

# Bowles Rice

ATTORNEYS AT LAW

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## Board Members' Electronic Communications

**Question:** *“Is it lawful, during board meetings, for board members to email or text each other using their assigned laptops or their personal handheld phones? Why or why not? What about passing handwritten notes to each other during a meeting?”*

**Answer:** *As with so many legal questions, the answer is, it depends! If the email or text during the meeting pertains to the business of the board, then no – two or more board members may not text or email each other during a board meeting about board business. If the email or text is truly unrelated to any business of the board, while disrespectful, the email or text is not unlawful.*

Public bodies, like boards of education, are subject to the West Virginia Open Governmental Proceedings Act. Often referred to as the Sunshine Law, this Act requires boards of education to deliberate and act upon their business out in the open for the public to see. Board members who email or text one another about board business during the public portion of a board meeting violate the Sunshine Law and may be found guilty of a misdemeanor. Although the board members might be in a duly constituted meeting, their electronic discussion is shielded from the public eye, which is prohibited by the Act.

This prohibition extends beyond board meetings. In Open Meetings Advisory Opinion 2006-09, the Ethics Commission explained that:

Generally, written communications, including electronic mail or "E-mail," should not be used to avoid public discussions that would ordinarily take place in the context of an open public meeting. Therefore, an exchange of E-mail communications among a quorum of a governing body which involves deliberating toward a decision on a matter requiring official action is not permitted by the Act.

If a quorum of the board (typically three members) email or text one another about an item of board business, they run the same risk of violating the Sunshine Law and are subject to criminal prosecution. Not only are they avoiding public discussion, but their acts may constitute a meeting which was not properly convened.

These rules draw no distinction as to whether the messages are made with an electronic device assigned by the school district, a personal electronic device or an old fashioned handwritten note. In fact, if a board member is engaging in discussions and conducting board business on their personal electronic device, that personal account and device may be subject to a Freedom of Information Act request. An email is considered a writing under the Act, and if the email by a public official or employee is about a public matter, then it is a candidate for disclosure under the

Freedom of Information Act. Simply because email is made on a private device, or even from a private email account, does not automatically exempt it from disclosure.

While electronic communications are an integral part of our lives, as a practical matter, outside of a meeting a quorum of board members should avoid communicating with each other about an item of board business, electronically or by other means. Board members should not communicate with each other at all during the public session of a board meeting in any fashion that keeps the message from the public and news media attending the meeting.

When in doubt, ask yourself if a communication with other board members comports with the letter and the spirit of the Sunshine Law and the Freedom of Information Act. If the answer is no, step back and refrain from tapping “SEND!”

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*Kimberly Croyle provides assistance and advice to clients throughout the state on education law issues such as policy formation; Title IX; bullying and harassment, and disability discrimination and accommodation issues, including 504 accommodations, personnel matters, FERPA, Title VII and the ADA. She represents clients before the West Virginia Public Employees Grievance Board; at due process hearings and mediations; in state and federal court; and before the Supreme Court of Appeals of West Virginia.*

