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## Rosenstein, Fist & Ringold

# Chalkboard

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### MORAL TURPITUDE: A SLAM DUNK?

The Oklahoma Legislature has already determined that "any reason" involving "moral turpitude" can lead to the immediate dismissal of a career teacher. Plans of improvement and admonishments are not required before terminating for moral turpitude. Unfortunately, or depending on who you ask, fortunately, the Legislature did not define "moral turpitude" in the teacher termination statute. Consequently, administrators and teachers have had to look to the courts to fill in the blank. The Oklahoma courts have, in a variety of contexts, consistently defined moral turpitude as acts that: 1) are knowingly and intentionally committed, and 2) are contrary to justice, honesty or good morals to the point that the conduct, by itself, shows baseness, vileness, depravity or something immoral. As one early Oklahoma case put it, moral turpitude is a "baseness" in "private social duties which [one] owes to [another] or society in general, contrary to accepted and customary rules of right and duty between [others]."

Many tend to focus on the second prong of the test, reprehensible conduct, and lose sight of the fact that the conduct must be "intentional." In other words, was the teacher the captain of his or her own destiny? Subsumed in that same question is whether there is some nexus between the misconduct, the "moral turpitude" and the educational process itself, the safety of the students or the ability of the teacher to effectively teach or be an outstanding role model.

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Although the definition of moral turpitude appears simple enough, its application has been much more problematic. The following summary of moral turpitude decisions, including those this firm has been involved with, illustrates that point.

#### CONDUCT INVOLVING MORAL TURPITUDE

Female teacher's romantic (non-sexual) relationship with male junior high student found to be moral

turpitude.

High school counselor's falsification of student transcripts, favoritism toward own daughter and failing to maintain the integrity of school records.

Teacher's falsifying school disciplinary records by falsely reporting that parents of affected students had been contacted.

Teacher's use of racial epithets during a "weigh in" for high school wrestlers.

Teacher's solicitation of a prostitute off school grounds on a weekend, held to be moral turpitude.

Teacher/coach's consensual sexual relationship with student was moral turpitude.

### CONDUCT FOUND NOT TO INVOLVE MORAL TURPITUDE

Teacher threatening, but not carrying out physical violence against school employees during school hours, but not in front of students.

Teacher's possession of marijuana plant and paraphernalia at home.

Kegger party with high school students in teacher's back yard.

Possession of school property, lost fundraiser monies and dishonest reporting as to fundraiser money.

Teacher erroneously reporting that administrator purchased pornographic materials.

### PRACTICAL CONSIDERATION: GET ADVICE ON THE FRONT END

Termination for moral turpitude is never a "slam dunk." The legal standard used by the courts in moral turpitude cases is so broad that there is plenty of room for *both* sides to argue whether the conduct in question is base or vile enough or is "contrary to justice, honesty or good morals." Call your school attorney for advice. A detached, neutral evaluation on the front end is critical to determining if you have a strong or "marginal" case, especially since significant back wages, benefits, interest, costs and attorney fees could be at stake.

### DO A THOROUGH INVESTIGATION

This is especially critical in cases involving sexual misconduct or inappropriate relationships between teacher and student. Typically, in these situations one student may come forward or rumors may surface about an inappropriate relationship with one student. Yet, the reality might be that there are multiple current or former students involved or multiple events of reoccurring improper conduct.

If a career teacher is at a point of ignoring boundaries and having romantic or sexual encounters with students, then chances are that the same teacher has crossed the line in other areas. It is much better to present, at the board level, a pattern of misconduct instead of rushing to judgment with an isolated incident of improper conduct only to find out later that there were multiple acts of moral turpitude

involving the same teacher. Experience shows that district courts are generally reluctant to consider "after acquired" incidents of moral turpitude, i.e. offending conduct that was not presented at the board level. Thus, it is better to err on the side of being over inclusive when it comes to a recommendation for moral turpitude.

### KEEP THE BIG PICTURE IN MIND

Do not lose sight of the fact that the ultimate decision-maker in these types of cases will typically be a local district court judge or a panel of appellate judges in Oklahoma City. This is especially true now that the termination process in front of the local board of education has been streamlined.

Further, hanging the badge of "moral turpitude" on a career teacher is more than likely the "kiss of death" for future employment at another district. Accordingly, career teachers fighting the issue of moral turpitude at the board level will almost certainly take the fight to the district and appellate courts since they have nothing to lose. Thus, conduct that a local board of education directly deals with and rightly finds to be reprehensible may not look as bad on paper when the issue is ultimately presented to a panel of appellate court judges. In essence, terminations for moral turpitude should be approached in terms of "what can be proven in court" as opposed to "what can be presented to the board of education."

