



Elected Official Presentation

City of Commerce City • April 28, 2025

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



Introduction – Overview

- Refresher on best practices for liability and risk management issues at the governing body level. Suggestions to enhance your effectiveness and, in turn, reduce risk for the City, the City Council and you individually. Topics we will touch on include:
 - Transparency-related risks: OML, CORA, social media, etc.
 - The fiduciary role of public official
 - Organizational structure, role discipline personal conduct
 - Public official and governing body liability risks
- Presentation is a training resource only; is not intended to address or provide legal advice on any specific, pending issues.

Transparency-Related Risks - Liability Dynamics

- You've already been trained on the core requirements of the Open Meetings Law (OML), so let's talk about some dynamics around liability risks under the OML:
- **Standing:** The Colorado Court of Appeals recently confirmed that essentially anyone denied or threatened with denial of their OML rights can sue for an OML violation. This principle of "standing" means persons without a connection to the City or a stake in the matter at issue can sue.
- **Courts' Usual Approach:** "The OML is broad in application and should be construed to increase governmental transparency in appropriate situations."
- **Remedies:** Though there is no money damages remedy in the OML, successful plaintiffs shall be awarded attorneys' fees and costs (one-way fee provision). Fees are not covered by insurance, so a violation can have direct fiscal impacts.

Transparency-Related Risks – Hot Topics

- **“Serial meetings”** have become a focus of litigation and should not be used to avoid the “three or more” threshold.
- **Executive sessions:** Use them sparingly and by the book! The manner in which the Council uses, calls and conducts executive sessions directly influences its risks.
 - Give close attention to the OML’s substantive and procedural requirements. Use a script. Have legal support for call and conduct of executive sessions.
 - And in service of your fiduciary obligations, have appropriate systems in place for the protection of confidential information and discussions.
- **Electronic Communications:** Recognize that electronic communications (e-mail, texts, chats, etc.) impact perceptions of your transparency, can also raise OML compliance issues. Be circumspect in this area.

Transparency-Related Risks – CORA

- Additionally and separate from OML compliance issues, under the Colorado Open Records Act (CORA) 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 any emails, texts, chats, and other electronic communications discussing public business could be a record subject to disclosure under CORA.
- And electronic communications of all kinds—and made by you in any capacity—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.
- For more, see handout and this CIRSA article: <https://www.cirsa.org/news/how-the-colorado-open-meetings-law-applies-to-elected-officials-email/>).

Transparency-Related Risks – Social Media



Auburn mayor resigns after posting controversial comments on Facebook

Florida Man Arrested for Making Racially-Motivated Threats in Interference with Election in Charlottesville and Cyberstalking

Durham man charged with harassing and cyberstalking Raleigh City Council member

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 NRC 7 Investigates.



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

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

Glenwood Springs mayor deletes official Facebook page following threats

Can Elected Officials Censor Their Critics on Social Media?

Allegations mount against councilmember over Indian Trail Weasel Report Facebook page



NYC council members 'doxxed' by anti-cop activists before budget vote

Idaho extremists target judges, prosecutors, health workers in doxxing campaigns
Idaho activists have shared photos and home addresses in effort to interfere with court, child protection cases

Transparency-Related Risks – Social Media

- Using social media? Be cognizant of risks for public officials/public bodies; e.g.:
 - Open meetings and open records issues
 - First Amendment concerns
 - Due process issues related to quasi-judicial proceedings
 - Tort liabilities (and defense/indemnification for same)
 - True threats and doxing

Social Media - Tips

- Make sure your personal social media accounts are labeled as personal.
- Don't engage in discussions of pending quasi-judicial matters on social media (ex parte).
- When using social media, consider "keeping it light." Consider also the value and impact of your social media activity in relation to your "24/7" role as a member of the governing body; e.g.: Are personal opinions denoted as such? Are posts for/about Council activities accurate as to "we" and where "we" are at?
- If you are speaking on social media for official purposes, don't delete posts or block persons based on content or viewpoint. While the U.S. Supreme Court recently heightened the standard for liability in this area, risk remains! If unsure, seek assistance.
- If on balance there is a need for the City and/or its officials to correct disinformation, consider carefully the who, how, when and where.
- Review and follow your Council-adopted social media policies; *see, Council Policy #CP-24.*

The Fiduciary Role of a Public Official

- As we've discussed before, there are unique dynamics of being a local elected official:
 - Citizen → government official (24/7!)
 - Outsider → insider
 - Critic/proponent → representative-ambassador-**fiduciary** of the City as an entity and of the City Council as an institution.
- “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 a Public Official

