

David L. Fist
 A.F. Ringold
 Coleman L. Robison
 J. Douglas Mann
 John G. Moyer, Jr.
 John E. Howland
 Jerry L. Zimmerman
 Mark S. Rains
 Frederick J. Hegenbart
 Andrea R. Kunkel
 Eric P. Nelson
 Karen L. Long
 John E. Priddy
 Bryan K. Drummond
 Matt P. Cyran
 Eric D. Wade
 Cassandra L. Wilkinson

Of Counsel
 Jerry A. Richardson
 Larry A. Lewis
 Kent "Bo" Rainey
 Catharine M. Bashaw
 Jana R. Burk

C.H. Rosenstein
 (1893-1990)

Henry L. Fist
 (1893-1976)

Volume 17
 Issue 1

Copyright 2006
 Rosenstein, Fist &
 Ringold, Inc.

Chalkboard

525 South Main, Suite 700 Tulsa, Oklahoma 74103 (918) 585-9211
 2801 N. Lincoln Blvd., Suite 224 Oklahoma City, Oklahoma 73105 (405) 521-0202
 Internet Web Site - www.rfrlaw.com

SELECTING AN INSURANCE COMPANY

Annually, the administration and board of education of every school district in Oklahoma are faced with the task of selecting one or more insurance companies to protect their district against risk of loss. It goes without saying that this is a daunting task. Many school districts rely solely upon a local insurance agent, who obtains and evaluates quotes and makes a recommendation regarding the selection of a company and policy. Does this approach serve the interest of the school district?

Certainly there are many very fine insurance agents in business across the State of Oklahoma. Some are affiliated with one insurance company or another, while others are independent agents. The vast majority of

these individuals do a fine job in representing their clients and in obtaining good quality insurance from reputable companies, but questions remain. Has the agent found the best deal for the school district? Does the company selected meet the needs of the district? Is there a better fit for the district?

Even the finest insurance agent will not have the knowledge of your business - public education - that you have. This knowledge is critical to the selection of an insurance company to serve your district and a policy to meet your needs. It is critical to the process that the district and the agent work together in order to assure that the district receives quotes, and ultimately a policy of insurance, that meets the needs of the district.

Here are some suggestions as to how your board of education might go about selecting a policy of insurance to meet the needs of your district.

1. Independent Agent. Begin with the understanding that it is the responsibility of

IN THIS ISSUE

SELECTING AN INSURANCE CO.	1
THE EVOLVING DEBATE ON EVOLUTION IN PUBLIC SCHOOLS	2
THE PERILS AND PITFALLS OF EQUIPMENT LEASING AGREEMENTS	3
RFR ALERT: PUBLIC TRUST CONDUIT FINANCING AND GENERAL OBLIGATION BONDS MIGHT VIOLATE OKLAHOMA LAW	4
THE OKLAHOMA OPEN MEETING ACT ..	7
RFR SPEAKERS AND/OR EVENTS SHOWCASE	8

the board of education and administration to select the right company based upon information collected from various sources, including your agent or broker. Selecting an insurance professional to assist you in this process is a good first step. Seek someone who is an independent agent, with a good reputation, who will look at all of the options available to you. If possible, select an independent agent who knows something about Oklahoma school districts or is at least willing to learn.

2. Request for Proposal (RFP). Work with your independent agent to construct an RFP to be sent to those insurers who write insurance for school districts in Oklahoma. Some of the information which you will want to know in order to make a decision for your district includes:

- a. the rating of the insurance company;
- b. the location of the insurance company;
- c. who will handle adjustment of claims, the location of the company's adjusters, and are they knowledgeable about school districts and school law;
- d. does the company allow the school district to select or approve legal counsel (the school district must be involved in selecting the attorney who will defend the school district);
- e. what is and what is not covered by the proposed insurance policy;
- f. what is the term of the proposed insurance policy;
- g. whether the proposed insurance policy is a "claims made" policy or not; and
- h. what is the deductible.

An RFP should be prepared by your agent, in consultation with the administration and board of education.

3. Timeliness and Time Lines. You can determine when your current insurance policy expires by looking at the "Declaration Page." Start early to assure that you have plenty of time to work through the selection process with your agent and to obtain quotes in response to your RFP. Think in terms of

months in advance - rather than weeks.

4. Review of Agent's Recommendations. The superintendent should meet with the agent to review proposals made by various insurance companies in response to your RFP. This initial meeting is for the purpose of considering the proposals. Of course, the RFP itself will help in determining which company or companies have submitted proposals that are truly responsive to the RFP.

