

LIABILITY BASICS FOR ELECTED OFFICIALS

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What We'll Cover

- What is CIRSA and What In The World Do We Know About Liability?
- The World of Liability As We Know It: State and Federal Liability Laws
- Suggestions for Avoiding Personal Liability



WHAT IS CIRSA?



What is 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 234 member municipalities and affiliated legal entities
- Out of 271 incorporated municipalities in Colorado:
 - 74% are members of our Property/Liability pool
 - 45% are members of our WC pool



What is CIRSA?

- Member-owned, member-governed organization
 - No profit motive – sole motive is to serve our members effectively and responsibly
 - Have returned over \$30,000,000 in contributions to our membership
- 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
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities



Introduction to Public Entity/Public Official Liability



State Liability Laws

- Primary liability concern = liability in the nature of "tort"
- The good news: Colorado Governmental Immunity Act (GIA) confers public entities immunity **except** in 6 specified circumstances where liability is waived
 - Actually more than 6 now, but rest have no application to local governments
 - Is an "immunity" act – a difficult concept to wrap your mind around!
- The bad news: Most of the waivers pertain directly to daily municipal operations!
- A bit more good news: Federal laws are not often implicated in routine accidents!
- A bit more bad news: some activities -- the more complex areas of municipal decision-making, such as personnel, police, land use -- frequently implicate federal constitution/civil rights laws rather than state laws
- Working knowledge of state law liability issues is helpful with respect to high-level policy decisions, budgetary priorities, etc.



6 Waiver Areas – GIA

- Operation of motor vehicle by public employee
- Dangerous condition of a public highway, road, or streets within corporate limits of municipality
- Dangerous condition of public hospital, jail, public facility in park or rec area maintained by public entity, or of public water, gas, sanitation, electrical, power, or swimming facility.
- Operation and maintenance of public water, gas, sanitation, electrical, power, or swimming facility
- Dangerous condition of public building
- Operation of public hospital, correctional facility, or jail



Waiver Area #1

- Operation of motor vehicle by public employee**
 - Must be OWNED OR LEASED by public entity
 - A truck that your employee is just test driving?
 - Private vehicle driven on municipal business?
 - Term "public employee" as used in the GIA includes elected officials – so this waiver applies to you when operating a municipally-owned vehicle!



Waiver Area #2

- Dangerous condition of a public highway, road, or street within corporate limits of municipality that physically interferes with the movement of traffic on the paved portion (or portion used for motor vehicle travel) thereof**
 - "Dangerous condition" is a dangerous **physical** condition proximately caused by the public entity's negligence in the **construction or maintenance** of a facility
 - Means you can't skip out on maintenance responsibilities!
 - All public entities have **design immunity** in CO
 - Counties have street immunity!



Waiver Area #3

- **Dangerous condition of public hospital, jail, public facility in park or recreation area maintained by public entity, or of public water, gas, sanitation, electrical, power, or swimming facility.**
 - “Dangerous condition” definition is pivotal – physical condition of the facility, proximately caused by your entity’s negligence in constructing or maintaining the facility



Waiver Area #3

- Sewer backups are where the \$#!% often hits the fan for elected officials where this waiver area is concerned
 - Citizens aren’t happy when they come home to a basement full of sewage
- A pivotal question, from a liability assessment standpoint is, “Whose negligence was it?”
 - If customer misuse, your entity will have immunity, and the claim will be denied – diapers, paper towels
 - If you have good routine maintenance, and can prove it, then proof of entity negligence may be absent, and the claim will be denied
 - A denied claim makes for a doubly unhappy citizen, and you may well hear about it
- On the other hand, these factors may make it difficult to assert immunity:
 - Repeat incidents at same location
 - Inadequate funding for routine maintenance
 - Poorly performed routine maintenance, or lack of good maintenance records



Waiver Area #4

- **Operation/maintenance of public water facility, gas facility, sanitation facility, power facility, or swimming facility**
- Note: Swimming facilities are the one type of recreational facility that is the subject of not one, but TWO immunity waivers
 - Lifeguards are a key protection that must be factored into the cost of operating a swimming pool
 - Recent inquiries about allowing pools to operate without lifeguards causes us great concern



