COLORADO MUNICIPAL LEAGUE

Municipal Attorneys Conference Sessions

2019

Colorado Municipal League Annual Conference

June 18–21 • Breckenridge, CO

Municipal Attorneys Conference Sessions

97th CML Annual Conference • June 18–21, 2019 • Breckenridge

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CLE Accredited Sessions

WEDNESDAY
1:00–2:15 P.M.

2019 LEGISLATIVE UPDATE *(Advanced session)*
BRR Breckenridge Ballroom Peaks 14–16
This annual analysis of the legislative sessions reveals how Colorado municipalities fared in 2019 on the issues affecting them.
Kevin Bommer, CML executive director; Morgan Cullen, CML legislative and policy advocate; Brandy DeLange, CML legislative and policy advocate; Meghan Dollar, CML legislative and policy advocate

WEDNESDAY
3:15–4:15 P.M.

NAVIGATING MARIJUANA ISSUES FOR MUNICIPALITIES *(Advanced session)*
DT Columbine Ballroom A–C
Marijuana's shifting legal status challenges municipalities as they deal with low unemployment, the possibility of off-duty use, and heightened Fourth Amendment obligations. This session covers policy considerations, reasonable suspicion, how technology will change drug testing, best practices, and more.
Curtis Graves, SPHR, Employers Council attorney

WEDNESDAY
4:15–5:15 P.M

ANNEXATION: TOOLS FROM START TO FINISH (INCLUDING DISCONNECTION) *(Advanced session)*
DT Columbine Ballroom A–C
Gain a fresh understanding of how to satisfy the technical steps in annexation through the use of key tools, annexation calendar, and standard forms, which can be adapted to each new annexation. Common pitfalls will be identified and explained, including one not found in the annexation statute itself! The techniques for disconnection also will be covered.
Gerald Dahl, Murray Dahl Beery & Renaud LLP

THURSDAY
8:30–9:45 A.M.

VIRTUE AND VICE: FIRST AMENDMENT AND LAND USE REGULATION *(Advanced session)*
DT Columbine Ballroom A–C
Many thorny land use issues implicate the First Amendment, from signs to adult businesses, religious land uses to public assemblies. As the Supreme Court expands individuals' free speech rights, local governments face the difficult task of preparing and implementing constitutional regulations in these areas. This session will review current law and creative approaches to these problems.
Brian Connolly, Otten Johnson Robinson Neff + Ragonetti PC shareholder

THURSDAY
10:15–11:30 A.M.

MODERN MYSTERIES OF MUNICIPAL INSURANCE *(Advanced session)*
DT Columbine Ballroom A–C
Municipal insurance can be mysterious. This session will provide a legal overview, as well as some practical tips, for addressing insurance issues and questions that commonly arise in municipal operations. Some of the topics covered will include certificates of insurances, additional insureds, reservations of rights, interpreting coverages, and other issues.
Sam Light, CIRSA general counsel

THURSDAY
1:45–3:00 P.M.

SOCIAL MEDIA: LEGAL ISSUES FOR MUNICIPALITIES *(Advanced session)*
DT Columbine Ballroom A–C
This session will address several legal issues surrounding social media for municipalities including policies for the public and elected officials, as well as employment law issues.
Rebecca Greenberg, Colorado Springs City Attorney's Office corporate division senior attorney; Tracy Lessig, Colorado Springs City Attorney's Office employment division chief; Marc Smith, Colorado Springs City Attorney's Office corporate division chief and legislative counsel; Frederick Stein, Colorado Springs City Attorney's Office public safety senior attorney

THURSDAY
3:15–4:30 P.M.

COLLABORATIVE LEGAL RESPONSES TO HOMELESSNESS ISSUES *(Advanced session)*
DT Columbine Ballroom A–C
As homelessness becomes more prevalent, municipalities face challenges associated with balancing the rights of residents and enforcing local ordinances. The City of Arvada has adopted a collaborative team approach and will discuss the legal framework for managing issues related to homelessness, its collaboration with municipal staff, lessons learned, and take-aways for municipal legal departments.
Emily Grogg, Arvada assistant city attorney; Aaron Jacks, Arvada assistant city attorney; Rachel Morris, Arvada deputy city attorney; Nora Steenson, Arvada deputy city attorney

CLE Accredited Sessions

FRIDAY
8:30–9:30 A.M.

METRO DISTRICT REGULATION AND OVERSIGHT *(Advanced session)*
DT Columbine Ballroom A–C
Explore how Colorado municipalities can respond to the proliferation and impacts of metro districts in their communities. Topics include transparency, board representation, taxation, governance, and fiscal accountability. Learn what actions municipalities could take for the benefit of their residents without hindering development.
Kim Emil, Windsor town attorney; Doug Marek, Greeley city attorney; Robert Sheesley, Commerce City city attorney

FRIDAY
9:45–10:45 A.M.

MUNICIPAL DUTY TO INDEMNIFY: OBLIGATIONS AND LIMITATIONS *(Advanced session)*
DT Columbine Ballroom A–C
An incident occurs. A lawsuit is filed. What is the duty to defend the people sued and pay any judgments related to the claim? Indemnification can be a tricky subject for public employees, litigators, and insurance companies. This session includes the legal framework for indemnification and a moderated discussion about practices and processes seen across the state.
Steven Dawes, The Law Office of Steven J. Dawes LLC partner; Nancy Rodgers, Aurora deputy city attorney; Sophia Tsai, Morgan Rider Riter Tsai PC partner

FRIDAY
10:45 A.M.–12:00 P.M.

ETHICS: WHAT YOU NEED TO KNOW *(Advanced session)*
DT Columbine Ballroom A–C
Get an update on new rules, proposed rules, and rules on the horizon. Where is the practice headed? Hear about changes in the practice related to online companies, admission trends, and what is important to government lawyers.
John S. Gleason, Burns Figa & Will PC special counsel

FRIDAY
NOON–1:30 P.M.

ATTORNEYS LUNCHEON: COLORADO BAR ASSOCIATION PRESIDENT JOHN VAUGHT *(Advanced session)*
DT Mt. Elbert A–B
Learn about access to justice issues in Colorado.
Advance registration and ticket required. No on-site sales.

▶ NOTE

CLE accredited sessions are arranged by the Attorneys Section. CML has secured 16 general credits of which 1.5 are ethics credits. You must be registered to receive credits. Materials received for CLE accredited sessions will be available online (*www.cml.org/annual-conference*) if received prior to the conference.

CML ANNUAL CONFERENCE
JUNE 18 – 21, 2019
BRECKENRIDGE
CLE SESSIONS

KEVIN BOMMER IS RESPONSIBLE TO CML'S 21-MEMBER EXECUTIVE BOARD FOR EXECUTING THE POLICIES AND PROGRAMS OF THE LEAGUE, SUPERVISING STAFF MEMBERS, MANAGING AND COORDINATING ACTIVITIES AND OPERATIONS, RECOMMENDING AND DEVELOPING ORGANIZATION POLICIES AND PROGRAMS, AND SERVING AS A SPOKESPERSON FOR LEAGUE POLICIES. KEVIN IS RESPONSIBLE FOR DIRECTING THE LEGISLATIVE PROGRAM, AND ADVOCATING MUNICIPAL INTERESTS BEFORE THE STATE LEGISLATURE. IN ADDITION, HE PARTICIPATES IN WORKFORCE PLANNING, BUDGETING, AND STAFFING DECISIONS, AS WELL AS OVERSEES CML'S STRATEGIC PLAN DEVELOPMENT AND IMPLEMENTATION. HIS ADVOCACY ISSUES INCLUDE BEER AND LIQUOR, MARIJUANA, EMPLOYMENT AND LABOR, SALES TAX, PENSIONS AND RETIREMENT, FISCAL POLICY, AND OTHER ISSUES OF MUNICIPAL INTEREST. HE ALSO ASSISTS IN TRAINING AND ANSWERING INQUIRIES FOR MUNICIPAL OFFICIALS ON VARIOUS TOPICS AND AUTHORS THE "CML LEGISLATIVE MATTER BLOG. KEVIN JOINED THE LEAGUE IN 1999.

BRIAN CONNOLLY REPRESENTS PUBLIC- AND PRIVATE-SECTOR CLIENTS IN MATTERS RELATING TO ZONING, PLANNING, DEVELOPMENT ENTITLEMENTS AND OTHER COMPLEX REGULATORY ISSUES. BRIAN'S PRACTICE ENCOMPASSES A

BROAD RANGE OF LAND USE MATTERS INCLUDING ZONING COMPLIANCE, REZONINGS AND OTHER REGULATORY AMENDMENTS, PLANNED-UNIT DEVELOPMENTS, DEVELOPMENT AGREEMENTS, PRIATE COVENANTS AND RESTRICTIONS, LAND USE AND ZONING LITIGATION, INITIATIVES AND REFERENDA ASSOCIATED WITH LAND USE APPROVALS, AND REAL ESTATE TRANSACTIONS.

MORGAN CULLEN IS RESPONSIBLE FOR ADVOCATING MUNICIPAL INTERESTS BEFORE THE STATE LEGISLATURE. HIS ISSUES INCLUDE ECONOMIC DEVELOPMENT, SUSTAINABILITY, TRANSPORTATION AND TRANSIT, MUNICIPAL DEBT AND FINANCE, AND UTILITIES. HE ALSO ASSISTS IN TRAINING AND ANSWERING INQUIRIES FOR MUNICIPAL OFFICIALS ON VARIOUS TOPICS MORGAN JOINED THE LEAGUE IN 2016.

GERALD DAHL REPRESENTS PRIVATE AND GOVERNMENT INTERESTS IN THE PLANNING AND DEVELOPMENT OF LAND. HIS PRACTICE IN THIS FIELD IS STATEWIDE. HE HAS AUTHORED NUMEROUS COMPLETE LAND USE CODES FOR MUNICIPALITIES AND COUNTIES. HE SPECIALIZES IN LAND USE CODE DIAGNOSIS AND REVISION TO IMPLEMENT PLANNING GOALS. HE IS A FREQUENT SPEAKER ON LAND USE AND LOCAL GOVERNMENT ISSUES. HE IS WITH THE FIRM OF MURRAY DAHL BERRY RENAUD LLP.

STEVEN J. DAWES HAS REPRESENTED LOCAL GOVERNMENTS AND PUBLIC OFFICIALS IN TORT, CONSTITUTIONAL, AND CIVIL RIGHTS

CLAIMS; ELECTION CONTESTS; LICENSING; CORA AND COML; AND EXCISE TAX AND CAREER SERVICE HEARINGS. HE HAS LECTURED ON INDEMNIFICATION OBLIGATIONS UNDER MANY TYPES OF INSURANCE CONTRACTS INCLUDING PUBLIC OFFICIALS LIABILITY, GENERAL LIABILITY, AUTO AND PROPERTY, PROFESSIONAL LIABILITY AND EXCESS.

BRANDY DELANGE IS RESPONSIBLE FOR ADVOCATING MUNICIPAL INTERESTS BEFORE THE STATE LEGISLATURE. HER ISSUES INCLUDE BROADBAND, NATURAL RESOURCES, ENVIRONMENT, LAND USE, AND ANNEXATION. SHE ALSO ASSISTS IN TRAINING AND ANSWERING INQUIRIES FOR MUNICIPAL OFFICIALS ON VARIOUS TOPICS. SHE JOINED THE LEAGUE IN 2018.

MEGHAN DOLLAR IS RESPONSIBLE FOR ADVOCATING MUNICIPAL INTERESTS BEFORE THE STATE LEGISLATURE. HER ISSUES INCLUDE AFFORDABLE HOUSING, CRIMINAL JUSTICE AND COURTS, PUBLIC SAFETY, LOTTERY AND GAMING, HISTORIC PRESERVATION, AND OPEN MEETINGS/OPEN RECORDS. SHE ALSO ASSISTS IN TRAINING AND ANSWERING INQUIRIES FOR MUNICIPAL OFFICIALS ON VARIOUS TOPICS. MEGHAN JOINED THE LEAGUE IN 2011.

KIMBERLY A. EMIL HAS SERVED THE TOWN OF WINDSOR SINCE 2004 AS THE MUNICIPAL PROSECUTOR, GOING IN HOUSE AS THE ASSISTANT TOWN ATTORNEY IN 2015. SHE RECEIVED HER BA DEGREE, CUM LAUDE FROM DOANE UNIVERSITY IN CRETE, NEBRASKA IN 1987 AND HER JD FROM CALIFORNIA WESTERN SCHOOL OF LAW IN SAN DIEGO, CALIFORNIA IN 1990. SHE AND HER

HUSBAND HAD A PRIVATE WORKERS' COMPENSATION DEFENSE PRACTICE REPRESENTING SELF-INSURED EMPLOYERS IN SOUTHERN CALIFORNIA UNTIL MOVING TO COLORADO IN 1998. SHE PREVIOUSLY SERVED AS THE ASSISTANT CITY ATTORNEY AND PROSECUTOR FOR THE CITY OF FORT MORGAN AND IS THE MUNICIPAL JUDGE FOR THE TOWNS OF WIGGINS AND KERSEY.

JOHN S. GLEASON IS SPECIAL COUNSEL WITH BURNS FIGA & WILL PC. PRIOR TO JOINING BFW, HE WAS REGULATION COUNSEL FOR THE COLORADO SUPREME COURT (1999-2013) AND DIRECTOR OF REGULATORY SERVICES FOR THE OREGON STATE BAR AND OREGON SUPREME COURT (2013-2014). MR. GLEASON'S PRACTICE IS LIMITED TO REPRESENTATION OF LAWYERS AND MEDICAL PROFESSIONALS IN REGULATORY AND LICENSING MATTERS. MR. GLEASON ALSO SERVES AS OUTSIDE ETHICS COUNSEL FOR SEVERAL COLORADO LAW FIRMS.

CURTIS GRAVES IS AN EMPLOYMENT LAW ATTORNEY FOR EMPLOYERS COUNCIL, HEADQUARTERED IN DENVER. EMPLOYERS COUNCIL IS A NON-PROFIT MEMBERSHIP ORGANIZATION OF MORE THAN 4,000 EMPLOYERS THROUGHOUT THE WESTERN UNITED STATES. EMPLOYERS COUNCIL PROVIDES ADVICE, COUNSEL, INFORMATION, REPRESENTATION, TRAINING, AND EDUCATION IN ALL ASPECTS OF THE EMPLOYMENT RELATIONSHIP.

REBECCA GREENBERG IS A SENIOR ATTORNEY IN THE CORPORATE DIVISION OF THE CITY ATTORNEY'S OFFICE IN COLORADO SPRINGS. SHE ADVISES VARIOUS DEPARTMENTS

INCLUDING PUBLIC WORKS, BUDGET/FINANCE/SALES TAX, THE CITY CLERK IN RELATION TO ELECTIONS AND CAMPAIGN FINANCE, AND VARIOUS CITY APPOINTED BOARDS. PRIOR TO JOINING THE CITY, REBECCA WORKED AT THE COLORADO ATTORNEY GENERAL'S OFFICE AND WAS A PROSECUTOR WITH THE 4TH JUDICIAL DISTRICT ATTORNEY'S OFFICE.

EMILY GROGG JOINED THE CITY OF ARVADA IN 2015 AFTER BEING A MUNICIPAL PROSECUTOR FOR FOUR YEARS. EMILY HAS TRANSITIONED FROM CRIMINAL PROSECUTION TO ARVADA'S CIVIL DIVISION AND NOW PROVIDES LEGAL ADVICE AND CONTRACT DRAFTING FOR HER ASSIGNED DEPARTMENTS. EMILY HAS BEEN A PART OF THE HOMELESSNESS COLLABORATION TEAM SINCE 2017.

AARON JACK IS A RETIRED ARVADA POLICE OFFICER WHO ATTENDED LAW SCHOOL AND RETURNED TO WORK FOR THE CITY AS AN ASSISTANT CITY ATTORNEY IN 2017. HE IS THE LEGAL ADVISOR TO THE ARVADA POLICE DEPARTMENT, PROSECUTES CODE ENFORCEMENT MATTERS, AND HANDLES VARIOUS LEGAL AGREEMENTS WHICH SUPPORT POLICE OPERATIONS. AARON NOW LEADS ARVADA'S HOMELESSNESS COLLABORATIVE TEAM.

TRACY LESSIG IS THE DIVISION CHIEF OF THE EMPLOYMENT LAW DIVISION OF THE COLORADO SPRINGS CITY ATTORNEY’S OFFICE. MS. LESSIG JOINED THE CITY ATTORNEY’S OFFICE IN 1998. SINCE JOINING THE OFFICE, SHE HAS PRACTICED IN THE AREAS OF PROSECUTION, WORKERS COMPENSATION, EMPLOYMENT LAW, AND ETHICS.

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.

DOUG MAREK IS THE GREELEY CITY ATTORNEY. A NORTHERN COLORADO NATIVE, BOETTCHER SCHOLAR, AND GRADUATE OF COLORADO COLLEGE, HE RECEIVED HIS J.D. FROM DRAKE UNIVERSITY LAW SCHOOL. DOUG'S CAREER HAS FOCUSED ON GOVERNMENT PRACTICE AND LITIGATION IN STATE AND FEDERAL COURTS, AND HAS INCLUDED WORK FOR CITY AND COUNTY GOVERNMENTS, SCHOOL DISTRICTS, AND STATE OFFICERS AND AGENCIES. PRIOR TO RETURNING TO COLORADO IN 2012 HE SERVED AS CITY ATTORNEY FOR THE CITY OF AMES, IOWA.

RACHEL MORRIS LEADS ARVADA'S CIVIL DIVISION. RACHEL JOINED THE CITY ATTORNEY'S OFFICE IN 2017 WITH AN EXTENSIVE BACKGROUND IN CIVIL LITIGATION AND MUNICIPAL CLAIMS DEFENSE. RACHEL HAS ADVISED THE CITY EXTENSIVELY ON THE LEGAL LANDSCAPE RELATED TO HOMELESSNESS ISSUES.

NANCY RODGERS IS A DEPUTY CITY ATTORNEY FOR THE CITY OF AURORA. SHE SERVES AS ONE OF THE POLICE LEGAL ADVISORS AND IS THE MANAGER FOR THE PUBLIC SAFETY AND LITIGATORS

ATTORNEY GROUP OF THE CITY ATTORNEY'S OFFICE. PRIOR TO JOINING THE CITY OF AURORA, NANCY WORKED AT KISSINGER & FELLMAN, P.C., REPRESENTING BOTH PUBLIC AND PRIVATE ENTITIES.

ROBERT SHEESLEY HAS SERVED AS THE CITY ATTORNEY FOR COMMERCE CITY, COLORADO, SINCE APRIL 2016. ROBERT PREVIOUSLY SERVED IN THE CITY ATTORNEY'S OFFICE FOR THE CITY OF NEW ORLEANS, REPRESENTING THAT CITY'S PUBLIC WORKS DEPARTMENT, AND WORKED IN FAR LESS EXCITING COMMERCIAL LITIGATION AND EMPLOYMENT LAW PRACTICES IN NEW ORLEANS AND JACKSONVILLE, FLORIDA. A GRADUATE OF LOYOLA UNIVERSITY NEW ORLEANS, ROBERT RECEIVED HIS J.D. FROM THE UNIVERSITY OF FLORIDA COLLEGE OF LAW AND HIS MASTERS IN PUBLIC ADMINISTRATION FROM THE UNIVERSITY OF COLORADO DENVER.

MARC SMITH STARTED WITH THE OFFICE OF THE CITY ATTORNEY IN COLORADO SPRINGS IN THE SUMMER OF 2004 AS A LAW STUDENT INTERN. SINCE GRADUATING FROM LAW SCHOOL IN 2005, HE HAS PRACTICED MUNICIPAL LAW IN COLORADO SPRINGS WITH A FOCUS ON DAILY OPERATIONAL AND DEPARTMENTAL ADVISING INCLUDING WORK IN REAL ESTATE, PLANNING AND ZONING, BOARDS AND COMMISSIONS, AND LEGISLATIVE DRAFTING. HE IS A GRADUATE OF THE UNIVERSITY OF COLORADO AT COLORADO SPRINGS (BA), OHIO UNIVERSITY (MSA), AND THE UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW.

NORA STEENSON LEADS ARVADA'S CRIMINAL DIVISION. NORA WAS THE ARVADA POLICE DEPARTMENT'S LEGAL ADVISOR FOR OVER 20 YEARS AND HAS BEEN EXTENSIVELY INVOLVED WITH THE LEGAL DEPARTMENT'S RESPONSE TO HOMELESSNESS ISSUES. AS A DEPUTY CITY ATTORNEY SHE NOW SUPERVISES ALL CRIMINAL LEGAL FUNCTIONS INCLUDING MUNICIPAL PROSECUTIONS AND THE POLICE LEGAL ADVISOR.

FREDERICK STEIN BEGAN HIS CAREER IN 2001 AS A PROSECUTOR WITH THE HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE (HOUSTON, TX) BEFORE SUBSEQUENTLY MOVING TO COLORADO SPRINGS AND JOINING THE 4TH JUDICIAL DISTRICT ATTORNEY'S OFFICE IN 2003. IN 2013, HE JOINED THE COLORADO SPRINGS CITY ATTORNEY'S OFFICE AS THE CITY'S PUBLIC SAFETY ATTORNEY WHERE HE CURRENTLY ADVISES THE CITY'S POLICE, FIRE, AND EMERGENCY MANAGEMENT DEPARTMENTS. MR. STEIN GRADUATED WITH A BACHELOR OF ARTS DEGREE FROM TRINITY UNIVERSITY (SAN ANTONIO) AND JURIS DOCTOR DEGREE FROM THE SOUTH TEXAS COLLEGE OF LAW.

SOPHIA TSAI IS A PARTNER AT MORGAN RIDER RITER TSAI, P.C. SHE HAS REPRESENTED LOCAL GOVERNMENTS AND PUBLIC OFFICIALS IN TORT, CONSTITUTIONAL, AND CIVIL RIGHTS CLAIMS, INCLUDING CLAIMS PRESENTED TO THE EEOC AND CCRD. SHE HAS ALSO PROVIDED ANALYSES OF INSURANCE COVERAGE FOR PUBLIC OFFICIALS.

JOHN M VAUGHT CAME TO COLORADO 40 YEARS AGO TO CLERK FOR THE 10TH CIRCUIT. HE WAS A COMMERCIAL LITIGATOR WITH HOLLAND & HART, GIBSON DUNN & CRUTCHER, AND WHEELER TRIGG O'DONNELL FOR 40 YEARS. JOHN WAS CHAIRMAN OF THE DENVER BAR ASSOCIATION YOUNG LAWYERS DIVISION, AND WAS ON THE EXECUTIVE COMMITTEE OF THE YOUNG LAWYERS DIVISION OF THE ABA, AND ALSO PRESIDENT OF THE DBA/CBA.

2019 LEGISLATIVE UPDATE: LAWS ENACTED

BEER AND LIQUOR

SB 19-028 BEER & LIQUOR

Allow On and Off Premises Beer Licenses in Rural and "Underserved" Areas

The act changes a provision of 2018 legislation related to retail sale of beer for consumption both on and off a licensed premise. On/off licensees were required by the original legislation to select either an on or off premise license at the time of renewal and on/off licenses were to be completely eliminated. This year's act now allows existing on/off beer licenses to be renewed and new licenses to be issued in the following circumstances only: anywhere in a county with a population of less than 35,000; anywhere in the unincorporated portions of a county with a population of more than 35,000; or in any municipality with a population of less than 7,500. Effective: Feb. 20, 2019 for all license applications filed on or after June 4, 2018. Lobbyist: Kevin Bommer, kbommer@cml.org.

MARIJUANA AND HEMP

SB 19-224 MARIJUANA

Regulated Marijuana Sunset

SB 19-224 combines the retail and medical marijuana codes into one article in Title 44 of the Colorado Revised Statutes and contains numerous additions. The act creates a definition of open and public consumption in state law, but allows local governments to adopt exceptions to the newly defined state definition of open and public consumption. Prior statutory direction on the timelines for local licensing are repealed and local ordinances may determine application timelines. The act repeals language requiring the order that state and local licenses are processed, and licensees that apply for renewal may continue to operate until the renewal applications is acted upon. For marijuana businesses that have applied for a change of location, the act allows the business to operate in both the old location and the new location for a period of 180 days. The act contains new restrictions to prevent "looping" or repeatedly selling to the same customer in the same day. Conflicting provisions defining unlawful acts of licensees are harmonized. The act updates and revises ownership requirements, including reducing the timeline for prohibitions on ownership for any person convicted of a felony. The act creates a whole new category of "accelerator licenses" to encourage inclusion of persons from disadvantaged communities in the marijuana business. Numerous other provisions apply and should be thoroughly reviewed by municipalities that license medical or retail marijuana establishments. Effective: Aug. 2, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

HB 19-1230 MARIJUANA

Onsite Consumption Establishments

HB 19-1230 creates two types of licensed establishments for onsite consumption of marijuana or marijuana products. In jurisdictions where retail marijuana sales are already authorized — and subsequent to additional local approval by the local governing body or by initiative with specific requirements — the act authorizes two distinct classes of licensing: marijuana hospitality establishment licenses and retail marijuana hospitality and sales establishment licenses. A marijuana hospitality establishment license allows consumption of marijuana onsite but includes no onsite sales. A retail marijuana hospitality and sales establishment license allows onsite sales of retail marijuana, retail marijuana concentrate, and retail marijuana products for onsite consumption. In contrast to similar bills in prior years, SB 19-1230 does not require a sales establishment to be co-located with or co-owned by a retail marijuana store or any other type of retail marijuana license, and nowhere does the act refer to these establishments as "tasting rooms." Each of the two new classes of licenses is subject to numerous specific provisions and local approval may specify additional approval requirements and limitations. The act expressly authorizes local governments to grant marijuana consumption businesses an exemption from the Colorado Clean Indoor Air Act and allow marijuana smoking or vaping within a licensed premises if the local government so chooses. Licenses may begin to be issued on Jan. 1, 2020. Effective: Aug. 2, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

HB 19-1234 MARIJUANA

Delivery

HB 19-1234 allows municipalities and counties to permit delivery of either medical or retail medical marijuana, medical marijuana-infused products, retail marijuana, and retail marijuana products to customers from medical marijuana centers and transporters and licensed retail marijuana stores and transporters where such establishments are allowed. Adoption of an ordinance by the local governing body or approval by voters through initiative or referendum is required to approve delivery permits, and such approval may include additional requirements or restrictions. Subject to state and local approval, delivery permits may be issued for one year.

Marijuana products may be delivered only to customers in jurisdictions that have authorized the sale of the product being delivery (medical or retail). Municipalities and counties that have authorized sales may prohibit delivery from other jurisdictions. Additional state requirements and provisions apply. Medical marijuana delivery permitting for medical marijuana centers may begin on Jan. 2, 2020, and medical marijuana delivery permitting for medical marijuana transporters, and all retail marijuana delivery permitting may begin on Jan. 2, 2021. Effective: Aug. 2, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

SB 19-220 INDUSTRIAL HEMP

Hemp Cultivation

With the adoption at the federal level of the 2018 Farm Bill that removes hemp from the Controlled Substances Act, SB 19-220 starts the process for Colorado to seek approval from the USDA for primary authority over hemp cultivation. The act aligns Colorado law with federal law and requires the Colorado Department of Agriculture to work with stakeholders on development of Colorado's plan. Effective: May 29, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

SB 19-240 INDUSTRIAL HEMP

Industrial Hemp Products Regulation

The act allows additional regulation at the state and local level for processing industrial hemp. The act creates clear authority for municipalities and counties to adopt local business licensing and regulation laws related to storage, extraction, processing and manufacturing of industrial hemp and industrial hemp products. Local laws and regulations may not conflict with any state regulations, otherwise the state regulation controls. The act also establishes a state registration fee. Effective: May 29, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

OTHER BUSINESS REGULATIONS

HB 19-1210 EMPLOYMENT

Local Minimum Wage Laws

HB 19-1210 repeals various statutes that formerly prohibited counties and municipalities from enacting and enforcing local minimum wage laws. The act now enables counties and municipalities to adopt such laws subject to certain restrictions, and to exceed the minimum wage requirement set forth in article XVIII, section 15 of the Colorado Constitution. Counties may adopt a minimum wage law that applies only in the unincorporated parts of the county. The act allows municipalities and counties to enter into intergovernmental agreements to uniformly apply an established minimum wage across multiple jurisdictions. Local wage laws must include a tipped wage credit that equals the tip credit set forth in the constitution. Local governments may enforce a local wage law by means specified in the act. The act also limits the total number of local governments that may exceed the state minimum wage, unless further legislative authority is granted. The act contains other provisions. Effective: Jan. 1, 2020. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

SB 19-103 BUSINESS LICENSING

Exempting Minors from Local Business Licensing

The act prohibits municipalities and counties from requiring a business license or permit for businesses operated by any person under the age of 18 and located at a distance determined by the municipality or county as to not directly compete with other businesses. The prohibition applies to any minor's business that operates no more than 84 days per year. Municipalities and counties are not prohibited from enforcing local laws on the manner in which the business is conducted. Effective: April 1, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

HB 19-1033 PUBLIC HEALTH

Local Governments May Regulate Nicotine Products

The act explicitly authorizes statutory and home rule municipalities to enact ordinances regulating the sales of tobacco or nicotine products to minors. Municipalities will be able to enact fees and licenses on cigarettes without forfeiting their shares of cigarette taxes from the state. The act authorizes municipalities and counties to adopt additional sales taxes on tobacco or nicotine products; however, any such local tax as applied to cigarettes would still result in a loss of state cigarette tax revenue currently shared with local governments. Further authority is granted to establish multijurisdictional intergovernmental agreements for the collection and enforcement of local sales taxes. Effective: July 1, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

HB 19-1076 PUBLIC HEALTH

Clean Indoor Air Act — Add E-cigarettes, Remove Exceptions

The act adds a definition of electronic smoking devices (ESDs) to include e-cigarettes and similar devices with the exception of FDA-approved nebulizers, inhalers, vaporizers, and humidifiers that emit only water vapor. The act also establishes a 25-foot radius from entryways with the exception of existing municipal regulations established on or before July 1, 2019 that permit a smaller radius. Finally, the act amends signage requirements for tobacco and vape shops notifying customers that only those 18 or older may enter the business. Effective: July 1, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

HB 19-1191 LAND USE

Regulation of Farm Stands

HB 19-1191 allows a farm stand to operate regardless of whether or not the land on which the stand is located has been zoned for agriculture. Municipalities may still require appropriate licensing and/or permitting prior to operation. Effective: April 12, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

HB 19-1246 BUSINESS LICENSING

Local Regulation of Food Trucks

The act allows "state and regional organizations representing local governments" to study the safety and health code regulation of local food trucks to determine possible areas of duplicate or conflicting regulation. Any findings, recommendations, or legislative solutions may be presented to the Business Affairs and Labor Committee of the House and Senate of the Colorado General Assembly by Nov. 1, 2019. Effective: Aug. 2, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org.

