



Elected Officials Presentation

Frisco Town Council 2024

Presented by Tami Tanoue, CIRSA Executive Director



Introduction

- Congratulations on your election to the Council!
- Refresher/intro on liability risks & risk prevention best practices surrounding meetings and quasi-judicial issues, social media, and Council involvement in personnel matters.
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues; in case of any inconsistency between this presentation and your Town Attorney's advice, your Town Attorney is always right!
- 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>
 - Our latest elected officials' training video, found on our CIRSA Safety YouTube channel: <https://www.youtube.com/watch?v=bfhxvn1c1IA&t=413s>

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 289 member municipalities & affiliated entities:
- CIRSA views proactive approaches to risk management as critical member services – it's a win-win when issues can be addressed/resolved before they turn into more contentious disputes or litigation
- **We also view the governing body's leadership as a critical part of risk management – how you approach your roles, your commitment to ethical and lawful practices, and the example you set as leaders -- are reflected and amplified throughout the organization**

Today's Topics

- Meetings and Transparency
- Quasi-Judicial Proceedings
- Social Media Issues
- Legislative versus Administrative Matters
- Any particular areas above to emphasize/de-emphasize?
- Any other topics you'd like to discuss?

Open Meetings-Honor Transparency

- The Colorado Open Meetings Law (OML) applies to all meetings of the governing body, boards, commissions, committees, etc.
- Applies to three 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.
- The OML allows executive sessions for limited purposes. Follow executive session procedures and other processes to comply with the law and protect confidential information.
- “Serial meetings” have become a focus of litigation, and should not be used to avoid the “three or more” threshold
- Recognize that non-meeting communications (**e.g. e-mail, texts, social media**) can raise liability and transparency issues in much the same way as meeting practices

Other Communications-Honor Transparency

- Electronic communications may be covered by the **Open Meetings Law**
 - If elected officials do their discussions of public business by email or other electronic means, the public may be denied their right to be present at such discussions
 - Are you texting each other during public meetings? Same concerns apply.
- E-mails may be covered by the **Open Records Act**
 - Each email discussing public business could be a record subject to public disclosure
- Electronic communications of all kinds may be subject to the **civil discovery process**
 - Electronic communications 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 provisions!**

Quasi-Judicial Issues

- Your role as a quasi-judicial decision-maker is one of the relatively little-known aspects of being an elected official
 - The rules that apply to quasi-judicial decision-making are distinct from those that apply in other settings, and are often counter-intuitive
- But, because of the high stakes involved in these decisions, and because of the constitutional protections underlying the applicable rules, missteps in the quasi-judicial arena can have severe consequences
- Your responsibilities can be broadly broken out into two arenas: **legislative and quasi-judicial**
- It's critical to know, with respect to any given matter that may come before you, which of these two arenas is applicable

Legislative v. Quasi-Judicial Issues

- **“Legislative” activities** are those that most likely came to mind as the elected official’s “job description” when you were contemplating a run for office:
 - listening to citizens who contact you in person, by email, on social media, etc.
 - investigating the issues yourself, applying your own personal knowledge
 - communicating early and often with your constituents
 - lobbying and being lobbied
 - working in advance to create a consensus (subject to open meetings laws)
 - having strong convictions/ opinions/prejudgments that you don’t hesitate to voice and share....
- And then ultimately **voting on an ordinance or other policy-making enactment that will have prospective application to all who come within the ambit of the enactment** – that’s legislation!
- The “rules of engagement” for **legislative activities** are easy and intuitive – the kinds of activities described above are OK!

Quasi-Judicial Issues

- But when it comes to **quasi-judicial** issues, *all of the activities described above can become problematic!*
 - That's why the quasi-judicial "rules of engagement" can be non-intuitive and easy to breach
 - So it's critical to keep in mind which rules of engagement" apply for any given situation!
- As long as you follow the **right** "rules of engagement," and correctly apply the facts you determine from the hearing to the applicable legal standards, your decision will most likely be upheld on appeal
 - Route of appeal follows Rule 106(a)(4) of the Colorado Rules of Civil Procedure, and is an "on the record" review of your hearing and decision: "Review shall be limited to a determination of whether the body or officer has **exceeded its jurisdiction or abused its discretion**, based on the **evidence in the record before the defendant body or officer.**"

Quasi-Judicial Issues

- **Let's make sure we're on the same page as to what "quasi-judicial" matters are:**
 - Typically involve a decision affecting property rights at an individual level
 - Examples: application for land use approval, application for a permit or license
 - Decision is made on the basis of specific criteria (the law) and the testimony and other evidence concerning the application of the criteria (the facts) that are brought forward at a hearing
 - Require notice, a public hearing, and a decision based on the record of the hearing (what's submitted by testimony and other evidence at the hearing)

Quasi-Judicial Issues

- The “rules of engagement” that apply to quasi-judicial decision-making are premised on the existence of property rights that will be affected by your decision, and **the constitutional requirement that “no person shall be...deprived of life, liberty, or property, without due process of law.”**
- “Due process,” at its essence, means a **fair hearing** before an **unbiased decision-maker**: you!
- When your Town Attorney emphasizes the need to follow the “rules of engagement” in quasi-judicial matters, he/she is trying to achieve two goals:
 - Protect YOUR right and responsibility to participate in the decision-making; and
 - Protect you, the Town, and the decision that is ultimately reached
- Not following these rules can jeopardize both of those goals!