- Within a municipal/public entity structure, effective governance and effective risk management requires continual recognition that you are **fiduciaries**.
- As the “corporate board,” the protection of the City’s interests and assets is one of your most critical functions. A guiding principle in your policy making discussions and decisions should always be, “what is the right thing for the City?”
- Among other attributes, the fiduciary responsibility of service on an elected, public, multi-member governing body 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, and a commitment to consider matters on their merits alone.
- Other fiduciary duties: Duty of care. Duty of Impartiality. Duty of Accountability. Duty to preserve public trust in government. Others?

Legislative v. Administrative Matters

Where are you focusing your 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:** Don’t jump more than one level! (Remember your Charter, *Sec. 7.6. Relationship of Council to Administrative Organization.*)
- **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!

Legislative v. Administrative Matters

- The legislative-administrative distinction 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 roles. This the most common form of municipal structure.
- **Council:** “Legislative and Governing Body of the City” (i.e., Policy & Governance)(See Charter Sec. 4.8). Mayor is the presiding officer with certain executory and ceremonial powers.
- **Manager:** “Administrative Officer” & “Executive Head” of the City (i.e., Administration)(See Charter Sec. 7.3, Code Sec. 2-4100). Oversees the “day-to-day” municipal operations.
- By statute, 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

- Council/Manager format: The gold standard of local government!
- You hold this gold standard and have allocated significant resources to it...so use this format to its best advantage!
- Establish “corporate” values and mission, set overall goals and priorities, and give broad direction, leaving details of execution to staff.
- If a matter is one that has been delegated/entrusted to your Manager and staff, it is likely to be an administrative matter.
 - 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 in order to prevent entanglements, disempowerment, misunderstandings, and exposure to legal liability, including potential individual liability for you.

Role Discipline

- You may experience pressure to become involved in personnel matters concerning positions that are not direct reports to you, or in administrative matters assigned to staff.
 - Pressure can come from various directions – yourself, citizens, employees.
 - But your involvement in such matters may come at a huge cost – the chain of command is disrupted, supervisors and managers are disempowered, and ultimately, the ability to sort out and establish accountability is lost. Risk-wise, you might become “ensnared” individually is a claim/dispute.
- Thus, embrace the delegation of supervisory responsibility to supervisors.
 - Shouldn't the supervisor be able to make supervisory decisions without being second-guessed or end-runned?
 - Is a dysfunctional working relationship inevitable when the supervisor has been disempowered and/or the employee knows that an “end run” is possible?

Council – Staff Roles – Tips

- Recognize perceptions and impacts of getting involved in matters delegated to your Manager and staff. **Your “question for clarification” or comment that “I’d like to see this” may be perceived as an order or an instruction.**
- Establish a collaborative process for bringing forward your questions and concerns (or those raised by citizens) about administrative matters. Follow your Council Policies (*e.g.*, #CP-17, *Council Contacts with Administrative Personnel*).
- For your direct reports, remember the Council is one boss, not a group of nine bosses. Resolve to speak with “one voice” to your direct reports—will pay dividends in terms of clarity, accountability, trust, and certainty of purpose.
- Speak in terms of “we” and not “I”. Recognize that Council acts as one it is the Council’s responsibility to sort out and reconcile its differences.

Personal Conduct

- In service of your fiduciary responsibility, commit to high levels of personal conduct that strengthens the WE - the governing body as an institution. This sometimes requires personal sacrifices:
 - Setting aside a personal interest or agenda when there is lack of support.
 - Accepting “the Council has spoken” though one preferred a different outcome.
 - Individually respecting Council Policies and other “house rules” and “norms of conduct” that Council has adopted or agreed to follow.
 - Avoiding perceptions (internal or external) of “getting ahead” of or “speaking for” the voice of Council where Council has not yet spoken. Be particularly attune to these perceptions/impacts in speaking with the press or on social media, etc.

Personal Conduct

- ... and also recognition that inappropriate personal conduct can be destructive to a public body, its agenda, and its reputation. Some problem areas we've seen:
 - “Outsider syndrome” and elected officials “going it alone”, including disregarding rules and other norms on the mistaken belief they can be ignored or “end-run” because they are “outdated,” “unfair,” “adopted by a prior council” or “not what I or my constituents want.”
 - Accusations of lack of respect or good faith, hidden agendas, preconceptions, undue partisanship, incivility, “proxy talk” or other concerns creating a sense of distrust.
 - Failures to recognize the “24/7” nature of being a public official and the impacts problematic behaviors can have on the organization, others and community trust—irrespective of whether the conduct is in an “official,” “individual,” or “personal” capacity.

