

LAW WEEK

COLORADO

Special Districts: How to Protect Yourself from Litigation

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With special districts come special legal considerations. The goal with any best practice, as always, is to avoid being sued. District leaders can implement several steps to reduce the risk and put their districts in better positions if litigation develops.

AVOIDING LITIGATION

The best defense is often created by consistently implementing best practices, which include following industry-accepted practices and laws when conducting the district's business and dealing with employees and the public. Standard operating procedures can reduce human error and become particularly relevant if litigation does arise.

When these issues are handled well, the risk of litigation can be significantly limited.

Adhere to all laws and protocols associated with meetings. This includes properly providing notice of meetings, keeping accurate and appropriate meeting minutes and ensuring that open meetings laws are not inadvertently violated.

Set up effective protocols and designate someone, whether that be your district manager or general counsel, to make sure they are followed.

It is important to pay particular attention to emails and to educate board members about the legal requirements that apply to special district meetings.

Comply with collections regulations. While there are strong legal arguments as to why collections regulations such as the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act and the Colorado Fair Debt Collection Practices Act do not apply to districts, best practice is to follow the requirements in these regulations so as not to unknowingly subject your district to these sorts of claims.

Similarly, pay particular attention and consult counsel when your collection matters intersect with the bankruptcy court.

Adopt and follow a proper record-keeping system. It is not enough to have a good record-keeping procedure. Staff members — as well as all consultants



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— have to use it. Again, designate someone in the organization to be responsible for ensuring compliance.

Treat all open records requests seriously and follow proper steps to comply. Adopt a procedure governing how requests for records will be accepted and processed, and be sure to understand and comply with all open records regulations.

pay particular attention to the application and preservation of the attorney-client privilege.

If litigation should arise, waiver of the attorney-client privilege during discovery and trial can significantly harm your defense.

Know what you should and should not include in contracts. Districts have legislative and proprietary functions. Contracts cannot repeal legislative powers, so, highly scrutinize contracts that purport to limit or delegate legislative powers. To the extent your district has previously entered into a contract that purports to limit legislative powers, consult with legal counsel regarding its enforceability.

Understand the limits of your liability. Because districts are government entities, they generally cannot be sued for tort claims (with some exceptions). In Colorado, districts are protected by the Colorado Government Immunity Act, which describes the protections for its entities and employees. Be sure to evaluate and timely assert the defenses provided by the CGIA.

HOW TO WIN

Although litigation risks can be minimized, litigation is a fact of life. When

Assume that no one — not the judge, jury, opposing counsel or plaintiff — knows what a special district is.

Everyone needs to know you are a government entity with a specific function and powerful defenses.

Contact litigation counsel. Provide your counsel with all relevant documents as soon as possible. The amount of time you have to file an answer or otherwise respond can vary depending on whether the case is brought in state or federal court.

Organize all documents to minimize discovery time. Act quickly to gather and organize all relevant documents, including electronically stored information. Discovery can be the most expensive component of litigation, so early organization can save your district time and money down the road.

Notify your insurance carrier. Even if you are not sure whether you have coverage for a situation, alert your carrier immediately.

Under some policies, coverage can be denied if there is a failure or even a delay in notifying the insurance company.

Plan the internal and external messaging. Discuss how the litigation will be communicated internally as well as externally. Be prepared for press coverage.

Preserve attorney-client privilege. Pay particular attention to situations involving district managers, engineers and other consultants. Make sure that every board member knows and understands the importance of attorney-client privilege and how to preserve it.

Ensure that a litigation hold is in place. When you suspect you are going to be sued, it is impermissible to destroy, eliminate or alter any potential evidence.

This obviously includes documents but also extends to the less obvious emails, hard drives, audio recordings, text messages and any other social media.

Consider alternative dispute resolution. When a dispute arises, consider early alternative dispute resolution. However, be careful to select a mediator that has special district knowledge and understands a special district's powers and limitations. •

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Consult with legal counsel if you think the request may relate to a pending or threatened litigation.

Educate board members and staff on attorney-client privilege issues. Education is key in all of these areas, but it is wise to

your district is sued, taking these steps may help you win in litigation and can help reduce your legal costs.

Have a story. Develop and then focus on the “special district story” at the earliest stage possible.