5. Board's Action. Finally, the board of education must act to approve the selection. At this point, hopefully you will have a number of good proposals from which to select.

Needless to say, a thorough discussion of all of the above issues would take up this entire publication and be far too boring to read. In the coming months, we will address other issues in a series of articles on insurance. If you would like to pose a question regarding the acquisition of insurance or any matter discussed above, please e-mail me.

John Moyer may be reached at johnm@rflaw.com

THE EVOLVING DEBATE ON EVOLUTION IN THE PUBLIC SCHOOLS

The winds of controversy surrounding the teaching of evolution in public schools have recently been blowing in a Pennsylvania federal courthouse and the halls of the Kansas Board of Education. Triggering this tempest is a recent alternative to Darwin's theory of evolution known as "intelligent design," which is commonly described as the belief that the world and its creatures are too complex to have arisen through random patterns of evolution and must be the product of some intelligent designer.

In late 2004, the Dover Area School District adopted a new science curriculum. This new curriculum requires all ninth grade biology students to hear an administration-read statement at the beginning of the class recognizing intelligent design as an alternative to Darwin's theory of evolution.

Additionally, the School District has made available in its high school library copies of a textbook donated by a local church that support intelligent design theory.

However, before the new science curriculum could be implemented a group of parents brought suit in federal court challenging the constitutionality of the school district's actions on the principal ground that they violate the Establishment Clause of the First Amendment to the United States Constitution by endorsing or inhibiting religion.

Both parties to the lawsuit agree that the constitutionality of the school district's new science curriculum will hinge upon application of the test set forth in the United States Supreme Court's decision *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon Test*, as it is commonly known, states that governmental action is unconstitutional and offends the Establishment Clause if it: (i) has a secular purpose; (ii) has the principal or primary effect of advancing or inhibiting religion; or (iii) fosters an excessive entanglement of the government and religion.

Trial testimony ended in early November. On December 20, 2005, the District Court entered its 139 page opinion. In summary, the court held: "The proper application of both the endorsement and Lemon tests to the facts of this case makes it abundantly clear that the [school district's intelligent design policy] violates the Establishment Clause" and, therefore, was unconstitutional. Furthermore, the court specifically held that intelligent design is not science and that intelligent design "cannot uncouple itself from its creationist, and thus religious, antecedents." It is uncertain whether an appeal will be taken since eight board members who voted for the curriculum change were defeated in recent elections, and on January 3, 2006, the board voted unanimously to rescind the School District's intelligent design policy. General information about the lawsuit as well as the court's opinion can be viewed online at <http://www.pamd.uscourts.gov/kitzmiller/kitzmiller.htm>.

A similar controversy recently arose in Kansas when the State Board of Education voted to approve changes in the State's science standards. These controversial changes to take effect in the spring of 2006, reportedly urged and supported by proponents of intelligent design, include not only revising the state's science standards to include criticisms of evolution, but also changing the definition of science itself. Formerly, science was defined as "a human activity of systematically seeking natural explanations for what we observe in the world around us. The new definition, which deletes the term "natural explanations," states now that science is "a systematic method of continuing investigation that uses observation, hypothesis testing, measurement, experimentation, logical argument and theory building to lead to more adequate explanations of natural phenomena."

The renewed debate on the teaching of evolution in public school classrooms means that school administrators and board members must be cognizant of any proposed changes to a district's science curriculum or textbooks, despite however simple or innocuous they may appear. Given the significant and expensive legal battles that can erupt, school officials should timely seek the advice of their legal counsel when confronted with such issues.

Bo Rainey may be reached at borainey@rflaw.com

THE PERILS AND PITFALLS OF EQUIPMENT LEASE AGREEMENTS

School districts have a variety of equipment needs. In satisfying those needs, a school district has several options, one of which is to lease equipment. When leasing, schools need to be aware of and avoid several pitfalls that commonly appear in equipment lease agreements.

Many lease agreements contain a choice of law provision and forum selection clause. A choice of law provision simply states that the parties to the lease agree that a particular state's law governs the parties' rights and obligations under the agreement. A forum selection

clause is a stipulation on the jurisdiction (*i.e.*, location) in which a lawsuit pertaining to the lease must be filed. An Oklahoma school district should never sign a lease that imposes the laws of a state other than Oklahoma on the school district. Entering into such an agreement could cause a school district to lose protections afforded to it under Oklahoma law, such as the Oklahoma law that requires a vendor to tender a deed or bill of sale to the leased equipment once the school district has made lease payments that equal the purchase price of the equipment plus interest. Similarly, a school district should never sign a lease that contains a forum selection clause that specifies a jurisdiction other than Oklahoma. Entering into an agreement that contains a non-Oklahoma forum selection clause could subject the school district to the burden and expense of being sued in another state.

