



Ethics, Liability & Best Practices for Elected Officials

Board of Trustees Training 9.12.22

Presented by Sam Light, CIRSA General Counsel



Introduction

Presentation Overview

- Suggestions for “best practices” that will enhance your effectiveness as Board members and as a Board – which in turn will reduce risk for the Town and you individually. Topics we will touch on:
 - The role of public official
 - Transparency rules
 - e Town’s structure & liability
 - Ethical obligations & personal conduct
 - Due process requirements
- Presentation is a training resource only; is not intended to address or provide legal advice on any specific, pending issues.

Suggestion One: Commit to the Role of Public Official

- Being a public official means your role has changed:
 - Citizen → elected official / government official (24/7!)
 - Outsider → insider
 - Critic/proponent → representative-ambassador-fiduciary
- The role requires an understanding that in the eyes of the community, you are always a public official.

One: Commit to the Role of Public Official

- When you became an elected official, you agreed to uphold and follow applicable laws, including the Town's ordinances, resolutions, etc. What does that commitment embody?
 - A commitment to respect your role within the Town's organizational structure.
 - A commitment to lawful conduct, including following the Town's rules, procedures and criteria in making decisions.
 - A commitment to ethical practices.

One: Commit to the Role of Public Official

- As local government officials, part of your role is delivering good governance 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 & Evenhandedness** (equal protection, certiorari claims, etc.); and
- Mutuality of Respect**

Suggestion Two: Honor Transparency

- Commit to the “openness” and other requirements of the Open Meetings Law (OML).
 - The “openness” clause of the OML applies to 3 or more or a quorum, whichever is less. Requires discussion of public business to take place at a meeting open to the public.
 - And, if action will be taken or a quorum will be present, there must be timely notice—agenda posted at least 24 hours in advance (in those place(s) designated by Board). Any Board action must be taken at meeting open to the public.
 - A “meeting” includes any gathering to discuss public business, in person, by phone, or electronically (e-mail, etc.).

Two: Transparency – Other Issues

- Using email? *See* CIRSA Handout. The recently adopted HB 21-1025 will bring some clarity regarding application of the OML to e-mails; see, <https://www.cirsa.org/news/how-the-colorado-open-meetings-law-applies-to-elected-officials-email/>).
- What about one-on-one discussions?
- Be cognizant of social media risks for public officials; see <https://www.cirsa.org/wp-content/uploads/2019/06/Social-Media-Use-by-Elected-Officials.pdf>.
- Separate from issues of compliance with the openness requirement of the OML, not that correspondence of elected officials is generally a matter of public record (with only limited exceptions).

Two(b): Protect the Town's Confidences

- The OML permits executive sessions for discussion of only a limited number of authorized topics and following specific procedures. Authorized topics most frequently used:
 - Conference with legal counsel for legal advice/specific legal questions.
 - Matter subject to negotiation (but only for developing strategy, determining positions and instructing negotiators).
 - Personnel matters (unless person subject to session has requested open discussion). This authority does not extend to discussion of general personnel policies or Board members.
- Must follow detailed procedures and make/maintain a recording. Make sure your executive session procedures are set up to comply with OML!
- Make sure your procedures are also set up to protect the Town's confidential information.

Two(b): Protect the Town's Confidences

A Scenario

In executive session the Board develops a strategy for negotiating a purchase of a piece of vacant land from a property owner. A confidential appraisal states the parcel is worth \$100,000-125,000 and the Board instructs the Mayor and Town Administrator to meet with the owner and negotiate for a purchase price of \$100,000. Board Member Smith sees the owner the next day and tells her the Town is willing to pay \$100,000 for the parcel and may go as high as \$125,000 as the Town's appraisal says it may be worth that much.

Problems?

Suggestion Three: Commit to Supporting the Town Structure

- Everyone within the organization has a “job description”—it is important that you honor your “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!
 - You have protection from personal liability if you are “within the scope of employment” 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 the potential of personal liability for you. Can also result in potential loss of insurance coverage.

Three: Commit to Supporting the Town Structure

- What is the Town structure? The Board “job description”?
 - Fairplay operates as a statutory town.
 - **Board:** Legislative & Corporate Authority (Governance)(*See C.R.S. 31-4-301*).
 - **Administrator:** Chief administrative officer; administrative functions and day-to-day operations (*See Town Code Sec. Sec. 2-3-40*).
- By law and ordinance, certain duties are performed by the Board—that is, by the Board as a Board—and certain duties are performed by staff. These existing allocations of authority & responsibility not only define your municipal structure, they also operate to **serve** and **protect** the Town and the Board and its members, if honored.

Three: Commit to Supporting the Town Structure

Where Does the Town Board Focus its Efforts?

