

Legally (Relevant



by Gary Hanson, JD
Stumbo Hanson, LLP, Topeka, Kan.

What You Should (and Should not) Expect of Legal Counsel

Cities and water districts are corporations – artificial entities – municipal corporations in the case of cities, quasi-municipal corporations for water districts. They have no conscience, no parenting or schooling to prepare them to behave properly. The rules that govern them are likewise artificial.

Artificial entities like corporations necessarily must act through officials and employees acting on their behalf. But there's nothing about a board, council member's or manager's life experience to tell her how to legally conduct an election, or issue a bond, or hold an executive session to discuss a personnel matter.

Of course, experience and education, like that from attending KRWA training programs at the annual conference, will help greatly over time. But for every city and district, at some time or another, there is need to have the assistance of legal counsel to navigate the laws and regulations that govern these corporations.

What is the role of Counsel?

Some larger entities will have staff attorneys – employees of the city or district. Many others will contract for the services of legal counsel on less than full-time basis. In either case, the rules that govern what may be expected of such staff or contract attorneys are determined by both the terms of their employment agreement or contract and the Kansas Rules of Professional Conduct (KRPC), a set of rules set by the Kansas Supreme Court governing the conduct of all attorneys practicing in the state.

An attorney representing an entity like a city or district represents the entity itself, and owes all the duties imposed on attorneys by the KRPC to that entity. Those duties include loyalty, competence, diligence, confidentiality and communication. Because an entity can't act except through persons acting on its behalf, this relationship can be a

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tightrope, and in some cases may be impossible to do successfully. The KRPC requires an attorney acting on behalf of an organization to take action necessary to protect the organization if the attorney knows that an officer, employee or other person intends to act in violation of his or her legal duties to the organization. The action required of the lawyer may range from asking for reconsideration of the matter, to referring it to higher authority – and if that fails to change the course – then to resign from the representation entirely.

What should be expected?

Most importantly, the client (as represented by its authorized representatives – mayor, council members, manager and board members, etc.), should expect those things that are required of attorneys by the KRPC – loyalty, competence, diligence, confidentiality and communication. The lawyer should be expected to be free from conflicts of interest or if conflicts exist, to follow the KRPC rules concerning conflicts.

The client should expect independent judgment and advice. This goes beyond merely speaking when asked, but that the attorney bring matters to the attention of the client as the attorney is made aware of them. For example, if a city council is about to enter executive session for an improper purpose, the attorney should be expected to interject, advising of the law on Open Meetings, and suggesting an alternative course.

In some instances, there may be a difference of opinion, and there may be internal differences within a council or board, or between the governing body

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and staff. The attorney should be expected to weigh in on matters having legal implications, not necessarily with one side or the other, but in the interests of the organization. Obviously, this includes taking a position that opposes action proposed by the Mayor of a city or board of a district, even if this will likely result in the lawyer's termination of employment. It is this very independence of judgment, coupled with the other qualities as described above, that makes legal counsel valuable to the organization.



What not to expect!

It should be apparent at this point that the city attorney or district counsel is not the Mayor's, or board Chairman's or manager's attorney. There are instances where those persons can be represented as well as the entity by one attorney so long as KRPC rules are met. But officials should not regard the entity's attorney as their confidante or ally, and officials should expect to be warned as such if they stray into that territory with the attorney.

It should also be apparent that legal counsel should not be expected to sit quietly while officials, including those that hired counsel and write the checks for their fees, do or plan a course of action that has adverse legal implications for the entity. As a



Can Employers Providing Essential Services Require Employees to Receive COVID Vaccination?

The three vaccines for COVID-19 approved for emergency use in the U.S. are the Pfizer-BioNTech and Moderna two-dose versions, and the Johnson & Johnson single dose vaccine. All are proving to be exceedingly effective in preventing illness. With about 115 million American adults having been fully vaccinated as of mid-May, the odds of illness in those persons fully vaccinated is .00006, or 6 in 100,000, and those who do become ill usually have relatively mild cases. This compares with the incidence of COVID-19 infected persons exhibiting symptoms in the overall US population of about 1 in 12. Most recent data also suggests that the transmission of the virus from vaccinated persons to others is considerably reduced.

With this building evidence of vaccine efficacy, employers providing essential services like water and wastewater, dependent on a healthy and safe workforce, may ask if they can require employees to receive the vaccine.

The short answer is – likely yes. Court decisions as well as recent guidance from authorities such as the U.S. Equal Employment Opportunity Commission (EEOC) affirm that an employer may require employees to be vaccinated as a condition of continued employment, so long as the rule is reasonably related to performing the job and there are exceptions in the policy for those with sincerely held religious beliefs that direct them to reject vaccinations and for those who have a medical condition or disability that prevents receiving the vaccine.

