



Elected Officials Presentation

Town of Erie Board of Trustees 2.16.21

Presented by Sam Light, CIRSA General Counsel



Introduction

- Refresher on liability risks & risk prevention best practices surrounding social media and board involvement in personnel matters.
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues.
- For additional CIRSA resources:
 - Elected officials' page on CIRSA website: <https://www.cirsa.org/safety-training/elected-officials/>
 - CIRSA *Elected Officials Liability Handbook*: <https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>



Social Media

Glenwood Springs mayor deletes official Facebook page following threats

Anti-fracking activist sues outgoing Lafayette Mayor Christine Berg over alleged First Amendment violation



Federal Court: Public Officials Cannot Block Social Media Users Because of Their Criticism



Should the First Amendment apply to Facebook? It's complicated.

Colorado fire chief resigns after social media comment about George Floyd protesters

Can Elected Officials Censor Their Critics on Social Media?

Escondido Mayor Sued for Blocking Profile on Facebook

Mayor Sam Abed is one of dozens of politicians found to be blocking profiles on their social media accounts, according to records obtained by NBC 7 Investigates.



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TOGETHER**

Social Media

- While we don't yet have appellate decisions directly on point from the 10th Circuit, decisions elsewhere confirm that elected officials' social media pages can be subject to First Amendment principles and limits on restriction of First Amendment rights:
 - Use of a social media account can be a “designated forum” for First Amendment purposes.
 - Thus, an elected official cannot block private citizens from twitter account after posting of critical content (impermissible content-based regulation). *Knight First Amendment Institute v. Trump*, 928 F.3d 226 F. Supp. 3d 541 (2nd Cir. 2019).

Social Media

- If site is used to exercise government power or fulfill some function/goal of government, then it is governmental in nature. As such, it is a First Amendment violation for elected official to block a person from her Facebook page for posting accusatory comments. *Davison v. Randall*, 2019 WL 114012 (4th Cir. 2019).
- “Of course, not every social media account operated by a public official is a government account...[it] will in most instances be a fact-specific inquiry.”
- And, as with any written/spoken words, social media activity can be a source of potential tort claims—defamation, false light, public disclosure of private facts, etc.—and, for supervisors, potential employment related claims.

Social Media – Tips

- Keep personal and any official sites separate. Be sure to identify and treat them as such. Use the category setting, and other settings and messaging to aid in this.
- On your official site, don't delete posts or discriminate based on content or viewpoint.
- Don't engage in discussions of quasi-judicial matters.
- If on balance there is a need for the Town and/or its officials to correct disinformation, consider carefully the who, how, when and where.
- Follow social media policy.

Involvement in Personnel Matters

- While it doesn't always present as a claim, our experience is that one of most common risk areas for elected / appointed officials relates to involvement in non-Board personnel issues and administrative matters already assigned to staff. Such activities:
 - Can undermine the structure of the body or organization.
 - Can waste resources.
 - Can be backwards step in the organization's evolution given the task/issue/matter has been delegated to the "CEO" and staff.
 - Can increase the risk of liability for yourself.

Involvement in Administrative Matters

- Why is “role discipline” a potential 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 or appointed official interferes with a routine permit or other item that is staff’s responsibility.
- Warning signs: “He/she/they did what?!”

Involvement in Personnel 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 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.

Involvement in Personnel 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.

Involvement in Personnel Issues

- As the above code section suggests, this distinction in roles 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.

Involvement In Personnel 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?

Board – Staff Roles - Tips

- Recognize perceptions and impacts of getting involved in matters already delegated to staff.
- Use and support systems in place – they protect you and the organization.
- Resolve to speak with “one voice” to your direct reports—will pay dividends in terms of clarity, accountability, trust, and certainty of purpose.
- Use your direct reports effectively as a resource.
- Speak in terms of “we” and not “I”. Recognize it is the Board’s responsibility to sort out and reconcile its differences.
- Commit to service of the Board’s priorities and agenda.

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.

About CIRSA

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 282 member municipalities & affiliated entities:
 - 278 are members of the PC pool
 - 139 are members of WC pool
- CIRSA views proactive approaches to risk management as critical member services – is a win-win.