Elected Official & Governing Body Liability Risks

- Where do liability risks lie for elected officials and elected governing bodies?
 - Civil rights claims (e.g., First Amendment, Due Process, Equal Protection)
 - Employment practices – e.g. harassment, discrimination, retaliation
 - Alleged “willful & wanton” conduct (state law intentional torts)
 - Breach of ethics and/or fiduciary duty
 - Open meetings/open records laws
 - C.R.C.P. 106(a)(4) challenges to a “quasi-judicial” action of Council
 - Declaratory or injunctive relief claims arising from Council action; e.g., challenging an ordinance or some other action
 - Contract and quasi-contract claims
 - Takings and regulatory takings claims

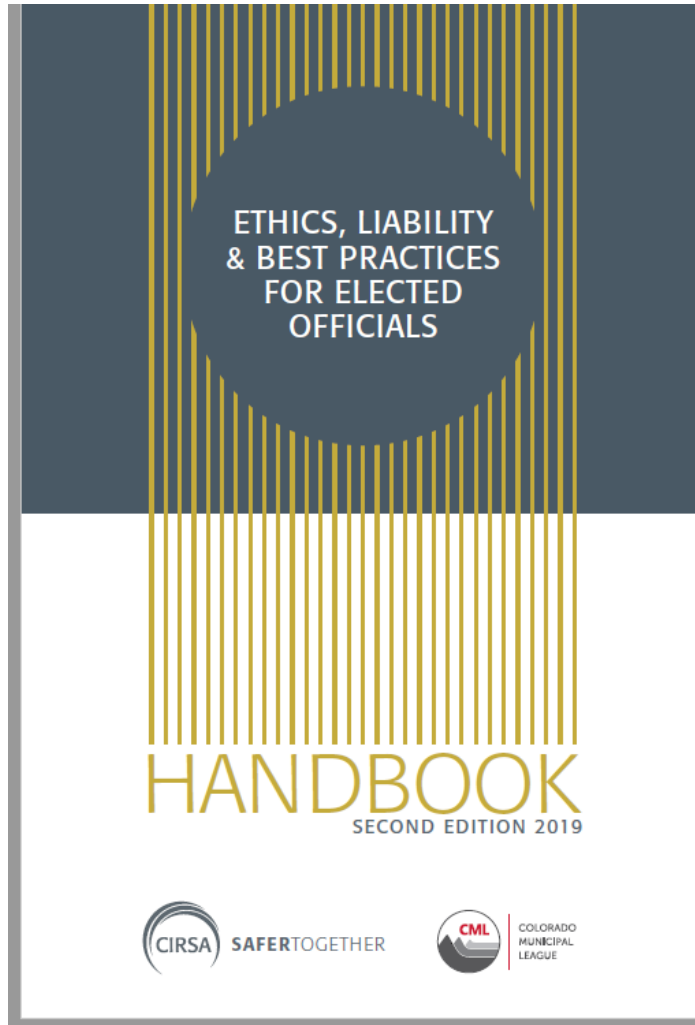
Elected Official & Governing Body Liability Risks

- Some key “takeaways” for managing and mitigating risk at the governing body level?
 - Remember and embrace the policy/administrative distinction
 - Take the time you need and get the information you need to make sound decisions
 - Have great deliberations—they lead to defensible decisions
 - Individually and collectively, stay within your “scope of employment” and authority
 - 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 Council authority is exercised collectively
 - Avoid conduct and decisions that may appear (fair or unfair) as retaliatory

Concluding Thoughts

- Recognize, as its elected leaders you set the tone for City government.
- Commit to courtesy, tact, and diplomacy, especially in public settings. Commit to civility and mutual respect even in the face of incivility.
- As members and as a body, commit to a “no surprises” approach at your meetings and while dealing with one another and staff.
- Deal effectively with discord. Every public body has disagreements—but can have disagreements without be disagreeable. Don’t let discord drive your how you interact with the citizens, each other, or staff.
- Commit to service of the City as an entity and service of the Council as an institution, and embrace the fiduciary, stewardship, and “We” responsibilities of elected office.

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 293 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.

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.