Waiver Area #5

- **Dangerous condition of public building**
 - Grounds surrounding public building, and driveway leading to it, are not part of public building
 - (But there’s a separate waiver of immunity for snow and ice on walks leading to public building)
 - A question: What’s a “public” building?
 - Building owned by public entity but leased/rented to private party? **We don’t know!**
 - Make sure your leases properly characterize “non-public” nature of building and its use in this situation
 - “Non-public” part of a public building? **Still part of the public building!**



Waiver Area #5

- Waiver applies to building or structural defects – not to the **use** of a building
 - Party held in public building leading to public employee’s intoxication and motor vehicle accident relates to use of building, so immunity is retained
 - Shooting in public courthouse likewise relates to acts by intervening third party, not to any condition of the building



Waiver Area #6

- **Operation of public hospital, correctional facility, or jail**
 - Critical exposure to watch out for: suicides in jails/lockups



Waiver Areas – A Bit More Good News

- Keep in mind – in Colorado, there is a maximum recovery of \$150,000/person and \$600,000/occurrence under state law for an injury that occurs within one of the waiver areas
- These waivers and immunities also apply to you as “public employees,” but in order to be protected, you must:
 - **Be within the scope of your employment (SOE) – your authorized duties**
 - **Not be acting in a “willful and wanton” fashion**
- **“Outside the scope” or “willful and wanton” conduct takes you outside any GIA protections as well as outside your liability coverage protections**
- Other protections apply when you are within the scope/not willful and wanton, such as your right, as a public employee defendant, to be defended at entity’s expense, notice requirements as precondition to suit



Federal Law Liability - Section 1983

- 42 USC Section 1983:
Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.



Federal Law Liability - Section 1983

- Does not itself establish or create any substantive rights. It is a remedy in damages for violations of constitutional or other federally protected rights.
- Liability is premised upon (1) an action under color of law and (2) a violation of a constitutional or other federally protected right.
- Actions that you take while purporting to act as a public official will be considered actions “under color of law.”



Federal Law Liability - Section 1983

- Constitutional rights frequently alleged to have been violated by local governments include:
 - **First Amendment:** Interference with expression, religious freedom
 - **Fourth Amendment:** Excessive force
 - **Procedural due process:** the right to notice and a fair hearing before taking government action
 - **Substantive due process:** the right to be free from irrational and unreasonable conduct.
 - **Equal protection:** the right to have legislation and actions applied evenhandedly to all persons similarly situated in a designated class.



Federal Law Liability - Section 1983

- For liability under Section 1983, there is NO MONETARY LIMIT on the damages a plaintiff can win
- Additionally, a plaintiff who “substantially prevails” in a Section 1983 claim will be entitled to an award of attorney’s fees
- Attorney’s fees can far exceed any damages award
 - \$1 in damages can support hundreds of thousands of dollars in attorney’s fees



Federal Law Liability - Section 1983

- Troublesome claim areas:
 - Failure to provide procedural due process – quasi-judicial issues
 - More later
 - Deliberate indifference in hiring/training/supervision/discipline
 - Don't lower your hiring standards
 - Don't stint on training
 - Don't accept ineffective or nonexistent discipline standards/practices
 - Retaliation for exercise of a protected right
 - Mayor in New Mexico claim hit with \$1.5 million in punitive damages for retaliatory and discriminatory acts
 - Sheriff in Colorado claim hit with \$150,000 in punitive damages for retaliatory acts



Federal Employment Laws

- The Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination
- The Fair Labor Standards Act (FLSA), which establishes minimum wage, overtime, and other requirements
- The Pregnancy Discrimination Act of 1978 (PDA), which requires pregnancy to be treated the same as other medical conditions that may affect an employee’s ability to do his or her job
- The Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination



Federal Employment Laws

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin
- The Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older
- The Americans with Disabilities Act of 1990 (ADA), and the ADA Amendments Act of 2008 (ADAAA) which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments
- The Family and Medical Leave Act, which provides leave rights for employees whose employers employ at least 50 employees



Federal Employment Laws

- High-risk areas include:
 - Pregnancy discrimination – esp. in public safety arena
 - Sexual harassment; other protected category harassment
 - Racial discrimination
 - Overtime violations, esp. in public safety arena
 - Failure to follow established procedures in discipline/termination
 - **Retaliation!!**



Federal Employment Laws

- A perennially troublesome area: The Fair Labor Standards Act (FLSA)
- Overtime requirements of FLSA have been applicable to municipalities for over 20 years now, yet unlawful wage practices are frequently uncovered
 - "We're too small to follow the FLSA" does not work as an excuse!
- Wage claims generally not covered by liability insurance
- Wage claims can result in a double damages liability, as well as payment of the claimant's attorney's fees
- Make sure your wage practices are FLSA-compliant!!