LAND USE

SB 19-181 OIL AND GAS

Protect Public Welfare Oil and Gas Operations

SB 19-181 clarifies the authority of counties and municipalities to regulate the surface impacts of oil and gas development under their land use powers by adopting express enabling authority in state land use statutes, including authority over matters such as air quality, water quality, and noise. The act grants new authority for local governments to adopt stricter regulations than the state, and requires local approval to precede state approval for new drilling sites in those local jurisdictions that have chosen to regulate well siting. Within their own jurisdictions, municipalities have the option to impose fees to cover the costs of regulating, monitoring, and permitting sites. The act also reforms the makeup and scope of the Colorado Oil and Gas Conservation Commission (COGCC), directing the COGCC to regulate the development of oil and gas in a manner that protects public health, safety, and welfare, including protection of wildlife resources. Finally, the act makes changes to the forced pooling statute, changing the royalty rate for nonconsenting owners from 12.5 percent to 13 percent for a gas well and 16 percent for an oil well. Applicants must now also get the consent of more than 45 percent of the mineral interests that will be pooled. Effective: April 16, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

HB 19-1309 AFFORDABLE HOUSING

Mobile Home Park Act Oversight

HB 19-1309 gives counties and municipalities authority to enact ordinances addressing the "safe and equitable operation" of mobile home parks, consistent with the state's Mobile Home Park Act. The act gives mobile home owners additional time between the notice of nonpayment of rent and eviction, and additional time to vacate a mobile home park after a court ordered eviction. The act also creates the Mobile Home Park Dispute Resolution and Enforcement Program in the Department of Local Affairs. Effective: May 23, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted*.

HB 19-1009 PUBLIC SAFETY

Substance Abuse Disorders Recovery — Regulation of Recovery Residences

The act appropriates $1 million to the Department of Local Affairs to expand the Housing Voucher Program and allows individuals with substance abuse disorders to apply for housing vouchers. The act adopts new regulations for recovery residences and sets forth new standards and procedures for certification before any entity can hold itself out to the public as a recovery residence. The act also creates a grant program in the Department of Human Services to defray recovery residences' certification costs. Finally, HB 19-1009 creates an advisory committee to advise the Department of Law on uses of any custodial funds received by the state as a result of opioid-related litigation. A municipal official may be appointed to the advisory committee. Effective: May 22, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

BUILDING CODES

SB 19-156 BUILDING REGULATIONS

Sunset State Electrical Board

The act continues the State Electrical Board and its regulatory oversight of electricians. The sunset also reflects changes made to decouple local and state electrical inspections as well as the requirement to conduct contemporaneous reviews. If contemporaneous reviews are not conducted, the board may issue a cease-and-desist order to the local government but only after a show cause has been issued to the local government. Contains numerous other provisions. Effective: July 1, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org.

HB 19-1035 BUILDING REGULATIONS

Decoupling Electrical Inspection Fees

HB 19-1035 decouples municipal and county electrical inspection fees from state inspection fees and caps local fees at $120 (adjusted annually for inflation) as well as

sets the multiplier at 8 percent based on size or valuation of the improvement (i.e., larger residential and commercial improvements). Effective: Aug. 2, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

HB 19-1086 BUILDING REGULATIONS

Plumbing Inspections Ensure Compliance

The act requires plumbing inspectors employed by a municipality or county to conduct a contemporaneous review of each plumbing project as well as develop standard procedures on how to conduct a contemporaneous review. Procedures must be posted on the municipalities' website and shared with the director of the Division of Professions and Occupations. Effective: Jan. 1, 2020. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

HB 19-1260 BUILDING REGULATIONS

Building Energy Codes

HB 19-1260 requires local governments to adopt and enforce one of the three most recent version of the (International Code Council) energy code when updating and adopting new building codes. By Jan. 1, 2020, municipalities must report their current energy and building code to the Colorado Energy Office. Effective: Aug. 2, 2019. Lobbyist: Brandy DeLange, bdelange@cml.org. *Reprinted.*

IMMIGRATION MATTERS

HB 19-1124 IMMIGRATION

Enforcement of Federal Immigration Detainers

The act prohibits state and local law enforcement officials from arresting or detaining an individual on the basis of civil immigration detainer request. HB 19-1124 clarifies that law enforcement may assist federal authorities in the execution of a federal warrant or other federal criminal investigations. In addition, the act prohibits a probation department officer or employee from providing personal information to federal immigration authorities. HB 19-1124 requires that persons in custody receive certain information in writing when being interviewed and again when are released. Effective: May 28, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

HB 19-1148 CRIMINAL JUSTICE AND COURTS

Change Maximum Penalty from One Year to 364 days

This act reduces the maximum jail sentence for municipal ordinance violations (along with Class 2 state misdemeanors) from one year to 364 days. According to federal immigration laws, foreign nationals who are lawfully in the United States are subject to removal if convicted of a state or local crime that carries the potential for a one-year jail sentence. Thus, the act is designed to eliminate the risk of deportation and removal for those convicted of lower level state and municipal crimes. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

SB 19-030 CRIMINAL JUSTICE & COURTS

Remedying Improper Guilty Pleas

The act allows a defendant to petition the court and challenge a guilty plea in a deferred judgement on the grounds that they were not properly advised of the immigration consequences associated with the guilty plea. This motion can be filed at any time and must allege in good faith that the defendant has suffered, is suffering, or will suffer an adverse immigration consequence. The act also specifies that the defendant must allege in good faith that the guilty plea was obtained in violation of state or federal law regarding proper advisement. The act specifies a process for the prosecution to weigh-in and timelines the court must meet. This act applies to deferred judgements accepted in municipal court. Effective: May 28 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

OTHER CRIMINAL JUSTICE/ MUNICIPAL COURTS

HB 19-1225 CRIMINAL JUSTICE AND COURTS

No Monetary Bail for Certain Low-level Offenses

The act prohibits the use of monetary bonds for any defendant charged with a petty offense, traffic offense, or a municipal offense. The act does not apply to municipal offenses that have a comparable state misdemeanor. The use of monetary bond as part of a local pretrial release is allowed, if the defendant is informed that they are entitled to release on a personal recognizance bond if he or she waits for the required bond hearing. Monetary bond conditions may be used for a defendant who fails to appear in court or violates a condition of their release on bond. Effective: April 25, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

HB 19-1275 CRIMINAL JUSTICE AND COURTS

Increased Eligibility for Criminal Record Sealing

The act repeals and reenacts statues related to sealing criminal records. This act creates a simplified record sealing process by allowing a defendant to request to seal criminal records as part of a criminal case when there is a criminal conviction and without requiring the defendant to file a separate civil action. The act retains the current record sealing provisions for municipal offenses. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

SB 19-008 CRIMINAL JUSTICE AND COURTS

Substance Use Treatment in the Criminal Justice System

The act creates a process for sealing drug-related criminal records. It also expands the use of medication-assisted treatment in county jails and the Department of Corrections. SB 19-008 creates the Harm-Reduction Grant Program where a number of entities, including local law enforcement agencies, may apply for grants to expand addiction services and diversion programs in local communities. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

HB 19-1335 CRIMINAL JUSTICE AND COURTS

Juvenile Record Expungement Clean-up

The act cleans up HB 17-1204, which created an expungement process in municipal and county courts. HB 19-1335 clarifies when juvenile delinquent records are automatically expunged; when a juvenile delinquent is eligible for expungement; and that juvenile record expungement applies in municipal court by establishing guidelines for municipal courts. The act also streamlines who is notified when a record is expunged in municipal court, and when municipal courts must look back at previous cases to identify any that should be automatically expunged. Effective: May 28, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

SB 19-185 CRIMINAL JUSTICE AND COURTS

Protections for Minor Human Trafficking Victims

The act provides immunity to a minor charged with prostitution if probable cause exists to believe he or she was a victim of human trafficking or sexual servitude. This applies to prostitution related municipal offenses. Lastly, this act requires a post-enactment review five years after its passage. Effective: May 6, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

POLICE PROCEDURES

HB 19-1177 PUBLIC SAFETY

Extreme Risk Protection Orders

This act creates procedures for local law enforcement agencies to request and for courts to issue an extreme risk protection order (ERPO). When a local law enforcement officer or agency petitions for an ERPO, the act provides that the officer or agency shall be represented by a city or county attorney upon request. An ERPO requires an individual to surrender all firearms if the person is found to pose a significant risk of causing personal injury to themselves or others. The firearms may be returned if the order expires or is terminated. A family or household member may also petition the court to issue an ERPO. An ERPO has a 364 day duration and can be renewed within 63 days of the expiration of the order. When a petition is filed, the respondent shall receive an attorney to represent him or her at the cost of the court unless the respondent elects to select and pay for their own the attorney. Law enforcement must file for a search warrant to find any firearms that may be in possession of the individual but were not surrendered. During the 364 day duration of the ERPO, a respondent may file a one-time written request with the court to terminate the order if he or she shows that they do not pose a significant risk of causing injury. The act contains numerous other provisions. Effective: April 12, 2019; however the act specifies that courts will not begin to accept petitions for ERPOs until Jan. 1, 2020. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

HB 19-1119 RECORDS

Peace Officer Internal Investigation Open Records

HB 19-1119 amends the Colorado Criminal Justice Records Act and allows the public to inspect investigation files upon the completion, which includes any appeals process, of an internal investigation. The act applies in cases where the investigation examines the in-uniform or on-duty conduct of a peace officer related to a specific, identifiable incident of alleged misconduct involving a member of the public. The custodian of the records may first provide a summary of the investigation file and must only provide the entire file upon subsequent request. Witness interviews, video and audio recordings, transcripts, documentary evidence, investigative notes, and final departmental decisions are subject to inspection. The custodian is required to redact certain information from the records prior to releasing them. If a record contains certain redacted information, the applicant may request a written explanation of the reasons for the redaction. The custodian may deny inspection of the file if there is an ongoing related criminal case until the case is dismissed or upon sentence for a conviction. The act applies to internal investigations initiated after the effective date. Effective: April 12, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org. *Reprinted.*

SB 19-091 PUBLIC SAFETY

Support Peace Officers Involved in Use of Force

The act requires state and local law enforcement agencies to develop and maintain a policy for supporting a peace officer who is involved in a shooting or fatal use of force. The act applies to all law enforcement agencies including a municipal police and towns marshal offices. The act prescribes what must be included in the use of force policies, and that they must be evaluated every other year and updated to reflect current best practices and available resources. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

SB 19-166 PUBLIC SAFETY

Revoke POST Certification for Untruthful Statement

This act requires the revocation of a peace officer standards and training (POST) certification when the POST Board receives notice from a law enforcement agency that a peace officer knowingly made an untruthful statement or knowingly omitted a material fact on a criminal justice record while testifying under oath or during an internal affairs investigation or comparable administrative investigation. The law enforcement agency must certify that it has completed a process to review, and determined through clear and convincing evidence, that the officer knowingly made an untruthful statement or omitted a material fact. The act requires the law enforcement agency official submitting the notification to the POST Board to attest, under penalty of perjury or revocation of the official's POST Board certification, that the statements on the submitted notification form are true, correct, and complete. The act allows a person whose POST certification is revoked to appeal the revocation in accordance with rules of the POST Board and may seek judicial review pursuant to the State Administrative Procedure Act. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

TRAFFIC LAWS

HB 19-1221 TRANSPORTATION

Regulation of Electric Scooters

This act excludes electric scooters from the definition of "toy vehicle" and includes electric scooters in the definition of "vehicle," thus authorizing the use of electric scooters on roadways. The act affords riders of electric scooters the same rights and responsibilities that riders of electric-assisted bicycles have under the laws of the state. The act preserves the authority of municipalities to determine whether or when to allow electric scooters on sidewalks. Effective: May 23, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org. *Reprinted.*

HB 19-1298 TRANSPORTATION

Electric Vehicle Charging Stations

The act authorizes the owner of a plug-in electric motor vehicle charging station to install a sign that identifies the station. If the sign is installed, a person is prohibited from parking in the space if the vehicle is not an electric vehicle or is using the dedicated charging station for parking if the electric vehicle is not charging. Effective: Aug. 2, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org.

SB 19-262 TRANSPORTATION

General Fund Transfer to HUTF

This act requires the state treasurer to transfer $100 million from the General Gund to the Highway Users Tax Fund on July 1, 2019, for allocation to the state highway fund, counties, and municipalities in accordance with the existing "second stream" allocation formula, (60 percent to the state highway fund, 22 percent to counties, and 18 percent to municipalities). This means an additional $18 million in municipal transportation revenue for 2019. Effective: June 3, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org.

SB 19-263 TRANSPORTATION

Delay Referred Transportation Bonding Measure to 2020

SB 18-001 authorized a referred $2.34 billion transportation bonding measure for voter consideration in the 2019 election. This legislation delays that referred measure for voter consideration until the 2020 election cycle. The act also reduces the amount of notes authorized to be issued to offset the additional transportation funding that will result from the repeal of only two, rather than three, tranches of lease-purchase agreements authorized by SB 17-267. Effective: June 3, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org.

EMPLOYMENT

SB 19-085 EMPLOYMENT

Equal Pay

SB 19-085 allows an employee to bring a civil action against an employer, including municipal employers, for wage discrimination based on the sex of the employee. Relieves complainants from any requirement to exhaust administrative remedies through the Colorado Department of Labor and Employment (CDLE) before filing a lawsuit. A mediation process may be established by CDLE, but there is no requirement for an employee to utilize mediation prior to filing a lawsuit. The act establishes exceptions to disparity of wages based on sex if the employer demonstrates several factors specified including geographic location, education and training, seniority, and merit. The act also prohibits employers from seeking the prior wage or salary of job applicants and additional, related actions. Employers must make all advancement opportunities, job openings, and related pay range known to all employees. CDLE is authorized to enforce violations of transparency provisions and fine employers. Contains other provisions. Effective: Jan. 1, 2021. Lobbyist: Kevin Bommer, kbommer@cml.org.

SB 19-188 EMPLOYMENT

Family Medical Leave Insurance

SB 19-188 establishes a study of a uniform paid family and medical leave program applicable to all employers and employees in the state. The act specifies the members of a task force to study the actuarial soundness of a mandated, uniform program and recommend a plan for implementation. Effective: May 30, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

ELECTIONS

SB 19-232 ELECTIONS,

Campaign Finance Enforcement

SB 19-232 amends the state's Fair Campaign Practices Act (FCPA) by codifying rules of the Secretary of State related to specific campaign finance provisions. The amended FCPA includes procedures related to complaint filing and initial review and the manner in which violations may be cured, among other provisions. The act provides: "Any complaint arising out of a municipal campaign finance matter must be exclusively filed with the clerk of the municipality." However, the act does not further define what the Secretary of State will consider to be a "municipal campaign finance matter" as distinguished from campaign finance matters arising under state law over with the secretary exercises exclusive authority. Effective: July 1, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted*.

HB 19-1278 ELECTIONS

Uniform Election Code

Statewide and coordinated elections conducted under Title 1 of the Colorado Revised Statues are significantly amended by HB 19-1278. Elections conducted by municipalities subject to Title 31 are not impacted. Specific to municipal interests, the act creates new requirements on county clerks for the selection and use of voter service and polling centers, including public buildings. While the act contains no ability for a county clerk to compel the use of a municipally-owned public building, it does require that approved use of a public building for a voter service and polling center be given priority over other uses if the building. Reasonable rental fees may be charged but must not exceed the usual rental rate for the building. The act applies to elections conducted after the effective date. Effective: Aug. 2, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

SALES TAXES

SB 19-006 TAXATION

Sales — Electronic Sales & Use Tax System

SB 19-006 implements legislation recommended by the interim Sales and Use Tax Simplification Committee. The act requires the Department of Revenue and the state Office of Information Technology to issue an RFP for the development of a system allowing a single point of electronic remittance for all sales taxes collected in the state. Subsequent to the development of the system, the act requires that all sales taxes collected by the state be processed through the system. The act does not attempt to require that self-collecting home rule municipalities participate in the system, but it does declare legislative intent for at least three to voluntarily use the system at first and for all to use the system within three years. Effective: April 12, 2019. Lobbyist: Kevin Bommer. kbommer@cml.org.

HB 19-1240 TAXATION

Sales — Sales and Use Tax Administration

The act codifies sales tax rules adopted by the Department of Revenue with certain modifications. It establishes economic nexus for remote sales without a retailer's physical presence in Colorado for sales made beginning June 1, 2019, and requires the collection and remittance of all sales taxes collected by the state based on the destination of the item sold. The act creates an exception to the destination sourcing rule for retailers with less than $100,000 in retail sales, as well as until the state develops a GIS-based address locator for accurate determination of proper taxing jurisdiction. The act also requires sales taxes collected by the state to be collected and remitted by marketplace facilitators beginning on Oct. 1, 2019, for sales made by marketplace sellers, and the act contains other marketplace sales provisions. Existing provisions in statute related to the implementation of the failed federal Marketplace Fairness Act (MFA) are repealed. With the exception of the repeal of MFA language and future availability of the address locator, the act does not implicate home rule municipalities that self-collect sales tax. Effective: June 1, 2019, except marketplace facilitator requirements, which are effective Oct. 1, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org.

ON THE NOVEMBER 2019 STATE BALLOT

HB 19-1257 TABOR

Statewide Debrucing

HB 19-1257 places Proposition CC on the November 2019 ballot to ask voters to allow the State of Colorado to retain

revenue over the state's fiscal year limit, beginning with fiscal year 2019–2020 and continuing in perpetuity. The approval limits retained revenue to be distributed to fund public schools, higher education, and transportation and transit. Effective: June 3, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

HB 19-1258 TABOR

Distribution of Debruced Revenue

HB 19-1258 is companion legislation to HB 19-1257 that specifies the distribution of revenue retained in excess of the state's annual fiscal year limit. The act states that retained revenue shall be divided equally between public school funding, higher education fund, and funding for roads, bridges, and transit. The act specifies the manner in which the revenue must be allocated, including requiring the transportation allocation be distributed using the existing Highway Users Tax Fund (HUTF) formula, which specifies 18 percent for municipalities. Effective: Only upon passage of Proposition CC on the November 2019 ballot. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

HB 19-1327 LIMITED GAMING

Authorize and Tax Sports Better Refer Under Taxpayers' Bill of Rights

The act decriminalizes both in-person and online sports betting and creates a regulatory framework within the Department of Revenue and the Limited Gaming Commission. If approved by local voters, in-person sports betting will be restricted to the three constitutionally approved gaming towns, (Black Hawk, Central City, and Cripple Creek) and the 17 companies in these towns currently established with gaming licenses. These companies may apply to the Gaming Commission for a master license, allowing a sports book and ability to contract with online operators. The act also establishes a tax question and upon voter approval, a 10 percent tax will be levied on net sports betting proceeds. This measure will appear on the November 2019 statewide ballot as Proposition DD. The revenue generated from taxing will be directed toward repayment of the General Fund for startup costs for the Division of Gaming, payment of ongoing Division of Gaming administrative expenses for sports betting, an annual 6 percent transfer to the Hold Harmless Fund that includes the cities of Black Hawk, Central City, and Cripple Creek, and a transfer of $130,000 to the Department of Human Services for gambling addiction. Any remaining funds will be transferred to the State Water Plan Implementation Cash Fund. Effective: May 20, 2020. Lobbyists: Meghan Dollar, mdollar@cml.org, and Brandy DeLange, bdelange@cml.org.

ODDS AND ENDS

HB 19-1087 OPEN MEETINGS

Posting Meeting Notices Online

HB 19-1087 allows local governments to be exempt from physically posting meeting notices required under the Colorado Open Meetings Act if meetings notices are posted on the local government's website. Contains other provisions. Effective: Aug. 2, 2019. Lobbyist: Kevin Bommer, kbommer@cml.org. *Reprinted.*

HB 19-1279 PUBLIC SAFETY

Regulation PFAs Polyfluoroalkyl Substances

HB 19-1279 creates the Firefighting Foams Control Act, which prohibits the use of class B firefighting foam that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS foam) for training purposes. The act includes various exceptions, including circumstances where the use of foam containing PFAS as required by federal laws or rules, use at certain types of fuel storage facilities, and use at the Eisenhower-Johnson tunnels on I-70. A person or fire department that administers a training program that violates this prohibition is subject to a civil penalty of up to $5,000, for a first offense and up to $10,000 for each repeat offense. Penalties are deposited into the Local Firefighter Safety and Disease Prevention Fund. The act requires the Department of Public Health and Environment to survey fire departments every three years about issues related to PFAS foam and to compile and present the survey results to the General Assembly by January 1, 2020. Beginning Aug. 2, 2019, purchasers of firefighting personal protective equipment that contains intentionally added PFAS chemicals must be notified in writing by the manufacturer or distributor about the chemical additive and the reason for the addition. Effective: Aug. 2, 2019. Lobbyist: Meghan Dollar, mdollar@cml.org.

HB 19-1084 URBAN RENEWAL

Notification of Blight Designation

HB 19-1084 updates Colorado's urban renewal statute, requiring property owners be notified of a blight designation by a municipality so that they have an opportunity to seek a review and contest the decision. The act is in response to a ruling by the 10th Circuit Court of Appeals in May 2018 in *M.A.K Investment Group v. City of Glendale* that the plaintiff's due process had been violated because they were not properly notified about a blight resolution the city had adopted. Effective: Sept. 1, 2019. Lobbyist: Morgan Cullen, mcullen@cml.org. *Reprinted.*

Navigating Marijuana Issues for Municipalities

Employers Council®

Marijuana – A Brief History

- First document usage was in China some 5,000 years ago
- Essentially uncontrolled until Marihuana Tax Stamp Act
- Placed on Schedule I of CSA in 1970

Colorado Legal Off-Duty Activities

- Illegal to terminate employee for legal activity during non-work hours
- Exceptions for BFOQ and conflict of interest
- Does not apply to marijuana due to *Coats v. Dish Network* case

Schedule I Controlled Substances

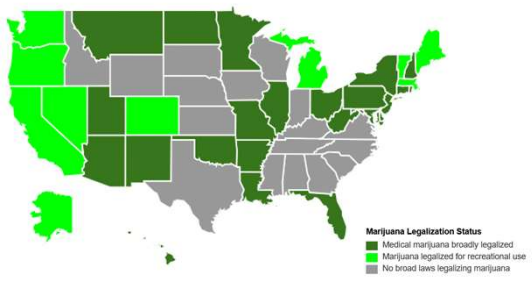
Three traits:

- High potential for abuse
- No currently accepted medical use in treatment in the United States
- Lack of accepted safety for use of the drug or other substance under medical supervision

Change on Federal Level Coming Sooner than You Think

- Legal Off-Duty Activities Law will then protect off-duty marijuana use
- Ability to detect usage through reasonable suspicion = paramount

Legal Status of MJ Nationally



http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html

Drug Laws

- Approximately 31 states have drug policy laws
- Colorado is not one of them
- The City of Boulder does have a drug policy ordinance

Outcomes: Colorado

- No requirement to have a drug policy
- No requirement to follow certain drug-testing procedures
- No prohibition on considering positive test results
- No requirement to use certified laboratory

The Problem

- Surveys indicate most employers don't care what employees do on their own time
- However, marijuana has an extremely long testing window
- Currently no convenient way to determine current impairment

The Fourth Amendment to the U.S. Constitution

"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

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Unemployment by State April 2019

Colorado: 3.4 percent

Arizona: 4.9 percent

Utah: 2.9 percent

California: 4.3 percent

Source: *U.S. Bureau of Labor Statistics*

Trends in Pre-Employment Screening

- NYC: In May 2020, employers will no longer be able to test applicants for THC
- Nevada: Can't bar applicants for testing positive for THC
- Arizona: Can't bar medical marijuana-using applicants for testing positive for THC

The Fourth Amendment to the U.S. Constitution

Caselaw: Government must have search warrant before requiring government worker to take a *suspicionless* drug or alcohol test

Government can be interpreted as federal, state or special district

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Pre-Employment Testing

Is pre-employment testing justified for the position?

- Safety-sensitive?
  - Working with dangerous equipment
  - Armed peace officer
- Does it involve public safety?
  - Operator at water treatment facility

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Pre-Employment Testing

- Still a "suspicionless" test – *Must be "reasonable"*
- However, applicant ≠ employee
- No U.S. Supreme Court case approving it
- Approach on position-by-position basis

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Pre-Employment Testing

Non-safety-sensitive

- Questionable
- Have been found ok in some cases

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Reasonable Suspicion

Exception to prohibition on drug testing

Is there a valid suspicion that the employee used, possessed, or was impaired by drugs or alcohol while on the job?

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Reasonable Suspicion Testing

Constitutes "individualized suspicion" exception to requirement for a warrant

Does information available create a reasonable suspicion that the employee used, possessed, or was impaired by illegal drugs or alcohol on the job?

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Reasonable Suspicion Testing

Training is critical

- Supervisors and managers must document signs and symptoms of drug use
- Belief need not be correct, but must be "reasonable"

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Reasonable Suspicion Testing

DOT/FMCSA Provides Excellent Guideline

- Reasonable suspicion should be based on specific, articulable, contemp-oraneous observations based on appearance, behavior, speech, body odors
- Just observations; no conclusory language

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Post-Accident Testing

U.S. Supreme Court has been inconsistent

- More likely to be ok where testing limited one employee
  - More like reasonable suspicion testing
- Less likely to be ok
  - Wall-to-wall post-accident testing
  - But can be ok if government interest high enough

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Random Testing

- In general, it violates the Fourth Amendment to the U.S. Constitution
- If employer can show special need, courts will use balancing test
  - Individual's privacy rights versus
  - Furtherance of legitimate interest

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Random Testing

Tenth Circuit

- Struck down policy where mechanics had to get tested to renew CDL license
- Court: employer did have interest in ensuring mechanics were drug free. However, predictable testing intervals meant policy did not accomplish its purpose

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Physical Signs and Symptoms: Marijuana

- Reddened Eyes (use of eye drops)
- Slowed Speech
- Distinctive Odor on clothes
- Lackadaisical, "I don't care" attitude
- Chronic fatigue and lack of motivation
- Irritating cough, chronic sore throat

Marijuana

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How Long Does Marijuana Stay In The Body?

3-5 days - *occasional use*

5 days or more - *moderate*

30 days - *chronic use*

Marijuana

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What is the right approach for municipalities?

Limit suspicionless testing to where a compelling public interest is served

Consider not terminating for a first offense

Train supervisors on Reasonable Suspicion

Marijuana

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Technologies for Detecting Marijuana Use

Urinalysis

Oral fluids testing

Hair/fingernail

Breathalyzer?

Marijuana

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Other Laws

ADA

FMLA

OSHA

Unemployment compensation

Marijuana

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Final Thoughts

Curtis Graves
cgraves@employerscouncil.org
303.223.5429

Marijuana

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97th CML Annual Conference

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ANNEXATION IN COLORADO
JUNE 19, 2019, 4:15-5:15

GERALD E. DAHL
MURRAY DAHL BEERY & RENAUD, LLP

COLORADO MUNICIPAL LEAGUE

Contents of this presentation reflects the view of the presenter, not of CML.

Annexation can Take Place in Three Ways

1. Landowner petition, C.R.S. 31-12-107(1).
2. Annexation election, C.R.S. 31-12-107(2).
3. Unilateral annexation of enclave or municipally owned land: C.R.S. 31-12-106.

"**Landowner**" means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6). Joint tenant landowners are counted individually.

Sources of Colorado Annexation Law

1. **Municipal Annexation Act of 1965: CRS 31-12-101 *et seq.***
   - Basic structure unchanged today: ***one-sixth boundary contiguity*** must exist between municipality and property to be annexed;
   - Petition or election process to initiate annexation;
   - Findings by the municipal governing body required.
   - *"No subject relating to municipal government aroused more interest or emphasis in the Committee's study than the matter of logical municipal growth through annexation. . . [p]roviding adequate urban services to ever growing unincorporated fringe areas constituted one of most important problems to Colorado municipal government . . . Annexation is recognized as an important vehicle to achieve logical urban development."* Report of the State Wide Committee to the Governor's Local Affairs Study Commission, December 1964.

Establishing Eligibility

- One-sixth boundary contiguity required: C.R.S. 31-12-104(1)(a).
- No division of property held in "identical ownership," without landowner consent.
- No annexation of property for which annexation proceedings have been initiated by another municipality.
- No annexation which will detach property from a school district without written consent of the district
- No annexation which will detach property from a school district.
- Three mile plan required. C.R.S. 31-12-105(1)(e)(I).
- If annexing a portion of a street or alley, must annex the entire width. C.R.S. 31-12-105(1)(f).