### THE OKLAHOMA OPEN MEETING ACT (25 OKLA. STAT. § ET. SEQ.)

Oklahoma's Open Meeting Act ("OMA" or "Act") is designed to facilitate and maximize, to the extent possible, openness in government. More often than not, questions regarding the extent to which the Act applies to a particular circumstance can be resolved by application of the overriding principle that government is to be open unless a specific limitation applies. Limitations are generally those instituted with regard to executive or closed sessions of the public body and involve issues that the Legislature has decided require a balance between the people's right to know on one side and, on the other, matters which compel closed session deliberation and discussion. Matters which have been designated as qualifying for consideration in executive session are those which the Legislature has decided require confidentiality with respect to business transactions or which involve personal privacy issues. Exceptions to the concept of open meetings are few, and departures are generally to protect the governmental body's ability to conduct business involving personnel matters, which may implicate personal privacy interests, or business transactions that would be compromised if the discussions were made public.

Violations of the OMA are frequent and most often involve impermissible discussions of business in executive session or the conduct of business in casual meetings of a majority of the body without public notice and without an agenda. The three most common violations: (1) limited and specific use of the executive session, (2) notice of public meetings, and (3) posting of an agenda which identifies with specificity the business to be conducted - represent the heart of the OMA. This article will begin a series in *Chalkboard* that will provide answers to commonly asked questions related to Oklahoma's Act.

**Q: Other than possible criminal penalties, what is the impact of noncompliance with the OMA on a governmental body's actions?**

A: The Act provides that actions taken in violation of the law are null and void. Accordingly, a decision made by the public body in violation of the Act can be overturned. Sincerity of the public body's members, belief that they were acting in the best interest of the public body and similar defenses will not insulate the body from a penalty for violations. Whether or not the body made a wise decision is irrelevant to the issue of nullification of a public body's action taken in violation of the law. The issue for a reviewing judge is solely to determine whether the Open Meeting Act was violated.

**Q: Is the public body insulated from a penalty for its violation of the OMA if it can be shown that it had a good faith intent not to violate the law?**

A: Good faith intentions of the public body's members and its employees to comply with the law do not insulate the body from nullification of actions violative of the statute. The sole issue is whether the law was violated. For instance, the fact that the body's members did not intentionally try to conceal deliberations from the public is irrelevant. Similarly, the fact that a designated employee was unable to post a meeting agenda at least twenty-four hours before the start of the meeting because he or she faced a genuine emergency that made it impossible to comply with the posting requirement is, likewise, not relevant. The sole issue is whether the agenda was or was not posted at least twenty-four hours before the meeting, not including holidays and weekends. In short, unsuccessful good faith efforts to comply with the law are just as void as conscious attempts to deceive the public.

**Q: Does the OMA apply to administrative meetings of the public body?**

A: The OMA governs meetings of "public bodies." The public body of a school district, for instance, is the Board of Education. *Staff* meetings of public bodies

need not comply with the law. Likewise, the administrative head of the public body is not required to notify the County Clerk, Secretary of State, or Municipal Clerk or post agendas when conducting staff meetings, regardless of how important the meeting might be. Similarly, a citizen has no right to attend staff meetings or meetings of the chief executive officers of the agency, city, county, school district or other public body covered by the Act. However, the Act would apply if the majority of members of the board attend an administrative meeting and discuss the board's business with the administration, management, or employees of the district.

**Q: When do members of the public body participate in a meeting?**

A: The key to determining whether a meeting, legal or illegal, is being conducted, is whether there is a discussion of the public body's business. The law defines a "meeting" as "conducting business of a public body by a majority of its members being personally together." Although the OMA specifically bars a majority of members from meeting informally to "decide any action or vote on any matter," the definition of a meeting is not restricted to meetings where votes occur. Discussion of the public body's business by a majority of its members should be regarded as triggering the statute, and should be avoided, outside a meeting in compliance with the OMA. The Attorney General has previously held that the law applies when a majority of members meet to discuss appropriations or to receive insight from a group of experts. It also applies when the public body initially meets informally to discuss issues personal to individual board members or individual members of the public body but moves the discussion from nongovernmental topics to a discussion of the public body's business. See AG Op. No. 82-212; AG Op. No. 81-184. Accordingly, the OMA is applicable, even when no decisions are made, if the discussion of the public body's business is the topic of conversation.

### CASE SUMMARY: LEAST RESTRICTIVE ENVIRONMENT

On August 11, 2004, the United States Court of Appeals for the Tenth Circuit (which includes Oklahoma) decided *L.B. v. Nebo School District*, 379 F.3d 966 (10th Cir. 2004). The parents of a student with autism claimed that the District denied the student a free appropriate public education by refusing to pay for the student's ABA program, which was administered both in the home and in a private preschool for typically developing students. The

School District had proposed the student's placement in a District preschool program for students with disabilities, all of whom functioned at a lower academic level than this student, and some typically developing children. The evidence established that the student performed better academically than all of her typically developing peers in the private preschool program.

