



Suggestions for Success (and Avoiding the Risk of Liability) for Elected Officials

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ERIE
COLORADO

Introduction

Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.

Introduction

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations.
- Not an insurance company, but an entity created by IGA of our members. Total membership today stands at 276 member municipalities & affiliated entities:
 - 273 are members of the PC pool
 - 144 are members of WC pool
- CIRSA views proactive approaches to risk management as critical member services – is a win-win.
- Elected official resources: <https://www.cirsa.org/safety-training/elected-officials/>.





SERVING THOSE WHO SERVE COLORADO COMMUNITIES

CIRSA EXISTS to ENABLE COLORADO COMMUNITIES to exist, to thrive, and to prosper

OUR RULES THE 5 C's

COVER

- WE PROVIDE COVERAGE

COACH

- WE HELP OTHERS PERFORM at THEIR PEAK by COMBINING EXPERTISE with GUIDANCE, SKILL with MOTIVATION

COLLEAGUE

- WE SHARE RESPONSIBILITY for CULTIVATING COMMUNITY through EFFECTIVE RISK MANAGEMENT

OUR VISION

A COLORADO FILLED with RICH and DIVERSE COMMUNITIES in which PEOPLE can LIVE WELL TOGETHER with the freedom to PURSUE their PERSONAL and PROFESSIONAL dreams

RISK is a NECESSARY PART of EVERYDAY LIFE... risk and life BECOMES MORE interesting WHEN WE LIVE together

SERVICE
WE ADVANCE a GREATER GOOD! community

FREEDOM
WE INSTILL confidence and security

COMPASSION
WE STAY loyal and committed

OUR VALUES

PARTNERSHIP
WE FOSTER collegiality

TRANSPARENCY
WE DO the right thing

OUR MISSION

TO PROVIDE COLORADO MUNICIPALITIES with the KNOWLEDGE, GUIDANCE and RESOURCES they NEED to effectively manage risk and increase the CONDITIONS for THEIR communities and citizens to thrive

TRUE RISK MANAGEMENT is a fully comprehensive APPROACH to MAINTAINING the health of a COMMUNITY and the INDIVIDUALS served by IT



CATALYST

- WE EMPOWER OUR MEMBERS to CULTIVATE WELL-RUN, PROSPEROUS and THRIVING COLORADO COMMUNITIES

CHAMPION

- WE ARE "CHAMPS" at RISK MANAGEMENT, and WE ADVOCATE for a FUNCTIONAL, LIVABLE COMMUNITY through STRATEGIC RISK MANAGEMENT



Introduction

Presentation Overview

- Suggestions for Good Governance – Best Practices – which in turn will reduce risk for the Town and you individually.
- Are based on my years as a public entity attorney and observing the ways in which elected and appointed bodies and their members can get into or stay out of trouble from a liability standpoint.
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues.
- In case of any inconsistency between author's remarks and views of your Town Attorney...your Attorney's views prevail!

Suggestion One:

Recognize the Change in Roles

- Being a public official means your role has changed:
 - Citizen-official (24/7)
 - Outsider-insider
 - Proponent/Critic-representative
 - Single-issue focus – broader policy focus

Suggestion One:

Recognize the Change in Roles

- When you took office, you took an oath to uphold constitution, laws, and Town ordinances. What does that oath embody?
- A commitment to respect the boundaries and allocations of responsibility set by law.
- A commitment to lawful conduct, including constitutional requirements such as providing “due process” and following criteria in making decisions.
- A commitment to ethical practices.
- A commitment to professional courtesy and respect for one another’s divergent viewpoints and styles?

Suggestion One:

Recognize the Change in Roles

- Whatever your role may have been to the Town previously, you are now all elected leaders – guardians – stewards – of the Town.
- The protection of the Town's interests and assets is perhaps your most critical function now.
- The guiding principle in decision making should always be, “what is the right thing for the Town?”

Suggestion One:

The Role – Good Governance is Part of the Job

- As elected leaders, part of your oath and “job duties” is good leadership which, at root, is based both practically and legally on a few core concepts:
- Openness & Transparency (open meetings/records laws);
- Fundamental Fairness (due process);
- Predictability (following applicable laws & ordinances); and
- Mutuality of Respect.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- You have personal protection from liability under the Governmental Immunity Act (GIA) only if you are “within the scope of employment” and not acting “willfully and wantonly.”
- Concept of “scope of employment” applies to everyone - elected & appointed officials, employees, and authorized volunteers.
- Means everyone needs to know and respect their “job description.”
- Conduct that is “outside the scope” or “willful and wanton” can create liability and result in a loss of governmental immunity.