Sources of Colorado Annexation Law, *cont'd*

2. **Poundstone I (1974): Colo. Const. Art. XX, Sec.1**
   - Applies only to Denver
3. **Poundstone II (1980): Colo. Const. Art. II, Sec. 30**
   - Applies to all Colorado municipalities
   - One of three lternative conditions must apply:
     - Approval of the annexation by vote of landowners and registered electors of the area to be annexed;
     - Petition for annexation signed by more than 50% of the land owners who own more than 50% of the land; or
     - The area is entirely surrounded by or is solely owned by the annexing municipality.

Contiguity: Flagpoles and Other Configurations

- *"…not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality."* C.R.S. 31-12-104(1)(a).
- C.R.S. 31-12-104(1)(a) was amended in 1987 to confirm as legitimate the longstanding practice of annexing one or more parcels in a series, considered simultaneously, in order to annex property which, taken as a whole, does not have the requisite one-sixth contiguity.
- *"Within said three mile area, the contiguity required by Section 31-12-104(1)(a) may be achieved by annexing a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, or a lake, reservoir, stream, or other natural or artificial waterway."* C.R.S. 31-12-105(1)(e).
- In using a street to serve as the "pole" to reach, and thus annex, the desirable "flag" of property, it is required that the municipality also annex the "pole."

Contiguity: Flagpoles and Other Configurations, *cont'd.*

- The shape and size of the parcel ultimately annexed, whether in a "flagpole" configuration or otherwise, is not relevant to its eligibility for annexation.
- In 2001, C.R.S. 31-12-105(1)(e) was amended to grant certain rights to property owners abutting the proposed "pole," giving them a time-limited opportunity [90 days maximum] to be annexed along with the "flag."
- Existence of contiguity satisfies the "community of interest" requirement of C.R.S. 31-12-104(1)(b).
- Disconnection and re-annexation to satisfy contiguity requirement is acceptable. BOCC v. Greenwood Village, supra, 30 P.3d 846@849.

Annexation of Municipally-Owned Land

- Can annex by ordinance, without notice and hearing.
- One-sixth contiguity still required.
- The annexing ordinance must state that the area proposed to be annexed is owned by the annexing municipality *and is not solely a public street or right-of-way*.

Annexation Impact Report and Notice of Hearing

- Impact Report: required for annexations over 10 acres, unless waived by board of county commissioners. C.R.S. 31-12-108.5.
- Notice of Hearing: required except for enclaves [Notice only; no hearing: C.R.S. § 31-12-106(1)] and municipally owned property. C.R.S. 31-12-108; 109.

Zoning of Land while Annexation is Underway

- Municipality may institute zoning or subdivision proceedings for the area proposed to be annexed at any time after a petition for annexation or petition for annexation election has been found to meet the requirements of the statute.
- Most annexations occur simultaneously with zoning and subdivision or planned unit development (PUD) review.
- The area annexed must be brought under the municipality's zoning ordinance within 90 days from the effective date of the annexation ordinance.

Enclave Annexations

- When an unincorporated area has been entirely contained within the boundaries of a municipality for at least three years, the municipality may annex the property by ordinance without regard to the eligibility requirements in Colorado Revised Statute § 31-12-104, the limitations in Colorado Revised Statute § 31-12-105, or the hearing requirements of Colorado Revised Statute § 31-12-109.
- A private owner may force an enclave annexation. Colorado Revised Statute § 31-12-107(5).
- The enclave must be a "true" enclave.
- No enclave may be annexed pursuant to subsection (1) of this section if:

  (I) Any part of the municipal boundary or territory surrounding such enclave consists *at the time of the annexation of the enclave* of public rights-of-way, including streets and alleys that are not immediately adjacent to the municipality on the side of the right-of-way opposite to the enclave. (emphasis supplied)

Zoning of Land while Annexation is Underway, *cont'd.*

- The municipality has no land use or police power authority over the property until it is finally annexed and becomes part of the municipality.
- The governing body may agree to "consider" a certain zoning density in the event annexation is taken to completion if the annexation agreement states that zoning is not guaranteed and that the municipality retains its full discretion to zone the property following the public hearing.
- Often, the petitioning landowner reserves the right to withdraw the petition and prevent the recording of the annexation plat if the desired zoning is not granted.
- Most annexation agreements provide that the annexation ordinance and map may not be filed with the clerk and recorder under Colorado Revised Statute § 31-12-113 (and thus the annexation never becomes effective) unless the agreed zoning is granted.

Jurisdiction for Zoning Purposes: Resolving the 60 Day Problem

- *C.R.S. 31-12-115:* "The annexing municipality may institute the procedure *[outlined in state statutes or municipal charter to make land subject to zoning]* nor *[outlined in its subdivision regulations to subdivide land in the area proposed to be annexed]* at any time after a petition for annexation or a petition for an annexation election has been **found to be valid** in accordance with the provisions of Section 31-12-107."
- A petition is "found to be valid" likely by a finding of "substantial compliance," as referenced in 31-12-107(1)(g) [*petition for annexation*] or 31-12-107(2)(e) [*petition for annexation election*], and C.R.S. 31-12-107(I)(f).

Annexation Agreements

- "Additional terms and conditions" upon the annexation will require an election to be held. CRS 31-12-101(1)(g). No election is required if 100% of landowners petition and have agreed to the conditions.
- An annexation agreement is a contract.
- Example developer/annexor obligations: dedicate and improve roads, install water and sewer lines, pay fees for water transmission.
- Example municipal obligations: provide water and sanitary sewer service.

Jurisdiction for Zoning Purposes: Resolving the 60 Day Problem, *cont'd.*

What to do? At latest count, there are four alternatives:

1. Set the annexation hearing, then simply keep continuing it under C.R.S. 31-12-108(3) [*after taking 1 hour of testimony*] until the land use applications catch up. This is the most common approach.
2. Act by ordinance to permit the Council to table an annexation petition for up to ____ days/months after receiving it.
3. Act by ordinance to grant the governing body such additional time as it wishes.
4. Adopt the resolution of substantial compliance under C.R.S. 31-12-108, set the hearing within the 60 day maximum, conduct the hearing and adopt the second resolution declaring the property eligible for annexation, but delay action until the land use applications have been brought to final form.

For statutory municipalities, options 2 and 3 are not available.

Challenge and Enforcement

- C.R.S. 31-12-116 provides the only means for challenging a municipal annexation:
  - Any landowner or qualified elector in the area annexed;
  - the board of county commissioners; or
  - any municipality within one mile of the area annexed.
- Annexation is a legislative act; rezoning is quasi-judicial. This difference leads to interesting problems when (as is commonly the case) an annexation petition is accompanied by a request for rezoning.

Effective Date of Annexation-Required Filings

- Colorado Revised Statute § 31-12-113 establishes detailed filing requirements which must be followed before an annexation is effective:
  1. One copy of the annexation map and the original annexation ordinance are filed with the municipal clerk.
  2. Three certified copies of the map and ordinance are filed with the county clerk and recorder.
- The Colorado Court of Appeals has held that substantial compliance with this filing requirement is sufficient to satisfy the two statutes.
- Importantly, the effective date of the annexation *ordinance* is distinct from (and precedes) the effective date of the *annexation* which is the date the ordinance and map are actually filed with the county.

Conflicting Annexation Claims of Two or More Municipalities

C.R.S. 31-12-114 governs the procedure for resolving these claims. Subsection (1) provides:

> At any time during a period of notice [of the annexation hearing] given by a municipality pursuant to section 31-12-108, any other municipality may adopt a resolution of intent pursuant to section 31-12-106 or receive a petition for annexation or a petition for an annexation election pursuant to section 31-12-107 with the area partly or wholly overlapping the area proposed for annexation by the first municipality. If this occurs, the respective rights of the several municipalities shall be determined in accordance with an election as provided in this section.

Required Mediation of Certain Annexations

- Colorado Revised Statute § 24-32-3209, entitled "comprehensive planning disputes-development plan disputes-mediation-list.
- The statute requires mandatory mediation of certain planning disputes, including disputes over the proposed annexation of land.
- Requirement applies when the proposed annexation includes territory within the boundaries of a "development plan" (defined at Colorado Revised Statute § 24-32-3209(1)(c.5) to include plans approved by intergovernmental agreements) to which the annexing municipality is not a party, but notice of and copy of which has been received by that municipality.

Disconnection

1. Disconnection of territory because of failure to serve: CRS § 31-12-119.
2. Disconnection by ordinance-statutory cities and towns: CRS §§ 31-12-501 to 503.
3. Disconnection by court decree - statutory cities: CRS §§ 31-12-601 to 605.
4. Disconnection by court decree-statutory towns: CRS §§ 31-12-701 to 707.

GERALD E. DAHL
MURRAY DAHL BEERY & RENAUD, LLP

CML ANNUAL CONFERENCE
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ANNEXATION IN COLORADO

A. Introduction and Historical Context

Annexation is the process by which municipalities incorporate new territory, either before or after development has taken place. Over 70% of the total population of Colorado lives within the boundaries of a municipality. A central fact of annexation today is that it means added revenue for the annexing municipality. This has led to competition between municipalities for desirable land. Annexation often, but not always, brings with it municipal utilities: water, sewer, electricity, police and other services.

Annexation can take place in three ways: (i) landowner petition (a contractual relationship which can be memorialized in an agreement separate from a petition); (ii) annexation election; or (iii) unilateral annexation of enclave or municipality owned land.

B. Sources of Colorado Annexation Law

1. Municipal Annexation Act of 1965: CRS 31-12-101 *et seq*.

   - Basic structure unchanged today: ***one-sixth boundary contiguity*** must exist between municipality and property to be annexed;
   - Petition or election process to initiate annexation;
   - Findings by the municipal governing body required.
   - *"No subject relating to municipal government aroused more interest or emphasis in the Committee's study than the matter of logical municipal growth through annexation. . . [p]roviding adequate urban services to ever growing unincorporated fringe areas constituted one of most important problems to Colorado municipal government . . . Annexation is recognized as an important vehicle to achieve logical urban development."* Report of the State Wide Committee to the Governor's Local Affairs Study Commission, December 1964.

2. Poundstone I (1974): Colo. Const. Art. XX, Sec.1

   - Applies only to Denver
   - Effectively blocked Denver's ability to undertake further annexation: required majority vote of a six member boundary control commission: three from Denver and one each from Adams, Arapahoe and Jefferson Counties.

- In addition, no property located in these three counties could be annexed by Denver unless approved by a unanimous vote of all members of the Board of County Commissioners of the county in which the land is located.

- Unaffected: Denver's ability as a county to change its boundaries pursuant to Article XIV, Section 3, Colorado Constitution and C.R.S. 30-6-100.3, *et seq.,* (still requires approval by electors in the county from which land is proposed to be removed for addition to Denver). This procedure was used by Denver in 1988 to annex the site in Adams County for Denver International Airport.

3. Poundstone II (1980): Colo. Const. Art. II, Sec. 30

- Applies to all Colorado municipalities

- Imposed three alternative conditions, at least one of which must exist before an unincorporated area may be annexed:

  - Approval of the annexation by vote of landowners and registered electors of the area to be annexed;

  - Petition for annexation signed by more than 50% of the land owners who own more than 50% of the land; or

  - The area is entirely surrounded by or is solely owned by the annexing municipality.

C. Basic Principles of Annexation

- **Annexation can take place in three ways:**

  - Landowner petition (a contractual relationship which can be memorialized in an agreement separate from the petition) signed by more than 50% of the landowners [*Colo.Const.Art II Sec30(1)(b)*] who own more than 50% of the land C.R.S. 31-12-107(1).

  - Annexation election, in which only landowners and registered electors in the area may vote. Colo.Const.Art II Sec. 30(1)(b); C.R.S. 31-12-107(2). Note: a few municipalities require an election for all annexations.

  - Unilateral annexation of enclave or municipally owned land: C.R.S. 31-12-106.

  - **"Landowner"** means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6). Joint tenant landowners are counted individually. Rice v. City of Englewood, 362 P.2d 557 (Colo.1961). As are tenants in common. BOCC v. Denver, 566 P.2d 335 (Colo.1977).

- ***One-sixth boundary contiguity*** must exist between municipality and property to be annexed: C.R.S. 31-12-104(1)(a).

  - Configuration of the parcel to be annexed is not relevant to review.

- Roads, water bodies and most government lands may be “skipped” for purposes of establishing the required contiguity. (County roads are not “county owned open space” and thus may be skipped.) BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

- Existence of contiguity satisfies the "community of interest" requirement of C.R.S. 31-12-104(1)(b).

- Prior noncontiguous annexations render subsequent annexations relying upon those annexations void ab initio. C.R.S. 31-12-104(2).

- **Establishing eligibility**

  - Series/simultaneous annexation of streets, rights-of-way, etc. permitted: C.R.S. 31-12-104(1)(a); 105(1)(e).

  - No division of property held in "identical ownership," without landowner consent unless separated by a “dedicated street, road or other public way;" written consent also required to annex 20 acres or more in identical ownership valued in excess of $200,000. C.R.S. 31-12-105(1)(a&b).

  - No annexation of property for which annexation proceedings have been initiated by another municipality (more on this later). C.R.S. 31-12-105(1)(c).

  - No annexation which will detach property from a school district without written consent of the district. C.R.S. 31-12-105(1)(d).

  - No annexation to expand municipal boundaries greater than 3 miles in “any one year.” C.R.S. 31-12-105(1)(e)(I).

  - Three mile plan required. C.R.S. 31-12-105(1)(e)(I).

  - Flagpole annexations must permit annexation of abutting property "under the same or substantially similar terms and conditions." C.R.S. 31-12-105(1)(e)(II).

  - If annexing a portion of a street or alley, must annex the entire width. C.R.S. 31-12-105(1)(f).

  - Annexation shall not deny reasonable access to landowners, easement owners or franchise owners adjoining a platted street or alley that has been annexed and is not bounded on both sides by the municipality. C.R.S. 31-12-105(1)(g).

  - Power of attorney not sufficient for annexation election. C.R.S. 31-12-105(1) (h).

- **Annexation Impact Report**

  - Required for annexations over 10 acres, unless waived by board of county commissioners. C.R.S. 31-12-108.5.

- **Notice and Hearing**

- Required except for enclaves [Notice only; no hearing: C.R.S. § 31-12-106(1)] and municipally owned property. C.R.S. 31-12-108; 109.

D. C.R.S. 31-12-105(1)(e) imposes two separate "three mile" limitations:

1. No annexation may have the effect of extending a municipal boundary more than three miles in any one year. See, Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo.App.1999) Letting stand a district court order that "one year" was a running 12 months, but see, C.R.S. 2-4-107: "year" defined as a "calendar year."

2. As a precondition to final adoption of an annexation ordinance within the three mile area outside present municipal boundaries, the municipality must have in place a plan for that area, in the nature of a comprehensive or master plan.

   - The statute does not require that the three-mile plan be adopted prior to submission of an annexation petition; instead, it must be in place "prior to completion of any annexation within the three mile area. . ."; thus, prior to final action on the annexation ordinance and recording with the clerk and recorder under C.R.S. 31-12-113(2).

   - The information required for a three mile plan is relatively limited. The plan must generally describe the proposed location, character and extent of:

     - subways, bridges
     - waterways, waterfronts
     - parkways, playgrounds, squares, parks
     - aviation fields
     - other public ways, grounds, and open spaces
     - public utilities
     - terminals for water, light, sanitation, transportation and power to be provided by the municipality [*not such utilities provided by others*]

     This requirement can be satisfied by including a three mile plan element in the comprehensive plan. See, C.R.S. 31-23-206(1);(2). The three mile plan must be updated at least once annually.

E. Landowner Consent or Voter Approval Required

- With the limited exception of municipally-owned property and property which has been wholly surrounded by the municipality for three years, landowner consent is required for a valid annexation petition. This consent is obtained either by: (1) signature on an annexation petition (at least fifty percent of the landowners, owning at least fifty percent of the land), or (2) a successful election, in which only landowners and registered electors may vote. C.R.S. 31-12-107; 112.

- For the purposes of the statute, "landowner" means the owner in fee of the surface estate, not the owner of the mineral estate if severed. C.R.S. 31-12-103(6).

- Landowner consent on an annexation petition may be withdrawn prior to final action; such a withdrawal deprives the municipality of power to complete the annexation. Town of Superior v. Midcities Co., 933 P.2d 596 (Colo. 1997).

- Many municipalities have required, as a condition to providing water or sewer service outside their boundaries, that the property owner sign a power of attorney granting the municipality the right to consent, on their behalf, to annexation when, as, and if the property becomes eligible for annexation in the future. House Bill 1061 (1996) eliminated the use of powers of attorney by municipalities to "vote" a parcel of property in an annexation election. C.R.S. 31-12-105(1)(h).

- In 1999, the statute was amended to limit the effective term of a power of attorney for use in an annexation petition to five years. C.R.S. 31-12-107(8).

F. Achieving Continuity: Flagpoles and Other Configurations

1. One-Sixth Boundary Requirement Generally

- The basic requirement that the property to be annexed must have at least a one-sixth boundary contiguity with existing municipal boundaries appears straightforward: *"…not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality."* C.R.S. 31-12-104(1)(a).

- C.R.S. 31-12-104(1)(a) was amended in 1987 to confirm as legitimate the longstanding practice of annexing one or more parcels in a series, considered simultaneously, in order to annex property which, taken as a whole, does not have the requisite one-sixth contiguity.

- *"Within said three mile area, the contiguity required by Section 31-12-104(1)(a) may be achieved by annexing a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, or a lake, reservoir, stream, or other natural or artificial waterway."* C.R.S. 31-12-105(1)(e).

- In using a street to serve as the "pole" to reach, and thus annex, the desirable "flag" of property, it is required that the municipality also annex the "pole." Board of County Commissioners v. City and County of Denver, 543 P.2d 521 (Colo. 1975). Use of a street as the "pole" does not eliminate the application of the one-sixth contiguity requirement to the perimeter of the "pole." Board of County Commissioners v. City of Lakewood, 813 P.2d 793 (Colo. App. 1991).

- The shape and size of the parcel ultimately annexed, whether in a "flagpole" configuration or otherwise, is not relevant to its eligibility for annexation. Board of County Commissioners v. City and County of Denver, 548 P.2d 922 (Colo. 1976); Board of County Commissioners of County of Arapahoe v. City of Greenwood Village, 30 P.3d 846 (Colo. App. 2001).

- In 2001, C.R.S. 31-12-105(1)(e) was amended to grant certain rights to property owners abutting the proposed "pole," giving them a time-limited opportunity [90 days maximum] to be annexed along with the "flag." This opportunity exists only until forty-five days prior to the public hearing on the main annexation itself (creating some timing problems for notice and hearing if such owners elect to petition for annexation). The annexing municipality is required to provide mailed notice to these abutting landowners of their right to annex. The abutting property owners must

still submit an annexation petition and demonstrate the required one-sixth contiguity. Significantly, these owners may annex only *"upon the same or substantially similar terms and conditions"* as the main annexation. It is not clear whether this change in statute will either discourage flagpole annexations or result in abutting landowners taking advantage of the opportunity thus presented to annex.

- Disconnection and re-annexation to satisfy contiguity requirement is acceptable. BOCC v. Greenwood Village, supra, 30 P.3d 846@849.

2. Series/Simultaneous Annexations

- The statutory basis for series/simultaneous annexations is C.R.S. 31-12-104(1) (a), last sentence:

> Subject to the requirements imposed by C.R.S. 31-12-105(1) (e), contiguity may be established by the annexation of one or more parcels in a series, which annexations may be completed simultaneously and considered together for the purposes of the public hearing required by Sections 31-12-108 and 31-12-109 and the annexation impact report required by Section 31-12-108.5.

- Must each individual annexation in a series/simultaneous annexation be supported by an individual annexation petition? A review of the statute and case law does not support this notion. C.R.S. 31-12-107(1)(a) permits "the landowners of more than 50% of the area excluding public streets and alleys, meeting the requirements of Sections 31-12-104 and 105" to petition. The petition must allege ownership of more than 50% of the territory to be annexed, exclusive of streets and alleys." C.R.S. 31-12-107(1)(c)(III). See also, BOCC v. Aurora, supra, 62 P.3d 1049 at 1055-56, construing Colo.Const.Art.II Sec.30(1)(b).

- The impact of this distinction is significant: so long as there is some private land associated with any annexation parcel in the series, the petitioner can claim that it is the owner more than 50% of the land, exclusive of streets and alleys, with respect to the entire series/simultaneous annexation. This has permitted series/simultaneous flagpole annexations of considerable length.

- The references to annexations in the statute are often in the plural, such as "annexation of one or more parcels in a series, which **annexations** may be completed simultaneously." The references to annexation petition are in the singular, except for the heading of C.R.S. 31-12-107 itself.

- If the statute is plain and its meaning is clear, it must be interpreted as written. Casados v. City and County of Denver, 832 P.2d 1048 (Colo.App. 1992). It is only if the statute is ambiguous that the court may look beyond the words to such things as the objects ought to be obtained, the circumstances, legislative history and consequences of a particular construction. C.R.S. 2-4-203. It appears that the statute permits a single annexation petition, by a private landowner to support a series/simultaneous annexation including multiple parcels consisting exclusively of "public streets and alleys."

G. Enclave Annexations.

- When an unincorporated area has been entirely contained within the boundaries of a municipality for at least three years, the municipality may annex the property by ordinance without regard to the eligibility requirements in Colorado Revised Statute § 31-12-104, the limitations in Colorado Revised Statute § 31-12-105, or the hearing requirements of Colorado Revised Statute § 31-12-109. Notice under Colorado Revised Statute § 31-12-108(2) must still be given. This enclave annexation technique is not available if any boundary of the enclave consists, at the time of annexation, of only a public right-of-way. Instead, the municipality must truly surround the enclave. The annexing ordinance must state that the area proposed to be annexed is owned by the annexing municipality and is not solely a public street or right-of-way. Railroad rights of way are not "public rights of way, including streets and alleys. Accordingly, railroad rights of way may be used to satisfy the enclave test of Colorado Revised Statute § 31-12-106(1.1).

- Notice that Colorado Revised Statute § 31-12-108.5 (impact report) is not exempted for enclave annexations, nor for annexation of municipally-owned land.

- Any IGA addressing enclave annexations must be filed with the county clerk and recorder.

- A private owner may force an enclave annexation. Colorado Revised Statute § 31-12-107(5) provides:

    - If a petition is filed pursuant to subsection (1) or (2) of this section and the territory sought to be annexed meets the specifications of section 31-12-106(1), the governing body of the municipality with which the petition is filed shall thereupon initiate annexation proceedings pursuant to the appropriate provisions of section 31-12-106(1). In the event that any governing body fails to initiate such annexation proceedings within a period of one year from the time that such petition is filed, annexation may be effected by an action in the nature of mandamus to the district court of the county where the land to be annexed is located, and the petitioner's court costs and attorney fees incident to such action shall be borne by the municipality.

    - At least one district court has held this section to require that a municipality is required to annex a qualifying enclave if petitioned by the enclave owner, even when the property is no longer a qualifying enclave at the time of annexation.

- The enclave must be a "true" enclave as stated in Colorado Revised Statute § 31-12-106(1.1)(a):

    - No enclave may be annexed pursuant to subsection (1) of this section if:

      (I) Any part of the municipal boundary or territory surrounding such enclave consists *at the time of the annexation of the enclave* of public rights-of-way, including streets and alleys that are not immediately adjacent to the municipality on the side of the right-of-way opposite to the enclave. (emphasis supplied)

- Note the language "at the time of the annexation of the enclave," implying that while the "area" must have been "so surrounded for a period of not less than three years," only at the time of annexation of the enclave itself may the nature of that "surround" not consist only of a right-of-way. May an enclave consist of less than the entire area which has been surrounded for the requisite three years? Notice the language of the statute: "When any unincorporated area is entirely contained within the boundaries . . . the governing body may annex such territory . . . if said area has been so surrounded for . . . three years . . . ." Also note that "enclave" is defined in

Colorado Revised Statute § 31-12-103(4) as "an unincorporated area of land entirely contained within the boundaries of the annexing municipality." Both references would appear to allow less than an entire enclave to be annexed under the expedited process. If less than the entire enclave is annexed, does the three-year clock restart as to the remainder? The better view is that if only part of the enclave is annexed, the remainder does not thereby lose its three-year eligibility. While no appellate case law exists on this point, if the intent of the three-year prerequisite for unilateral annexation of enclaves is that, having been surrounded for that period eliminates the need for a petition, this should apply for all the land which has been so surrounded.

H. Municipally-Owned Land

The statute expressly permits annexation of unincorporated land owned by the annexing municipality, by ordinance, without notice and hearing. The property still must have the required one-sixth contiguity under Colorado Revised Statute § 31-12-104 and meet the requirements of Colorado Revised Statute § 31-12-105 and section 30(1)(c) of Article II of the Colorado Constitution (Poundstone II). The annexing ordinance must state that the area proposed to be annexed is owned by the annexing municipality and is not solely a public street or right-of-way.

I. Zoning of Land while Annexation is Underway; Zoning of Newly Annexed Land; subdivision of Land while Annexation is Underway

- An annexing municipality may institute zoning or subdivision proceedings for the area proposed to be annexed at any time after a petition for annexation or petition for annexation election has been found to meet the requirements of the statute. The proposed zoning or subdivision approval may not become final, however, before the date that the annexation ordinance is adopted on final reading. Zoning must be completed within 90 days after the effective date of the annexation ordinance.

- Most annexations occur simultaneously with zoning and subdivision or planned unit development (PUD) review, as described above. To the extent this is not done, the requirements of Colorado Revised Statute § 31-12-115(2) apply and the area annexed must be brought under the municipality's zoning ordinance within 90 days from the effective date of the annexation ordinance. Failure to do so arguably reinstates county zoning until the municipality acts. For example, immediately after an annexation without a companion zoning ordinance, a building permit could be demanded based on the previous county zoning. During the 90-day period, the annexing municipality may refuse to issue any building or occupancy permits for any portion of the newly annexed area. Any attempted "universal" zoning provision that automatically applies a uniform zoning classification to all lands subsequently annexed is deemed void. This has the effect of requiring the municipality to affirmatively act to zone each property as it is annexed. Subdivisions and building permits authorized by the annexing municipality in an area where annexation is undergoing judicial review are expressly recognized as valid, even though the annexation itself may be subsequently declared invalid.

- Colorado Revised Statute § 31-12-115(6), added in 2004, prohibits the adoption or enforcement of any restriction on rights-of-way within the annexed area if the same have been customarily or regularly used for ""movement of any agricultural vehicles and equipment," to the extent such use is in existence at the time of annexation, and for the period the land remains in that use. Zoning of the annexed area for other than agricultural uses does not affect the restriction. Notice to adjacent property owners is required 30 days prior to adoption of an ordinance or regulation "affecting the right-of-way." Significantly, municipalities are permitted to adopt and enforce traffic regulations

that are "consistent with the customary or regular use of the right-of-way or are necessary for the safety of vehicular and pedestrian traffic . . ."

- The question often is raised whether a municipality may contract by annexation agreement that the property will be given certain zoning if the annexation ordinance is adopted. While most annexation agreements contain such agreements, it should be noted that the municipality has no land use or police power authority over the property until it is finally annexed and becomes part of the municipality. Thus, any agreement to zone property entered into before the authority to so zone may be argued to be *ultra vires*, or outside the authority of the municipal governing body. Such an agreement might result in circumventing the municipality's own adopted zoning process — for instance, by stipulating zoning without the full process of notice and hearing, planning and zoning review, etc. — thus creating an additional procedural problem.

- Obviously, the governing body may agree to "consider" a certain zoning density in the event annexation is taken to completion. In addition, any implications of "contract zoning" or *ultra vires* action will be eliminated if the annexation agreement states that zoning is not guaranteed and that the municipality retains its full discretion to zone the property following the public hearing. The agreement should clearly state this is for initial zoning upon annexation and is not a promise to maintain that zoning in perpetuity. In addition, the agreement should include a statement that it does not constitute a waiver of governmental or legislative authority or an abridgement of the police power. Once the annexation has been completed, the municipality may complete the zoning of the property and may even agree not to change that zoning for a prescribed period of time through a development or vested rights agreement under Colorado Revised Statute §§ 24-68-101 et seq. Often, the petitioning landowner reserves the right to withdraw the petition and prevent the recording of the annexation plat if the desired zoning is not granted. Most annexation agreements provide that the annexation ordinance and map may not be filed with the clerk and recorder under Colorado Revised Statute § 31-12-113 (and thus the annexation never becomes effective) unless the agreed zoning is granted.

J. Jurisdiction for Zoning Purposes: Resolving the 60 Day Problem

- *C.R.S. 31-12-115:* "The annexing municipality may institute the procedure *[outlined in state statutes or municipal charter to make land subject to zoning]* nor *[outlined in its subdivision regulations to subdivide land in the area proposed to be annexed]* at any time after a petition for annexation or a petition for an annexation election has been **found to be valid** in accordance with the provisions of Section 31-12-107." (emphasis supplied.)

- C.R.S. 31-12-107(I)(f) requires prompt action on a submitted petition: The clerk shall refer the petition to the governing body as a communication. The governing body, without undue delay, shall then take appropriate steps to determine if the petition so filed is substantially in compliance with this subsection (1).

- A petition is "found to be valid" likely by a finding of "substantial compliance," as referenced in 31-12-107(1)(g) [*petition for annexation*] or 31-12-107(2)(e) [*petition for annexation election*], and C.R.S. 31-12-107(I)(f).

- "Substantial compliance," is in turn established by resolution under C.R.S. 31-12-108(1):

> **As a part** of the resolution initiating annexation proceedings by the municipality or of a **resolution finding substantial compliance of an annexation petition** or of a petition for an annexation election, the

governing body of the annexing municipality shall establish a date, time and place that the governing body will hold a hearing to determine if the proposed annexation complies with sections 31-12-104 and 105 or such parts thereof as may be required to establish eligibility under the terms of this part one. **The hearing shall be held not less than 30 days nor more than 60 days after the effective date of the resolution setting the hearing.** (emphasis supplied.)