Ownership



Governance



Management



Supervision



Front Line Employment

Legislative and Corporate Governance is:

- Policy-setting, big picture, and forward-looking, rather than making reactive, case-by-case decisions as issues arise, or after-the-fact.
- Examples: General ordinances, annual budget, decisions regarding corporate assets, appointment of Board reports, administrative matters reserved to the Board.
- The governing body should:
 - Have longest time horizon—looks down the road.
 - Have broad interests in mind.
 - Work together in its fiduciary role to protect the Town as an entity and the Board as an institution.

Three: Commit to Supporting the Town Structure

- Board-staff dynamics require particular attention in that both must honor and respect their roles—staying in one's lane.
- Individual elected officials are not employee supervisors. Rather, the Board as a Board is responsible for the supervision of its direct reports. Similarly, neither the Board nor its individual members have authority or responsibility for administrative matters that are assigned to staff. Thus,
 - Don't get individually and improperly involved in personnel issues, or engage in or facilitate activities that undermine your organizational structure.
 - Don't get individually and improperly involved in administrative matters assigned to staff. This also undermines your organizational structure and creates risks for the Town and for you individually.

Three: Commit to Supporting the Town Structure

- But, do focus attention on those areas where the Board has an appropriate role; e.g.:
 - Setting general personnel rules.
 - Selecting and supervising the Board's "direct reports."
 - Determining overall personnel items; e.g., positions and number of employees.
 - Determining resource allocation and work plan priorities at the governance level.
- These matters are the collective responsibility of the Board as a Board and are not powers held by any one Board member.
- Resolve to speak with "one voice". The Board is responsible for sorting out and reconciling the views and priorities of its members. In doing so, Board achieves clarity, credibility and accountability to its voice.

Three: Commit to Supporting the Town Structure

- Tips to support the structure and avoid concerns around “role discipline” and “scope”:
 - Understand “job description” and stay within it. Look to your structural documents.
 - Use your Administrator as a resource to help you do well and look good while doing it. Seek mutual support and collaboration consistent with “role discipline”.
 - Recognize that elected officials act primarily as a BODY, and exercise responsibilities mainly by VOTING in a PUBLIC MEETING.
 - Therefore, think “We” ... not “I”! If you acting in terms of “I” rather than “we” ...that’s a red flag.
 - Another warning sign: “He/She/They Did What!?!?!?”

Three: Commit to Supporting the Town Structure

- Role discipline (and its positive impacts) requires recognition that the governing body is not “seven boards of one” but rather one Board of seven...the VOICE OF the Board.
- This commitment sometimes requires:
 - Setting aside a personal interest or agenda when there is lack of support.
 - Accepting “the Board has spoken” though one may have preferred a different outcome.
 - Recognizing that others may look to hold you accountable for “making promises” or “assuring outcomes.”

Suggestion Four: Commit to Ethical Conduct

- Ethical scandals don't happen all that often and they can be exciting to read about—when they don't involve us!
- Become familiar with the ethics laws governing your conduct as Board members. Make them your “best friend” in resolving ethics issues. Some key areas:
 - **Conflicts of Interest:** Disclose, recuse, don't vote, and don't influence other members.
 - **Confidential Information:** Don't disclose or use any confidential information for personal benefit.
 - **Gifts:** Decline any gifts that seem to be connected to your service (and abide by gift rules).

Suggestion Five: Go Beyond Ethics!

- Beyond ethical conduct, commit yourselves to high levels of personal conduct. Recognize 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”.
 - Accusations of lack of respect, lack of good faith, hidden agendas, preconceptions, undue partisanship, incivility, 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.

Six: Commit to Providing Due Process

- Much of the time you're acting as "legislators"—making policy and general rules that apply generally—or handling Board level business and corporate matters.
- But other times you make decisions affecting a specific applicant's property rights. For these "quasi-judicial" matters—which include most land use/development public hearings and certain licensing matters—you are essentially acting as judges and have heightened duties to provide due process. Failures in this area expose you and the Town to liability.
- Be familiar with the due process "rules of engagement."
- These rules have a familiar source: "No person shall be...deprived of life, liberty, or property, without due process of law."

Due Process - Tips for Quasi-Judges

- Limit your involvement to just your participation at the Board public hearing.
- Remain neutral; don't make up your mind before the hearing and don't make prejudicial pre-hearing statements.
- Don't participate if you have a prohibited conflict of interest in the matter (code of ethics).
- Don't engage with one side or the other, or with your fellow Board members, before or outside the hearing (ex parte contacts).
- Make sure your decision is based on the relevant, existing criteria and not other factors.

Due Process - Tips for Quasi-Judges

- A critical duty of the quasi-judge—that goes along with the power to decide—is to avoid “ex-parte” contacts, meaning “outside the hearing” discussions 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 challenged and, as important, having the integrity of your process eroded.
- When we and your Town Attorney advise against ex-parte contacts, we are protecting your ability to participate, and your ultimate decision.
- So, don’t engage in pre-hearing “buzz”—remember, you get to make the decision but with that power goes the obligation to remain fair and unbiased.