Some lease agreements may contain a guarantor or surety provision. This type of provision is a promise by a third party to pay the school district's obligations under the agreement in the event the school district does not pay. When this type of provision appears in a lease agreement with a school district, it is often a board member, administrator, or school employee who has promised to act as a guarantor or surety. A school district should never enter into a lease agreement where any board member or school district employee promises to pay in the event the school district does not. Under certain circumstances, there may be good reasons for a school district not to continue paying under a lease agreement. If there is a guarantor or surety provision in the agreement, the vendor could sue both the school district and the individual who signed as guarantor or surety. The individual and the school district would have opposing interests in such a lawsuit, which means the individual would have to hire separate legal counsel at his own expense. The individual could be personally liable to the vendor, and the Oklahoma laws protecting school districts from overreaching language in the agreement would probably not protect the individual. This situation should never be allowed to occur, and a school district should refuse to enter into a lease agreement with any vendor who is not willing to do business with an Oklahoma school district without a guarantor or surety.

The Oklahoma Constitution imposes fiscal year limitations on school districts. A school district cannot enter into a lease agreement that binds the school district's revenues for succeeding fiscal years. An agreement that does so is void. School districts have the authority to rent real or personal property only for a

period that does not extend beyond the then-current fiscal year. An agreement may, however, have a non-mandatory term that extends beyond the then-current fiscal year if the agreement also contains provisions for mutual ratification of renewal. Simply put, this means that both the vendor and the school district must have the option of renewing the agreement beyond the then-current fiscal year, but if they do not both exercise that option, the agreement terminates at the end of the then-current fiscal year. A school district can only exercise that option through an affirmative vote by the board of education. Quite often, equipment lease agreements violate these principles by containing mandatory terms that stretch beyond the then-current fiscal year. A school district should make sure that any lease agreement it enters does not contain a mandatory term that extends beyond the then-current fiscal year.

Oklahoma law requires all lease agreements with school districts to include the purchase price of the property being leased. The lease cannot be extended so as to cause the school district to pay more than the original purchase price of the property, plus the legal rate of interest. Once the purchase price plus interest has been paid, the property belongs to the school district, and the vendor must deliver a deed or bill of sale for the property to the school district. A school district should ensure that any lease agreement it enters contains the purchase price of the leased property. Additionally, a school district would be well-advised to keep track of its payments to make sure that it does not pay more than the original purchase price of the property plus interest.

Eric Wade may be reached at ericw@rflaw.com

**RF&R ALERT:
CERTAIN TRANSACTIONS
INVOLVING PUBLIC TRUST
CONDUIT FINANCING AND
GENERAL OBLIGATION BONDS
MIGHT VIOLATE OKLAHOMA LAW**

Rosenstein, Fist & Ringold has previously advised our clients that we are now supplementing the legal representation which we offer our school districts by providing legal representation service, counsel and guidance in the area of tax exempt bond

financing. In the course of our representation of clients, it has come to our attention that certain bond financing techniques being considered or used throughout the state could be violative of Oklahoma law. This alert sets forth a financing technique which we believe has been used in Oklahoma and which arguably does not comply with Oklahoma law. This technique, referred to as "conduit financing" involves the use of a public trust and the issuance of revenue bonds to make improvements to school district property. The clearest way to present this extremely complex structure is to use an example.

Example

Set forth below, for illustrative purposes, is an example of the financing transaction which gives us concern.

1. School District desires to build a gymnasium for \$2,000,000.
2. The School District's building fund is insufficient and its bonding capacity in the current year and over the next several years is only \$400,000 per year due to the valuation of the property within its geographic boundaries and the outstanding indebtedness of the School District. Thus, even if the School District issues general obligation bonds to the maximum extent allowed by law, the money generated by the sale of its bonds will be far less than the amount needed to construct its gymnasium.
3. A public trust (either an existing trust or one created for the purpose) agrees to assist the school district by entering into a ground lease covering the construction site, building the gymnasium and subleasing the improved property back to the school district.
4. The public trust finances the construction cost by issuing revenue bonds. The issuance by the public trust of revenue bonds does not require a vote of the people and is not subject to Constitutional debt limits.
5. The School District, recognizing the value of the commitment by the public trust, leases its ground to the public trust so that the public trust

now has a tract of land upon which it can construct the gymnasium.