- Thus, under the statute, annexation and zoning may not be initiated (and, arguably, the municipality has no jurisdiction to do so) until the substantial compliance resolution is adopted. However, if that resolution must also establish a hearing within 60 days, the municipality only has that time to bring the zoning and subdivision applications to a final stage. For a large annexation this is not nearly enough.

- What to do? At latest count, there are four alternatives:

    1. Set the annexation hearing, then simply keep continuing it under C.R.S. 31-12-108(3) [*after taking 1 hour of testimony*] until the land use applications catch up. This is the most common approach.

    2. Act by ordinance to permit the Council to table an annexation petition for up to ____ days/months after receiving it under C.R.S. 31-12-107(1)(f) and before adopting the resolution of substantial compliance under C.R.S. 31-12-108, all in order to, in the words of the ordinance, "enable the land use applications to be processed to a final stage." Does this really solve the jurisdictional problem? Only if the municipality may confer land use jurisdiction upon itself for property not within its boundaries, separate and apart from the jurisdiction conferred by C.R.S. 31-12-115.

    3. Act by ordinance to grant the governing body such additional time as it wishes between the adoption of the resolution of substantial compliance and the date of eligibility hearing (and customary second resolution under C.R.S. 31-12-110) on the annexation itself. This still relies on the municipality having the authority to vary the terms of the statute, but does not raise the jurisdictional question, since the resolution of substantial compliance will have been adopted and jurisdiction conferred under C.R.S.31-12-115.

    4. Adopt the resolution of substantial compliance under C.R.S. 31-12-108, set the hearing within the 60 day maximum, conduct the hearing and adopt the second resolution declaring the property eligible for annexation, but delay action on the annexation ordinance itself until the land use applications (and also likely the annexation agreement) have been brought to final form. This avoids the necessity of either taking a jurisdictional risk, or adopting an ordinance varying the terms of the statute. However it also means that the City Council or Board of Trustees must explain to members of the public at the "eligibility hearing," that it is not really annexing the property yet, that all of their comments, while important, are not really going to be acted on at this time.

    For statutory municipalities, options 2 and 3 are not available.

K. Effective Date of Annexation-Required Filings

- Colorado Revised Statute § 31-12-113 establishes detailed filing requirements which must be followed before an annexation is effective:

    1. One copy of the annexation map and the original annexation ordinance are filed with the municipal clerk.

    2. Three certified copies of the ordinance and map are filed with the county clerk and recorder.

    3. The clerk and recorder in turn files one copy with the division of local government and one copy with the Colorado Department of Revenue.

- These requirements are substantially repeated at Colorado Revised Statute § 24-32-109, concerning the functions of the Division of Local Government, Colorado Department of Local Affairs. Both statutes declare that the annexation is not effective until the filings with the county clerk and recorder have been made. Once the filings are made, the annexation is effective "upon the effective date of the annexing ordinance." It is common for annexation agreements to provide that the filings are not to be made, and thus the annexation is not effective, if the zoning requested in the petition is not approved. The Colorado Court of Appeals has held that substantial compliance with this filing requirement is sufficient to satisfy the two statutes. Importantly, the effective date of the annexation *ordinance* is distinct from (and precedes) the effective date of the *annexation* which is the date the ordinance and map are actually filed with the county. Accordingly, municipal officials should include these requirements in their "annexation calendar" suggested above, and scrupulously follow them.

L. Annexation Agreements

- Once the Council / Board of Trustees has determined that requirements of C.R.S. 31-12-104 and 105 have been met and that an election is not required, it may proceed to annex the area by ordinance, unless it chooses to impose "additional terms and conditions" upon the annexation, in which case an election must be held. C.R.S. Section 31-12-101(1)(g). No election is required if 100% of landowners petition and have agreed to the conditions.

- C.R.S. 31-12-106(4), 31-12-107(4), 31-12-111, 31-12-112(1) and 31-12-121 specifically contemplate that annexation agreements may be entered into. Such agreements are judicially enforceable. The Colorado courts have upheld the imposition of conditions by annexation agreement. City of Aurora v. Andrew Land Company, 490 P.2d 67 (Colo. 1971); Lone Pine Corp. v. City of Ft. Lupton, 653 P.2d 405 (Colo. App. 1982).

- An annexation agreement is a contract. Terms and conditions may also be imposed by a memorandum of agreement. C.R.S. Section 31-12-112(2).

- Example developer/annexor obligations: dedicate and improve roads, install water and sewer lines, pay fees for water transmission, make storm drainage improvements, participate in bridge costs, donate land for public purposes; construct necessary public improvements; dedicate surface and nontributary groundwater.

- Example municipal obligations: provide water and sanitary sewer service to the annexed lands; initially zoning the property to the agreed-upon zone category.

- The annexation agreement should affirmatively reserve the right of the municipality to rezone the property in the future. A municipality cannot be contractually bound never to rezone property,

although Colorado's vested property rights act, C.R.S. 24-68-101, *et seq*., may impose other constraints.

M. Challenge and Enforcement

Statutory Requirements & Limitations

- C.R.S. 31-12-116 provides the only means for challenging a municipal annexation. This opportunity is limited to a sixty day period following the effective date of the annexation ordinance. The challenge right is strictly limited to:

  - Any landowner or qualified elector in the area annexed;

  - the board of county commissioners of any county governing the area annexed; or

    any municipality within one mile of the area annexed.

- Annexation is a legislative act; rezoning is quasi-judicial. This difference leads to interesting problems when (as is commonly the case) an annexation petition is accompanied by a request for rezoning:

  - The annexation ordinance and agreement, being concerned with a **legislative** matter, can be negotiated through the liberal use of *ex-parte* contacts. The agreement can be challenged at any time by declaratory judgment; challenge to the annexation ordinance itself is time limited (sixty days) and plaintiff-limited (landowner; county; other municipalities within one mile). C.R.S. 31-12-116.

  - The rezoning request is **quasi-judicial**; *ex-parte* contacts are prohibited; challenge to the rezoning by certiorari review is strictly limited to within thirty days of final action.

- In 1991, the legislature closed an interesting loophole created by the sixty day limitation, adding subsection C.R.S. 31-12-104(2). The new subsection declared "noncontiguous," "disconnected municipal satellites" located more than three miles from the annexing municipality to be void *ab initio*, and removed the sixty day limitation from actions brought to challenge such attempted annexations. The subsection goes on to similarly void any annexation subsequently relying on the initial (void) annexation attempt. Review is available under this sub-section only to a municipality within one mile of the challenged annexation, and only if the challenging municipality has a three mile "plan in place," as required by C.R.S. 31-12-105(1)(e). Town of Berthoud v. Town of Johnstown, 983 P.2d 174 (Colo. App. 1999).

- Litigation between the City of Aurora and Douglas County has highlighted the role of the board of county commissioners governing the area proposed to be annexed. C.R.S. 31-12-104(1)(a) provides, *inter alia,* that *"[c]ontiguity shall not be affected by the existence of a platted street or alley, a public or private right-of-way or area, public lands, whether owned by the state, the United States, or an agency thereof,* ***except county-owned open space****, or a lake, reservoir, stream or other natural or artificial waterway between the annexing municipality and the land proposed to be annexed."* (emphasis supplied). This "skipping rule" allows the annexing municipality to ignore, for purposes of contiguity, intervening lands of the types described, with the exception of "county-owned open space." The Douglas County Board of County

Commissioners, faced with a pending (and, in the county, unpopular) Aurora annexation, promptly adopted a resolution declaring two intervening county roads to be "county-owned open space," and thus land which destroyed the required contiguity. The district court agreed. The Colorado Court of Appeals reversed the district court, holding that active county roads were not "open space." BOCC v. Aurora, 62 P.3d 1049 (Colo.App.2002).

- Douglas County and the City of Aurora have also litigated the extent to which a county may use regulations enacted under the Areas and Activities of State Interest Act, C.R.S. 24-65.1-101 *et seq*.. The Court of Appeals held in 2001 that the county lacked authority to require an annexing developer to obtain a county permit under such regulations before it could seek to annex to Aurora. Board of County Commissioners of the County of Douglas v. Gartrell Investment Company, LLC, 33 P.3d 1244 (Colo. App. 2001).

Conflicting Annexation Claims of Two or More Municipalities

- C.R.S. 31-12-114 governs the procedure for resolving these claims. Subsection (1) provides:

> At any time during a period of notice [of the annexation hearing] given by a municipality pursuant to section 31-12-108, any other municipality may adopt a resolution of intent pursuant to section 31-12-106 or receive a petition for annexation or a petition for an annexation election pursuant to section 31-12-107 with the area partly or wholly overlapping the area proposed for annexation by the first municipality. If this occurs, the respective rights of the several municipalities shall be determined in accordance with an election as provided in this section.

- For the rather complicated definition of when proceedings for annexation have been "commenced," see C.R.S. 31-12-105(1)(c), stating that no annexation under C.R.S. 31-12-106 or C.R.S. 31-12-107:

> *". . . shall be valid when annexation proceedings have been commenced for the annexation of part or all of such territory to another municipality, except in accordance with the provisions of section 31-12-114. For the purpose of this section, proceedings are commenced when the petition is filed with the clerk of the annexing municipality or when the resolution of intent is adopted by the governing body of the annexing municipality if action on the accepting of such petition or on the resolution of intent by the setting of the hearing in accordance with section 31-12-108 is taken within 90 days after the said filings, if an annexation procedure initiated by petition for annexation is then completed within 150 days next following the effective date of the resolution accepting the petition and setting the hearing date and if an annexation procedure initiated by resolution of intent or by petition for an annexation election is prosecuted without unreasonable delay after the effective date of the resolution setting the hearing date."*

- Once it is determined that there are conflicting annexation claims, C.R.S. 31-12-114(2) provides that proceedings for annexation by both municipalities are "held in abeyance pending the holding of an election of the qualified electors resident within such area or as described in subsection (4) of this section . . . "

- The second municipality is obliged to petition the district court for the election. The petition must be filed within 30 days after the second municipality's resolution of intent or the date of the filing of the petition for annexation with the second municipality. Note: the date of filing of the petition will generally control, and this is underscored by C.R.S. 31-12-105(1)(c), unless it is annexation of an enclave or municipally owned land under C.R.S. 31-12-106.

- At the election, "qualified electors and qualified nonresident landowners" in the area claimed by both municipalities may vote. A likely "qualified nonresident landowner" would be the Colorado Department of Transportation, when a series/simultaneous annexation relies on segments of state highway. CDOT typically will not sign annexation petition; it is unlikely it would vote in an election under C.R.S. 31-12-114. If the overlap area consists solely of CDOT right-of-way, the election may result in a tie (0 to 0), in which case the court must order both annexations void, barring both municipalities from continuing with the current annexation proceedings insofar as they relate to such disputed area." C.R.S. 31-12-114(6).

- Where the disputed area has less than two-thirds boundary contiguity with either municipality, the electors get two questions: for or against annexation, and for annexation to [*municipality 1*] or [*municipality number 2*].

- If less than 2/3 boundary contiguity, question 2 only.

- The election is decided by a majority of votes cast, except a three-quarters majority vote is required to defeat annexation to a municipality with more than two-thirds boundary contiguity of the total area proposed for annexation or the disputed part thereof. C.R.S. 31-12-115(9).

- Unless the area of overlap is more than one-third of the area proposed for annexation (inclusive of streets) to the first municipality, either municipality may proceed to annex the area not claimed by the other without waiting for the election. C.R.S. 31-12-115(10).

- Proceedings by one municipality to challenge the annexation of another where there are conflicting annexation claims are exclusively governed by C.R.S. 31-12-116. City & County of Denver, et al. v. Jefferson County District Court et al., 509 P.2d 1246 (Colo.1973); Berry Properties v. City of Commerce City, 667 P.2d 247 (Colo. App. 1983).

- No such suit may be brought prior to "the effective date of the annexing ordinance by the annexing municipality." C.R.S. 31-12-116(1)(a). This means that municipalities claiming the same territory must proceed through the annexation election process under C.R.S. 31-12-114 before commencing a challenge against each other, on whatever basis (including other defects in the annexation process).

- Of course, C.R.S. 31-12-116(2)(a)(II) continues to apply, requiring a motion for reconsideration within 10 days of the effective date of the ordinance finalizing the challenged annexation.

N. Required mediation of Certain Annexations

- Special mention is required of Colorado Revised Statute § 24-32-3209, entitled "comprehensive planning disputes-development plan disputes-mediation-list of qualified professionals to assist in mediating land use disputes-definitions."

- This statute, enacted in 2000 and amended in 2001 and 2003, can be easily overlooked by the municipal annexation practitioner, located as it is in an obscure location in Title 24 in the Colorado

Revised Statutes. Failing to pay attention to this statute can have serious consequences. The statute requires mandatory mediation of certain planning disputes, including disputes over the proposed annexation of land. Specifically, the statute requires a municipality, upon receipt of an annexation petition, in some cases to refer the petition to other local governments for review and their potential objection before the annexing municipality may take any action on the petition. This requirement applies when the proposed annexation includes territory within the boundaries of a "development plan" (defined at Colorado Revised Statute § 24-32-3209(1)(c.5) to include plans approved by intergovernmental agreements) to which the annexing municipality is not a party, but notice of and copy of which has been received by that municipality.

- A common circumstance under which the requirements of this statute would be triggered would be an IGA between Municipality No. 1 and the county regarding Municipality No.1's urban growth area. Municipality No. 2, not a party to the IGA, but on notice of it, receives a petition for annexation for property within the area covered by the IGA. The statute would apply and would require the following procedure:

    1. Municipality No. 2 must provide notice and a copy of the annexation petition to all parties to the IGA (the county and Municipality No. 1).
    2. The parties to the IGA have 30 days after receiving their copies of the petition to file written objections with Municipality No. 2.
    3. The written objections may include a request (which may not be refused) that municipality No. 2 participates in mediation of the "dispute."
    4. The petition may not be referred to Municipality No. 2's governing body under Colorado Revised Statute § 31-12-107(1)(4) for action until the required mediation is complete or 90 days have passed since the request for mediation was made.
    5. In lieu of mediation, the parties may enter into an IGA to resolve the dispute.

- The Colorado Department of Local Affairs is required to maintain a list of qualified mediators. While the statute only requires mediation, in our example Municipality No. 2 would eventually be able to proceed with the annexation. However, it would be subject to a delay of up to 120 days before its governing body could even take action to determine substantial compliance and set a hearing date on the annexation petition. During that time, Municipality No. 1 could accept a conflicting petition for annexation under Colorado Revised Statute § 31-12-114, further complicating the situation.

- It is obvious that in addition to complying with intergovernmental agreements to which it is a party, the annexing municipality must be aware of those agreements to which it is *not* a party, but which cover territory that may be the subject of an annexation petition

O. Disconnection.

- Municipalities are authorized to disconnect territory from within their municipal boundaries through several different statutory procedures. There are four separate statutory procedures for disconnection:

    1. Disconnection of territory because of failure to serve: Colorado Revised Statute § 31-12-119.

2. Disconnection by ordinance-statutory cities and towns: Colorado Revised Statutes §§ 31-12-501 to 503.
3. Disconnection by court decree - statutory cities: Colorado Revised Statutes §§ 31-12-601 to 605.
4. Disconnection by court decree-statutory towns: Colorado Revised Statutes §§ 31-12-701 to 707.

- It is important to note that all of these statutes require some form of landowner consent or landowner initiation of disconnection:

1. Colorado Revised Statute § 31-12-119: landowners must petition governing body for disconnection for failure to serve (and the procedures of Colorado Revised Statutes §§ 31-12-601 or 31-12-701 are used).
2. Colorado Revised Statutes §§ 31-12-501 et seq.: landowner applies to the governing body for an ordinance disconnecting the property.
3. Colorado Revised Statutes §§ 31-12-601 et seq.: landowner petitions the district court (statutory cities).
4. Colorado Revised Statutes §§ 31-12-701 et seq.: landowner petitions district court (statutory towns).

- In all the statutory disconnection proceedings, not only is landowner consent or landowner initiative required but significantly, each procedure details the debt and property tax impact of the disconnection. This is important because disconnection moves the property into the unincorporated county, and the statutes require that any taxes lawfully assessed against the property for the purpose of paying indebtedness lawfully contracted by the governing body municipality while the land was within the limits of the community which remains unpaid continues to be an indebtedness of the property and must be collected by the county treasurer. The effect of disconnection is to impose new and different tax burdens on the property as well is to require payment of those burdens contracted while the property was in the municipality.

- Disconnection for Failure to Serve: The owner or owners of any tract or contiguous tracts of land consisting of more than five acres and located on the boundary of a municipality may petition for disconnection from the municipality if municipal services have not been provided to the area within three years after annexation on the same terms and conditions as the rest of the municipality. The procedures for such disconnection are set forth in Colorado Revised Statutes §§ 31-12-601 to 31-12-707, depending upon whether the municipality involved is a city or a town. Disconnection in this circumstance is accomplished by court decree, rather than by ordinance. The Colorado Court of Appeals has held that a municipality may not shield itself from the effect of Colorado Revised Statute § 31-12-119 by imposing a condition on an annexation that the municipality would not be required to supply services to the annexed area.

- Disconnection by Ordinance: While property owners may petition the district court for disconnection from statutory cities and towns under Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq., the most available means by which a municipality may disconnect property is Colorado Revised Statutes §§ 31-12-501 et seq. ""disconnection by ordinance-statutory cities and towns."" Home rule municipalities may also follow this procedure by enacting a simple code requirement that disconnection from such municipality by petition

shall follow the procedures set forth in Colorado Revised Statutes §§ 31-12-501 et seq. This is advantageous, since that statute allows a municipality, upon the request of a property owner, to disconnect property without the more cumbersome procedure of the court proceedings in the other two mechanisms.

- Under Colorado Revised Statute § 31-12-501, the owner of a tract of land "within and adjacent to the boundary of a municipality" may apply to the governing body for disconnection. A copy of this application is provided to the board of county commissioners and the board of directors of any affected special district, who may request a meeting with the property owner and the governing body of the municipality to "discuss and address any negative impacts on the County that would result from the disconnection." Colorado Revised Statute § 31-12-501(2)(a). Importantly, whether or not such a meeting is requested, or if requested, conducted, the municipality's governing body must simply give consideration to the comments of the county commissioners and/or special district directors, but is not required to address those comments in any particular way. Nor may the board of county commissioners or the special district block or impede the disconnection. The requirement of consultation is simply that.

- Once any required consultation is completed as described above, the municipality may proceed to consider the request for disconnection, and "if such governing body is of the opinion that the best interest of the municipality will not be prejudiced by the disconnection of such tract, it shall enact an ordinance affecting such disconnection." This standard of review is very simple, and makes the question of disconnection one of the pure discretion of the municipal governing body. Colorado Revised Statute § 31-12-501(3). Once the disconnection ordinance is enacted, disconnection is immediately effective upon filing of the ordinance with the county clerk and recorder in essentially the same manner in which annexation ordinances are filed under Colorado Revised Statute § 31-12-113.

- The general procedure for disconnection under this statute is as follows:

  - The governing body adopts an ordinance amending the Municipal Code by the incorporation of Colorado Revised Statutes §§ 31-12-501 et seq., as the procedure for disconnection of property from the municipality by ordinance.
  - The municipality accepts an application from "the owner of a tract of land within and adjacent to the boundary" of the municipality, asking to have the property disconnected.
  - The governing body considers the application and if it is "of the opinion that the best interests of the municipality" would not be prejudiced by disconnection, it enacts an ordinance "effecting such disconnection."
  - Upon filing the ordinance and map with the county clerk and recorder, the property is disconnected from the municipality and returned to the unincorporated county.

- Disconnection by Petition and Court Decree: Under Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq., the court petition and decree procedure is available only in limited circumstances, including disconnection of agricultural and farmland which has not yet been platted, and will not be platted for six years after the effective date of disconnection. Disconnection for failure to serve under Colorado Revised Statute § 31-12-119 is available, unless the municipality has services made available to the property on the same or similar basis as for the remainder of the municipality.

- Necessity of Landowner Consent: A home rule municipality could adopt a local code provision

designating Colorado Revised Statutes §§ 31-12-501 et seq., as the procedure for disconnection, so as to preclude the more complex district court proceeding of Colorado Revised Statutes §§ 31-12-601 et seq. and 31-12-701 et seq. Some home rule municipalities have done so. Could a home rule city disconnect property without landowner consent? Here, however, the home rule power collides with the property rights of the owners being disconnected:

- First, while not controlling disconnection, the Constitution (importantly for home rule municipalities) and the statute both require a form of landowner consent for *annexation* – either by petition or election.
- The only exception is annexation of enclaves and municipally owned land (the latter, by virtue of the City's ownership of the property, is really a consented annexation).
- The statute requires some form of landowner consent or landowner initiation of *disconnection*:
  - Colorado Revised Statute § 31-12-119: landowners petition governing body for disconnection for failure to serve (and the procedures of Colorado Revised Statutes §§ 31-12-601 et seq. or 31-12-701 et seq. are used).
  - Colorado Revised Statute § 31-12-501: owner must apply to the governing body
  - Colorado Revised Statute § 31-12-601: owner petition to district court
  - Colorado Revised Statute § 31-12-702: owner petition to district court

- With the single exception of an enclave annexation, any annexation or disconnection requires landowner consent for property to be placed under the jurisdiction of a different local government. In all of the statutory disconnection proceedings, not only is the owner consent or initiative required, but significantly, each procedure details the debt and real property tax impact of the disconnection. Again, the effect of disconnection is to impose new and different tax burdens on the property, as well as to require payment of those burdens that were on the property while it was in the city.

- Consequences of Disconnection: Disconnection restores the territory to the jurisdiction of the county for all purposes, including property taxation County land use control is restored, although to the extent vested rights were acquired while the property was within the municipality, those rights continue to be valid and enforceable. While uncommon, municipalities do occasionally disconnect property, returning it to the jurisdiction of the unincorporated county. Regarding the effect of disconnection on public streets, the Colorado Supreme Court has held that an ordinance disconnecting previously annexed areas was not sufficient to vacate a public street dedicated by subdivision at the time of annexation. The street in question therefore remained a public street, but control over the street passed to the county.

- While none of the disconnection statutes mention recording, the disconnection ordinance (or, if applicable court decree) and map should be filed with the county clerk and recorder in the same manner as annexation ordinances and maps under Colorado Revised Statute § 31-12-113.

TIMELINE AND PROCESS FOR ANNEXATION

The process for annexation of property showing the time frame for accomplishing the various requirements for an annexation under the Municipal Annexation Act, C.R.S. § 31-12-101, *et seq*.

Date	Action Required
	Petition for Annexation ("Petition") signed and submitted. Petition referred to Council by City/Town Clerk.
	Send notice by regular mail to landowners abutting the annexed road, advising of their right to petition for annexation on "the same or similar terms and conditions." C.R.S. § 31-12-105(1)(e.3).
1	City/Town Council adopts Notice of Public Hearing ("Notice") and Resolution of Intent to Annex ("Resolution of Intent"), Finding Substantial Compliance, and Setting Annexation Hearing.
3	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Send a copy of the Notice, Resolution of Intent and Petition to the Board of County Commissioners, County Attorney, and any special districts and school districts serving the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).
10	City/Town begins preparation of Annexation Impact Report ("AIR") for filing with the Board of County Commissioners, pursuant to C.R.S. §31-12-108.5, unless the Board of County Commissioners waives the requirement, or the property to be annexed is ten acres or less. **].** The impact report must include the following:

1. A map or maps of the City/Town and adjacent territory, showing:
    a. Present and proposed boundaries of the City/Town in the vicinity of the annexation;
    b. The present streets, major trunk water mains, sewer interceptors and outfalls, other utility lines and ditches, and the proposed extension of streets and utility lines in the vicinity of the proposed annexation;
    c. The existing and proposed land use pattern in the areas to be annexed.
2. A copy of any draft or final annexation agreement.
3. A statement setting forth the plans of the City/Town for extending to or otherwise providing for, within the area to be annexed, municipal services performed by or on behalf of the municipality at the time of annexation.
4. A statement setting forth the method under which the City/Town plans to finance the extension of the municipal services into the area to be annexed.
5. A statement identifying existing districts within the area to be annexed.

6. A statement on the effect of annexation upon local-public school district systems, including the estimated number of students generated and the capital construction required to educate such students.

15 File AIR, if required, with the Board of County Commissioners.

17 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

24 Publish Notice and Resolution of Intent in newspaper of general circulation in the area proposed to be annexed. C.R.S. § 31-12-108(2).

30 Request certificate of publication from owner, manager or editor of newspaper. Add certificate to the record at annexation hearing. C.R.S. § 31-12-108(2).

35 City/Town Council conducts public hearing on annexation petition. C.R.S.§ 31-12-109.

35 After hearing, pursuant to C.R.S. § 31-12-110, City/Town Council adopts a resolution identifying findings of fact.

35 After hearing City/Town Council adopts Ordinance Approving Annexation. C.R.S. § 31-12-113.

35 After hearing City/Town Clerk signs Certificate of Annexed Plat.

36 Original Annexation Ordinance and one copy of the annexation map filed in the office of the City/Town Clerk. C.R.S. § 31-12-113(2)(a)(I).

36 Three certified copies of the annexation ordinance and map, containing a legal description, filed for recording with the County Clerk and Recorder. C.R.S. § 31-12-113(2)(a)(II)(A).

36 Effective date of Annexation. C.R.S. § 31-12-113(2)(b).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Division of Local Government of the Colorado Department of Local Affairs. C.R.S. 31-12-113(2)(a)(II)(B).

40 County Clerk and Recorder files one certified copy of the annexation ordinance and map with the Department of Revenue. C.R.S. 31-12-113(2)(a)(II)(B).

Virtue and Vice: First Amendment Considerations for Local Government

Brian Connolly
Otten Johnson Robinson Neff + Ragonetti, P.C.
Denver, Colorado

OTTEN JOHNSON
ROBINSON NEFF + RAGONETTI PC

Session Outline

- Introductory concepts
- Public forum doctrine
  - Social media: can government restrict speech and expression (comments) on its social media?
- The right to record
  - Can government restrict or confiscate recordings of police, public officials, etc.?
- Door to Door Solicitation
  - Can government impose curfews and permitting requirements?
- Questions and answers

The First Amendment

Congress shall make no law respecting an ***establishment of religion****, or prohibiting* ***the free exercise thereof****; or abridging the* ***freedom of speech****, or of the* ***press****; or the right of the people* ***peaceably to assemble****, and to* ***petition the Government for a redress of grievances****.*

INTRODUCTORY TOPICS

Free Speech Concepts

- Marketplace of ideas: better to have more speech rather than less
- Prior Restraint: better to punish speech after than prohibit it from being expressed
- Some speech is *not* protected
  - Obscenity (contemporary community standards)
  - Child pornography (even if not obscene)
  - Threats of imminent harm ("let's beat-up those protesters")
  - "Fighting words" (you piece of --, your mother is a --)

Free Speech Concepts

- Speech about ideas has somewhat more protection than speech only about commercial activity; *e.g.*, an election sign vs. a "for sale" sign
- Regulations based on content of speech are scrutinized much more than "content-neutral" regulations; *e.g.*, election sign vs. "yard" sign
- Where speech occurs makes a difference: greatest protection for speech in "traditional public forum"; *e.g.*, sidewalk in front of city hall vs. inside city council chambers

Free Speech Concepts

- Content (or message) neutrality
- Time, place or manner regulations
- Commercial vs. non-commercial speech
- Bans and exceptions
- Over/Underinclusive
- Permits and prior restraints
- Vagueness and Overbreadth

Commercial speech vs. Non-commercial speech

Commercial speech

- "speech that proposes a commercial transaction" or promotes intelligent market choices
- protected under 1st amendment … but not as much as "traditional" (non-commercial) speech

Non-commercial speech

- speech about political, ideological, religious, ideas, etc.
- highest degree of 1st amendment protection

Viewpoint Neutrality

- In a limited or nonpublic forum, the court will ask: "***is the regulation viewpoint neutral?***"
- Viewpoint neutrality looks at point of view
  - A ban on posts that criticize government is not viewpoint neutral
  - A ban on political posts is viewpoint neutral
- Examples
  - Ban on signs that criticize foreign government within 500 feet of an embassy: VIEWPOINT BASED (*Boos v. Barry*, 485 U.S. 312 (1988))
  - Restriction on advertising that is demeaning or disparaging: VIEWPOINT NEUTRAL (*AFDI v. King County*, 796 F.3d 1165 (9th Cir. 2015))

Content Neutrality

- In a traditional or designated public forum, the court will ask: "is the regulation content neutral?"
- Content neutrality looks at subject matter
  - A ban on all political signs is *not* content neutral but *is* viewpoint neutral
  - A limitation on the time at which a protest may occur is content neutral and viewpoint neutral
- Examples
  - A requirement that performers in a public band shell use public sound amplification devices: CONTENT NEUTRAL (*Ward v. Rock Against Racism*, 491 U.S. 781 (1989))
  - A prohibition on location of a KKK rally due to concerns about violent outbursts: CONTENT BASED (*Christian Knights of KKK Invisible Empire, Inc. v. Dist. of Columbia*, 972 F.2d 365 (D.C. Cir. 1992))

Content Neutrality

Examples of content neutral "time, place or manner" regulations:

- "Sound amplification may not exceed 75 db."
- "Public Plaza may be used for public assemblies between the hours of 8 a.m. and 10 p.m."