Claims in Real Life: CIRSA General Liability Loss Causes 2004-2009

▪ Sewer Back Ups	490	\$3,790,360
▪ Waterline Ruptures	135	\$1,013,653
▪ Slip/Trip/Falls	175	\$ 892,927
▪ Negligent Maintenance	142	\$ 589,218
▪ Swimming Pools	25	\$ 513,967



Claims in Real Life: CIRSA Errors & Omissions Loss Causes 2004-2009

▪ Wrongful Terminations	98	\$2,009,842
▪ Discrimination	84	\$1,859,549
▪ Zoning Disputes	24	\$ 1,620,996
▪ Civil Rights Violations	55	\$1,252,132
▪ Sexual Harassment	32	\$ 467,648



Claims in Real Life: CIRSA Auto Liability Loss Causes 2004-2009

▪ Ice & Snow – All	368	\$1,158,678
▪ Intersections	87	\$ 502,849
▪ Left Turn	76	\$ 483,835
▪ Passing/Lane Change	75	\$ 379,485
▪ MV Backed into OV	386	\$ 132,896



So... what do I do to avoid liability?



Recognize that your role may have changed

- Being newly elected, or a change in the balance of power on a Council/Board, means that your role may have changed:
 - Citizen-official
 - Outsider-insider
 - Minority-majority
 - Critic-representative
 - Single-issue proponent-all issues decision-maker



Recognize that your role may have changed

- Whatever your role may have been previously, you are now all trustees – guardians – stewards – of the City/Town
- The protection of the City/Town's interests and assets is perhaps your most critical function now
- Council/Board is analogous to the board of directors of a multi-billion dollar corporation
- The guiding principle in decision making should always be, "what is the **right thing** for the **City/Town**?"



Recognize that your role may have changed

- Hanging on to "outsider" mentality can be destructive – when you were elected, you became the ultimate insider!
- Misunderstanding your role can increase the risk of liability for the City/Town and for yourself.
- It can also greatly reduce your own effectiveness: being part of a collective decision-making body requires **collaboration** and **consensus-building**.



Operate within the areas where immunities are strongest

- You have, among other immunities, "qualified immunity" from individual liability under Section 1983 when making discretionary decisions unless your conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known"
 - Means you need to have a reasonable and up-to-date familiarity with constitutional rights!
- You have personal protection from liability under the Governmental Immunity Act if you are "within the scope of employment" and not acting "willfully and wantonly."
 - Concept of "scope of employment" (SOE) applies to ALL persons covered by the GIA– including elected and appointed officials, employees, and authorized volunteers
 - Means everyone needs to know their "job description"!
 - For council/boards, that's found in a variety of legal sources



Operate within the areas where immunities are strongest

- Conduct that is outside the scope of employment (SOE) or willful and wanton will result in a loss of governmental immunity.
- Can also result in loss of coverage under liability insurance policies
- Can also result in personal liability, including punitive damages
- You may become responsible for defending yourself and paying any settlement/judgment against you



Operate within the areas where immunities are strongest

- Understand your "job description" and stay within it.
- Before acting, look for a law, charter provision, ordinance, resolution, or motion that authorizes you to act.
 - Keep in mind you may need to reconcile conflicting and superseding authorities
- **If you can't trace your action to a source of authorization, you may be outside your SOE!**
- **If you know what the limits of your authority are, and you choose to ignore those limits, you may be acting willfully and wantonly!**
 - Be very cognizant of what charter and/or statutory provisions say about your job duties, and respect what they say!



Operate within the areas where immunities are strongest

- As council/board members, you act primarily as a BODY.
- You exercise your responsibilities mainly by VOTING in a PUBLIC MEETING.
- When you find yourself doing **anything** other than that, it is particularly critical to make sure you are properly authorized!
 - Particularly in smaller municipalities, at least portions of the "job description" of elected officials tend to be found in oral history and tradition!