6. The public trust subleases the ground back to the School District, along with the gymnasium on that ground, which the public trust has caused to be built. The cost of the project has been paid from the loan proceeds which the public trust received in connection with its sale of its revenue bonds.
7. The school district will be required to pay sufficient rent to the public trust to repay the principal and interest due under the trust's revenue bonds.
8. As a result, the School District proposes a general obligation bond issue whereby it will issue general obligation bonds in the amount of \$400,000 per year serially to "construct, acquire and equip a gymnasium."
9. The School District's general obligation bond referendum passes. The money received by the School District as a result of the School District's bond issue is being used to pay rent to the public trust under the School District's sublease with the public trust.

The Problem

We have been advised that some school districts are considering or have already entered into conduit financings where the installments of rent are paid through the issuance of the school district's general obligations bonds approved by the voters, to be issued annually as bonding capacity permits for the purpose of "constructing, acquiring and equipping a gymnasium."

The fundamental problem with this structure is that the proceeds which the School District received from the issuance of its general obligation bonds may not be used to make payments under its sublease pursuant to which it subleases the gymnasium from the public trust. The conduit financing of the public trust is not the problem.

Article X, Section 26(a), of the Oklahoma Constitution allows school districts to issue bonds, subject to financial limitations and voter approval,

for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment. The Oklahoma Constitution does not allow school districts to issue bonded indebtedness for the purpose of paying lease payments. The Oklahoma School Code authorizes school districts to rent property or lease-purchase property provided that the lease payments must be made out of appropriations for the applicable, current fiscal year. The rule is clear: if lease payments are made by a school district, they must be made from annual appropriations and the obligation to make payments may not extend beyond the current fiscal year. Bond proceeds may not be used to make lease payments.

Additionally, with one exception that is noted below, general obligation bond proceeds may not be used to acquire title to a building, fixtures or equipment that is financed by the school district through a "lease-purchase" agreement. A lease-purchase agreement is an agreement pursuant to which (a) the school district is obligated to pay annual lease installments consisting of principal and interest, (b) the school district may terminate the lease if the necessary funds are not appropriated for a fiscal year, and (c) the school district attains title and receives a bill of sale to the assets after it has made all lease payments. The critical aspect of a lease-purchase agreement is that the school district has the right to terminate the lease-purchase agreement at the end of any fiscal year and "walk away from the deal" by returning the property that it was leasing, and without any further liability to the lessor. The only time that the proceeds of general obligation bonds of a school district can be used to acquire property being financed through a lease-purchase agreement is when the bond proceeds pay the full principal amount owed under the lease-purchase agreement resulting in a transfer of title to the property to the school district. In this manner, the school district has acquired property; not merely paid an installment payment.

On November 13, 2002, the Attorney General issued Opinion No. 2002-43 concerning the use of general obligation bonds to make annual installment payments under a lease-purchase

agreement for the purpose of acquiring buildings or equipment. Summarily, the Attorney General concluded that:

- ▶ The bonds, if issued, must be used to "acquire" school building sites, fixtures or equipment or other facilities.
- ▶ The term "acquire" means obtaining full legal title, possession or control. It specifically does not include a fractional or divided interest in a building or facility.
- ▶ No statute exists which allows a school district to make lease-purchase installments from bond proceeds if the leased property remains in the lessor and the school district does not acquire it.
- ▶ Whether proceeds of a general obligation bond are used to "acquire" title in real or personal property depends on the facts and circumstances of each case.

It is possible to use bond proceeds to accelerate the acquisition of property. However, the property must consist of personal property or equipment which can be severed from the real estate without damage to the property itself or to the building. You may not simply allocate a portion of the purchase price or construction cost to components of a building and claim to be "acquiring" these components separate and apart from the building itself.

While not addressed in Attorney General Opinion No. 2002-43, we have an additional concern with respect to the structure specified in the example and its possible violation of the Oklahoma Bond Issue Proceeds Act ("Act"). The purpose of the Act is to assure the citizens of Oklahoma that the proceeds of the bond issues which they have approved will be expended for the purposes or projects approved by them. Even in its most favorable light, it is at least questionable as to whether a general obligation bond proposal in which the electorate is requested to approve the issuance by the School District of its general obligation bonds to construct and acquire a gymnasium and its equipment" provides sufficient notice to the electorate that the proceeds will be used to pay rent or acquisition payments under an annually terminable sublease agreement with a

public trust. Any member of the board of education who knowingly violates the provisions of the Act, shall forfeit his office.

The primary concern of Rosenstein, Fist & Ringold is, and always has been, that of sound legal advice to the boards of education which we represent. We urge all school district administrators and board members to exercise caution with respect to this financing technique. We remain available to assist school districts in developing legal general obligation bond issues, and we are also available to evaluate the legal risk attributable to overly aggressive or overly creative bond issues.