Levels of Scrutiny

- Content neutral regulations get *intermediate* scrutiny, while content based regulations get *strict scrutiny*
- Constitutional scrutiny looks at:
  - Governmental purpose
  - Means-ends tailoring
- Types of constitutional scrutiny:

Type of Scrutiny	Governmental Interest	Tailoring
Strict	Compelling	Least-restrictive means
Intermediate	Significant	Narrow, with ample alternative channels
Reasonableness	N/A	"Reasonable in light of the purposes of the forum"

Bans and exemptions

- Generally disfavored
- Supreme Court has upheld some total bans…
  - commercial billboards in *Metromedia*
  - signs posted on public property in *Vincent*
  - protests in non-public forum
- …But has struck down others
  - real estate lawn signs in *Linmark*
  - personal lawn signs in *Ladue*

Overinclusiveness/Underinclusiveness

- Overinclusive regulation: restricts speech that doesn't implicate the government interest
  - If government can serve the interest while burdening less speech, it should
- Underinclusive regulation: allows speech that undermines the government's interest
  - Government shouldn't exempt speech from a ban if it undermines the interest

Vagueness and Overbreadth

Vagueness

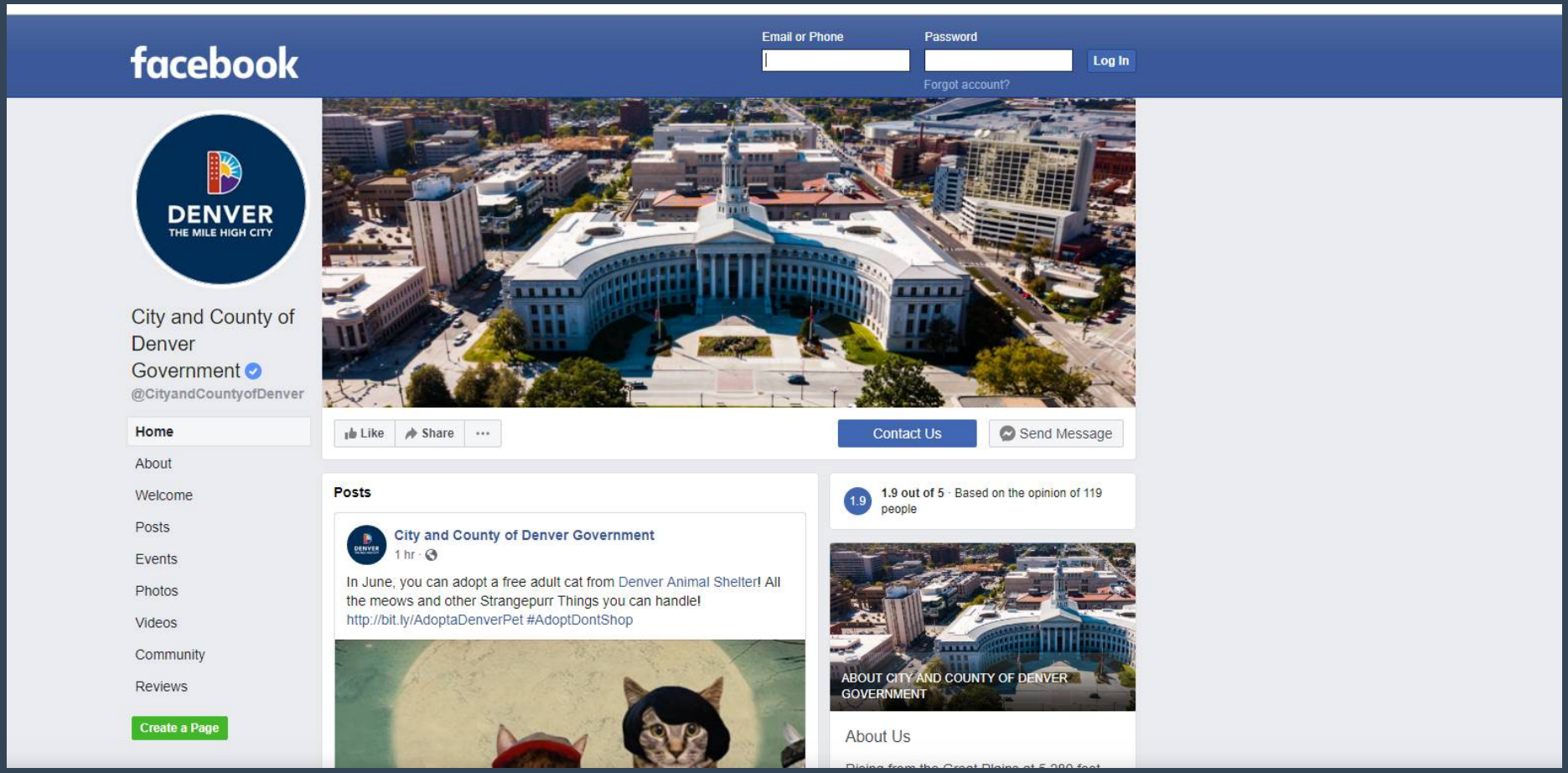
- a regulation should specify what is/isn't regulated and how
- if it doesn't, it may be void for vagueness

Overbreadth

- a regulation that restricts "too much" may be struck down as overbroad

Prior Restraint

- Any time someone must get a permit before they can "speak" there's a potential prior restraint
- Less of a problem if:
  - content-neutral regulation
  - strict limits on discretion
  - reasonable timeframe for decision



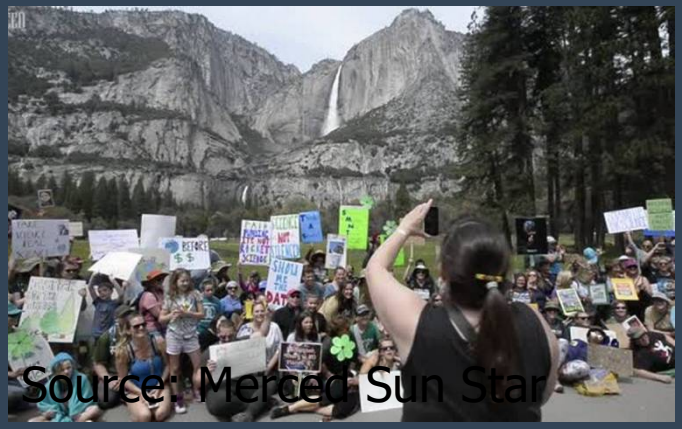
PUBLIC FORUM DOCTRINE

Public Forum Doctrine: Introductory Concepts

- Answers the question: "When and how can the government control speech and expression on government property?"
- Requires consideration of the type and function of government property in question
- Nature of regulation is subject to varying degrees of judicial scrutiny

Public Forum Classifications

Source: theblaze.com


Source: Merced Sun Star


Source: NBC San Diego

Public Forum Classifications

Source: WBUR


Source: White House Museum


Source: CBS Pittsburgh


Source: New York Times

Traditional Public Forum

- Streets
- Sidewalks
- Parks

"[S]treets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions." --Hague v. CIO, 307 U.S. 496, 515 (1939)

Designated Public Forum

- Government may, by fiat and intentionally, open up some government property for speech activity akin to traditional public fora
- Open to all speakers and topics
- Subject to closure
- Examples:
  - Plazas in front of government buildings
  - Squares on college campuses
  - Flagpoles in front of city hall (*see Sons of Confederate Veterans v. City of Lexington*, 722 F.3d 224 (4th Cir. 2013))
  - County facility where leafleting is allowed (*see Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991))

Limited or Nonpublic Forum

- Government property opened up for limited range of speakers or topics
- Subject to closure
- Examples:
  - Student group meetings (*see* Widmar v. Vincent, 454 U.S. 263 (1981))
  - Utility poles (*see* Members of the City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984))
  - Sidewalks at post offices (*see* U.S. v. Kokinda, 497 U.S. 720 (1990))
  - Airport advertising or protest
  - Bus advertising
  - Mailboxes

Nonforum

- Government property not opened for speech activity at all
- Examples:
  - Prisons
  - Military bases (*see* Greer v. Spock, 424 U.S. 828 (1976))

Judicial Review: Three Steps

Step 1: What type of forum is it?

Step 2: Is the regulation content neutral? Is the regulation viewpoint neutral?

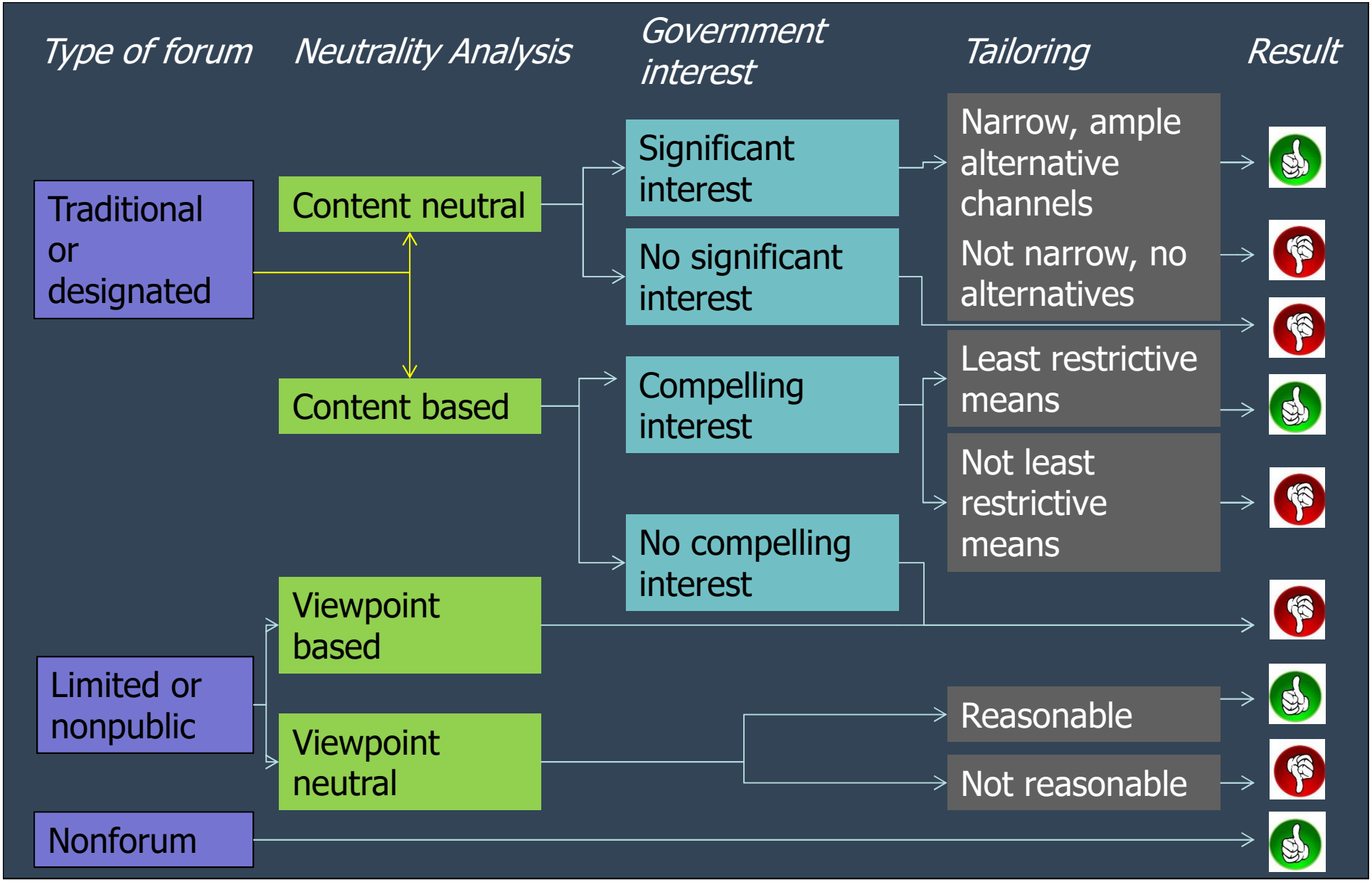
Step 3: Is the regulation appropriately tailored?

Neutrality in the Fora

- Traditional and designated public fora: require content neutral regulation
- Limited and nonpublic fora: require viewpoint neutral regulation
- Nonfora: no limitation

Application of Levels of Scrutiny

- TPF or DPF and content based: **strict**
- TPF or DPF and content neutral: **intermediate**
- LPF or NPF and viewpoint neutral: **reasonableness**
- LPF or NPF and viewpoint based: **invalid**
- Nonforum: **reasonableness**


Type of forum
Neutrality Analysis
Government interest
Tailoring
Result
Traditional or designated
Content neutral
Content based
Limited or nonpublic
Viewpoint based
Viewpoint neutral
Nonforum
Significant interest
No significant interest
Compelling interest
No compelling interest
Narrow, ample alternative channels
Not narrow, no alternatives
Least restrictive means
Not least restrictive means
Reasonable
Not reasonable

Public Fora and Social Media

- While the government speech itself (ex: it's own Facebook post) is not a public forum, many courts have held invited public response on the accounts (ex: comments, posts) to be within a public forum
- Analysis factors:
  - Is there government ownership or control?
  - Is the application of forum analysis consistent with the purpose, structure, and intended use of the account and space at issue?

Examples

Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018)

- President Trump uses the same Twitter account both personally and in his official capacity, showing government control
- Trump blocked certain users from commenting on his tweets
- This "interactive space" of the account is a designated public forum
- Blocking users based on political comments was impermissible viewpoint discrimination

Source: CNN

Examples

Davison v. Randall, 912 F.3d 666 (4th Cir. 2019)

- Local official created and ran a Facebook page for her office
- Official deleted a critic's comment on the page
- The official's posts were government speech, but the invited public comments were a public forum
- Deleting the comment was impermissible viewpoint discrimination in any type of public forum

Examples

Robinson v. Hunt Cty., 921 F.3d 440 (5th Cir. 2019)

- County Sheriff Office Facebook page openly censored ("ANY post filled with foul language, hate speech . . . and comments that are considered inappropriate will be removed and the user banned")
- Facebook page stated "this is NOT a public forum," but County did not make that argument at trial; Fifth Circuit assumed it a public forum
- County not immune in 42 U.S.C. § 1983 action because censorship action directly from stated policy that discriminates on viewpoint

Examples

Landman v. Scott., 1:19-cv-01367 (D. Colo.) (filed 05/13/19)

- Complaint filed against Colorado State Senator for blocking the plaintiff from the interactive portions of his official Facebook and Twitter accounts
- Plaintiff claiming violation of her First Amendment rights by a viewpoint-based restriction on speech in a public forum

RIGHT TO RECORD

Right to Record: Overview

- Citizen typically charged under state wiretapping law
- Supreme Court yet to rule on a case
- Six circuits of the U.S. Court of Appeals have recognized a right to record public officers conducting duties in public areas
  - First, Third, Fifth, Seventh, Ninth, Eleventh
- Right to record grounded in the right of access to information about officials' public activities
- No difference between rights of individuals and press
- Policy rationale: uncovering of abuses, concern of retaliation

Evolution of the Right

- Changing technology has impacted law
- "The First Amendment protects the right to gather information about what officials do on public property, and specifically, a right to record matters of public interest." (*Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995)
  - Early in the line of cases, broad
- The right to record has since been more explicitly stated
  - *See, e.g.*, *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017) (explicitly recognizing a First Amendment right to film the police)

Examples: First Circuit

Iocabucci v. Boulter, 193 F.3d 14 (1st Cir. 1999)

- Right to peacefully videotape a public meeting

Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011)

- Plaintiff, suspecting use of excessive force, filmed police officers arresting a young man on the Boston Common
- Clearly established right to record on-duty officer in traditional public forum
- Peaceful recording did not interfere with officers' performance of duties
- Officers had no qualified immunity

Gericke v. Begin, 751 F.3d 1 (1st Cir. 2014)

- Plaintiff claimed a First Amendment right to film a public traffic stop

Examples: Third Circuit

Fields v. Philadelphia, 862 F.3d 353 (3rd Cir. 2017)

- Case 1: Officer physically prevented woman from moving to a vantage point to video record an arrest at a protest
- Case 2: College student used iPhone to photograph police breaking up house party; officer confiscated phone and detained him
- Because the recordings did not interfere with police activity, officers' actions unjustifiably infringed on right to record
- Did not entertain argument that right hinged on expressive intent

Examples: Fifth Circuit

Turner v. Lieutenant Driver, 848 F.3d 678 (5th Cir. 2017)

- Explicitly recognized a First Amendment right to film the police
- Qualified immunity because Plaintiff did not meet burden to show violation of a clearly established right or objectively unreasonable actions

Examples: Seventh Circuit

ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012)

- Reject argument that police have privacy right in their public actions
- "Audio and audiovisual recording are communication technologies, and as such, they enable speech."
- Broad-reaching state eavesdropping law cannot be enforced against those who openly record police publicly performing official duties

Pending: Tenth Circuit

Frasier v. Evans, (No. 19-1015)

- Plaintiff recorded police arrest and submitted to a news station
- District court: no qualified immunity, recognize a right to record police officers publicly performing duties

Examples: Traffic Stop

- Ability to restrict right depends on circumstances and need to do so for safety

Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010)

- Adopt a narrow view of the right to record – say no clear rule on videotaping in traffic stop circumstances, which are "inherently dangerous situations"
- Because no clearly established right- find qualified immunity

Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014)

- Plaintiff had First Amendment right to film a public traffic stop when no police order to stop

Permissible Restrictions

- Right to film may be subject to reasonable time, place and manner restrictions that leave open ample alternative channels of communication (*Glik*; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989))
  - Ex: restriction on videotaping a planning committee's meeting can be constitutional when observers can take notes (*Whiteland Woods L.P. v. Township of West Whiteland*, 193 F.3d 177, 183 (3rd Cir. 1999))

Qualified Immunity

- Two-pronged analysis *(Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 1996)):
  - Do the facts alleged make out a violation of a constitutional right that a reasonable defendant would have perceived his conduct to violate?
  - Was the right "clearly established" at the time of the violation?

DOOR TO DOOR SOLICITATION

Door to Door Solicitation: Overview

- Any right to door-to-door solicitation is subject to certain limits, keeping a balance with local interest
- Important to determine whether commercial or non-commercial speech is regulated
- Government should identify strong interests in regulation, backed up with evidence
- Common restrictions include curfews and registration requirements

Non-Commercial Speech

- Non-commercial speech includes political and religious speech
- Afforded greater First Amendment protection than commercial speech

Commercial Speech

- Commercial speech includes advertisements
- Commercial speech is reviewed differently from noncommercial speech
  - Commercial speech gained First Amendment protection in 1975
  - Content neutrality not required (but…)
- *Central Hudson* test: (1) lawful speech, (2) substantial governmental interest, (3) regulation must directly advance governmental interest, and (4) no more extensive than necessary

Terminology

- Ordinances usually define relevant terms, including "solicit" and "canvass"
- Solicitation often includes commercial speech; canvassing often includes non-commercial speech

First Amendment Right

- Many cases have recognized the importance of door-to-door solicitation, particularly when the speaker has limited resources
  - *See, e.g. Watchtower Bible and Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 162 (2002)
- This is balanced with local government interest in regulation

Implied License

- Door-to-door solicitors can also be seen as exercising an implied license to doorsteps
  - *See Florida v. Jardines*, 569 U.S. 1, 8 (2013)
- This license can also be restricted
- Entering uninvited upon private property used for private purposes is not protected speech
  - *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972)
- "A speaker must seek access to public property or to private property dedicated to public use to First Amendment concerns."
  - *Cornelius v. N.A.A.C.P. Legal Defense and Educ., Fund, Inc.*, 473 U.S. 788, 801 (1985)

Restrictions?

- Strength of the asserted government interest?
- Is the restriction content-neutral and sufficiently narrow?
- Are there ample alternative methods to communicate?
- *Watchtower* suggests approval of sufficiently narrow restrictions on commercial solicitation
- *Vivint Louisiana, LLC v. City of Shreveport*, 213 F. Supp. 3d 821 (2016) upheld a ban, with exceptions for farm and garden products, on commercial door-to-door solicitation

Restrictions?

Source: Working America

Working America, Inc. v. City of Bloomington, 142 F. Supp. 3d 823 (D. Minn. 2015)

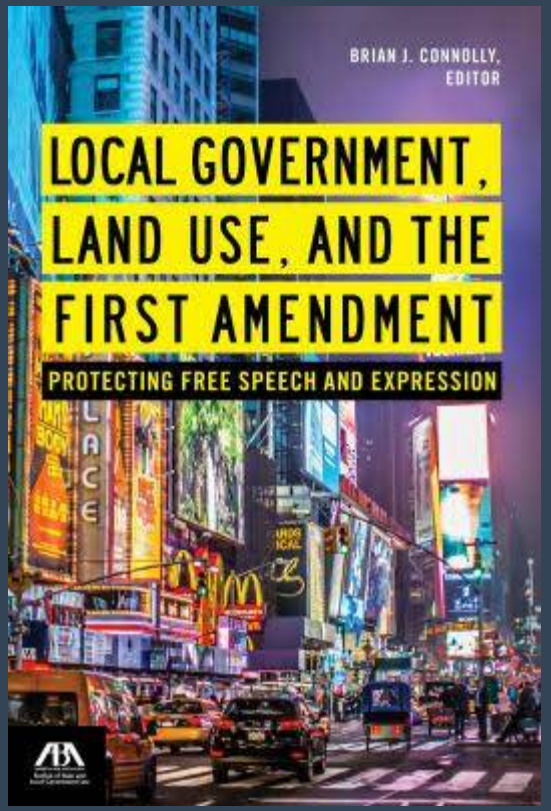
- City solicitor licensing ordinance applied against labor union activities
- "Going from place-to-place (1) advertising or selling any product, service, or procuring orders for the sale of merchandise or personal services for future delivery or future performance; or (2) seeking donations of money or property on behalf of any person, organization or cause."
- Content based, subject to strict scrutiny, unconstitutional

Restrictions?

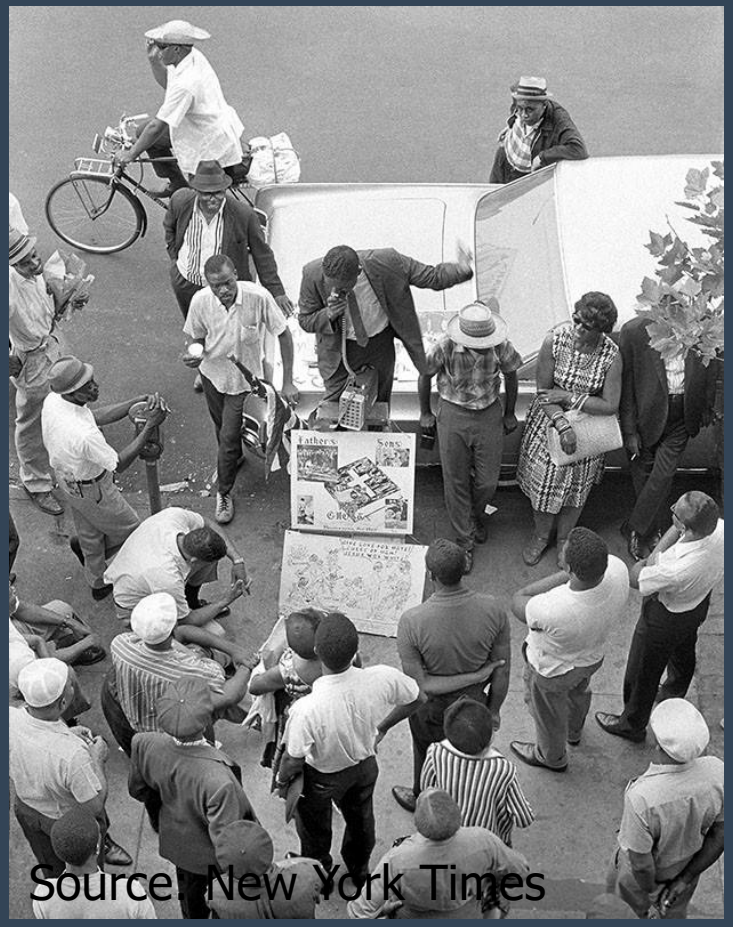
- Still, many courts have struck down curfews and/or permit requirements
  - *Citizens Action Coalition of Indiana, Inc. v. Town of Yorktown, Ind.*, 58 F. Supp. 3d 899 (S.D. Ind. 2014)
  - *Project 80's Inc. v. City of Pocatello*, 942 F.2d 635 (9th Cir. 1991)
- Not dispositive whether a permit fee is required
  - *Compare Yorktown* (charge for a permit, regulation not upheld) *with Watchtower* (no charge for a permit, regulation not upheld)

Resources

Brian J. Connolly, ed., **Local Government, Land Use, and the First Amendment** (ABA Publishing 2017)



Questions and Answers



Source: New York Times

Brian Connolly
(303) 575-7589
bconnolly@ottenjohnson.com

97th CML Annual Conference

June 18–21, 2019 • Breckenridge, CO

Modern Mysteries of Municipal Insurance
Thursday, June 20, 10:15-11:30 a.m.
Sam Light, CIRSA General Counsel

CML COLORADO MUNICIPAL LEAGUE

Contents of this presentation reflects the view of the presenter, not of CML.

1

Presentation Summary – Caveats

- General discussion only of some of the questions/issues—some broad, some minutiae—we see at CIRSA in helping members and their counsel with liability insurance questions (session does not focus on property or workers' compensation coverage).
- The solution to most any insurance mystery is in the details—i.e., the specific language of the policy, endorsement, or contract; the specific details of the coverage question, claim, etc. This presentation is a training resource only.
- Any resemblance to any claim, claimant, insured, etc. is purely coincidental!
- Sample materials/provisions are just that and not a substitute for your own expert analysis and drafting on particular issues.

CIRSA

2

How are Pools Different?

- Genesis in excessively hard market for public entity insurance in late 1970s & early 1980s.
  - Nationwide aversion to insuring governmental risks.
  - Commercial insurers exiting market.
  - Commercial coverage unavailable, unaffordable and/or severely limited in scope.
- Resulting in efforts by local governments to create self-insurance pools for pooling of resources to cover/manage their own risks.

3

Pooling in Colorado

- Pools in Colorado are generally organized by broad entity types:
  - Municipalities - Colorado Intergovernmental Risk Sharing Agency (CIRSA) – 1982
  - Counties – Three pools by coverage line (Casualty & Property Pool, Health Pool & Workers Compensation Pool) - 1984
  - Special Districts - Colorado Special Districts Property & Liability Pool (CSDPLP) - 1988
  - School Districts - Colorado School Districts Self Insurance Pool (CSDSIP) - 1981

4

Pooling in Colorado

- Organizing efforts spearheaded by founding members & local government associations (e.g., CML, SDA, CCI).
- Pool is separate legal entity, established by contract (intergovernmental agreement), bylaws or similar (CIRSA IGA & Bylaws attached).
- Member owned & controlled.
- Governing bodies made up of member representatives.
- Work closely with their related associations.

5

Pooling in Colorado

- Statutory Authority:
  - C.R.S. 24-10-115.5 – "Public entities may cooperate with one another to form a self-insurance pool" to provide coverages.
- See also following authorities:
  - C.R.S. 24-10-115 (power to insure & self insure against… general liability risks).
  - C.R.S. 29-5-111 (… law enforcement liability).
  - C.R.S. 29-13-102 (… property).
  - C.R.S. 8-44-204 (… workers' compensation).

6

Regulatory Treatment of Pools

- Pools are not considered to be or regulated the same as commercial insurers.
  - C.R.S. 24-10-115.5: A public entity self-insurance pool "shall not be construed to be an insurance company" nor subject to regulations governing commercial carriers; *City of Arvada v. CIRSA*, 19 P.3d 10 (Colo. 2001).
- Rather, public entity pools are subject to:
  - Member control.
  - Division of Insurance regulations specific to pools (e.g., 3 CCR 702-2, Regulation 2-2-1).
- Pools are public entities within the meaning of the Colorado Governmental Immunity Act (GIA), and have the same liability protections as other public entities.
  - Immunity - "bad faith breach of insurance contract" - *Jordan v. City of Aurora*, 876 P.2d 38 (Colo. 1993) (public entity immune from tort of "bad faith" under GIA).

CIRSA

7

Who is Insured?

- The issue of who is insured under the public entity/public officials liability policy is seemingly straight-forward; for example, under the CIRSA's liability form, a Covered Party includes:
  - The named CIRSA Member (the city or town, etc.).
  - Any board, commission, authority, governing body or similar unit "operated by or under the jurisdiction of" a Member. (Other forms are to similar effect, insuring "your boards.").
  - Any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a Member or of any unit as described above, while in the performance of his or her duties for the Member and within the scope of his or her employment by the Member.

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8

Who is Insured – Affiliated Board/Entities

- But what boards or other entities are "your boards" or ones "operated by or under the jurisdiction" of the city or town:
  - Library board, senior board, cultural board, or similar board to which your governing body appoints directors?
  - Urban Renewal Authority? Housing Authority?
  - Separate entity created by IGA?
  - What about nonprofits—e.g., animal shelter, food bank, etc.—to which your governing body appoints directors, and/or provides staff support, accounting services, office space, etc.

CIRSA

9

Who is Insured – Affiliated Boards/Entities

- The answer depends on who control the funds and/or the board or governing body of the other entity.
- For example, CIRSA's "jurisdictional test" provides that in order for a board/commission or affiliated legal entity to qualify under the Member's coverage:
  - 51% of the board/commission or board of the affiliated legal entity must be made up of the Member's officials, employees or appointees, or the Member must have 51% control of the funds; or
  - And, in addition, the member must include all of the exposures of the board/commission or affiliated legal entity in the coverage application (property, vehicles, expenditures, etc.).

CIRSA

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Who is Insured – Affiliated Boards/Entities

- Other forms are similar effect; e.g.:

"Your boards":

a. Means any board, commission, or other governmental unit or department that:

(1) Is under your jurisdiction; and

(2) Is funded and operated as part of your total operating budget.

- Under these tests, it may be possible for a nonprofit to qualify for coverage, but not if the city/town does not control its board/funds.
- Also note, while the tests may lead to analogous conclusions, coverage tests are not identical to "instrumentality" tests developed under case law for determining application of open meetings/open records laws, governmental immunity, or other laws. *See, e.g., Robinson v. Colo. State Lottery Div.*, 179 P.3d 998 (Colo. 2008); *Colo. Special Districts Property & Liability Pool v. Lyons*, 277 P.3d 874 (Colo. App. 2012).