Operate within the areas where immunities are strongest

- "We" ... not "I"!
 - If you find yourself thinking (or worse, acting) in terms of "I" rather than "we" ...that's a red flag.
- Be particularly cautious once you've voted on a matter.
- The tribe has spoken!
 - Get behind the decision, don't undermine.
 - If you feel there is a need to change it, use proper channels only.
 - Recognize that some decisions CANNOT be undone without liability.



Operate within the areas where immunities are strongest

- Avoid acting out of personal motives
- Acting on the basis of personal motives is likely to be outside your SOE!
- May also be willful and wanton
- If a motivation can be described in any of these terms, it may be a red flag!
 - Retaliation
 - Revenge
 - Personal axe to grind
 - Out to "get" someone
 - Single-issue "agenda"
 - Personal benefit – financial or otherwise



Understand your open meetings responsibilities

- Protect legitimate confidences.
- Government is conducted in the open – but there are legitimately confidential matters, including:
 - Legal advice, litigation issues
 - Personnel matters
 - Issues being negotiated
- Understand and comply with the formalities and substance of the Open Meetings Law, and maintain executive session confidentiality after you complete the executive session
 - CIRSA recently enhanced its coverages with open meetings/open records defense costs protection



Run a good meeting

- Outside of appropriately confidential matters discussed in a properly convened executive session, ALL matters before a public body are to be discussed AND decided only in a properly noticed public meeting.
- Don't hold a private "meeting before the meeting"
- Be especially careful about emails among/between elected officials – concerns about both open meetings/open records act issues
- No public "rubber stamping" of decisions already made in private
 - If some or all members have already decided an outcome in private, then the concept of public participation in a public meeting has been effectively destroyed



Run a good meeting

- Understand the difference between legislative and quasi-judicial matters, and observe the different requirements applicable to each!
 - Boards that need to be particularly concerned about this distinction include Council/Board, Board of Adjustment, Planning Commission
- In a quasi-judicial hearing, an array of special procedural requirements apply
 - Think Gold Dome versus courtroom!
 - Violation of those requirements in a quasi-judicial setting is a violation of due process – a constitutional/civil rights violation!



Quasi-judicial hearings - avoid ex parte contacts

- An ex parte contact is an “outside the hearing” contact with someone who has a stake or interest in the subject matter of the hearing
 - The contact is impermissible in a quasi-judicial matter whether with the **applicant, citizens, or staff**
- When your City/Town Attorney advises against them, she is protecting YOU, your ability to participate in the decision-making, and your ultimate decision
- Improper ex parte contacts **disempower you** as the decision-maker!



What’s the problem with ex parte contacts, anyway?

- The courts will accord you a presumption of integrity, honesty, and impartiality as a decision-maker.
 - You can lose that presumption by actions that are unfair, or even appear unfair
 - Ex parte contacts are among those actions



Ex parte contacts, cont’d

- A board/commission member doesn’t wear a robe, is easily recognized on the street, and is expected by citizens and others to be “accessible” at all times, but . . .
 - A judge reviewing a quasi-judicial decision in an appeal proceeding will judge the board’s conduct against the way he/she would behave as a judge in his own courtroom – so keep the “judge – courtroom” scenario in mind when deciding on your own conduct in quasi-judicial matters
 - So “think like a judge” in your personal conduct when a quasi-judicial matter is pending. . .



Ex parte contacts, cont’d

- Would a judge seek out citizens and invite or ask them to come and testify as witnesses in a pending case before him/her?
- Would a judge allow himself/herself to be “lobbied” on a pending matter at home or at the local supermarket?
- Would a judge compromise the appearance (and possibly reality) of fairness by singling out one side or another to be overly friendly with, or to be an advocate for?
- Would a judge step away from the bench and try to start negotiating a compromise with one side or the other?
- Would a judge make a decision in a matter in which he/she had a financial interest, or in which he/she had already made his mind up?
- Would a judge make a public statement that could come back to haunt him/her later on in terms of displaying a possible bias?
- Would a judge decide to ignore the law and/or the facts in rendering a decision, and make his/her decision on the basis of factors that he/she knows are not relevant?



