



Elected Officials Presentation

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Presented by: Sam Light, CIRSA Deputy Executive Director/General Counsel



Introduction

- Discussion of risk management issues at the elected official level, including suggested best practices to enhance effectiveness and, in turn, reduce risk for the City and you individually. Topics we will touch on include:
 - The fiduciary role of public officials
 - Transparency requirements & risks
 - Organizational structure & liability
 - Ethics & personal conduct
 - Quasi-judicial rules of engagement
- Presentation is a training resource only; is not intended to address or provide legal advice on any specific, pending issues.

The Fiduciary Role of Public Official

- There are unique dynamics of being a local public official:
 - Citizen → government official (24/7!)
 - Outsider → insider
 - Critic/proponent → representative-ambassador-**fiduciary** of the City as an entity and of the local public body upon which you serve.
- “The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of...local government officials and employees.”

The Fiduciary Role of Public Official

- Within a municipal/public entity structure, effective governance and effective risk management requires continual recognition that you are **fiduciaries**.
- Among other attributes, the fiduciary responsibility requires:
 - Recognition of broader public interest.
 - The ability to place the City's interests and the public interest above narrow, personal, single-issue or other interests.
 - A commitment to consider matters on their merits alone.

Transparency Requirements & Risks

- Honor the openness requirement of Colorado's Open Meetings Law (OML): Applies to **three or more or a quorum, whichever is less**. Requires discussion of public business take place at meetings open to the public.
- Also, if action will be taken or a quorum will be present, there must be timely notice. Council action must be taken only at a duly-noticed public meeting.
 - **"Serial meetings"** have become a focus of litigation and should not be used to avoid the "three or more" threshold. Recognize also that non-meeting communications (**e.g. e-mail, texts, social media**) can also raise OML liability and transparency issues.
- Executive sessions? Make sure you follow the requirements of the OML. Have appropriate systems in place to protect confidential information.

Transparency & Electronic Communications

- Using email? *See* handout and this CIRSA article: <https://www.cirsa.org/news/how-the-colorado-open-meetings-law-applies-to-elected-officials-email/>). Separate from OML compliance issues, the correspondence of elected officials that relates to their duties or public funds is generally treated as a matter of public record (with limited exceptions).
- Thus, recognize that emails and other electronic communications discussing public business could be a record subject to disclosure under Colorado's Open Records Act.
- And electronic communications of all kinds may be subject to the civil discovery process and may be required to be divulged in litigation.
- Public officials must be cautious in their use of electronic communications to avoid getting crosswise with one or more of these legal considerations.

Organizational Structure & Liability

- Everyone within the organization has a “job description”—it is important that everyone honor their “job description,” both to help ensure the organization functions at a high level, and to avoid risks of liability, including the risk of personal liability!
- Under Colorado Governmental Immunity Act (CGIA) you have protection from personal liability if you are “within the scope of employment (SOE)” and not acting “willfully and wantonly.” Means everyone needs to know and respect their “job description.”
- Conduct that is “outside the scope” or “willful and wanton” can result in a loss of governmental immunity and create liability, including personal liability.
 - “Willful and wanton conduct”: Conduct that is purposefully undertaken and calculated to cause harm, in conscious disregard of the consequences or rights or safety of others.

Organizational Structure & Liability

- Can also result in potential 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 officials “in their capacity as such” (or similar) and have provisions excluding coverage where liability is imposed for willful and wanton conduct, fraud, ill-gotten gain, or criminal or malicious acts.
- The CGIA provides a form of qualified immunity, but it is not an absolute shield. Similarly, a federal form of qualified immunity protects government officials from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”
- Recognize that certain liability risks—in particular, civil rights and personal tort exposures—can be exacerbated by “bad facts” that suggest (or are perceived to be based upon) retaliatory or malicious conduct.