CIRSA

11

Additional Insureds

- Let's start with a hypo: Your city/town is hiring an independent contractor to perform landscape and irrigation system maintenance and repairs in the public parks, rights-of-way and other public spaces, and they send over their requested form of contract, which states:

"Throughout the term of this Agreement, the city/town agrees to maintain, at its own expense, liability insurance coverage. The Contractor and its principals shall be added as additional insureds on the city/town's coverage."

- Can/should your client agree to this?
- If your client agrees, what has it agreed to?

CIRSA

12

Additional Insureds

- Or, before answering those, consider this mystery: "Why isn't the contractor ***instead*** agreeing to name my client city/town as an additional insured on its coverage?
- This seems an appropriate point to start the discussion:
  - In engaging an independent contractor for services, the city/town seeks protection from suits/liabilities it may face which "arise out of" or are "caused in whole or part by" by the acts or omissions of the contractor.
  - If the purpose/scope of the contract is to hire and pay the contractor to do the work and be responsible for associated risks, why is it requesting protection under the city/town's coverage—is there a good reason, or is it a "'Never hurts to ask" scenario?
  - Instead, your city/town should seek to obtain protections under the contractor's coverage.
- **Mystery solved:** Whenever possible, get your client protection from the independent contractor's coverage, not the other way around!

CIRSA

13

Additional Insureds

- Well, maybe before moving on, we should break down the concept of additional insured in relation the whole program of risk management:
- How do clients seek to transfer risk:
  - Indemnification or hold harmless agreements;
  - Waivers;
  - Enter into an "Insured/Covered Contract";
  - Be listed as an "Additional Insured" on other party's coverage.

CIRSA

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Indemnification and Insurance

Sample (By Contractor to city/town). To the fullest extent permitted by law, the Contractor agrees to indemnify and hold harmless the city/town, and its officers and its employees, from and against all liability, claims, and demands, on account of any injury, loss, or damage, which arise out of or are connected with the Work, if such injury, loss, or damage, or any portion thereof, is caused by, or claimed to be caused by, the act, omission, or other fault of the Contractor or any subcontractor of the Contractor, or any officer, employee, or agent of the Contractor or any subcontractor, or any other person for whom Contractor is responsible. The Contractor shall investigate, handle, respond to, and provide defense for and defend against any such liability, claims, and demands, and to bear all other costs and expenses related thereto, including court costs and attorneys' fees. The Contractor's indemnification obligation shall not be construed to extend to any injury, loss, or damage which is caused by the act, omission, or other fault of the city/town.

CIRSA

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Indemnification and Insurance

Sample (By city/town to State; from DOLA grant). Grantee shall, to the extent permitted by law, indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Grantee, or its employees, agents, Subgrantees, or assignees pursuant to the terms of this Grant; however, the provisions hereof shall not be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions, of the GIA, or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq., as applicable, as now or hereafter amended.

CIRSA

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Additional Insureds

- If city/town agrees to indemnification/hold harmless agreement, what does the liability policy already say?
- Under CIRSA liability coverage (General Liability, Auto Liability, Law Enforcement Liability) - Exclusion for contractual liability except for a "Covered Contract" which means:
  - "any agreement, except one pertaining to aircraft, under which the "Member" assumes liability of other for "bodily injury," "property damage," "personal injury", or "advertising injury."
- Under CIRSA Public Officials Liability - Exclusion for Contractual Liability.

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Additional Insureds

- Under traditional (ISO) Coverage Form – Exclusion for Contractual Liability except for an "Insured Contract" which means, e.g.:
  - "that part of any contract or agreement pertaining to your business under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization."
- Such provisions operate as blanket, or automatic additional insured.
- If a contract falls outside definition of an "Covered/Insured Contract" the parties to the contract must specifically be added to coverage as an additional insured.

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Additional Insureds

- Sample policy provision (CIRSA):

GENERAL PROVISIONS

I. WHO IS A COVERED PARTY

It is agreed that the term covered party, as used in this coverage form, includes:

A. CIRSA and the "Members" of CIRSA designated in the Declarations;

B. Any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a "Member" or of any unit as described in (C) below, while in the performance of his or her duties for the "Member" and within the scope of his or her employment by the "Member"; and

C. Any governing body, board, commission, authority, or similar unit operated by or under the jurisdiction of a "Member;" and

D. Any person or organization to whom the "Member" is obligated to provide coverage afforded by this coverage form, because of a written or oral contract, but only for damage or injury arising out of the premises or operations of the "Member."

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Additional Insureds

- Sample policy provision (ISO) - insured includes a person or organization who by written contract is included as AI but only for tort liability caused in whole/part by named insured's acts/omissions in the performance of its ongoing operations.

WHO IS AN INSURED:

Any person or organization that is not otherwise an insured under this Coverage Part and that you have agreed in a written contract or agreement to include as an additional insured on this Coverage Part is an insured, but only with respect to liability for "bodily injury", "property damage", "personal injury" or "advertising injury" that:

a. Is "bodily injury" or "property damage" caused by an "occurrence" that takes place, or is "personal injury" or "advertising injury" caused by an offense that is committed, after you have signed and executed that contract or agreement; and

b. Is caused, in whole or in part, by your acts or omissions in the performance of your ongoing operations to which that contract or agreement applies or the acts or omissions of any person or organization performing such operations on your behalf.

The limits of insurance provided to such insured will be the limits which you agreed to provide in the written contract or agreement, or the limits shown in the Declarations, whichever are less.

CIRSA

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Additional Insureds

- Obtaining additional insured status:
  - Reinforces the contract indemnity.
  - Serves as a backup to the contract indemnity if the indemnity agreement proves unenforceable.
  - Gives the AI direct protections under the named insured's liability policy; typically including:
    - Right to immediate defense (as compared with later reimbursement).
    - Rights to indemnity for liabilities within the scope of coverage.
  - Generally, the AI becomes covered, and can look to the named insured's insurer for defense/indemnity in matters that involves "the premises or operations" of the named insured….with coverage limited to that scope.

CIRSA

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Additional Insureds - Tips

- Therefore, if requesting additional insured status for the city/town:
  - Confirm their coverage allows it—read their insurance policy (in your spare time ☺) & check requirements & limitations of that policy; e.g.:
    - Covers only written contracts and agreements.
    - Covers only if so endorsed onto the policy.
    - Covers additional insureds only to lesser of minimum amount required by contract or policy limits.
  - Obtain certificates of insurance.
  - Check limits of coverage.
  - Obtain endorsements if indicated.

CIRSA

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Additional Insureds - Tips

- And, if your city/town is asked to named another party as additional insured:
  - Consider, is it necessary; is the negotiation strength such that the city/town can reject the request?
  - Recognize, that in adding a party as AI:
    - You are agreeing to share coverage limits with them.
    - That party may not be subject to governmental immunity or the liability limits or other protections of GIA.
    - Loss history related to AI is included.

CIRSA

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Additional Insureds

- Where does this leave us on our original questions:
- Yes, your client can agree to overly broad indemnity and insurance provisions, but don't! Broad or inartful language will likely create confusion, disputes, new uncovered contract liabilities, and even default for failure to satisfy insurance requirements.
- Thus, if giving additional insured status, tie contract language to coverage—limit to damage and injury arising out of the named insured premises and operations.
- If getting additional insured status, consider when you need/want contractual indemnities for certain matters irrespective of coverage.
- For construction agreements, be aware of Colorado's anti-indemnity statute, C.R.S. 13-21-111.5, providing that provisions in a construction contract requiring the indemnitor to provide indemnity, insurance or defense against the indemnitee's negligence or fault are void as against public policy and unenforceable.

CIRSA

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Additional Named Insureds

- **Mystery:** What's the difference in being an "additional named insured?"
- Though not uniformly defined, additional named insured is generally distinct from additional insured, as the former gives the entity named the same rights and obligations as the first named insured on the policy, which may include such things as:
  - Responsibility for premium payment if first named insured doesn't pay.
  - The right or ability to make changes.
  - Separate and distinct coverage to the limits of coverage (as compared to sharing in the limits).
- Many carriers, including CIRSA, may not grant additional named insured status to third parties.
- **Mystery solved:** Don't grant additional named insured status to other parties, and absent special circumstances, don't request it.

CIRSA

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What's Up With The Certificate of Insurance?

Your city/town contract template states as follows:

"Prior to the commencement of the Services, the contractor shall forward certificates of insurance to the city/town for all required insurances, which certificates shall name the city/town of _____ as the certificate holder. Certificates of insurance on all policies to the city/town shall provide written notice of not less than 30 days prior to cancellation or change in coverage."

- What's the point of requiring certificates?
- Client sends over the certificate for review; what are you looking for?

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The Certificate of Insurance

The Certificate of Insurance:

- Is not a policy or contract of insurance; it is rather "a document acknowledging that an insurance policy has been written." *Pinnacol Assurance v. Hoff*, 375 P.3d 1214 (Colo. 2016)(internal cite omitted).
- Is a document used to provide information on a party's insurance coverage, usually on types and limits of coverage, insurance company, policy number, named insured, and the policies' effective periods.
- But, it is purely informational, confers no rights on the "certificate holder"—although it may include information on "additional insured" status—and may not provide a basis for claims against the issuing insurer. *Id.*

CIRSA

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The Certificate of Insurance

ACORD

CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
12/28/2018

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

CIRSA

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The Certificate of Insurance

- What to look for—common issues with respect to contract provisions and certificates:
  - Proper alignment with insurance requirements of the contract:
    - Types
    - Limits
    - Other technical details
- Cancellation-Notice Provision.
- Additional insured language and other special provisions.

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The Certificate of Insurance

- Types/Limits:

INSR LTR		TYPE OF INSURANCE	ADDL INSD	SUBR WVD
A	X	COMMERCIAL GENERAL LIABILITY		
	X	CLAIMS-MADE ☐ OCCUR		
	X	$10m POL E&O Aggregate		
		GEN'L AGGREGATE LIMIT APPLIES PER:		
		POLICY ☐ PRO-JECT ☐ LOC		
		OTHER:		

- Often overlooked is whether the coverage applies per-policy or per project. If dealing with a contractor with lower limits and/or multiple known pending projects, consider requiring the aggregate limits of coverage apply on a per-project basis. This is in turn reflected on the certificate.

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The Certificate of Insurance

- Notice of cancellation or changes.
- Older Accord form: insurer will "endeavor to" mail notice:

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

- Thus, the contact negotiation over the "endeavor to" language.

CIRSA

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The Certificate of Insurance

- Newer Accord form:

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

- No express statement of notice to the holder. This language does not "duplicate" for benefit of certificate holder the language in the policy, and thus, in the absence of other contract or policy provisions, parties will be deemed to have "consigned the entire question of notice, including to whom it must be given, to the provisions of the policy being cancelled." *Pinnacol Assurance v. Hoff*, 375 P.3d 1214 (Colo. 2016).

CIRSA

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The Certificate of Insurance

- The "special provisions" box is used to described AI status, locations, etc. For AI, the description should mirror what AI status concerns; e.g.:

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)
Certificate Holder is Additional Insured on Liability Policies if required by contract.
As respects to the use of land owned by the Certificate Holder for additional parking during the 4th of July Celebration

CERTIFICATE HOLDER	CANCELLATION
First National Bank, a division of First National Bank of Omaha (FNB)	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

But, contract and policies control.

CIRSA

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What is the Adjuster's Role?

- Or perhaps more pointedly, you may have thought during a strategy call on a litigated claim—where there are plenty of folks on the phone already, including the city/town attorney, city/town manager, department head, defense counsel, defendants, maybe an expert witness, etc.--What's the adjuster doing on this call?
- In a word—well, three words—attending to key responsibilities of:
  - Reserving;
  - Reporting, and
  - Documentation.
- See attached CIRSA *CoverageLine* article.

CIRSA

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Adjuster's Role - Reserving

- Reserving is largely out of sight to insured but is key component of fiscal health and accountability of pool.
- Is an art and science of "not too little" and "not too much" as under- and over-reserving have consequences throughout.
- Reserves typically set within 30 days; initial reserves heavily based on defense counsel's initial evaluation, litigation plan, and budget, as well as adjuster's experience and expertise in sound reserving practices.
- Reserves must be continually reviewed/revised as needed, and monitored and updated as appropriate—the adjuster's eyes and ears need to be on the claim at all times to ensure accurate reserving.

CIRSA

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Adjuster's Role - Reporting

- Every claim involves reporting requirements, including to:
  - Insured; e.g., with respect to billings to deductible.
  - Within organization, for funding, payment and financials.
  - To excess insurer/reinsurer depending on type or amount of claim. This crucial reporting is behind the scenes but critical to maintaining the relationship; e.g.:
    - Certain claims—death, civil rights, others—are always required to be reported up.
    - Also required when claim is reserved at 50 percent SIR.
    - Late reporting can have serious consequences.
- Adjuster performs critical role of reporting out, up and throughout with respect to pending claims.

CIRSA

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Adjuster's Role – Documentation

- There's a saying in the adjuster world: If it wasn't documented, it didn't happen.
- With all of the eyes involved in scrutinizing a claim, it's critical that each aspect, each bit of thinking, on the reserving process, as well as for each expenditure, be well-documented.
- The adjuster's critical role is documenting the happenings in the life of the claim, so that others—supervisors, excess insurer/reinsurers, auditors, others—are able to look at documentation, understand the adjuster's thinking, and have information for agreeing on appropriateness of expenditures.
- If the adjuster makes it difficult for an auditor to understand what's happening in the life of a claim, and what may be driving a reserve amount, then the adjuster – and the organization – will be called out for a standards/practices fail.

CIRSA

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What the Purpose of the Reservation of Rights?

- You city/town and some of its employees are named, individually, in a civil rights lawsuit. The insurer assigns one or more defense attorneys and you get a lengthy "reservation of rights" (ROR) letter from the insurer. What does it mean?

- The ROR is based on underlying legal concepts:
  - Insurers are required to let you know, at the inception of a suit, which claims are or are not covered.
    - If all claims are covered, you'll get an unconditional defense.
    - If no claims are covered, you'll get a denial letter and you'll be on your own.

CIRSA

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Reservation of Rights

- Many lawsuits include a combination of covered and uncovered claims. And, the duty to defend is broader than the duty to indemnify. *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).
- Thus, if some claims in a suit are covered, insurer typically will provide a defense as to all claims in the suit, until or unless only uncovered claims are left.
- The ROR serves as notice of limitations, exclusions and other provisions of policy, and for insurer to "reserve its rights" as to uncovered claims.
- Insurers handle differently disagreements flowing from RORs, but typically will further evaluate an insured's position and/or elevate consideration to "further ups" and/or obtain additional coverage opinions.

CIRSA

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Concluding Thoughts

- Mysteries of municipal insurance are often best-resolved early, through partnership and on a "going in" basis; e.g.:
  - Complete full, upfront review of contract indemnity and insurance provisions; ensure provisions reflect what is needed/appropriate. Partner with insurer or broker as needed.
    - See attached "sample only" services contract with indemnity & insurance requirements.
  - Seek clarity with respect to "affiliated entities" and AIs.
  - Have appropriate systems for insurance details - certificates, notices, renewals, etc.
  - In the event of claims, maintain communications with adjuster and seek clarification for any areas of questions/concerns.

CIRSA

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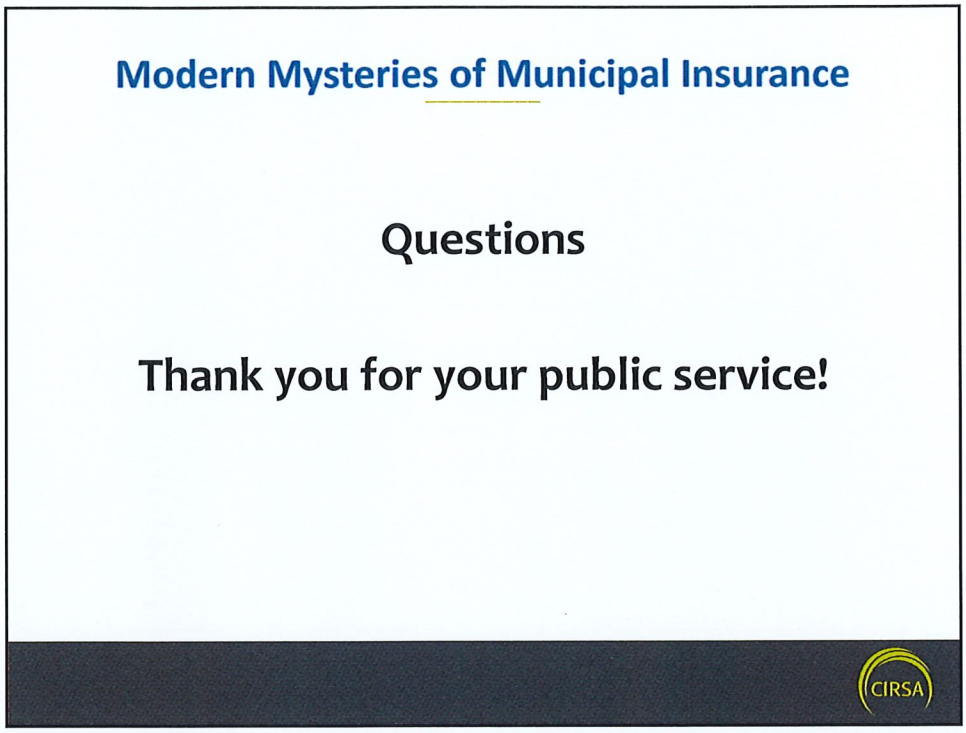
Modern Mysteries of Municipal Insurance
Questions
Thank you for your public service!
CIRSA

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Bylaws and Intergovernmental Agreement

ARTICLE I. Definitions. As used in this agreement, the following terms shall have the meanings hereinafter set out:

(1) ADMINISTRATIVE COSTS. All costs of CIRSA other than contributions to a loss fund or a reserve fund.

(2) BOARD. Board of Directors of CIRSA.

(3) BYLAWS. The Bylaws and Intergovernmental Agreement Colorado Intergovernmental Risk Sharing Agency.

(4) CIRSA. The Colorado Intergovernmental Risk Sharing Agency established pursuant to the Constitution and the statutes of this state by this intergovernmental agreement.

(5) CLAIM YEAR. Any twelve consecutive month period established by the Board.

(6) DIRECTOR. A person serving on the Board.

(7) EXCESS INSURANCE. Insurance purchased by CIRSA from an insurance company approved by the Insurance Commissioner of the State of Colorado to underwrite such coverage in Colorado providing certain coverage for losses over a prudent amount up to a pre-set maximum amount of coverage.

(8) EXECUTIVE DIRECTOR. Executive Director of CIRSA.

(9) FISCAL YEAR. January 1 to December 31.

(10) INTERGOVERNMENTAL AGREEMENT. The Bylaws and Intergovernmental Agreement, Colorado Intergovernmental Risk Sharing Agency.

(11) LOSS FUND. A fund or funds of money established by the Board to pay covered losses and loss adjustment expenses.

(12) MEMBERS. The municipalities and other entities which are authorized to participate in CIRSA pursuant to Article VI of these Bylaws and which enter into this intergovernmental agreement.

(13) RESERVE FUND. A fund or funds of money established by the Board to be used as provided in Article IX of this intergovernmental agreement.

(14) STOP LOSS INSURANCE. Insurance purchased by CIRSA from an insurance company approved by the Insurance Commissioner to underwrite such coverage in Colorado providing certain coverage up to a contracted amount for otherwise uninsured losses to be borne by the loss fund, which in any one year aggregate to a pre-set maximum amount of coverage.

ARTICLE II. Creation of CIRSA. The Colorado Intergovernmental Risk Sharing Agency, a separate and independent governmental and legal entity, is hereby formed by intergovernmental agreement by its members pursuant to the provisions of 24-10-115.5, 29-1-201 et seq., 29-13-102, 8-44-101(1)(c) and (3), and 8-44-204, C.R.S., as amended, and Colorado Constitution, Article XIV, Section 18(2).

ARTICLE III. Purposes.

(1) The purposes of CIRSA are to provide members the coverages authorized by law, through joint self-insurance, insurance, reinsurance, or any combination thereof, to provide claims services related to such coverages, and to provide risk management and loss control services to assist members in preventing and reducing losses and injuries.

(2) It is the intent of the members of CIRSA to create an entity in perpetuity which will administer and use funds contributed by the members to defend and indemnify, in accordance with these Bylaws, any member of CIRSA against stated liability or loss, to the limit of the financial resources of CIRSA available to pay such liability or loss. It is also the intent of the members to have CIRSA provide continuing stability and availability of needed coverages at reasonable costs.

(3) All income and assets of CIRSA shall be at all times dedicated to the exclusive benefit of its members.

(4) This intergovernmental agreement shall constitute the Bylaws of CIRSA.

ARTICLE IV. Source of Money; Non-Waiver of Immunity.

(1) All CIRSA monies are monies plus earned interest derived from its members.

(2) It is the intent of the members that, by entering into this intergovernmental agreement, they do not waive and are not waiving any immunity or other limitation on liability provided to the members or their officers or employees by any law.

(3) No waiver by a member of any immunity or other limitation on liability provided to the member or its officers or employees by any law shall expand the coverages established by the Board. No member shall waive any such immunity or other such limitation on liability without first notifying CIRSA in writing.

ARTICLE V. CIRSA Powers.

(1) The powers of CIRSA to perform and accomplish the purposes set forth above shall, within the budgetary limits of CIRSA and subject to the procedures set forth in these Bylaws, be the following:

(a) To retain agents, employees and independent contractors.

(b) To purchase, sell, encumber and lease real property and to purchase, sell, encumber or lease equipment, machinery, and personal property.

(c) To invest funds as allowed by Colorado statutes.

(d) To carry out educational and other programs relating to risk management and loss control.

(e) To create one or more loss funds, and to purchase reinsurance, excess insurance and/or stop loss insurance.

(f) To establish reasonable and necessary loss control standards and procedures to be followed by the members.

(g) To provide risk management and claim adjustment or to contract for such services, including the defense and settlement of claims.

(h) To carry out such other activities as are necessarily implied or required to carry out the purposes of CIRSA or the specific powers enumerated in these Bylaws.

(i) To sue and be sued.

(j) To enter into contracts.

(k) To reimburse directors for reasonable and approved expenses, including expenses incurred in attending Board meetings.

(l) To purchase fidelity bonds from an insurance company approved by the Insurance Commissioner of Colorado to do business in Colorado.

(m) To process claims, investigate their validity, settle or defend against such claims within established financial limits, tabulate such claims, costs and losses and carry out other assigned duties.

ARTICLE V.5. Services to Nonmembers.

(1) CIRSA may provide to nonmembers, by intergovernmental agreement, one or more services pertaining to or associated with insurance or self-insurance, loss control, risk management, and claims administration, if such services will not adversely affect the tax exempt status of CIRSA.

(2) The nonmembers to which the services described in paragraph (1) above may be provided shall be limited to governmental entities which are defined as "public entities" under 24-10-103(5), C.R.S., and which are authorized to enter into an intergovernmental agreement for such services pursuant to 29-1-201 et seq., C.R.S.

(3) The intergovernmental agreement described in paragraph (1) above shall comply with 29-1-203(2), C.R.S., and shall be approved by the Board and by the governing body of the nonmember governmental entity to whom the services described in paragraph (1) are to be provided.

(4) Neither the property and liability coverages authorized by 24-10-115.5 and 29-13-102, C.R.S., nor the workers' compensation coverages authorized by 8-44-101(1)(c) and 8-44-204, C.R.S., shall be provided except to entities which meet the requirements for membership inCIRSA and which properly adopt and execute these Bylaws.

ARTICLE VI. Participation.

(1) The membership of CIRSA shall be limited to the following entities which properly adopt and execute this intergovernmental agreement:

(a) Any municipality which is a member of the Colorado Municipal League;

(b) Any city and county which is formed as a result of a change in the status of a CIRSA member from a municipality to a city and county, except that the continued membership of any such member after such a change in status shall be subject to Board approval in the same manner as set forth in subsection (6) of this section for a new member, and shall also be subject to notice to and action by the membership in the same manner as set forth in subsection (7) of this section for a new member; and

(c) Any other entity which meets all of the following requirements:

1. The entity is a "public entity" as said term is defined in C.R.S. 24-10-103(5), as from time to time amended, other than the state, a county, a city and county, or a school district;

2. The entity has, throughout the term of its membership, an intergovernmental agreement in effect with a member municipality for the provision of one or more functions, services, or facilities lawfully authorized to both the entity and the municipality, and such member municipality consents to the entity's participation;

3. Participation by the entity is permitted by applicable state law; and

4. Participation by the entity will not adversely affect the tax-exempt status of CIRSA.

(2) An entity which ceases to have in effect an intergovernmental agreement with a member municipality as required by Section VI.1.b.2 shall cease to be a member as of the last day of the claim year in which the entity ceased to have such agreement in effect.

(3) No representative of any entity other than a member municipality may serve on the Board.

(4) Notwithstanding any other provision of these Bylaws, no proposed amendment to these bylaws to permit a representative of any entity other than a member municipality to serve on the Board shall be effective unless approved by at least two-thirds of the municipalities which are members of CIRSA.

(5) A member may participate in CIRSA for either or both of the following purposes:

(a) The property and liability coverages authorized by 24-10-115.5 and 29-13-102, C.R.S., as amended, and claims services, loss control services, and risk management services related to such coverages; and

(b) The workers' compensation coverages authorized by 8-44-101(1)(c) and (3) and 8-44-204, C.R.S., as amended, and claims services, loss control services, and risk management services related to such coverages.

(6) New members may be admitted only by a vote of the Board, subject to the payment of such sums and under such conditions as the Board shall in each case or from time-to- time establish.

(7) The members shall be notified in writing of each proposed new member. Ten percent (10%) of the members may request a membership meeting to consider admission of a new member. The request shall be in writing and must be received at the CIRSA offices no later than fifteen (15) days after mailing of the notice. If such request is received within the fifteen- (15) day period, a membership meeting shall be called by the Chairman and the new member shall be admitted only by a two-thirds (2/3) vote of the members present at the meeting. A member may waive its right to receive notification of proposed

new members pursuant to this section. The waiver shall be in writing and shall be signed by the mayor or manager or, if there is no manager, the clerk. Such a waiver by a member shall not prevent it from requesting a membership meeting to consider, or from taking any other action under these Bylaws concerning, the admission of a new member.

(8) A member who is participating in CIRSA for one of the purposes set forth in section (5) of this Article may be authorized to participate in CIRSA for the other of those purposes by a vote of the Board, subject to the payment of such sums and under such conditions as the Board shall in each case or from time-to-time establish. Compliance with the provisions of section (7) of this Article shall not be required in connection with the authorization unless such compliance is made a condition of the authorization by a vote of the Board.

ARTICLE VII. Members' Powers and Meetings.

(1) The members at a meeting thereof shall have the power to:

(a) Elect Directors by vote of the members present at the annual meeting.

(b) Amend the Bylaws by a two-thirds (2/3) vote of the members present at a meeting. Notice of any proposed Bylaw amendment shall be mailed to each member at least fifteen (15) days in advance of the vote thereon. An amendment shall take effect immediately unless otherwise provided in the amendment or in the motion to approve the amendment. No Bylaw amendment shall apply to or affect any member which withdraws from CIRSA within fifteen (15) days after approval of the Bylaw amendment and notifies the Board in writing, within such fifteen (15) day period, of its opposition to the Bylaw amendment.

(c) Decide an appeal from an expulsion decision as provided in Article XV, and admit members as provided in Article VI.

(d) Remove a Director by a two-thirds (2/3) vote of the members present at a meeting. Notice of the proposed removal of a Director shall be mailed to each member at least fifteen (15) days in advance of the vote thereon.

(2) Meetings of the members shall be held as follows:

(a) Members shall hold at least one membership meeting annually at a time and place to be set by the Board, with notice mailed to each member at least fifteen (15) days in advance. At least one of said membership meetings shall be held between June 1 and June 30 of each year.

(b) Special meetings shall be held if called by the Board or by a written petition of thirty percent (30%) of the members. Notice of special meetings shall be mailed to each member at least fifteen (15) days in advance.

(c) The Chairman of the Board will preside at the meetings.

(d) Thirty percent (30%) of the total number of members of CIRSA as of the date of any meeting shall constitute a quorum to do business during that meeting.

(e) No absentee or proxy voting shall be allowed.

(f) Each member shall be entitled to one vote on each issue.

(2.5) (a) Notwithstanding any other provision of these Bylaws, in order to accommodate the meeting date provided for in article VII(2)(a), the terms of office of Directors who are elected in December, 2002 shall continue only until June, 2004, and the terms of office of Directors who were elected in December, 2001 shall continue only until June, 2003.

(2.5) (b) This subsection 2.5 is repealed effective December 31, 2003.

ARTICLE VIII. Obligations of Members.

(1) The obligations of members of CIRSA shall be as follows:

(a) To pay promptly all annual and supplementary contributions and other payments to CIRSA at such times and in such amounts as shall be established by the Board pursuant to these Bylaws. Any delinquent payments shall be paid with interest which shall be equivalent to the prime interest rate on the date of delinquency of the bank which invests the majority of the CIRSA funds. Payments will be considered delinquent forty-five (45) days following the due date.

(b) To designate in writing, signed by the Mayor or Manager or, if there is no Manager, the Clerk, a voting representative and alternate for the members' meetings. A member's voting representative must be an employee or officer of the member, but may be changed from time-to-time.

(c) To allow CIRSA and its agents, officers and employees reasonable access to all facilities of the member and all member records, including but not limited to financial records, as required for the administration of CIRSA.

(d) To allow CIRSA and attorneys designated by CIRSA to represent the member in the investigation, settlement and litigation of any claim made against the member within the scope of loss protection furnished by CIRSA.

(e) To cooperate fully with CIRSA's attorneys, claims adjusters and any other agent, employee, or officer of CIRSA in activities relating to the purposes and powers of CIRSA.