What’s the problem with **ex parte contacts**, anyway?

- A local elected official or board member doesn’t wear a robe, and is easily recognized on the street ...



What's the problem with **ex parte** contacts, anyway?

- So how do you avoid ex parte contacts when everyone knows who you are and expects you to be accessible?
- First, make sure that you don't **INITIATE** any ex parte contacts yourself!
- Second, arm yourself with the knowledge and "talking points" you need to address an ex parte contact initiated by another



What's the problem with **ex parte** contacts, anyway?

Some "talking points" :

- "I'd love to hear your views, but the City Attorney advises that the only evidence we can consider as board members is what we actually hear at the hearing. Please plan to attend the hearing on ____ so that I can hear and understand your viewpoint."
- "The Town Attorney advises that when I talk to one side or another at any time or place other than at the hearing itself, it really compromises my ability to maintain the reality AND appearance of fairness. Worse case scenario, I could end up having to recuse myself from participating in the hearing. I'm sure neither you nor I want that. Please, please, please come to the hearing and express your views."



Reduce your involvement in administrative matters

- Understand and observe the difference between legislative and administrative matters!
- A municipality evolves from "hands on" elected official involvement in administrative issues to a City/Town administrator/manager form of government as the municipality's operations become more sophisticated and complex.
 - City/Town Administrator/manager format: The gold standard of municipal government!
- Establish "corporate" values and mission, set overall goals and priorities, and give broad direction, leaving details of execution to staff.



Reduce your involvement in administrative matters

- Inappropriate involvement in administrative matters by elected officials, collectively or individually, can:
 - Undermine the chosen form of government
 - Waste the resources you've committed to the form of government
 - Be a backwards step in municipal government evolution
 - Increase the risk of liability for yourself



Reduce your involvement in administrative matters

- The legislative-administrative distinction is particularly important in personnel matters.
- Council/Board has an appropriate role – the "big picture" issues:
 - Personnel rules, including selection procedures performance evaluations, disciplinary actions
 - City/Town-wide pay plan
 - Selection of your "direct reports"
 - Budget
 - Overall City/Town-wide and departmental goals and priorities



Reduce your involvement in administrative matters

- Make sure your involvement in these "big picture" issues doesn't devolve into the details:
 - Selection, evaluation, or disciplinary matters involving a specific individual who's not a direct report
 - Salary of specific individuals who aren't direct reports
 - Details of a specific individual's duties or job performance
- Other than your "direct reports," if you are looking at issues involving a single employee rather than the group as a whole, that is likely an administrative issue that should be entrusted to staff
- Don't be pressured to bypass the chain of command to deal with a specific employee – if you do it with one employee, how can you **ever** return to the proper chain of command?



Reduce your involvement in administrative matters

- Your BEST immunities as elected officials are in the legislative and quasi-judicial arena.
 - Courts recognize legislative and quasi-judicial immunities
- Venture into administration, and you're venturing into "outside the SOE" territory!



Use your power wisely and humanely

- Whether you know if or not, you set the tone for the whole City/Town in terms of the treatment of employees.
- If the tone you set is negative, demeaning, distrustful, discriminatory, etc., you are setting yourself and the City/Town up for liability. . . . And guess what rolls downhill?
- Understand that you are perceived as holding the most powerful positions in the City/Town
- Use courtesy, tact, and diplomacy in interactions, especially in public settings
- Your staff members are professionals, but they are humans too.
- Avoid acting explosively or with the intent to demean or embarrass
- Think before speaking off the cuff, especially in a public setting



Use your power wisely and humanely

- Do not allow Council/Board meetings to be used as an opportunity to berate your staff members
 - Citizens have every right to raise concerns and to be critical about the way City/Town government conducts business
 - Use the meeting as an opportunity to RECEIVE citizen feedback for appropriate follow-up
 - Do not join in the staff-bashing, if it's happening!



Conclusion

- Always keep in mind that you are the stewards of the City/Town's best interests and assets
- Stay within your "scope of employment"!
- Act as "we," not as "I"
- Observe best practices in meetings
- Avoid ex parte contacts in quasi-judicial matters
- Delegate administrative matters
- Use your powers wisely and humanely



QUESTIONS?