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- Can also result in loss of insurance coverage.
- Public official liability (POL) policies follow “course and scope” and “willful and wanton” concepts. That is, they extend coverage to elected and appointed officials “in their capacity as such” (or similar) and have provisions excluding coverage where liability is based on willful & wanton conduct, fraud, ill-gotten gain, or criminal or malicious acts.
- Insurers must look to the allegations to assess coverage. If allegations are of willful and wanton or other bad conduct, the insurer may not cover, or cover under a reservation of rights.
- POL policies do not insure against punitive damages.

Suggestion Two:

Tips for Avoiding Personal Liability Risks

- Understand “job description” & stay within it.
- Recognize you are part of a collective decision-making body. Each individual has a fraction of the power of the body, but that power can’t be exercised alone.
- Recognize that elected officials act primarily as a BODY, and exercise responsibilities mainly by VOTING in a PUBLIC MEETING.
- If you are doing anything other than that, particularly if you are contemplating action against someone on your own as a Town official ... ask if you properly authorized (and if not, don’t take action).

Suggestion Two:

Roles & Liability Risks

- Why is understanding & respecting the role—i.e., “role discipline”—a liability issue; some real-life examples:
 - An elected or appointed official directs or gets involved in a personnel decision entrusted to the Administrator or a department head.
 - An elected official interferes with a routine permit or other item that is staff’s responsibility.
- Warning signs: “He/she/they did what?!”

Suggestion Three:

Honor Transparency

- Transparency is a basic expectation for public entities.
- Citizens take interest in the goings-on of the Town, how/when those goings-on are discussed, and the opportunities afforded to them to listen in on/participate in the discussion.
- A lack of transparency can cause massive trust and credibility issues, and potential claims/disputes over compliance.

Suggestion Three:

Honor Transparency

- The Colorado Open Meetings Law (OML) applies to all meetings of the governing body, boards, commissions, committees, etc.
- Applies to 3 or more or a quorum, whichever is less. Requires discussion of public business take place at meetings open to the public, and if action will be taken or a quorum will be present there must also be timely notice.
- Recognize that non-meeting communications (e-mail, texts, social media) can raise liability and transparency issues.
- The OML allows executive sessions for limited purposes. Make sure your executive session procedures and other processes are set up to comply with the law and protect confidential information.

Suggestion Three:

Protect the Town's Confidences - Scenario

In executive session the Board develops a strategy for negotiating the purchase of a piece of park land. The confidential appraisal states a value range of \$375,000-425,000, and the Board consensus is that the Town Administrator and Parks Director should meet with the landowner and negotiate for a contract up to \$400,000. Board member Smith sees the landowner at the coffee shop the next day and, eager to get the deal moving, tells her the City is willing to pay \$400,000 and may go higher as the appraiser thinks the property may be worth up to \$425,000. Problem?

Suggestion Four:

Honor Due Process

- Sometimes you're "legislators" making general rules that apply generally.
- But sometimes you decide specific cases where you apply the general rules to specific persons/property. For these "quasi-judicial" matters—for example, Board action on a rezoning—you are essentially acting as judges and therefore must behave like judges.
- In this role you are required by law to provide "due process" and a failure to provide due process exposes you and the Town to liability. The key characteristics of a quasi-judicial process are notice, a public hearing, and a record-based decision made by a fair and impartial decision-maker.

Suggestion Four:

Honor Due Process – Tips to Avoid Trouble as a Quasi-Judge

- Consider land use and other quasi-judicial matters only at the duly-noticed public hearing.
- Remain fair and unbiased; don't make up your mind before the hearing.
- Don't participate if you have a prohibited conflict of interest in the matter (code of ethics).
- Don't make your decision on the basis of irrelevant or non-existent criteria.
- Don't engage with one side or the other before a hearing (ex parte contacts).

Suggestion Four:

Honor Due Process – Tips to Avoid Trouble as a Quasi-Judge

- A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing.
- A proceeding loaded with “ex-parte” contacts is a path to having your decision overturned and, as important, having the integrity of your process eroded.
- When we advise against ex-parte contacts, we are protecting your ability to participate, and your ultimate decision.
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.