However, the EEOC guidance makes clear that for employers who adopt a lawful vaccine mandate this is just the first step. Failure to receive the vaccination does not automatically equal termination of employment. The employer must also consider whether reasonable accommodation can be made for the unvaccinated employee – for example, can the employee work remotely? Or are there other conditions that could be employed to protect co-workers and the public? Employers who wish to adopt a mandatory vaccination rule need to carefully consider the EEOC guidance issued on December 16, 2020, in consultation with legal counsel. The rules are extensive, and complicated. For employers lacking HR and legal departments these legal requirements may seem overwhelming.

matter of principle, a city council may refuse to consider an offer of settlement with a former employee, but if the attorney knows that such refusal may have severe consequences for the city, it is her duty to raise those concerns and the reasons why the offer needs to be given due consideration.

Finally, the attorney should not be expected to weigh in on matters that have no legal aspect, but are purely policy decisions. No one elected the city attorney to the council or the district's attorney to the RWD board of directors. Unless it impacts a term of a contract, like the need to meet a debt service coverage ratio in a loan agreement, it's hard to imagine why legal counsel's opinion should be sought on a proposed rate increase. There are times when it may be convenient to lean on the attorney on all kinds of matters – and after all – counsel may have extensive experience and valued judgment. But it simply isn't counsel's role to do so on such matters.

Conclusion

There are times, more for some than others, when the services of legal counsel are needed. Cities' and districts' governing bodies and staff should be aware of what the role of counsel is supposed to be, what should be expected and what should not. A good basic understanding of these matters will help to ensure a productive and efficient relationship.



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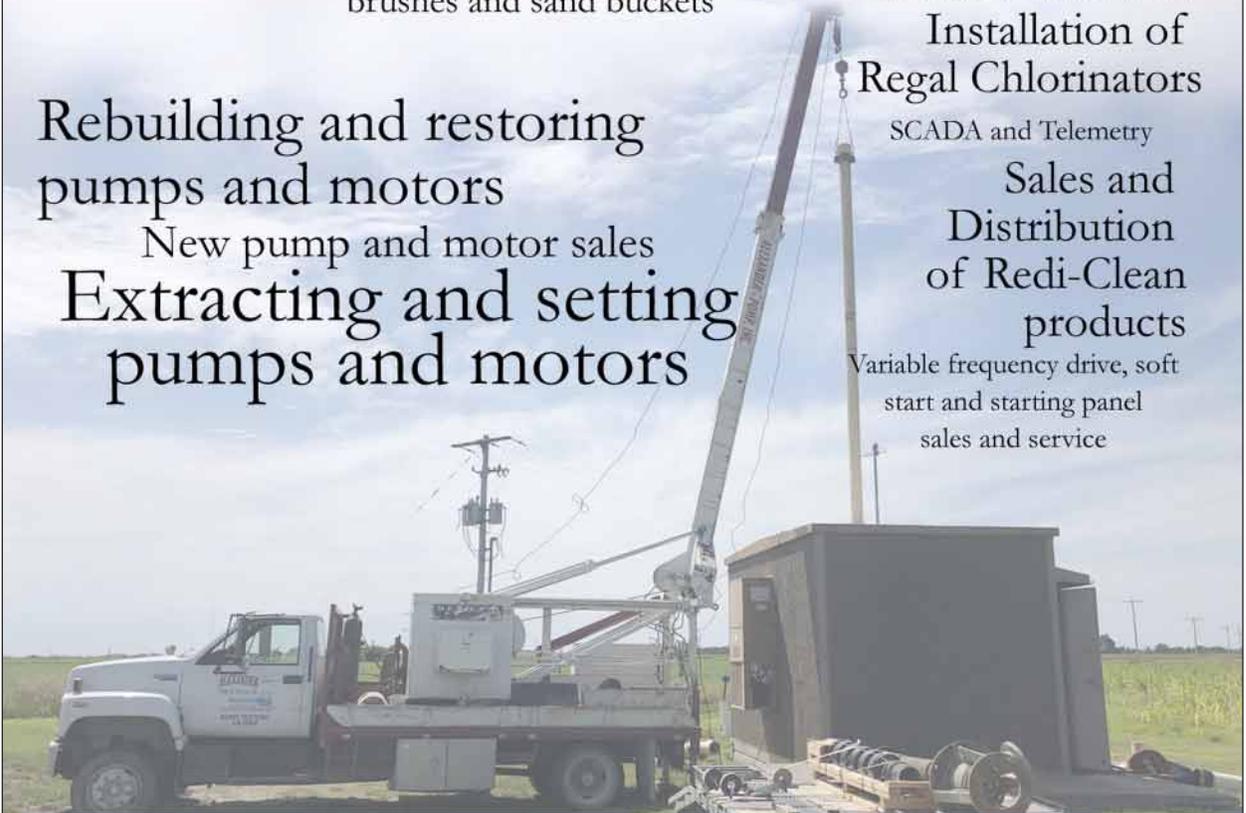
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**ALEXANDER
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785-383-2435 (Darren)
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