Due Process - Tips for Quasi-Judges

- One way to look at ex parte communications: If it were your application and your property interests at stake, would these activities seem fair:
 - Meeting with the applicant or proponents or opponents 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.
 - Conducting your own investigations into the project/site/applicant, etc. so that you have “better” information upon which to make your decision.

Due Process - Tips for Quasi-Judges

- Deliberations Matter – When you are in “quasi-judicial” mode, your group deliberation is particularly important. Your group discussions at the conclusion of the hearing are where:
 - The Board formulates the bases of its impending decision.
 - The applicant, the public, and others obtain an understanding of your position.
 - A reviewing judge will look at to understand why you decided the matter as you did (and whether you followed your own rules).
- So Discuss and Deliberate – Talk Amongst Yourselves!! Use Sam’s “Rule of Why.”
- For more on quasi-judicial “rules of engagement”, see CIRSA handout and these presentations: <https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4> and https://www.cml.org/docs/default-source/uploadedfiles/events/annual-conference/cml-2022-conference---qj-decision-making.pdf?sfvrsn=b0a4e3a3_0.

Suggestion Seven: Embrace Wise Leadership

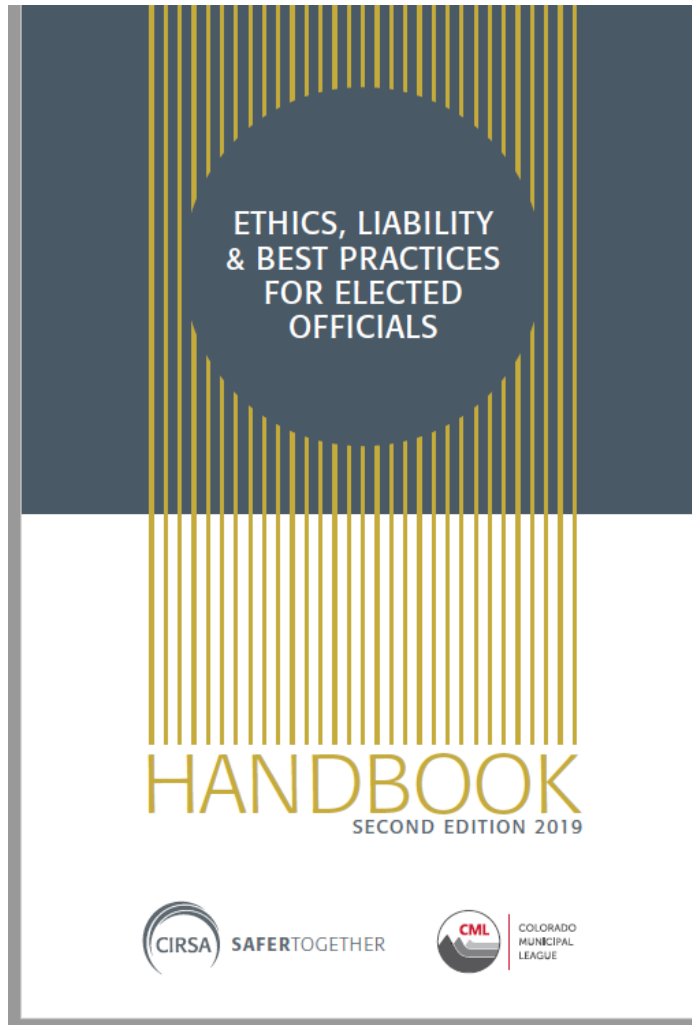
- As a body, commit to a “no surprises” approach while dealing with one another and staff. Meetings ought not to have “gotcha” moments or “staff bashing”.
- Deal effectively with discord. Every public body has disagreements, but discord should not drive meetings, your agenda, or how you interact with each other, staff, or other. And folks can disagree without being disagreeable.
- Commit always to civility & “mutuality of respect,” no matter how difficult the circumstances.
- 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.

Resources



CIRSA Elected Officials Handbook:

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

CIRSA Executive Director Tami Tanoue's Webinar on Ethics, Liability, and Best Practices for Elected Officials:

<https://www.cirsa.org/wp-content/uploads/2020/05/Ethics-Liability-and-Best-Practices-Webinar-2020.mp4>

Other CIRSA elected and appointed officials' resources: <https://www.cirsa.org/safety-training/elected-officials/>.

Conclusion

Colorado Intergovernmental Risk Sharing Agency

- Not a commercial insurance company; CIRSA is a Colorado public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed in 1982 by an intergovernmental agreement of 18 municipalities pursuant to CML study committee recommendations.
- 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.
- More information at www.cirsa.org.

Conclusion

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.