Suggestion Four:

Honor Due Process – Tips to Avoid Trouble as a Quasi-Judge

- Contrast – For your general legislative and policy making discussions and matters, it is okay: to lobby (and be lobbied) outside the meeting; to base your decision on your own personal policy perspectives, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial matter, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon legal standards, and you may not engage with interested parties about the case outside the hearing.

Suggestion Five:

Put Ethics First

- In Colorado, ethics scandals are rare – but happen from time to time.
- Ethical misjudgments greatly undermine public confidence in public bodies, and appearances of conflicts can be just as damaging as actual conflicts.
- Can result in criminal and civil liability.
- There is often a “personal benefit” exclusion from public officials liability coverage.

Suggestion Five:

Put Ethics First

- The theme that runs through codes of ethics is: It is not permissible to gain a personal benefit by virtue of holding public office – “shall not use public office for private gain.”
- Main rule – Conflicts of Interest: Disclose, recuse, don’t vote, and don’t influence other members.
- Don’t disclose or use any confidential information for personal benefit.
- Decline any gifts that seem to be connected to your service (and abide by gift rules).

Suggestion Six:

Be Cautious in Administrative Matters

- Inappropriate involvement in administrative matters by members of the governing body, collectively or individually, can:
 - Undermine the structure of the body or organization.
 - Waste resources.
 - Be a backwards step in Town evolution.
 - Increase the risk of liability for yourself.

Suggestion Six:

Be Cautious in Administrative Matters

- Understand and observe “role discipline” between policy and administrative matters.
- The Board Role - establish policy and vision for the Town as a whole; set overall goals and priorities; determine the “ends” and make specific decisions that are Board’s prerogative.
- BUT, leave details and execution to Town Administrator and staff.
- The Town Staff’s Role – determine the “means”—manage and accomplish the work as defined by the policy making bodies, within the Town’s established parameters.

Suggestion Six:

Be Cautious in Administrative Matters

- The legislative-administrative distinction is particularly important in personnel matters.
- The Board has an appropriate role – but should focus on “big picture” issues:
 - Approval of generally-applicable personnel rules.
 - Overall personnel budget.
 - Selection and supervision of the Board’s direct reports.
 - Overall Town goals and priorities.

Suggestion Six:

Be Cautious in Administrative Matters

- But, your involvement in these “big picture” issues must not devolve into:
 - Selection, evaluation, or disciplinary matters involving a specific individual who is not a direct report.
 - Becoming an individual “HR Manager” – if folks are inappropriately inserting themselves into, or are bypassing, the chain of command, how can the Town return to the proper chain of command?

Suggestion Six:

Be Cautious in Administrative Matters

Remember Your Town Code:

Section 1-6A-3: RELATIONSHIP OF BOARD OF TRUSTEES TO ADMINISTRATIVE SERVICE

“The board of trustees, acting as a whole and by formal action, shall have full authority to direct the town administrator with respect to the performance of his duties and responsibilities. Although individual board of trustees members, including the mayor, shall be authorized to discuss all matters relating to town operations with employees, officers, contractors and consultants of the town, including the town administrator, they shall not be authorized to give any direct orders to town employees.”

Suggestion Six:

When dealing with staff – speak with one voice

- Each governing body is made up of individuals, each with different goals and priorities; however, it is not a group of seven bosses. Therefore, resolve to speak with one voice to your direct reports.
- There is but one Board and it should commit to act as one. It alone can—and should—carry the burden of sorting out and reconciling the goals and priorities of its members with the goal of establishing a singular set of goals, priorities and directions to staff.
- This can be done even if there are strong differences of opinion or a split vote...And doing so provides for clarity, credibility and accountability in the direction you provide to the Town Administrator and other direct reports.

Suggestion Seven:

Use Your Power Wisely and Humanely

- As a Board, commit to a “no surprises” approach with one another and staff.
- Deal effectively with discord. Every governing body has disagreements! But discord should not drive meetings, your agenda, or how you interact with the community, each other, or staff. Therefore, take time to identify, discuss and resolve issues of discord among you.
- Recognize you set the tone for the whole organization in terms of treatment of citizens, the business community and staff, and that certain liability risks—in particular civil rights claims—can be exacerbated by “bad facts” that suggest (or are perceived to be based upon) retaliatory or reactive conduct.
- And, always keep in mind that you are the stewards of the Town’s best interests and assets.

Conclusion

Thank you for your public service!

And for the opportunity to present.