Eric P. Nelson and Jerry Zimmerman are both members of the National Association of Bond Lawyers, and may be reached at ericn@rflaw.com and jerryz@rflaw.com

**THE OKLAHOMA OPEN
MEETING ACT
25 OKLA. STAT. §302 ET. SEQ.**

This is a continuation of the Chalkboard's focus on the basic requirements of Oklahoma's Open Meeting Act.

Q: What constitutes discussion of school district business?

A: The question is an important one since the board of education violates the law by conducting a meeting in a manner or at a time other than that provided for in the Open Meeting Act. The law defines a "meeting" as the "conducting of business of a public body by a majority of the members being personally together." Although the law specifically bars a majority of members from meeting informally to "decide any action or to vote on any matter," the definition of a meeting is not restricted to meetings where votes occur. Discussion of school district business by a majority of members should be regarded as triggering the statute, and should be avoided outside of a meeting complying

with the law. The Attorney General has held that the law applies when a majority of members meets to discuss appropriations or to receive insight from a group of experts; initially meets informally to discuss personal issues but moves the discussion from non-district topics to a discussion of district business matters. A.G. Op. No. 82-212. The law applies to conversations involving a majority of board members. Accordingly, two school board members meeting to discuss school business does not constitute a majority of a board (assuming the board is not a 3-member board) and no illegal meeting occurs when the two members discuss school business.

Q: Does the board violate the law when board members are canvassed to determine their availability for a special or emergency meeting and decide to meet on a particular date and time?

A: The Open Meeting Act does not expressly address this question; however, one can assume that it is allowable for members to discuss whether or not to conduct a special or emergency meeting so that the board can submit notices and agenda that comply with the Open Meeting Act. Furthermore, it would be rare that such discussions would involve a majority of the board gathered at the same time, and while the result of contacts is a determination to meet at a selected date and time, the contacts are merely ministerial concerning the date and time of the meeting and do not amount to the conducting of school business.

Q: What is the procedure for canceling a board meeting?

A: The Open Meeting Act establishes requirements needed to call a meeting, imposes minimum standards on how to conduct a meeting, and sets the procedure to be followed to change a meeting time or date. The Act contains no procedures for canceling a meeting that is no longer needed because of a change in circumstances or due to the

discovery that the board will not have the necessary quorum present to conduct district business. As a practical matter, the administration should notify those who knew a meeting was planned or normally attend that the meeting will not be held, and should post with the meeting agenda a notice that the meeting is cancelled and the circumstances that caused the cancellation.

Q: Can a "new business" item appear on the agenda for a special meeting of the board?

A: No, while every regular meeting agenda should include an item for new business, only matters appearing on the posted agenda may be considered at a special meeting. Furthermore, there are serious misunderstandings regarding what constitutes "new business." By law, the "new business" item only permits discussion and action about matters not known about or which could not have been foreseen prior to the posting of the agenda. If a matter could have been placed on the agenda but was not, no action can be taken on that item.

Karen Long may be reached at karenl@rflaw.com

RFR SPEAKER AND/OR EVENTS SHOWCASE

- *RFR School Law Workshop: Employment Terminations*
February 3, 2006 8:30 a.m. – 12:20 p.m.
Western Technology Center
OR
February 1, 2006 8:30 a.m. – 12:20 p.m.
Kiamichi Technology Center

John G. Moyer, Jr. Larry Lewis and Bryan K. Drummond
Note: each registrant receives, at no additional charge, a copy of Larry Lewis' publication regarding teacher terminations. (\$75.00 registration)

- *When It's Time to Fish or Cut Bait and Other Bloody Decisions*

January 24, 2006
MetroTechnology Center
John G. Moyer, Jr.

- *ORUEF Administrators' National Seminar*

February 2-4, 2006 San Antonio, Texas
Karen L. Long, keynote speaker and individual presentations concerning cutting edge employment issues, media/public relations, religion and education, and special education.

- *Oklahoma Federation of the Council for Exceptional Children*

February 15, 2006
Norman, Oklahoma
Andrea R. Kunkel, keynote address

- *Board / superintendent relations*

February 16, 2005
With OSSBA in Oklahoma City
John G. Moyer, Jr.

AVAILABLE: The newest publications by Larry Lewis. Each copy is \$25.00, or at a discounted rate of \$20.00 each for 5 or more copies.

- *Help for the Depressed, the Despondent, the Despised, and Those Suffering from SFLD ("School Finance Learning Disabilities")*
- *A Guide for Teacher Employment Termination for Oklahoma School Administrators with Lessons from Baseball and Proverbs*

Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.