex. Gov't Code § 2254.1037.

**Findings:** On approval of a contingent fee contract, the board must state the following findings in writing:

- there is a substantial need for the legal services;
- the legal services cannot be adequately performed by the attorneys and supporting personnel of the district (if any); and

- the legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees, without regard to the outcome of the matter, because of the nature of the matter for which the services will be obtained or because the district does not have funds to pay the estimated amounts required under a contract providing only for the payment of hourly fees.

Tex. Gov't Code § 2254.1036(b).

**Attorney General (AG) Review:** Before a contingent fee contract is effective and enforceable, a district must receive AG approval of the contract. The district must file the contract with the AG along with a description of the matter to be pursued, a copy of the public notice and a statement of how and when it was given, and a copy of the statement of findings. Within 90 days of receipt, the AG may approve the contract or refuse to approve the contract in accordance with Texas Government Code section 2254.1038. A refusal to approve a contract may be contested by a district. Tex. Gov't Code § 2254.1038.

Texas Government Code section 2254.1034 specifies the claims for which a district may and may not require an attorney or law firm to indemnify the district under a contingent fee contract.

Only Sections 2254.1032 (selection), 2254.1034 (indemnification), 2254.1036 (notice and approval), and 2254.1037 (contracts as public information) apply to contracts under Texas Tax Code section 6.30 (delinquent tax collection) or Texas Government Code section 1201.027 (legal services in connection with issuance of public securities). Tex. Gov't Code § 2254.102(e).

A contract entered into in violation of Texas Government Code chapter 2254, subchapter C is void as against public policy. Tex. Gov't Code § 2254.110. If there is doubt about whether a contract with an attorney or law firm is subject to any or all of these requirements, a district should discuss it with an attorney in a position to advise the district.

**Costs:** An agreement for legal services will likely require the district to reimburse the attorney or firm for expenses directly related to providing legal services to the district, such as travel, postage, copies, filing fees, expert fees, and the like. Districts should not agree to pay overhead costs, such as general maintenance expenses, personnel costs, or membership fees.

### **Considering In-House Counsel**

#### **What services do in-house counsel provide for school districts?**

The scope of legal services provided by in-house counsel depends on the number and expertise of attorneys employed by the district and the needs and resources of the district. Typical tasks may include the following:

**Risk management:** Because in-house counsel are generally more familiar with district personnel and operations, they are uniquely positioned to identify and reduce legal risks in the district, to advise district officials within the context of local needs or other local considerations, and to anticipate interconnected legal needs that reduce future legal risks. In addition, administrators may be more likely to seek answers earlier from in-house counsel, instead of guessing and hoping for the best when trouble is brewing. Not only can administrators seek input from in-house counsel in the early phases of planning and establishing day-to-day procedures, but they also get a more timely response from an attorney dedicated to the district. In-house attorneys spend a significant portion of their time doing “preventative” legal work by answering inquiries from district employees, participating on the superintendent’s leadership team, disseminating new legal information, drafting and reviewing policies, auditing district records for legal compliance, negotiating and reviewing contracts, preparing written legal opinions on issues facing the district, and attending board meetings. In-house counsel also may investigate allegations of employee wrongdoing, discrimination, or harassment.

**Management of legal services:** In-house counsel can encourage effective management of all legal services to the district. Most in-house counsel monitor the work done and bills sent by outside law firms that represent the district.

In-house counsel also can assist with certain aspects of litigation, such as coordinating the discovery process or handling subpoenas served on the district. In-house counsel can ensure that legal advice and litigation strategies impacting the district are consistent, uniform, and not contradictory to other district operations.

**Dispute resolution:** In-house counsel may meet with complaining parties informally in order to resolve a dispute before it reaches the board or requires the involvement of an outside law firm. In-house counsel may also advise administrators in handling grievances.

**Training:** Consistent and high quality staff training is essential to avoiding legal pitfalls in a school district. In-house counsel routinely develop and conduct training for staff and board members on legal issues as part of the district’s strategic plan.