Legislative v. Administrative Matters

- A key component of SOE is the legislative-administrative distinction, which is recognized in the City Charter and Code. The City operates with a Council-Manager form of government. Under this structure, there is policy/administration allocation of duties, responsibilities and roles. This the most common form of municipal structure.
- **Council:** Legislative and Governing Body of the City (i.e., Policy & Governance)(*See* Charter Sec. 4.2). Mayor is the presiding officer, head of City government for ceremonial purposes, and has executory and other powers as conferred by Council.
- **Manager:** Chief administrative officer of the City (i.e., Administration)(*See* Charter Sec. 7.1). Oversees the “day-to-day” municipal operations.
- By statute, charter, ordinance, etc., certain duties are performed by Council and certain duties are performed by staff. These allocations of authority and responsibility not only define the organization’s structure; they define “scope of employment” for everyone in it.

Legislative v. Administrative Matters

Where is Council focusing its efforts?

Ownership



Governance



Management



Supervision



Front Line Employment

- **Time Horizons:** Yours should be the furthest out!
- **Legislative Affairs:** Council and its members are the policy-making body; “looking down the road”; forward thinking; big picture, rather than day-to-day.
- **Corporate & QJ Matters:** Addressing corporate matters (fiduciary) as well as QJ matters reserved to the Council.
- **Dealings within Chain of Command:** Appointment & Supervision of Council “direct reports.” Don’t jump more than one level! (*Remember your Charter; Sec. 7.4 – Council’s Relationship to Employees*).
- **No Redundancy:** Unlike other levels in the organization, there is no one else who can step in and do your job – and your job is not administration!

Supporting Organizational Structure

- Tips to support the structure and avoid concerns around “role discipline” and “scope”:
 - Understand “job description” and stay within it. Note, the “powers and duties” provisions applicable to the Council (and others) serve to define SOE.
 - Recognize that elected and appointed officials act primarily as a BODY, and exercise responsibilities mainly by group discussions and group decision-making in a PUBLIC MEETING. “Powers and duties” are exercised by the body as a whole.
 - Therefore, the role is a group role! Think “We” ... not “I”! If you find yourself about to act in terms of “I” rather than “we” ...that’s a red flag.
 - Another red flag? “He/she/they did what?!?!”

Supporting Organizational Structure

- Adherence to the City's organizational structure is particularly important in the area of employee relations and handling of administrative matters assigned to staff.
- Except for those employees that are the "direct reports" of the governing body, elected and appointed officials are not employee supervisors. Thus, don't give orders to staff below the Manager—that's outside your SOE; remember your Charter (Sec. 7.4)—or get individually and improperly involved in personnel issues.
- It's not that administrative matters are "hands off" for elected officials – you are entitled to ask questions and get information - but it's important to exercise role discipline to prevent entanglements, disempowerment, misunderstandings, and exposure to legal liability, including potential individual liability.

Supporting Organizational Structure

- Other tips:
 - Establish, in collaboration with your Manager, a process for bringing forward your questions and concerns (or those raised by citizens) about administrative matters.
 - Use your Manager and staff as a resource for accurate information and to get things done (and look good while doing it!). Be cautious of reacting to “one side of the story” or being “conscripted” into an attempted “end run.”
 - Avoid being swayed by the (understandable but mistaken) view that individual members have the power to override administrative decisions vested in others.
 - Resolve to work through your differences at the governing body level and speak with “one voice” to your direct reports. The solution for unresolved differences is not for individual members to take the issue upon themselves.

Ethics & Personal Conduct

- Become familiar with the ethics rules governing your conduct (*e.g.*, City Code of Ethics, Article 2-10 of City Code) and seek assistance as needed. The theme that runs through codes of ethics is: It is not permissible to use public office for private gain. Some key areas:
 - **Conflicts of Interest:** Disclose, recuse, don't vote, and don't influence other members.
 - **Confidential Information:** Don't use or disclose confidential information obtained as a result of holding public office to obtain financial gain, for yourself or others.
 - **Gifts:** Decline gifts that seem connected to your official action or from donors having (or likely to have) transactional, business or regulatory relationships with the City. Abide by other gift rules (e.g. \$65 limit & other restrictions in Code Sec. 2-10-30(f)).
- Avoid situations that may create an appearance of impropriety. Recognize that in matters of ethics, fair or not, sometimes perception = reality and reality = perception.