(f) To follow the loss control standards and procedures adopted by the Board.

(g) To report to CIRSA, in such form and within such time as CIRSA may require, all incidents or occurrences which could reasonably be expected to result in CIRSA being required to cover a claim against the member, its agents, officers, or employees, or for casualty losses to municipal property, within the scope of coverages undertaken by CIRSA.

(h) To maintain an active safety committee, safety coordinator, or safety contact.

(i) To report to CIRSA, in such form and within such time as CIRSA may require, the addition of new programs and facilities or the significant reduction or expansion of existing programs and facilities or other acts which will cause material changes in the member's potential loss.

(j) To provide CIRSA, in such form and within such time as CIRSA may require, a completed renewal application.

(k) To participate in coverage of losses and to pay contributions as established and in the manner set forth by the Board.

(l) To the extent permitted by law, each member shall prevent its officers, employees and attorneys from representing voluntarily any person or entity or providing voluntarily any expert testimony or other assistance to any person or entity in any tort claim made or tort action brought against any other member or against any officer, employee or attorney of another member for action taken as an officer, employee or attorney of such other member. The obligation imposed by this paragraph shall not apply where such claim is made or action is brought by a member itself or by an officer or employee thereof acting in an official capacity.

ARTICLE IX. Contributions.

(1) It is the intention of CIRSA to levy contributions from the members as established by the Board.

(2)(a) The contributions may include contributions to a reserve fund. The reserve fund may be used only to pay claims, and expenses related thereto, accepted by the Board pursuant to Article XI (1)(r) for which previous contributions for a claim year are insufficient.

(b) If the reserve fund is so used, the proportionate shares in the reserve fund of those members and former members which were members during the claim year for which claims were paid from the reserve fund shall be correspondingly reduced and the Board shall promptly determine, pursuant to policies adopted by the Board for replenishment contributions, whether replenishment of the reserve fund is necessary and, if so, the allocation among members and former members and the amount and timing thereof.

(c) All members and former members, by virtue of their membership during any claim year, waive the right to assert that the levy of replenishment contributions pursuant to this Article for such claim year is barred by any statute of limitations.

(3) The Board shall annually review and report to the members the contributions to the reserve fund, the earnings thereon and the expenditures therefrom. The Board shall credit members and former members making such contributions, in the same proportions as the contributions were made, all amounts in excess of the amounts which the Board reasonably determines to be necessary to pay claims and expenses related thereto, including sufficient funds for payments which might be made pursuant to Article XI (1)(r). Credits to members may be made in the form of credits against future contributions or in the form of payments, as the Board shall determine. Credits to former or withdrawing members shall be made in the form of payments. No credit shall be given or paid to any member or former or withdrawing member which owes any amount to CIRSA until the amount owing is paid, and any credit or payment to be made under this Article IX (3) may be used to pay such amount.

(4) Any money contributed to any loss fund or for the administrative expenses of CIRSA and not needed for loss fund purposes or administrative expense purposes may be credited to the reserve fund or may be as credited to members and former or withdrawing members, or both, in the manner determined by the Board, except otherwise specifically provided in these Bylaws or in policies adopted by the members as authorized in these Bylaws. Credits to members may be made in the form of credits against future contributions or in the form of payments, as the Board shall determine. Credits to former or withdrawing members shall be made in the form of payments. All credits shall be in similar proportions

as the contributions paid by the members. The Board shall reasonably determine whether money is available for reserve fund credit or contribution credit, or both, and the timing, proportions, and amounts thereof.

(5) No loss fund created for the property and liability coverages authorized by 24-10-115.5 and 29-13-102, C.R.S., as amended, shall be combined or commingled with any loss fund created for the workers' compensation coverages authorized by 8-44-101(1)(c) and (3) and 8-44-204, C.R.S., as amended.

ARTICLE X. Board of Directors.

(1) The Board shall be composed of seven (7) Directors, each from a different member. Directors will be elected from among the members' voting representatives. There will be:

(a) Two Directors, each from a different member under ten thousand (10,000) population

(b) Two Directors, each from a different member of ten thousand (10,000) to forty thousand (40,000) population.

(c) Two Directors, each from a different member above forty thousand (40,000) population.

(d) One Director at large.

(2) Every year population will be determined by the most current available population figures provided by the state Department of Local Affairs.

(3) The election of Directors will be made by the members at the membership meeting to be held between June 1 and June 30 of each year. A Director shall assume office at the first Board meeting held after the election.

(4) Terms of the Directors will be two-year-staggered terms.

(5) Notwithstanding subsections (3) and (4) of this section, commencing with the terms of office of Directors elected at the June, 2010 election, terms of Directors will be four- year-staggered terms, and Director elections shall be held in even-numbered years. In order to maintain staggered terms, terms of office of Directors elected at the June, 2009 election shall be three-year terms.

(6) A vacancy shall exist when a Director resigns, is no longer the member's voting representative, dies, or is removed by the members pursuant to these Bylaws.

(7) No person shall be removed from office as a Director by reason of any change, during the term of office for which such person was elected or appointed, in the population categories described in (1)(a),(b) and (c) of this Article or in the population of the Director's municipality.

ARTICLE XI. Powers and Duties of the Board of Directors.

(1) The Board has the following powers, in addition to any other powers set forth in these Bylaws:

(a) To elect during the first Board meeting held after the election as provided in Article X(3), a chairman, vice chairman, secretary/treasurer and other officers as appropriate. Each officer shall serve until his

or her successor is elected, but there shall be no limit on the number of terms served by any person.

(b) To admit new members as provided in Article VI and to adopt criteria for new members.

(c) To establish contributions to be paid by the members, at such time or times and in such amounts as the Board deems appropriate for the operation of CIRSA and as necessary to ensure the solvency and avoid impairment of CIRSA.

(d) To establish the types of losses to be covered, the limits of liability, and the types of deductions which CIRSA provides.

(e) To select all service providers necessary for the administration of CIRSA.

(f) To set the dates, places and provide an agenda for Board and members' meetings.

(g) To fill vacancies in the Board by majority vote of the remaining Directors for the unexpired term.

(h) To exercise all powers of CIRSA except powers reserved to the members.

(i) To hire and discharge personnel or to delegate such authority to the Executive Director.

(j) To provide for claims and loss control standards and procedures, to establish conditions which must be met prior to the payment or defense of a claim, and to deny a claim or the defense of a claim if the conditions are not met.

(k) To provide for the investment and disbursement of funds.

(l) To establish rules governing its own conduct and procedure and the powers and duties of its officers, not inconsistent with these Bylaws.

(m) To issue subordinated debentures consistent with applicable requirements of the Insurance Commissioner of Colorado.

(n) To form committees and provide other services as needed by CIRSA. The Board shall determine the method of appointment and terms of committee members.

(o) To do all acts necessary and proper for the operation of CIRSA and implementation of these Bylaws subject to the limits of the Bylaws and not in conflict with these Bylaws.

(p) Dissolve CIRSA and disburse its assets by a two-thirds (2/3) vote of the entire membership provided that a notice of intent to dissolve CIRSA shall be given to the Insurance Commissioner at least ninety (90) days prior to the effective date. No such plan to dissolve CIRSA shall be effective until approved by the Insurance Commissioner. Upon dissolution of CIRSA, the assets of CIRSA not used or needed for the purposes of CIRSA, as determined by CIRSA and subject to approval by the Insurance Commissioner, shall be distributed exclusively to municipalities which are members of CIRSA prior to dissolution to be used for one or more public purposes.

(q) To delegate to the Executive Director, by motion approved by the Board, any of the Board's powers and duties, except that the Board may not so delegate its powers to elect officers, admit new members,

establish contributions by the members, fill vacancies in the Board, adopt CIRSA's budget, establish conditions which must be met prior to the payment or defense of a claim, or dissolve CIRSA.

(r) Notwithstanding any other provision of these Bylaws or any limitation on CIRSA coverages, for any claim year since the inception of CIRSA the Board may pay those claims and expenses related thereto which would otherwise be denied for the reason that payment would exceed any applicable specified aggregate limit and available insurance or reinsurance. Any such payment shall be made only from a reserve fund established pursuant to Article IX (2), shall not exceed the amount in the reserve fund, shall be subject to the conditions and requirements of Article IX (2), and shall be consistent with such policy as the members may adopt by a two-thirds (2/3) vote of the members present at a meeting.

(s) To make reports to the members at member meetings or otherwise.

(t) To impose a reasonable fee on a former member for the costs of administration which pertain to that member and which arise after the conclusion of the membership. Such fee may be billed against and deducted from any surpluses that would otherwise be credited to the former member pursuant to Article IX, or may be billed to the former member.

(2) The Board has the following duties, in addition to any other duties set forth in these Bylaws:

(a) To prepare, adopt, and report CIRSA's budget to the members.

(b) To make reports to the members at their meetings.

(c) To provide to members annually an audit of the financial affairs of CIRSA to be made by a Certified Public Accountant at the end of each fiscal year in accordance with generally accepted auditing principles and state law.

(d) To provide to members annually an annual report of operations.

(e) To adopt a policy describing those CIRSA documents and records which are available to CIRSA members and to the public and any limitations thereon.

(f) To provide for payment of covered claims and expenses related thereto in the order in which the amounts become due, until any applicable specified aggregate limit and insurance or reinsurance available for such payment is depleted.

ARTICLE XII. Meetings of the Board of Directors.

(1) The Board may set a time and place for regular meetings which may be held without further notice, and shall establish procedures for notice of special meetings.

(2) Four (4) Directors shall constitute a quorum to do business. All acts of the Board shall require a majority vote of the Directors present.

(3) One or more or all Directors on the Board may participate in any meeting of the Board by means of a conference telephone or similar communications equipment by which all persons participating in the meeting can communicate with each other at the same time. Participation by such means shall constitute

presence at the meeting. No such meeting shall be held unless diligent effort is made to notify all Board members.

(4) Any action of the Board may be taken without a meeting if consent in writing setting forth the action so taken is signed by all Directors then serving on the Board. Such consent shall have the same effect as a unanimous vote and may be executed in counterparts.

ARTICLE XIII. Liability of Board of Directors or Officers. The Directors, officers and committee members of CIRSA should use ordinary care and reasonable diligence in the exercise of their powers, and in the performance of their duties hereunder; they shall not be liable for any mistake of judgment or other action made, taken or omitted by them in good faith; nor for any action taken or omitted by any agent, employee or independent contractor selected with reasonable care. No Director, officer, or committee member shall be liable for any action taken or omitted by any other Director, officer or committee member. CIRSA shall obtain a bond or other security to guarantee the faithful performance of each Director's, officer's and the Executive Director's duties hereunder. CIRSA may use any loss fund to defend and indemnify any Director, officer, committee member or employee for any action made, taken, or omitted by any such person in good faith within the scope of his or her authority for any CIRSA, or may pay for or reimburse the reasonable expenses, including liability expenses and attorneys' fees, incurred by any such person who is a party in a proceeding resulting from such an action, in advance of the final disposition of the proceeding, but any such payment or reimbursement shall be repaid to CIRSA if it is determined that the action was not made, taken, or omitted in good faith or was not within the scope of his or her authority for CIRSA. CIRSA may purchase or otherwise provide for insurance coverage for such Directors, officers, committee members and employees.

ARTICLE XIV. Withdrawal from Membership.

(1) Any member may withdraw from CIRSA by giving prior notice in writing to the Board of the prospective effective date of its withdrawal.

(2) If the effective date of a member's withdrawal is a date other than a January 1, the withdrawing member shall not be entitled to receive any refund of contributions made for administrative costs for the claim year of withdrawal. The withdrawing member shall be entitled to receive within forty-five (45) days after the effective date of withdrawal, a proportionate return of its contribution to any loss fund.

(3) If the effective date of a member's withdrawal is January 1 but the member's written notice of withdrawal is received by CIRSA more than thirty (30) days after the date on which CIRSA mailed a preliminary quote of the contribution to be assessed the member for the year beginning on that January 1, the withdrawing member shall be obligated to pay its share of CIRSA's administrative costs for the year beginning on that January 1. However, if the preliminary quote is mailed by CIRSA prior to September 1, members shall not be obligated for future claim year administrative costs if the member's written notice of withdrawal is received by CIRSA on or before the October 1 preceding the January 1 renewal date.

(4) The members may, by a two-thirds (2/3) vote of the members present at a meeting, adopt or amend a policy establishing additional conditions applicable to members which withdraw.

ARTICLE XV. Expulsion of Members.

(1) A member which fails to make any contribution or other payment due to CIRSA shall be automatically expelled from CIRSA on the sixtieth (60th) day following the due date, unless the member makes a request for extension prior to the sixtieth (60th) day, the request is granted by the Executive Director, and payment

is made within any extended period. A notice of failure to make a contribution or other payment due to CIRSA shall be mailed to the member at least seven (7) days prior to the first date of automatic expulsion. If time for payment is extended by the Executive Director and payment is not made within any extended period, the automatic expulsion shall occur on a date no later than twenty (20) days after the last day of the extended period. An expulsion under this subsection (1) shall not be subject to the provisions of subsection (2).

(2) A member may be expelled by the Board for failure to carry out any other obligation of the member pursuant to these Bylaws, or for failure to address in an effective manner a condition that the Board deems hazardous to the CIRSA membership as a whole, subject to the following:

(a) The member shall receive notice from the Board of the alleged failure and not less than thirty (30) days in which to cure the alleged failure, along with notice that expulsion may result if the failure is not so cured.

(b) The member shall receive at least thirty (30) days prior notice from the Board of the date, place and time when the Board will consider expelling the member from the pool, and the member shall be entitled to be present at that meeting and to present evidence and reasons why it should not be expelled. The decision of the Board shall be effective as of the date and upon the terms and conditions set forth in the Bylaws and applicable excess or reinsurance policies and as otherwise specified by the Board, except as provided in paragraph (c) of this Article XV (2).

(c) The member may appeal the Board's decision to the membership. Notice of the appeal shall be provided to each member. The appeal shall be considered by the members only if twenty percent (20%) of the members request the Board, in writing, to schedule a membership meeting on the appeal; otherwise the appeal shall be considered denied. If the appeal will be considered by the members, the Chairman of the Board shall schedule a membership meeting and each member, including the appealing member, shall be provided at least ten (10) days prior written notice of the date, time and place of the meeting. The appealing member shall be entitled to be present at the meeting and to present evidence and reasons why it should not be expelled and the Board may present evidence and reasons why expulsion is proper. The appealing member shall not be counted in determining the number of votes required, nor shall the appealing member be entitled to vote on the appeal. The decision of the members shall be by majority vote of those present at the meeting and shall be final, and any expulsion shall be effective as of the date and upon the terms and conditions set forth in the Bylaws and applicable excess or reinsurance policies, and as otherwise specified by the members.

(3) The members may, by a two-thirds (2/3) vote of the members present at a meeting, adopt or amend a policy establishing requirements applicable to members which are expelled.

ARTICLE XVI. Conditions of Withdrawal and Expulsion.

(1) A withdrawn or expelled member shall remain obligated for all amounts owing prior to withdrawal or expulsion from CIRSA and for all amounts which thereafter become owing pursuant to CIRSA Bylaws and policies adopted by the members which are in effect at the time of withdrawal or expulsion including, but not limited to, contributions levied pursuant to Article IX (2) of the CIRSA Bylaws.

(2) A withdrawn or expelled member is considered a member of CIRSA for the purpose of payment of the member's claims and expenses related thereto which remain covered under the terms of CIRSA's excess policies. A withdrawn or expelled member shall remain subject to all conditions of coverage and

obligations of a member under CIRSA Bylaws, insurance or reinsurance policies, and policies adopted by the members which are in effect at the time of withdrawal or expulsion. A withdrawn or expelled member shall have no right to vote on any matter pending before the CIRSA membership.

(3) Except as otherwise provided in these Bylaws:

(a) A withdrawn member shall retain all rights of a withdrawn member under CIRSA Bylaws and policies adopted by the members which are in effect at the time of the withdrawal;

(b) An expelled member shall retain all rights of an expelled member under CIRSA Bylaws and policies adopted by the members which are in effect at the time of the expulsion; and

(c) No withdrawn or expelled member may be adversely affected by any change in such Bylaws or policies adopted subsequent to the effective date of the member's withdrawal or expulsion.

(4) An expelled member shall have no right to be credited for any amounts pursuant to Article IX (3) or (4) of the Bylaws. Any such amounts that would have been credited but for the expulsion shall be redistributed among those members who were members on the effective date of such member's expulsion, in similar proportions as the contributions paid by those members.

(5) Unless disapproved by an affected insurance or reinsurance carrier, CIRSA shall offer a withdrawing member, no later than forty-five (45) days after CIRSA's receipt of the written notice of withdrawal, at least twenty-four (24) months of extended reporting period on any claims-made coverage provided through CIRSA, at a cost reasonably calculated by CIRSA and subject to any contract terms existing at withdrawal.

ARTICLE XVII. General.

(1) This document shall constitute an intergovernmental contract among the members of CIRSA. The terms of this contract may be enforced in court by CIRSA itself or by any of its members.

(2) The consideration for the duties herewith imposed upon the members to take certain actions and to refrain from certain other actions shall be based upon the mutual promises and agreements of the members set forth herein.

(3) A certified copy of the ordinance, resolution or other document of approval for each member, accompanied by an attorney's certification of proper authority and adoption, shall be attached to the original Bylaws on file with CIRSA. These Bylaws may be executed in counterparts.

(4) Except to the extent of the limited financial contributions to CIRSA agreed to herein or such additional obligations as may come about through amendments to these Bylaws, no member agrees or contracts herein to be held responsible for any claims in tort or contract made against any other member. The contracting parties intend in the creation of CIRSA to establish an organization only within the scope herein set out, and have not herein created as between member and member any relationship of surety, indemnification or responsibility for the debts of or claims against any other member.

(5) In the event that any article, provision, clause or other part of these Bylaws should be held invalid or unenforceable by a court of competent jurisdiction, such invalidity or unenforceability shall not affect the validity or enforceability with respect to other articles, provisions, clauses, applications or occurrences, and these Bylaws are expressly declared to be severable.

ATTEST: _____ By: _____

_____ _____

Name Title

_____ _____

Title City/Town

_____ _____

Date Date

COVERAGELINE

WHAT IS THE CIRSA CLAIM ADJUSTER'S ROLE IN THE MANAGEMENT OF LIABILITY CLAIMS?

By: Tami A. Tanoue, CIRSA Executive Director

So you might have read the title above and thought to yourself, "This should be a short article. The CIRSA claim adjuster's role in the management of a liability claim is to adjust the claim, duh!" But when it comes to the complicated liability claims that our members often experience, the claim adjuster's role is actually complex, shifting, and not always visible. In this article, we introduce you to the important and sometimes mysterious role played by the CIRSA liability claims adjuster in managing your claim.[1]

INTRODUCTION

There are, of course, relatively straightforward claims that our members experience. An example might be an intersection accident where a municipal employee driving a City- or Town-owned motor vehicle was clearly at fault and caused a fender-bender. In such a claim, the claim adjuster might be the sole point of contact with whom the member and the claimant interact. In such a claim, the claim adjuster would likely do the following:

- Serve as a resource and liaison to the member and others involved, adding value by virtue of the adjuster's knowledge and experience in handling similar matters.

- Work with the member to assess liability, immunity, and other issues, and work with the member and the claimant to resolve the claim by payment or denial.

- Provide expertise in strategy, direction, and negotiation issues.

- Perform "adjustment" functions by reviewing claim-related information, including coverage documents to ascertain the applicability of coverages or exclusions, invoices and bills to make sure they're reasonable and accurate, and otherwise ensuring that the correct amount is paid, if appropriate.

With larger, more complex claims, it is likely that the CIRSA claims adjuster will be one of several other players involved. An example might be an allegation of excessive force by a police officer in arresting a suspect, or an allegation of a procedural due process violation in your governing body's consideration of a quasi-judicial matter. In such a matter, your City/Town Attorney will likely be involved. If your municipality is lucky enough to have a dedicated risk manager on staff, he or she will likely be involved. The City/Town Manager/Administrator, the affected department head, and other City/Town management members may play a role. Outside counsel may be assigned to provide assistance and, if appropriate, defend the claim.

With so many players at the table in the event of a complex claim, the "resource" role of the claims adjuster may not be

as prominent. After all, there's plenty of expertise in the room in terms of knowledge, strategy, and direction. Nonetheless, the adjuster continues to play an important role in the management of the claim. This role may not be visible to the member, but is still a critical one not only for the member, but for CIRSA and its excess insurance and/or reinsurance partners. And with so many experts in the room, there may be a natural inclination to wonder...what value is the adjuster adding to a complex claim? Is he or she going to be telling the City/ Town Attorney or assigned defense counsel what to do?

Well, the adjuster's experience can certainly continue to add value to the discussion of a complex claim, but the adjuster's role in such a matter will likely shift. Although the management of every claim involves the additional responsibilities of **reserving, reporting, and documentation**, these are the responsibilities that take the forefront in complex claims. So let's explore these concepts.

CLAIMS RESERVING: THE LIFEBLOOD OF INSURANCE

Claims reserving is the practice by which the organization – whether it be CIRSA or an excess/reinsurance partner – sets aside money to pay for the defense of, and if appropriate indemnity for, a claim. (Indemnity means the cost of a settlement or judgment that is paid to the claimant.) If your municipality carries a high liability deductible, you may be estimating your own reserves for deductible payments as well.

For each claim that comes in from a member, the claims adjuster sets an initial reserve within 30 days based on the investigation to that point. In a litigated claim, the initial reserve relies heavily on the defense counsel's initial evaluation, litigation plan, and budget, as well as the adjuster's experience and expertise in sound reserving practices.

Over the life of the claim, the reserve is continually reviewed and revised as necessary. That's one reason why the adjuster needs to be at the table. How else will he or she understand new developments in the claim, the discovery of information that could be critical to the defense or settlement of the claim, and the need for changes in the litigation plan and therefore the budget? The adjuster's eyes and ears need to be on the claim at all times to ensure accurate reserving.

Every penny that is reserved for a claim is set aside by the organization under the assumption that it will eventually need to be paid. Multiply this by the number of claims that all CIRSA members have, and the dollars reserved for each of those claims! That's a big number, but it needs to be an accurate number. That is the amount we need to have in the bank to pay for the defense and/or indemnity of those claims.

Accurate reserving thus ensures that we have collected and hold on to enough money – not too much and not too little – to meet our claim-related obligations. You can see that under-reserving can be deadly to the organization. At its worst, under-reserving means that the pool's financial condition could be impaired, or even worse, hit insolvency, if it turns out that we need to pay more than we have reserved and set aside. But over-reserving is also harmful. It means we've tied up money – money belonging to the members – that would otherwise be counted in the net position of the organization and allocated to each member. It also means that we've created an inaccurate picture of our liabilities and thus are likely paying too much for excess or reinsurance coverage.

When you think about it, reserves touch the past, present, and future of the pool. Let's start with the present. Reserves must be accurate TODAY to assure we have enough money set aside TODAY to pay our claims obligations. If we don't, we could have financial impairment/ insolvency issues!

Our reserves are a continually updated projection of what we will pay in the FUTURE until the claim is closed. What those reserves look like in any given year will also influence what the actuaries think our claims trends look like, and how much we should charge our members NEXT year. So inaccurate reserving can mess up those projections.

And finally, the past. When all of the claims for a given year are finally closed out, what was reserved must equal what is paid. If we had

a practice of under-reserving, that year's going to look bad, and the specter of impairment/insolvency looms. If we over-reserved, we're going to be putting money back into the pool's (and thus your) net assets. But maybe that was money we didn't need to collect in the first place.

In summary, in large and complex claims, a primary role of the adjuster is in ensuring accurate reserving. This is one of those invisible, perhaps mysterious, roles, but a critical one. And now you know!

THE SUPERSTRUCTURE OF YOUR COVERAGES

How your coverages are structured and layered is another piece of the claims picture that may not be entirely visible to you. But it's helpful to see the adjuster's role in the context of that structure. Let's use your liability coverages as an example.

As a member, you have chosen a liability deductible. It could be $1,000 per claim for a small member, or as much as $250,000 per claim for a large member. On top of that, CIRSA has a self-insured retention (SIR) that goes up to $1 million per claim, inclusive of your deductible, in a liability claim.

But obviously, considering your risk exposures and the current litigation climate, $1 million per claim in coverage may not be adequate. That's why we form relationships with excess insurers or reinsurers[2] to take your limits of coverage to higher levels without undue risk to the pool. Thus, in a claim that could exceed the $1 million CIRSA SIR, the excess insurer or reinsurer becomes a direct partner in the management and payment of the claim. In fact, they want to partner even earlier in the life of certain types of claims, such as a claim involving a death or a civil rights violation, and typically always want to begin active partnering when a claim is reserved at 50 percent of CIRSA's SIR.

All of the dollars spent on a claim – from your deductible, to CIRSA's SIR, to the amounts subject to excess insurance or reinsurance, are interrelated. So, our partners don't say to us, "come see us when you've spent your $1 million SIR," and we can't say to you, "come see CIRSA after you've spent your deductible." If a claim hits our layer or the excess/reinsurance layer, someone has to make sure that each dollar spent getting there is properly charged to the claim. Who? Why, it's your friendly CIRSA adjuster.

Let's use an example. Say a claim is reserved at $2 million, and CIRSA has spent $1 million (inclusive of your deductible) in defense of the claim. We have an excess insurer, and we now say, "OK, now we're handing this off, excess insurer." Don't we have a responsibility to show that every dollar of the $1 million spent, including your deductible, was properly spent in the defense of the claim? We sure do, and that's the adjuster's job. If we can't document that every penny spent was spent properly, then the excess insurer's going to disallow the expenditure. We're not going to be able to tap into their money until they're satisfied that the dollars spent within your deductible and our SIR were spent properly.

Also, excess insurers and reinsurers insist on timely reporting of claims by us. As mentioned previously, some types of claims, like death or civil rights claims, must be reported at the start. Others must be reported when reserves are at 50 percent of the CIRSA SIR. What's the penalty for late reporting? In a worst case scenario, the excess insurer or reinsurer may DENY any responsibility for partnering in the loss. At a minimum, an adverse comment in an audit may appear. The relationship with the excess insurer or reinsurer may be harmed. Future years' renewals with that partner may be jeopardized. We depend on you, the member, to report your claims to us in a timely manner, so that we, in turn, can meet our reporting responsibilities in a timely manner. If you were to decide, "well, we have a $250k deductible, and we won't report this claim to CIRSA until we spend all of that $250k ourselves," then you've effectively thrown timely reporting out the window (among other terrible consequences). Thus, one of the adjuster's critical but unsung roles is coordinating with members and our excess/reinsurance partners to ensure timely and accurate reporting of claims.

SCRUTINY? YES!

You might be wondering if the fiscal solvency of the liability pool rests

solely in the hands of the adjusters who handle liability claims for CIRSA, one claim at a time. Well, no. This is such a lifeblood issue that there are multiple levels of scrutiny and accountability. But part of the adjuster's job is to ensure that the reserves, and indeed all of the documentation related to the claim, will hold up under scrutiny.

Each adjuster has his or her level of reserve authority. Beyond that level, each reserve change is subject to review and approval by others in the organization. So the supervisor, the Claims Manager, the Finance Director, and the Executive Director can be involved, depending on the magnitude of the claim. Each will have requirements and expectations regarding documentation.

Also, as mentioned above, CIRSA has excess/reinsurance partners. These partners expect certain serious types of claims to be reported to them immediately and through the life of the claim. Other claims reach a reporting threshold once a certain level of reserve is reached. And then reserves are subject to continual scrutiny by the excess insurer/reinsurers, too. These partners depend on accurate reserving the same way we do, and for the same reasons.

And reserves aren't just reviewed at the time they are established or changed. They are subject to multiple audits. Supervisors and the Claims Manager may choose to do a "desk audit" or "box audit" to verify the accuracy of reserves and compliance with other standards.

CIRSA also undergoes a claims audit each year by an independent claims auditing firm. In fact, this year, we've decided to invite the claims auditor back for quarterly audits, just for fun. Well, maybe not fun, but we think there will be a value in quarterly reviews and fine-tuning opportunities. Among the responsibilities of the auditor is to review a sampling of claims and determine the accuracy of reserves. Reserves that need to be taken up or taken down will be noted, and an overall accuracy rate will be provided. If that accuracy rate raises red flags, further scrutiny of additional claims may be in order.

CIRSA's annual financial audit also has a claims review component. Part of the job of the financial auditors is to review the adequacy of our reserves, because they're a huge piece of our overall financial solvency.

But wait, there's more. We are subject to annual audits by the Division of Insurance and the Division of Workers' Compensation. And every excess insurer or reinsurer with whom we have a current relationship, or a past relationship with still-open claims, also has the right to audit us...and they do! Thus, the CIRSA Claims Department is subject to 5, 7, 10 audits every year...but who's counting?

But there's still more! We engage actuaries who tell us the big picture of whether our reserves are adequate, and help us determine what we should be charging our members in the coming year. And we have yet another consultant, who tells us, from the thousand-foot perspective, what our funding needs and capital model should look like. Reserves are a big part of that picture.

All this scrutiny should persuade you of two things. One, we take all prudent measures to assure the fiscal solvency of CIRSA so that we can continue to serve you effectively, efficiently, and without unpleasant surprises. And two, you should have some sympathy for the hard work of the adjusters! There are a lot of eyes scrutinizing their work from start to finish. So, the next time you sense that one of them might be, well, wound a little tightly, you'll understand why.

DOCUMENTATION, DOCUMENTATION, DOCUMENTATION

There's a saying in the adjuster world: If it wasn't documented, it didn't happen. With all of the eyes involved in scrutinizing a claim, it's critical that each aspect, each aspect of the reserving process, as well as of each expenditure, be well-documented. Everyone in the supervisory levels, and all of the excess insurers and reinsurers, need to be able to look at the documentation and understand the adjuster's thinking, and must agree that any given expenditure was appropriate. Auditors will audit the adjuster against our own documentation standards as well as industry best practices. If the adjuster makes it difficult for an auditor to understand what's happening in the life of a claim, and what may be driving a reserve

amount, then the adjuster – and the organization – will be called out for a standards and practices fail.