### **What services don’t in-house counsel provide for school districts?**

Despite the broad scope of legal services that in-house counsel can provide, there are circumstances when a district will need to retain outside counsel. This may be driven by the capacity of the legal department to handle the volume of work or by the nature of the particular issue. Some areas that might warrant retention of outside counsel include the following:

**Litigation:** If a district becomes a party to litigation, either as a plaintiff or a defendant, it will be necessary to retain counsel to represent the district in that litigation. Sometimes this representation may be covered by a district’s insurance coverage. See [We’ve Been Sued! Now What?](#)

**Special projects:** Depending on the experience and expertise of a district's in-house counsel, certain matters or projects may require more specialized counsel. This might include elections to approve a tax rate, bond elections and issuances, alleged Title IX violations, eminent domain, special education matters, or politically-charged issues.

### **How much does in-house counsel cost a school district?**

The component costs include:

**Salary and benefits:** This must be considered for the attorney positions as well as administrative staff and legal assistants.

**Overhead:** This includes the customary cost of office space, furniture, equipment, utilities, and other facility overhead expenses.

**Unique costs:** Adding a legal department will likely require paying for specialized legal research materials, mandatory continuing legal education training, mandatory State Bar of Texas membership, and voluntary membership in the State Bar of Texas School Law Section, Texas Council of School Attorneys, and NSBA Council of School Attorneys.

### **How much does in-house counsel save a school district?**

A board considering in-house counsel should compare the estimated cost of in-house counsel based on the components set out above with the annual cost of legal services of the type that in-house counsel would provide. Direct cost savings alone may not offset the increased cost of adding one or more positions on the payroll; however, considering the money saved by renegotiating contracts, resolving disputes earlier, managing legal services more efficiently, and preventing legal claims through more legal training, in-house counsel may be a bargain for some school districts. Although cost savings cannot be guaranteed, many districts realize significant savings, depending on the size and circumstances of the district.

## **Communicating with Your School Attorney**

### **Who does a school attorney represent?**

An attorney's relationship with a client is governed primarily by the Texas Disciplinary Rules of Professional Conduct—the ethical rules applicable to every attorney licensed in the state of Texas. A school district's attorney represents the district as an entity, not any single person associated with the district. The board of trustees, acting as a body corporate, governs the district. Consequently, the attorney owes the ethical obligation to the district, not to any individual board member, board officer, or employee, including the superintendent. Tex. Disciplinary R. of Prof'l Conduct 1.12. Under certain conditions, the attorney may also provide limited representation of individuals acting for the district. Such circumstances may arise when

a lawsuit is filed against the district and individual administrators or trustees are named as co-defendants. This can only occur, however, when there is no conflict in the interests of the parties. Tex. Disciplinary R. of Prof'l Conduct 1.06.

In some larger districts, the board may retain counsel specifically to represent the board and its interests. This special counsel role may supplement the work of general counsel or other outside counsel, but the representation focuses on providing immediate and direct advice to the board. Typically, outside of board meetings, the board's counsel will coordinate primarily with the board president or board officers to avoid unnecessary expense, confusion in communication, or concerns about violating the Open Meetings Act. The attorney for the board may facilitate communication and coordination between the board and administration and help ensure compliance with the Open Meetings Act, the rules of parliamentary procedure, and local board policy during board meetings. Like other attorneys for the district, board counsel represents the district's interests and not those of any individual trustee.

### **Who in the district may communicate with the school attorney?**

When an attorney represents an entity, such as a school district, the attorney may report to and accept direction from the entity's *authorized* representatives. Tex. Disciplinary R. of Prof'l Conduct 1.12. Generally, in a school district this could include the superintendent and other specified administrators, as well as board members.

To control the flow of information and the cost of legal services districts often limit the persons who have access to the district's attorney. In most districts, the superintendent and the board president are the primary contacts for the district's attorney. In some districts, the other trustees may also contact the attorney. Depending on factors like the size and complexity of the school administration, other administrators—such as business managers, campus principals, and assistant superintendents—may need access to the attorney. Both the district and the attorney need a clear understanding of who is authorized to call the attorney and under what circumstances. The parameters should be specified in the written agreement between the attorney and the district, in TASB Policy BDD(LOCAL) or other written procedure, or both. In deciding who may contact the district's attorney, a district should bear in mind that the wider the circle of access, the greater the potential for unexpected legal costs and the need for outside counsel to help harmonize diverse points of view. On the other hand, the cost of not seeking advice can far outweigh the cost of a preventative phone call. Each district must decide how best to strike the balance between the need to control costs and the need to get timely legal advice.