Ethics & Personal Conduct

- Beyond compliance with the Code of Ethics, commit to personnel conduct that strengthens the WE – the Council as an institution. This sometimes requires personal sacrifices, such as:
 - Setting aside a personal interest or agenda when there is lack of support.
 - Accepting “the Council has spoken” though one preferred a different outcome.
 - Respecting Council’s Code of Conduct and other Council “norms of conduct”.
 - Accepting when “Our work is done”; i.e., the hand-off from Council → staff, or other.
 - Avoiding perceptions (internal or external) of “getting ahead” of or “speaking for” the voice of Council where it has not yet spoken.

Ethics & Personal Conduct

- Recognize also that inappropriate personal conduct can be destructive to a public body, its agenda, and its reputation. Some problem areas we've seen:
 - "Outlier syndrome" and individual elected officials "going it alone" or "fomenting controversy" for its own sake where none was otherwise existing or apparent.
 - Accusations of lack of respect, lack of good faith, hidden agendas, preconceptions, undue partisanship (by law, Colorado municipal elections are nonpartisan), incivility, "proxy talk" or other concerns creating a sense of distrust.
 - An "imbalance" of information and/or participation on the body, or bodies constantly lining up with the same split vote on every issue.
- Commit to identifying and avoiding personal conduct that can debilitate a public body.

Quasi-Judicial Rules of Engagement

- Often the Council and its members are acting as “legislators” —making general policies that apply generally—or handling routine business matters.
- But at other times you make decisions affecting a specific applicant’s property rights. For these “quasi-judicial” matters—e.g., land use and licensing applications before the Council—the members are essentially acting as judges. In this role you have heightened responsibilities to provide “due process” and a failure to provide due process exposes you and the City to liability.
- So, be familiar with the due process “rules of engagement” that apply to quasi-judicial matters. These rules require you conduct yourselves like judges, not like legislators.
- These rules have a familiar source: “No person shall be...deprived of life, liberty, or property, without due process of law.”