Until this case, the Tenth Circuit had never adopted a specific standard for determining whether a school district had met the IDEA's LRE requirement. Here, the Court adopted the two-part test from *Daniel R.R. v. Board of Education*, 874 F.2d 1036 (5th Cir. 1989).

The Tenth Circuit will now use the following test to determine whether a school district has satisfied LRE requirements: (1) Can education in a regular classroom with the use of supplemental aids and services be achieved satisfactorily? (2) If not, has the school district mainstreamed the child to the maximum extent appropriate? The court will consider the following non-exhaustive factors to determine whether the first prong of the test has been met: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom.

The Court noted that other circuit courts also consider the cost of mainstreaming the child in determining compliance with the LRE mandate. However, as the Nebo School District had expressly stated that cost was not a factor in this case, the Court did not decide whether the cost of mainstreaming should be one of the factors considered in the LRE test. The Court stated that the list of factors stated above ((1) through (4) and cost) is not exhaustive and that no one factor is dispositive.

The Court weighed the factors and found the Nebo School District's proposed placement violated the IDEA's LRE requirement.

### PUBLIC COMMENT AT SCHOOL BOARD MEETINGS

Neither the Oklahoma Open Meeting Act nor the First Amendment of the United States Constitution requires school boards to hear public comments at school board meetings. However, once a school board makes the

decision to allow public comment at school board meetings, the First Amendment does prohibit certain restrictions from being imposed by the board on the comments that are allowed to be made.

A school board that invites public comment at school board meetings may impose reasonable time, place, and manner restrictions on the speech that is allowed, so long as the restrictions are content-neutral, allow alternate channels of communication, and are narrowly drawn to achieve a significant governmental interest. Restrictions on when during the meeting and for how long the public may speak are examples of restrictions that are typically considered reasonable, and a public body's interest in conducting efficient, orderly meetings has been recognized as significant by many courts.

Content-based restrictions on speech are allowed only if they are narrowly drawn to advance a compelling governmental interest. An example of a content-based restriction is a rule limiting comments to particular topics. Whether this restriction is permissible depends on the circumstances. Viewpoint based restrictions are never allowed. An example of a viewpoint based restriction is a rule forbidding criticism of a school policy, but allowing praise.

Certain types of speech are not protected or are offered less protection by the First Amendment, including obscenity, fighting words, libel, and true threats. Therefore, these types of speech may be regulated to a greater extent. However, speech of these types is often hard to define and even harder to identify, so great care must be taken in regulating such speech.

Several options are available for a school board in forming its policy on public comment at meetings. One option is to permit comment on any issue individual members of the public wish to discuss. The board may include in its agenda a time set aside for public comment, and may set certain procedural rules. For example, the board may require all public comment to occur during the designated time. The board may also limit the amount of time each person may speak, so long as everyone has the same limit, or it may allow unlimited time. Another option is to ask each speaker how long he or she wishes to speak, and have a policy of limiting each speaker to their reserved time. Likewise, the board may require all speakers to make their comments from a particular part of the room, like from a podium or microphone stand, or the board may permit speakers to roam about the room while making comments. However, the school board selecting this option may not limit the topics or viewpoints selected by the speakers. The board is not allowed to cut off a speaker or prevent a member of the public from speaking at all just because the board does not like what the speaker is saying. If the board's policy is to allow comment on any issue, it must

truly allow comment on *any issue*. This option allows the greatest freedom of the public to comment on matters that concern them, and may be beneficial to the board in that it may learn of issues it had not realized needed to be discussed.

Another option is to permit public comment, but restrict such comment to matters on the school board's agenda for that meeting. However, the restriction must limit only the topics that may be discussed, not the viewpoints that may be expressed. For example, if the school board is considering adopting a new policy, public comment may be limited to comments on the new policy. It may *not* be limited to comments in favor of the new policy, or comments opposing the new policy. Notwithstanding this limitation, the board may make certain time, place, and manner restrictions, just as in the option discussed above. A school board selecting this option must be cognizant of the fact that, while its official policy may limit the topics that may be discussed to items on the agenda, if the board makes an exception and allows one speaker to comment off-topic, it may not limit subsequent speakers. This option has the advantage of allowing the public to participate in school board meetings to some extent while saving the school board from spending time listening to matters that are not before it for that meeting.