### **Are communications with a school attorney confidential?**

**From the public:** The Rules of Professional Conduct prohibit an attorney from revealing confidential client information—that is, information regarding a client or supplied by a client during the course of representation. Tex. Disciplinary R. of Prof'l Conduct 1.05. Further, the attorney-client privilege protects from disclosure confidential communications between a client

and its attorney that were made for the purpose of obtaining legal advice. Tex. R. Evid. 503. By shielding those communications, the privilege allows unrestrained communication and contact between the attorney and client, without fear that the communications will be revealed in public or a legal proceeding. *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied).

For Texas school districts, the attorney-client privilege protects communications from disclosure in litigation as well as in response to public information requests. Tex. Gov't Code § 552.107. In fact, the Texas Supreme Court found the attorney-client privilege to be a compelling reason to overcome the presumption of openness under Texas Government Code section 552.302. *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017). According to the Court, “in the public sector, maintaining candid attorney-client communication directly and significantly serves the public interest by facilitating access to legal advice vital to formulation and implementation of governmental policy. Full and frank legal discourse also protects the government’s interest in litigation, business transactions, and other matters affecting the public.” *Dallas*, 509 S.W.3d at 250. Without the privilege, school districts might fail to engage in “fruitful self-analysis and decide not to seek needed legal advice.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

It is important to remember that an in-house attorney may function in multiple capacities: for example, as a lawyer when giving legal advice and as an administrator when performing administrative tasks, such as providing training on legal compliance. Thus, all communications with in-house counsel are not necessarily confidential and protected from public disclosure.

The Open Meetings Act also protects a district’s communications with its attorney by allowing a private consultation when the board seeks its attorney’s advice about pending or contemplated litigation or a settlement offer, or on a matter in which the attorney’s duty of confidentiality conflicts with the requirement for an open meeting. Tex. Gov’t Code § 551.071.

**Not from the board:** Although communications with the school attorney are generally privileged from the public, individual communications by authorized district representatives with access to the school attorney are not privileged from the *client*, namely the board acting as a body corporate on behalf of the district. When dealing with the district’s school attorney, board members and district personnel must remember that the attorney represents the district, which acts through a majority of its board members. Therefore, the attorney does not represent the interests of any individual board member, administrator, or employee. Tex. Disciplinary R. of Prof’l Conduct 1.12. As a result, what an individual board member, administrator, or employee tells the school attorney and the advice the attorney renders cannot be kept from the board when it implicates the district’s broader interest. Moreover, the board should expect the school attorney to keep the superintendent informed about board members’ questions and the attorney’s advice, unless the consultation involves a matter in which the board and superintendent have conflicting interests.

**What are some ways to facilitate clear communication with the district’s school attorney?**

**Call early.** As stated, a key to managing risk is calling the attorney before problems develop. While school attorneys may have considerable knowledge about issues facing schools, everyone benefits from more time to fully consider and, if necessary, research legal issues.

**Communicate facts as completely and accurately as possible.** Every legal opinion is limited by and to the underlying facts and circumstances as understood by the attorney giving the advice. If an attorney lacks relevant information at the time advice is given, the advice may be incomplete or flawed. Thus, it is important to give the attorney as much accurate information as possible.

**Listen carefully.** Both school attorneys and districts benefit from taking the time to communicate carefully about the substance of the attorney’s legal advice. Attorneys may assume that school officials have more information about a situation or relevant legal authorities than they do. On the other hand, school officials may hear only what they expect or want to hear when an attorney offers advice. Taking the time to clarify understanding will prevent problems later.

This document is continually updated, and references to online resources are hyperlinked, at [tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Governance/documents/working-with-your-sch-attorney.pdf](https://tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Governance/documents/working-with-your-sch-attorney.pdf). For more information on this and other school law topics, visit TASB School Law eSource at [schollawesource.tasb.org](https://schollawesource.tasb.org).

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.*

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