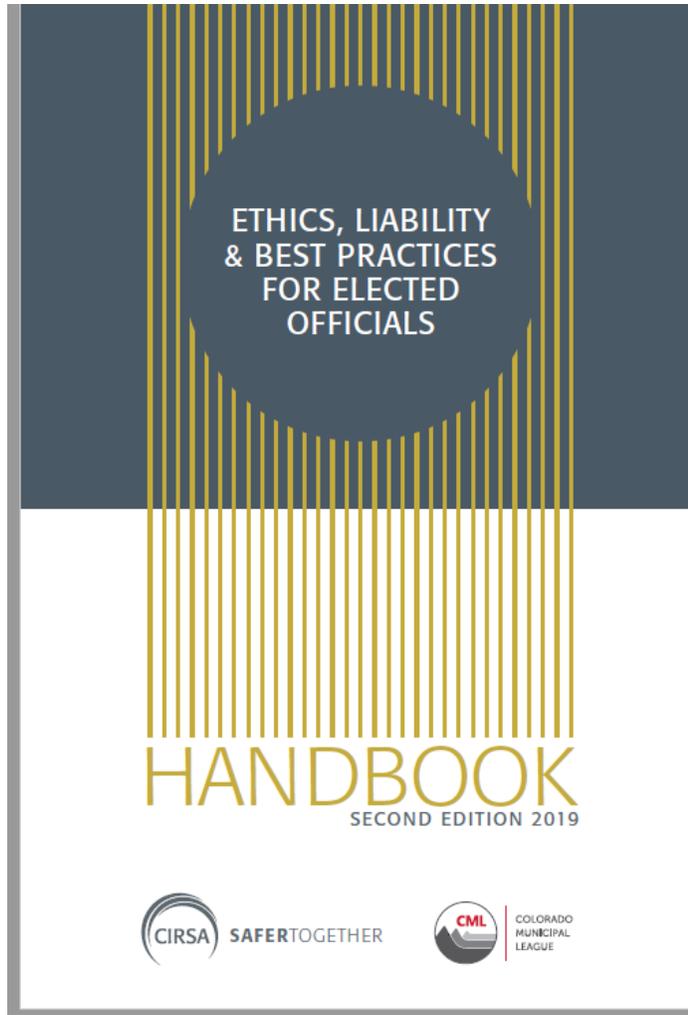
Quasi-Judicial Rules of Engagement

- **Avoid Ex Parte Contacts:** As the judge, don't engage with the applicant or others, or with your fellow quasi-judges, before or outside the hearing about the issues to be decided at the hearing.
- **Maintain Impartiality:** As a judge, remain neutral; don't make up your mind before the hearing and don't make prejudicial pre-hearing statements.
- **Recusal:** As the judge, you must recuse yourself from the proceedings if you have a conflict of interest or other disqualifying circumstance.
- **Judicial decision-making:** Your deliberations and decision on a quasi-judicial matter **must be focused/based upon** only the **evidence** presented at your hearing **and the relevant, existing criteria** (i.e., the standards) that apply to the decision before you. In this role you must set aside personal bias, opinions, and preferences. In deliberations, use Sam's "Rule of Why."
- For more on the quasi-judicial "rules of engagement" see handout and this presentation: https://www.cml.org/docs/default-source/2024-conference-presentations/6-19-24-1045-cml-2024-qj-decision-making.pdf?sfvrsn=ee380f05_2.

Concluding Thoughts

- Key “takeaways” for managing and mitigating risks at the governing body level.
 - Remember and embrace the policy/administrative distinction
 - Take the time you need & get the information you need to make sound decisions
 - Have focused and on-point deliberations—they lead to defensible decisions
 - Individually and collectively, stay within your authority and “SDE”
 - Know the rules, play by the rules, and apply them evenhandedly
 - Embrace and provide good process—process is itself a government service
 - Follow transparency rules
 - Recognize the authority of Council is exercised collectively
 - Avoid conduct and decisions that may appear as retaliatory
 - Work individually and collaboratively to fulfill your fiduciary responsibilities

Resources



CIRSA Elected Officials Handbook:

<https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>

CIRSA elected and appointed officials' resources:

<https://www.cirsa.org/safety-training/elected-officials/>.

CIRSA news & events page:

<https://www.cirsa.org/news-and-events/news/>

CIRSA Training & Events Calendar:

<https://www.cirsa.org/news-and-events/events-calendar/>

CIRSA Safety YouTube Channel:

https://www.youtube.com/@CIRSA_Safety/videos

About the Colorado Intergovernmental Risk Sharing Agency (CIRSA)

- 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 intergovernmental agreement of our members.
- Total membership today stands at 295 member municipalities and affiliated legal entities
- Member-owned, member-governed organization.
- No profit motive – sole motive is to serve our members effectively and responsibly.
- CIRSA Board made up entirely of municipal officials.
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review.
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities.



OUR CULTURE

CIRSA and its members embrace a proactive risk management culture. Through the power of pooling, our programs, services, and coverages enable CIRSA members to act with confidence so that they, in turn, can enable their organizations and communities to thrive.

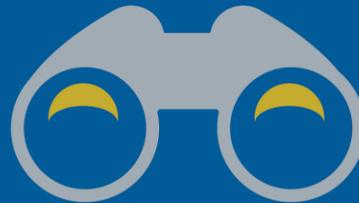
OUR MISSION

CIRSA is the leader in risk management and insurance coverage for Colorado local governments.



OUR VISION

CIRSA is revolutionizing risk management for Colorado communities.



OUR MEMBERS

Managing risk is the way our pool members foresee and protect against potential losses and liabilities facing their communities, and recover from them should they occur.



OUR VALUES



In the name of Community, we serve the greater good.
In the name of Partnership, we foster collaboration for problem-solving.
In the name of Ethical conduct, we do the right thing.
In the name of Stewardship, we aim for long-term sustainability.

ABOUT US

CIRSA is a public entity self-insurance pool serving Colorado municipalities and affiliated entities. CIRSA staff are subject matter experts in Colorado public entity insurance, liability, and risk management issues. CIRSA is accountable to each member individually and to the membership as a whole, NOT to stockholders seeking a profit.

Speaker Bio

Sam Light is Deputy Executive Director / 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 public entity risk issues and municipal law and has practiced in Colorado since 1993.