A final option is to not allow public comment of any kind at school board meetings. This option eliminates the possibility inherent in the other options that a mistake or a bad judgment call may cause the school board to violate a speaker's free speech rights. However, with this option, the public is not able to participate in the school board meeting at all, and the school board may miss out on valuable input from the public. Ultimately, which option a particular school board adopts depends on the situation and needs of that particular school district, and each school board must weigh its options and select the policy that is the best fit for them.

### SEPTEMBER 17 – CONSTITUTION DAY

Every **September 17** schools that receive federal funding must give lessons on the Constitution. That's the requirement of legislation passed by Congress late in 2004. Congress included the "Constitution Day" provision in the FY 2005 appropriations omnibus bill. The section of the law requiring schools to teach about the U.S. Constitution (Public Law 108-447 – December 8, 2004, Sec. 110) is to the point:

- b. Each educational institution that receives Federal funds for a fiscal year shall hold an educational program on the United States Constitution on

September 17 of such year for the students served by the education institution.

Some questions are predictable: Does the Constitution Day requirement involve all grades or may a school simply identify grades where a program on the U.S. Constitution is a good fit with the curriculum? The statutory language does not provide exceptions for certain grades or students. It is the Firm's opinion that the requirement includes PK-12 as well as career and technology centers.

There are areas in which the district may exercise its discretion. The law does not establish a particular curriculum and it does not give any indication as to the length or content of the mandatory program. It seems reasonable that the younger the students, the shorter and less sophisticated the program; conversely, more time may be involved in the program for older students and the material may be more sophisticated. Schools may also decide to incorporate the instruction as a part of an educational program involving all students at the elementary, middle school or high school levels. What to present, how to present the program and length of the program are all decisions left to the school district's judgment.

Like most federal mandates these days – this one comes with no funds. On the other hand, it also doesn't specify a penalty for the non-compliant school and schools, at this time, are not required to file a report regarding compliance. Nevertheless, schools should make every reasonable effort to set aside time on September 17, 2005 and every subsequent September 17 for a program on the U.S. Constitution. After, all – it's the law.

### USE OF EMPLOYEE SOCIAL SECURITY NUMBERS

A new law in Oklahoma affecting the way in which employers may use employee social security numbers went into effect on November 1, 2004. This law prevents employers from publicly displaying, including on cards other than health plan cards, transmitting over the internet, or including in correspondence an employee's social security number, except in particular situations. However, this law does not apply to political subdivisions of the state. Therefore, public schools are not required to comply with the new law. Nevertheless, for the sake of their employees' privacy, school administrators should take measures to protect their employees' social security numbers by assigning distinct identification numbers and avoiding the inclusion of social security numbers on correspondence whenever possible.

## FIRM NEWS

**Rosenstein, Fist & Ringold** is pleased to announce that **A.F. Ringold** and **Karen L. Long** will be included in the 2005-2006 edition of *The Best Lawyers In America*. *The Best Lawyers in America* is compiled by Woodward/White, Inc., a professional research company founded in 1981 by two Harvard Law School graduates. Lawyers are chosen for inclusion based on a vote of their peers.

**Rosenstein, Fist & Ringold** is also pleased to announce the hiring of **Cassandra L. Wilkinson** and **Jana R. Burk**.

**Ms. Wilkinson** was admitted to the Oklahoma bar in 2004. Her undergraduate and law degrees are from the University of Oklahoma (B.S., with distinction, 2001, J.D., with honors, 2004). While in law school, Ms. Wilkinson was Online Editor of the Oklahoma Law Review (2003-04), Technology Manager of the Oklahoma Journal of Law and Technology (2003-04), and a member of the Order of the Coif.

**Ms. Burk** was admitted to the Texas Bar in 1997 and the Oklahoma Bar in 2004. Both her law degree and undergraduate degree are from the University of Texas (B.A., 1992, J.D., 1997). While at the University of Texas School of Law, Ms. Burk was a staff member of the Texas International Law Journal (1995-1997). Her primary practice areas are Education Law, Employment Law and Civil Appeals.

## RFR SPEAKERS' CALENDAR

- April 28      Andrea R. Kunkel  
Oklahoma Directors of Special Services Spring Conference, Okla. City
- May 5          Andrea R. Kunkel  
IDEA Reauthorization in Oklahoma, Okla. City
- May 5          Karen L. Long, Program Chair and Moderator  
Oklahoma Bar Association seminar *Lessons from Loss*, Tulsa Convention Center  
Info: OBA Continuing Education Division  
(405) 416-7000
- May 19        Karen L. Long  
Open Meetings and Open Records, hosted by Tahlequah Public Schools
- June 9         John G. Moyer, Jr.  
CCOSA Summer Conference, Oklahoma City
- July 11        Karen L. Long  
International Christian Accrediting Association Conference, Tulsa

*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.