Quasi-Judicial Issues

Quasi-judicial issues encompass a minimum one-hour training topic, so these suggestions are aimed at your own personal conduct in quasi-judicial proceedings:

- Don't make up your mind before the hearing
- Don't make prejudicial pre-hearing statements
- Don't speak with one side or the other before a hearing (ex parte contacts, more in a moment)
- Don't participate if you have a financial or other personal interest in the matter (code of ethics)
- Don't sign any "pro" or "con" petitions
- Don't be a witness in your own hearing. Instead, have the parties provide you with information at the hearing

Quasi-Judicial Issues

- Discuss and consider quasi-judicial matters only at the Council’s duly noticed public hearing; that is:
 - Wait until the matter has arrived on your agenda and is “ripe” for you to hear, deliberate and decide
 - Don’t engage in pre-hearing “buzz”—you get to make the decision but with that power comes the responsibility to be fair and unbiased and follow the rules of engagement
- Focus your deliberations on the applicable criteria—have the criteria at the ready and speak directly to whether or not the application meets those criteria. Ask staff for help as needed – work with Town Attorney to develop “checklists” summarizing your more regularly-used criteria
- Once the Council has made its decision, let the decision speak for itself
- Even if you held a minority view, recognize your individual responsibility to respect the body’s decision

Quasi-Judicial Issues

A bit more about “ex parte contacts”:

- 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. Examples:
 - Meeting with the applicant outside the hearing to discuss the pro/cons of the request and how you might decide the case.
 - E-mailing your fellow decisionmakers before the hearing to persuade them why they should vote yes or no.
 - Attending meetings where folks for or against the application are discussing the application, even if you’re not participating.
- If it were your application and your property interests at stake, would these activities seem fair to you?

Quasi-Judicial Issues

- A proceeding loaded with “ex-parte” contacts is a clear 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 in the decision-making, and your ultimate decision.
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.
- Or, even in the hearing itself (i.e., no texting or e-mailing about the subject matter of the hearing within the hearing itself).
- Go back to the activities commonly associated with “legislative” actions, and you can see that most of them can be problematic in the quasi-judicial arena!

Quasi-Judicial Issues

- Arm yourself (and staff, arm your quasi-judges!) with knowledge you need when persons want to talk about a pending quasi-judicial matter outside the hearing. Keep some “talking points” ready; e.g.:
 - “Thanks for your interest [or e-mail, etc.] but I can’t talk with you about this application outside the upcoming hearing. I’d like to hear your views but because this is a specific property rights case, I need to hear and consider the evidence only through our public hearing process. Please plan to attend the hearing if you can. If you can’t attend, you can send written comments to our staff and they’ll include those comments in hearing materials.”
- Consider having a short explanation, or “FAQs,” on the quasi-judicial process on your website – as noted, these “rules of engagement” are non-intuitive and may be baffling to those encountering them for the first time!

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.



SAFER TOGETHER

Social Media

- This term, the United States Supreme Court for the first time provided some guidance on the issue of the extent to which public officials can block or delete comments on social media. *Lindke v. Freed*, 601 U.S. 187 (2024); *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024).
- The Court's decision confirms that federal civil rights liability (under 42 U.S.C. Section 1983) can exist for blocking or deleting a comment under this two-prong test:
 - First, the official must possess actual authority to speak on the public entity's behalf on the particular matter at issue in the relevant social media posts.
 - Second, the official must purport to exercise that authority when speaking in those social media posts.

Social Media

- The public official in question, James Freed, was a city manager. After his appointment, he made his personal page public, describing himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.”
- His profile photo was a photo of himself in a suit with a city pin.
- His postings were a mixture of personal and work-related. He occasionally deleted comments that he thought were “derogatory” or “stupid.”
- When Kevin Lindke, a citizen, began making derogatory comments about the City’s pandemic response and other matters, Mr. Freed first deleted his comments, and then blocked him from making comments; the lawsuit ensued, resulting in the articulation of the two-prong test described above.

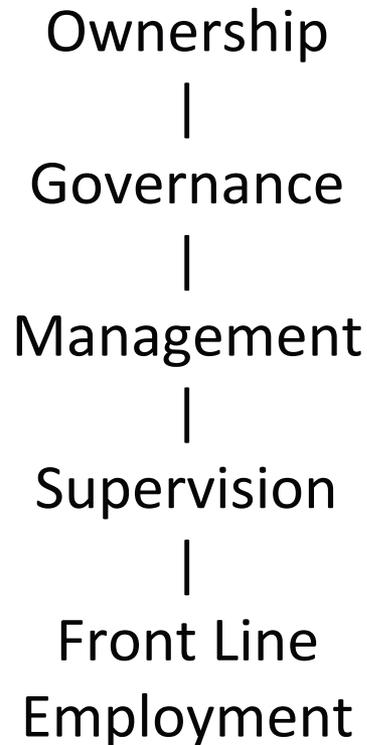
Social Media

- The Supreme Court noted that denoting personal opinions as such creates a heavy (though not irrebuttable) presumption that posts are personal and not “state action” for purposes of civil rights liability.
- CIRSA has consistently suggested to officials that they use caution as blocking commentors or deleting comments could expose them to potential civil rights liability as “state actors”. **Our best practices suggestion remains “Use Caution”:** *The best lawsuit is one that never happens.*
- The public official in the *Lindke* case was an employee. The Court in the *O’Conner-Ratcliff* held the same standard applies to elected officials—in that case elected school board members. With a Mayor or governing body member, the issue of actual authority to speak on a matter might land closer to home.
- And Section 1983 isn’t the only potential source of liability:
 - 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, especially for supervisors, potential employment related claims.
 - And remember the previous discussion about social media and open meetings/open records issues!

Social Media – Tips

- Consider “keeping it light.” Social media can be great for staying current and in touch but is probably not the best place for handling controversial issues.
- Consider the value and impact of your social media activity in relation to your role as a member of the governing body; e.g.:
 - **Are personal opinions denoted as such? This has become an important protection under *Lindke*.**
 - Be careful about using “We” in posts: Are posts for or about the Council accurate as to “we” and where “we” are at?
- **Is your activity calculated to foster open and honest communication, to build bridges, and to bridge divides, or just to embarrass, troll, or “get back at” someone?**
- If your objective on the Council is to draw together a consensus of votes on the issues you care about most, then consider whether your interpersonal conduct, especially on social media, is aimed at that end or is working against it!
- Confine your campaign activities to personal accounts
- Adopt and follow a Town social media policy

Legislative v. Administrative Matters: Where are you focusing your efforts?



- **Time Horizons:** Yours should be the furthest out!
- **Dealings within Chain of Command:** Don't jump more than one level!
- **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

- It's important to understand and observe the difference between legislative and administrative matters
- A local government evolves from “hands on” elected official involvement in administrative issues to a Council-Manager format as the entity's operations become more sophisticated and complex.
 - Council-Manager format: The gold standard of local government!
 - You've achieved 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, and misunderstandings

Involvement in Personnel Matters

- The legislative-administrative distinction is particularly important in personnel matters.
- A governing body's most appropriate role is to stick to the "big picture" issues:
 - Personnel rules, including selection procedures performance evaluations, disciplinary actions
 - Entity-wide pay/benefits plan
 - Selection and management of your "direct reports"
 - Overall entity-wide and departmental goals and priorities
- Governing bodies must do their work in public – but some aspects of personnel management should not be done in public!
 - The more you become involved in the intricacies of a personnel matter, the harder it will be to navigate the competing demands of privacy rights of an individual employee and governing body transparency requirements

Involvement in Personnel Matters

- You may experience pressure to become involved in hiring/firing/supervision decisions concerning positions that are not direct reports to you
 - Pressure can come from various directions – yourself, citizens, employees
 - But your involvement in such decisions 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
- Shouldn't the supervisor be the one to make hiring and firing decisions?
- 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?

Involvement in Personnel Matters

Remember Your Town Charter:

Section 7-4. Relationship of Council to Administrative Service. Neither the Council, nor any Councilmember, the Mayor, or any Council committee, shall dictate the appointment of any person to or removal of any person from employment by the Town Manager except as otherwise provided in this Charter, or in any way interfere with the judgment of the Town Manager in the appointment, hiring, suspension, transfer, or removal of employees in the administrative service of the Town. **Except for the purpose of inquiry, the Council, each Councilmember, the Mayor, and each Council committee, shall deal with the administrative service solely through the Town Manager and neither the Council, nor any Councilmember, the Mayor, or any Council committee, shall give orders to any employee of the Town. Except for the purpose of inquiry, the Council, each Councilmember, and each Council committee, shall deal with the Town Manager solely through the Mayor.**

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, in collaboration with your Manager, a process for bringing forward your questions and concerns (or those raised by citizens) about administrative matters
- 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 Council’s responsibility to sort out and reconcile its differences.
- Commit to honoring the Council’s priorities and agenda

Thank you!

- Many of these topics can be explored in greater depth
- Both CIRSA Deputy Executive Director/General Counsel Sam Light and I are always available for training, participation in Council retreats, etc.
 - tami@cirsa.org
 - saml@cirsa.org
- We appreciate the opportunity to be of service to the Town!

Speaker Bio

- Tami A. Tanoue
- Executive Director for CIRSA; previously General Counsel/Deputy Executive Director
- Previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, serving CIRSA as its contract General Counsel for 12 years, and serving as City or Town Attorney for several Colorado municipalities.
- Previously Staff Attorney for the Colorado Municipal League, representing the collective interests of Colorado municipalities.
- Regular speaker on local government liability topics; author of several publications on liability issues.