Rest assured that when an adjuster is involved in, say, a legal strategy discussion with the City/Town Attorney, outside counsel, municipal management, etc., he or she isn't there to boss everyone around. But the adjuster must understand what is happening and what's going to happen. The adjuster needs to approve and document significant expenditures, especially if they were not anticipated in the original budget and litigation plan. If a case is going seriously south, the adjuster needs to know, document, and report that up. All of these activities are critical to protecting the accuracy of the reserves, to document the appropriateness of the money going out, and to keep the excess insurers, reinsurers, and others appropriately informed.

You can see that the relationship between the adjuster and outside counsel is a critical piece of the reserving, documentation, and reporting picture. If outside counsel is late with reports, excludes the adjuster from critical discussions, or continually blows the litigation budget, then the adjuster can't do his or her job. And then the adjuster must face the wrath of the supervisor, Claims Manager, Finance Director, Executive Director, and others! That's one reason why we value the relationships we have with experienced outside counsel who are not only superb litigators, but who understand and accommodate the adjuster's responsibilities.

Finally, the adjuster can continue to bring value on the member-facing side of a large or complex claim. The adjuster has the big picture of the claims that members experience. The adjuster sees all of the successes (and sometimes failures) that happen in court, in mediation, and in settlement conferences. The adjuster has well-honed negotiation instincts and skills, and perhaps insights developed from experience with similar claims, or the same claimants and/or their counsel. So while certainly not seeking to get in the way of the legal and management talent in the room, the adjuster can bring the value of his or her experience to the discussion.

CONCLUSION

We hope this article illuminates the less visible side of the adjuster's job, helps to demystify it, and helps explain why the adjuster occupies an important place at the table when your claim is being discussed. We've focused on liability claims, but the reserving, documentation, and reporting responsibilities in first party property claims (i.e., those that involve damage to or loss of the member's property), and workers' compensation claims work much the same way.

Managing claims is truly a partnership between our member, CIRSA, and the applicable excess insurers and reinsurers. For that partnership to work optimally, we all must participate, and honor each other's participation. When the partnership works well, we can all rest assured that the claim is being managed as best it can be for the member's benefit.

Footnotes:

[1] The author is an attorney who has substantial experience in municipal pooling issues, but who is not a claims adjuster, financial professional, or actuary. While the content of this article has been reviewed by CIRSA's General Counsel, Finance Director, and Claims Manager, any irregularities in the characterization of the financial and/or claims adjusting issues discussed herein are entirely the author's.

[2] There are technical differences between excess insurance and reinsurance. Basically, when CIRSA purchases an excess policy, it is a second policy that sits above the CIRSA self-insured coverage document. So CIRSA provides the first $1 million/claim of coverage under its coverage document, and the excess insurer provides, say $9 million/claim of coverage, under its own policy. In reinsurance, CIRSA provides the entire $10 million/claim of coverage under its own self-insured coverage document, but "reinsures" $9 million/claim of that coverage through a contract with a reinsurer. The practical import of this difference is not likely to be very visible to you.

3665 CHERRY CREEK NORTH DRIVE • DENVER, CO 80209
303.757.5475 • 800.228.7136 • FAX 303.757.8950 • www.cirsa.org

Modern Mysteries of Municipal Insurance
CML Annual Conference 6-20-19
Sample Services Agreement Insurance Provision*

1. INSURANCE

A. The Contractor agrees to procure and maintain, at its own cost, the following policies of insurance. The Contractor shall not be relieved of any liability, claims, demands, or other obligations assumed pursuant to this contract by reason of its failure to procure or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types. Contractor shall cause each subcontractor of the Contractor to procure and maintain or insure the activity of Contractor's subcontractors in Contractor's own policy, the minimum insurance coverages listed below. Such coverages shall be procured and maintained with forms and insurers acceptable to the City/Town. All coverages shall be continuously maintained from the date of commencement of services hereunder through the term of this contract. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

1. Workers' Compensation insurance to cover obligations imposed by the Workers' Compensation Act of Colorado and any other applicable laws for any employee engaged in the performance of services under this contract, and Employers' Liability insurance with minimum limits of FIVE HUNDRED THOUSAND DOLLARS ($500,000) each accident, FIVE HUNDRED THOUSAND DOLLARS ($500,000) disease - policy limit, and FIVE HUNDRED THOUSAND DOLLARS ($500,000) disease - each employee.

2. Comprehensive General Liability insurance with minimum combined single limits of ONE MILLION DOLLARS ($1,000,000) each occurrence and TWO MILLION DOLLARS ($2,000,000) aggregate. The coverage shall be provided on an "occurrence" basis as opposed to a "claims-made" basis. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy shall contain a severability of interests provision. .

3. Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury and property damage of not less than ONE MILLION DOLLARS ($1,000,000) each occurrence and ONE MILLION DOLLARS ($1,000,000) aggregate with respect to each of Contractor's owned, hired and/or non-owned vehicles assigned to or used in performance of the services. The policy shall contain a severability of interests provision.

4. [Included if applicable; e.g., engineer, architect, etc.] Professional Liability (errors and omissions) Insurance with a minimum limit of coverage of ONE MILLION DOLLARS ($1,000,000) per claim and annual aggregate. Such policy of insurance shall be obtained and maintained for one (1) year following completion of all services under this contract.

B. The policies required above, except for the Workers' Compensation insurance, Employers' Liability insurance, and Professional Liability insurance, shall be endorsed to include the City/Town, and its officers and employees, as additional insureds. Every policy required above shall be primary insurance, and any insurance carried by the City/Town, its officers, or its employees, shall be excess and not contributory insurance to that provided by Contractor. The additional insured endorsement for the Comprehensive General Liability insurance required above shall not contain any exclusion for bodily injury or property damage arising from completed operations. The Contractor shall be solely responsible for any deductible losses under each of the policies required above.

C. Prior to the commencement of services, certificates of insurance shall be completed by the Contractor's insurance agent as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the City/Town. Each certificate shall identify by name the project or services as indicated in this contract, in form acceptable to the City/Town. Every policy of insurance shall provide that the City/Town will receive notice no less than thirty (30) days prior to any cancellation, termination or material change in such policy. In addition, the Contractor shall immediately provide to the City upon Contractor's receipt any notice of cancellation, termination or material change received by Contractor concerning the required insurances. If the words "endeavor to" appear in the portion of the certificate addressing cancellation, those words shall be stricken from the certificate by the agent(s) completing the certificate. The City/Town reserves the right to request and receive a certified copy of any policy and any endorsement thereto. The City/Town may, at its election, withhold payment for services until the requested insurance policies are received and found to be in accordance with this contract.
\

D. Failure on the part of the Contractor to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of contract upon which the City/Town may immediately terminate the contract, or at its discretion may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City/Town shall be repaid by Contractor to the City/Town upon demand, or the City/Town may offset the cost of the premiums against any monies due to Contractor from the City/Town.

E. The parties hereto understand and agree that the City/Town is relying on, and does not waive or intend to waive by any provision of this contract, the monetary limitations (presently $387,000 per person and $1,093,000 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq., as from time to time amended, or otherwise available to the City/Town, its officers, or its employees.

***Note: The above sample language, including stated amounts of coverage, is for general reference and illustrative purposes only, and not legal advice. Specific legal and other questions should be referred to the entity's own counsel, insurance representatives, and/or others as appropriate.*

97th CML Annual Conference

June 18–21, 2019 • Breckenridge, CO

Social Media: Legal Issues for Municipalities

June 20, 2019 1:45 pm to 3:00 pm
City of Colorado Springs
Marc Smith, Corporate Division Chief & Legislative Counsel
Tracy Lessig, Employment Division Chief
Frederick Stein, Senior Corporate Attorney
Rebecca Greenberg, Senior Corporate Attorney

Contents of this presentation reflects the view of the presenter, not of CML.

Introductions

- Marc Smith, Corporate Division Chief & Legislative Counsel
- Tracy Lessig, Employment Division Chief
- Frederick Stein, Senior Corporate Attorney
- Rebecca Greenberg, Senior Corporate Attorney

What is Social Media?

- Know it when I see it?
- Twitter, Facebook, LinkedIn, YouTube, Snapchat, etc.
- Changes on a daily basis

Legal Definition

- Difficult to define in legislation and policy
- Colorado Revised Statutes § 18-7-108 (6)(e):
- "Social Media" means *any electronic medium*, including an *interactive* computer service, telephone network, or data network, that *allows users to create, share, and view user-generated content*, including but not limited to videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail, or internet web site profiles. (*emphasis added*).

Impact of Social Media on Our Lives

- 135 minutes a day for the average global user https://www.forbes.com/sites/tomward/2018/06/08/how-much-social-media-is-too-much/#703ff57e60e6
- A new, less personal way to maintain interactive communication

Impact on Government

- Easier interaction with the public
- Ability to provide essential information more quickly
- Impersonal
- Easy to violate your own rules

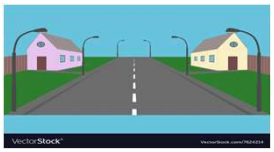
Major Issues

- Employment related issues
- What constitutes "government ownership" of a social media account? Can a policy help?
- Elected officials

Public Employee Free Speech and Social Media

First Amendment Free Speech

- Public employees have limited free speech rights
- First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen on matters of public concern



Public Employee Free Speech and Social Media

First Amendment Retaliation Five-Part Test:

1. Was the speech made pursuant to the employee's official duties (If yes – no protection);
2. Was the speech on a matter of public concern (If no – no protection);
3. Do the government's interests outweigh the employee's free speech interests (If yes – no protection);

Public Employee Free Speech and Social Media

First Amendment Retaliation Five-Part Test:

4. Was the protected speech a motivating factor in the adverse employment action (If no – no violation); and
5. Would the employer have made the same decision in the absence of the speech (If yes – no violation).

Public Employee Free Speech and Social Media

1. Was the speech made pursuant to the employee's official duties (If yes – no protection)

Garcetti v. Ceballos, 547 U.S. 410 (2006)

- District Attorney prepared memo disagreeing with prosecution of a case and testified on behalf of the defense
- DA alleged retaliation by being reassigned, transferred and denied a promotion

Public Employee Free Speech and Social Media

Garcetti v. Ceballos, 547 U.S. 410 (2006) (cont.)

Court held - not protected speech because it was made "pursuant to his job duties"

Public Employee Free Speech and Social Media

2. Was the speech on a matter of public concern (If no - no protection)
   - Matters of interest to the community (i.e., social or political issues)
   - *Graziosi v. City of Greenville,* 775 F.3d 731 (5th Cir. 2015)
     - Police sergeant terminated for posting comments critical of Chief
     - Court held she was not speaking pursuant to her job duties and her speech was not on a matter of public concern

Public Employee Free Speech and Social Media

3. Do the government's interests outweigh the employee's free speech interests (If yes - no protection)

Buker v. Howard Ctny., 2015 WL 3456750 & 2015 WL 3456757 (D. Md. 2015)

- Fire Battalion Chief and volunteer both terminated after Facebook postings derogatory to liberal individuals
- Court held the postings related to a matter of public concern
- Upheld BC's termination - department's interests outweighed the BC's free speech interests
- Summary judgment denied for volunteer's claim

Brief Overview of First Amendment Law

Traditional Public Forum

- Where people have traditionally been able to express their ideas: town square, park, public street

Non-Public Forum

- Government property traditionally not open to the free exchange of ideas: courthouse lobby, prison, military base

Public Forum Restrictions

Content Neutral

- Reasonable time, place and manner
- Must be narrowly-tailored to serve a significant government interest
- Leaves open alternative channels of communication

Content Based

- Subject to strict scrutiny
- Must be the least restrictive means to achieve a compelling government interest
- Generally presumptively invalid

Level of Scrutiny Depends on Forum

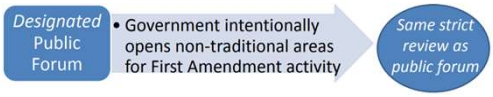
Non-Public Forum Restrictions

Most Lenient Test

Restrictions

Must be Reasonable & Viewpoint Neutral

Designated Public Forum



- Municipal auditorium dedicated to expressive activity
- Interior of city hall - when city opens building to display art but does not consistently enforce restrictions

Limited Public Forum

- Community Rooms in Public Buildings
- Public School Property

How Courts Determine Classification

Designation of public or limited public forum depends on terms of use

More consistently enforced and objective restrictions = More likely forum deemed a *limited* public forum

Government Speech

- Forum analysis only applies to limits on private speech
- If the government "is speaking on its own behalf," it is not subject to forum analysis or the usual limits on viewpoint discrimination
- Vanity license plates are government speech; however most social media platforms are unlikely to qualify as government speech

Government-Operated Social Media Platforms

- Are they a traditional public forum?
- Is social media the modern public square for discourse of ideas?
- Is it more akin to a bulletin board where only designated topics can be discussed?
- Do you need to be concerned with elected officials' social media platforms?

What Should Municipalities Do?

Carefully consider if a municipality wants social media platforms to serve as town halls for public comment and expression

IF YES - Courts unlikely to tolerate most restrictions of the speech that occurs

Adopting A Social Media Policy Tips & Suggestions

- Content Limitations
- Consequences for Violations
- Removal and Documentation
- Due Process – Appeals
- Legal Disclaimers
- Revisions to the Policy
- Acceptance of Terms

Content Limitations

- Clearly off-topic comments made on a specific topic, thread, or post
- Obscene, pornographic, racist, or explicit language
- Threaten violence or promote illegal activity
- Solicitation of commerce, including advertisements
- Violation of privacy of another individual (eg., posting personal information)
- Comments that could compromise an ongoing criminal investigation
- Information that compromises safety or security of the public or public information systems
- Content that violates intellectual property rights

Consequences For Violations

In addition to defining what content is inappropriate, a social media policy should also explain what remedial action the municipality may take in response to a violation.

This may include:

- Blocking the individual who posted the content
- Deleting the content at issue
- Reporting the content to the site administrator

A policy may provide for warnings to be issued, or that these actions may be taken without prior warning to the individual.

Removal and Documentation of Violations

The policy may allow moderators to remove comments or ban posters that violate the content limitations

- Document the post and all comments via screenshot or other method
- The moderator should provide a standard or tailored response message to the poster explaining the post was removed for violating the social media post/comment policy
- Retain documentation as provided by retention policies (these will be subject to CORA)

Due Process - Appeals

A policy that permits banning or blocking actions against a poster should provide either the moderator's contact information (ideally an email address) or a link to a forum which allows the poster to appeal the action

This narrow avenue of due process may help stave off legal challenges for specific cases, and create a paper trail in the event that blocking an individual or deleting a comment must be defended in court

Legal Disclaimers

Social media pages will inevitably receive legitimate comments that reflect views with which a municipality does not want to be associated

Legal Disclaimers

Policies should state:

- Users' comments do not reflect the views of the Municipality
- Municipality is not responsible for the content nor endorses any site that has a link from this page
- Municipality assumes no liability for damages incurred directly or indirectly as a result of errors, omissions or discrepancies for posted information
- Comments do not constitute legal notice against the Municipality
- Comments do not constitute valid requests for public records, such requests should be made via proper channels

Amending the Social Media Policy

The unsettled legal landscape on the First Amendment and the Internet means that any policy adopted today likely will be amended to account for new developments.

Policies should state:

- Social media policies may be revised at any time
- Revisions become effective upon being posted

Social Media Policy Accepting Its Terms

Finally, policies should provide that use of the site constitutes acceptance of the applicable social media policy terms in effect at that time.

Social Media and Elected Officials

Social media may now be the most important modern forum for the exchange of views[1]; the First Amendment applies to speech on social media with no less force than in other types of forums[2].

1. *Packingham v. North Carolina*, 137 S.Ct.1730
2. *Bland v. Roberts*, 730 F.3d. 368 (4th Cir, 2013)

Social Media and Elected Officials

- Cases nationwide. Developing area of law
  - Davison v. Loudoun County Board of Supervisors (Virginia)
  - Leuthy v. LePage (Maine)
  - Knight First Amendment Institute at Columbia University v. Trump (New York)
  - Colorado cases
- Potential Steps to protect your governmental entity

Davison v. Loudoun County Board of Supervisors

267 F.Supp.3d 702 (US District Court VA, 2017)

- FACTS:
  - Plaintiff posted comment including allegations of corruption on the part of Loudoun County School Board.
  - Chair of County Board of Supervisors deleted post and banned a user from Facebook page for 12 hours.
    - Can read and share content on/from the page but cannot comment on or send private messages.

- Plaintiff brought a 42 U.S.C. §1983 action against official alleging the chair violated his 1st Amendment and due process rights, seeking injunctive and declaratory relief.

Davison v. Loudoun County Board of Supervisors

- State action occurs where apparently private actions have a sufficiently close nexus with the state to be fairly treated as the actions of the state itself.
  - Court looked to the totality of the circumstances to determine what constitutes a sufficient nexus with the state to be fairly treated as the actions of the state itself.

Davison v. Loudoun County Board of Supervisors

- Some factors considered by the Court:
  - Whether the defendant opened a forum for speech by creating her Facebook page
    - What type of forum (traditional, limited or non-public)
    - Viewpoint discrimination is prohibited in all forums
  - Defendant created the Facebook page "Chair Phyllis J. Randall" to communicate with constituents
  - Defendant, and occasionally her Chief of Staff, ran the Facebook page
    - Her chief of staff paid by County was a County resource
  - Did not use County devices to post or update the page
  - Created the page outside the County official channels so as to not be constrained by County social media policies
  - Generally, Defendant entirely responsible for posting to the page
  - Defendant didn't ban Plaintiff pursuant to any neutral policy or practice applied evenhandedly
  - Speech may not be disfavored by the government simply because it offends
    - The type of speech here – criticism of County government – is exactly the type of speech 1st amendment protects

Davison v. Loudoun County Board of Supervisors

- When is the governmental entity liable for an individual elected official's actions?

When the claim is against an individual in their official capacity it is not truly against the individual, but against the governmental entity s/he represents

Davison v. Loudoun County Board of Supervisors

- **Holdings**
  - **Injunction** not appropriate - Plaintiff's ability to communicate on the Facebook page had been restored after 12 hours
  - **Declaratory Judgment** – granted
    1. Defendant acted under color of state law in maintaining her "Chair Phyllis J. Randall" Facebook page
    2. Defendant's "Chair Phyllis J. Randall" page operated as a forum for speech
    3. Engaging in viewpoint discrimination in the administration of that forum violates the 1st Amendment to the U.S. Constitution and the Virginia Constitution

Leuthy v. LePage

U.S. District Court, D. Maine

2018 WL 4134628

- FACTS:
  - 2 Maine residents brought lawsuit against LePage, Governor of Maine, in his individual and official capacity
  - Comments posted questioned why the Governor was intentionally misleading the press, intentionally avoiding the press, and blocking users from his page
  - Defendant deleted and blocked two users from his "Paul LePage, Maine's Governor" Facebook page

Leuthy v. LePage

- Action brought pursuant to 42 U.S.C. §1983
- Motion to Dismiss was filed by Defendant

Leuthy v. LePage

- Considerations/determinations by Court:
  - Page used official title
  - Citizens control the content and timing of their posts
  - The page acts as a passive conduit for the posts
  - Deleting posts does not constitute government speech (government speech immune to 1st amendment scrutiny)
  - Considered that the Plaintiffs had alternative means to contact and petition the government
- Motion to Dismiss Denied (8/29/2018)

Knight First Amendment Institute at Columbia University v. Trump

- Plaintiffs –
  - multiple individual Twitter users who were blocked; and
  - Knight Institute – Plaintiff who Court determined had standing because "the infringement of its desire 'to read comments that otherwise would have been posted by the blocked plaintiffs…in direct reply to @realDonaldTrump tweets'"
- Defendants –
  - President – blocked individual Plaintiffs who criticized the President or his policies
  - White House Social Media Director – had ability to block and unblock users from the President's @realDonaldTrump account
    - Account registered to: Donald J. Trump, 45th President of the United States of America, Washington D.C.

Knight First Amendment Institute at Columbia University v. Trump

- Blocking on Twitter
  - blocked users have the ability to view and reply to replies to @realDonaldTrump, they cannot see the original @realDonaldTrump tweets themselves when signed in to their blocked accounts and it can be difficult to understand the replies without the context of the original tweet

Knight First Amendment Institute at Columbia University v. Trump

- Remedies
  - Injunctive Relief:
    - The Court did not issue an Injunction. Presumed the Defendants would remedy the situation with the issuance of a Declaratory Order.
  - Declaratory Order:

"Turning to the merits of plaintiffs' First Amendment claim, we hold that the speech in which they seek to engage is protected by the First Amendment and that the President and Scavino exert governmental control over certain aspects of the @realDonaldTrump account, including the interactive space of the tweets sent from the account. That interactive space is susceptible to analysis under the Supreme Court's forum doctrines, and is properly characterized as a designated public forum. The viewpoint-based exclusion of the individual plaintiffs from that designated public forum is proscribed by the First Amendment and cannot be justified by the President's personal First Amendment interests."

Case is being appealed.

Colorado Cases

- **Landman v. Scott** (CO State Senator, Grand Junction) – complaint filed May 13, 2019
- **Armijo v. Garcia** (CO Senate President)(April 2019)
  - Deleting and blocking from Facebook page
  - Settlement of $25,000 (judgment and costs)
- **Willmeng v. City of Lafayette, CO and Berg** (Mayor) (March 2019)
  - Blocking Plaintiff from Facebook page in retaliation for critical comments in 2017
  - Settlement of $20,372.90 (attorney's fees, costs and $5,000 judgment)
- **Willmeng and Asher v. City of Thornton, CO and Kullman** (Mayor Pro Tem and City **Councilperson) (October 2018)**
  - Deleted comments and banned Plaintiffs from posting
  - Stipulated to a permanent injunction and monetary element

*** This list may not be exhaustive but these cases are becoming more prevalent in Colorado. Elected Officials and Municipalities should beware***

Lobbying & Quasi-Judicial Items

- Legislative Item—social media contacts permissible
- Quasi-judicial Items—minefield
- Can be considered *ex parte* contacts
- Is the elected official interacting or merely receiving information that can be disclosed to the entire body?

Considerations for Municipalities

- Social Media Policy
  - Extend to elected officials
  - Create policy for elected officials
- City control over social media
- Limitations on social media use

Potentially protect the municipality from liability


QUESTIONS?
COMMENTS?
CONCERNS?

97th CML Annual Conference

June 18–21, 2019 • Breckenridge, CO

Collaborative Legal Responses to Homelessness Issues
June 20, 2019, 3:15pm
Arvada City Attorney's Office
Aaron Jacks
Rachel Morris
Emily Grogg
Officer Sara Horan

COLORADO MUNICIPAL LEAGUE

Contents of this presentation reflects the view of the presenter, not of CML.

Collaboration Needs

- Legal service needs across our City clients
  - Police, Parks, Public Works, City Manager
- Client Collaboration with diverse stakeholders
  - Public/City Council
  - Community Organizations/Service Providers
  - Businesses
  - BID, Chamber of Commerce

Welcome!

CITY OF ARVADA

Legal Advising and Client Collaboration Issues

- Collaboration/Client management
  - Often the "quarterback" for collaboration efforts.
    - Keep in mind ethical obligation to educate/communicate with our clients under CRPC Rule 1.4.
  - Managing client needs and expectations.
  - Weighing legal requirements and client needs.
  - Considering multiple issues across non-legal disciplines.
  - Identifying workable solutions for clients.

CITY OF ARVADA

Welcome!

- Discussing Arvada CAO's collaborative efforts with City clients to address issues related to persons experiencing homelessness in our community.
- Focus on addressing "gaps" with legal responses while respecting the rights of stakeholders, including persons experiencing homelessness, property owners and the general public.

CITY OF ARVADA

Legal Advising and Client Collaboration Projects

- Legal and policy considerations, research and drafting related to:
  - Encampment cleanups
  - First Amendment issues and "Auditors"
  - Repeal/Re-enactment of ordinances related to homelessness issues
    - Roadway soliciting/median occupancy
    - Loitering and trespass
  - "One Small Step" Arraignments

Focus Area- Encampment Cleanup

- Brings significant public scrutiny.
- **Stakeholders:** Police, Police (Evidence), Parks, Streets, Risk Management, Legal.

Focus Area- Encampment Cleanup

- Scope of the issue
  - how often is our team encountering camps?
  - what types of materials/property does our team typically find?
  - how much property might need to be stored/handled?
- Answers to these questions should guide the drafting of any associated policy.

Focus Area- Encampment Cleanup

Understanding the Law

- 4th Amendment/ 14th Amendment
  - right against unreasonable searches and seizures (compare abandoned v. temporarily unattended property)
  - right to due process
  - danger creation

"[T]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking."

Lavan v. City of L.A., 693 F.3d 1022, 1032 (9th Cir. 2012) (citation omitted).

Focus Area- Encampment Cleanup

- Safety issues related to encampments
  - sanitation/contamination
  - culvert/floodway occupations
  - fire/shock hazards
  - Safety issues may create the need for exceptions to general policies and rules.
- Distinction between regulation of public and private property.

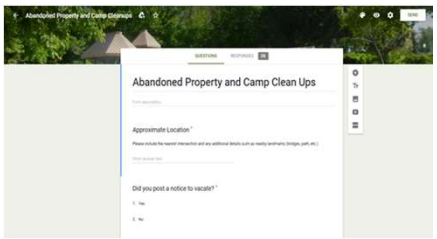
Focus Area- Encampment Cleanup

- Practical Examples of Legal Issues Which May Arise in the Context of Cleanups:
  - ***Notice:*** the alleged lack of notice (or effective notice);
  - ***Method:*** the alleged practice of giving affected persons only a brief time to gather what they can carry;
  - ***Property Preservation:*** the alleged failure to discriminate between valuable personal items that should be preserved, on the one hand, and trash or hazardous materials that should be discarded, on the other; and the affected persons' inability to reclaim stored property.
  - *See Lyall v. City of Denver*, Civil Action No. 16-cv-2155-WJM-CBS, 2018 U.S. Dist. LEXIS 48846, at *43-44 (D. Colo. Mar. 26, 2018).

Focus Area- Encampment Cleanup

Make compliance easy!

- Thorough and frequently repeated training;
- Easy methods of documentation/reporting.



Focus Area-Related 1st Amendment Considerations

Reed v. Town of Gilbert, Ariz

Sign code must survive strict scrutiny

Brown v. City of Grand Junction

Content Based vs Content Neutral

Focus Area-Safety and Trespass Issues

- Opportunities
  - Recent re-vitalization
  - RTD Gold Line
- Concerns related to homelessness
  - From businesses/residents
  - From visitors to the area
- Contributors
  - Library
  - Local Faith-Based Organization

EST. 1870
OLDE TOWN
ARVADA

1st Amendment Auditors

People ex rel. R. C.

"...it is not enough that words, gestures, or displays 'stir the public to anger,' 'invite dispute,' or 'create a disturbance'; they must 'produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

18-9-106. Disorderly conduct

(1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

(a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace;

Olde Town Legal Considerations

"Content Neutral" solutions- Focus on conduct and safety.

Use various available tools, including ordinances and policies.

Avoid discrimination against people experiencing homelessness.

3 Tiers of Public Property

Traditional Public Forum (Ex. Parks)

- Gov't may impose reasonable time/place/manner restrictions on speech

Designated Public Forum (Ex. CC Chambers)

- Gov't may regulate subject matter of speech, not viewpoints

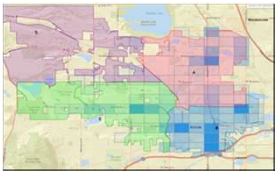
Non-Public Forum

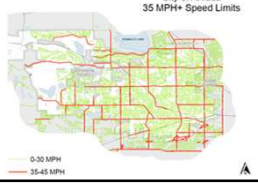
(Ex. Staff Offices)

- Gov't has much broader latitude to regulate

Pedestrian Safety Issues

- Pedestrian safety issues related to median occupation and soliciting along roadways.
  - Repealed and re-enacted existing municipal codes to comply with *Browne*.
  - Narrowly tailored to auto/pedestrian safety and supported by an overall increase in auto/pedestrian accidents.
  - Applicable to roadways/locations with high auto/pedestrian accident rates.





Related Safety Issues

- Trespassing Issues
  - Addressing behaviors/trespassing on both private and public property.
  - Repeal of outdated "Loitering" ordinance
    - Language obsolete and addressed by municipal trespass ordinance and existing C.R.S.

OSS Navigators

- Navigators
  - APD Mental Health Co-Responders
    - Access to a variety of mental health related services.
  - Bridges to Opportunity Coordinators
    - Associated with local Community Table food bank.
    - Access to a wide variety of services, resources, and assistance.

Municipal Courts/Prosecution "One Small Step" Arraignments

- Traditional municipal ordinance enforcement/prosecution is often ineffective.
- Beginning May 2019- an alternative to traditional plea offers for persons experiencing homelessness.
- Focus on defendants taking "One Small Step" toward improving their circumstances.

OSS APD Partnership

- Arvada PD's recently created Community Outreach Response Team will assist with OSS process.
  - COR officers are often familiar with defendants and develop rapport.
    - COR officers contact and remind defendants of upcoming court dates as possible.
    - COR officers present at OSS arraignments for consultation as appropriate.

Municipal Courts/Prosecution "One Small Step" Arraignments

- Alternative sentencing conditions in OSS plea offers.
- Referred to immediately available "Navigators" to discuss service needs.
- Navigators provide sentencing recommendations based on discussions.
- Traditional sentences are suspended on condition defendant participate and complete service referrals.

Emerging Regional Collaborative Efforts

- Multi-jurisdictional
  - High-level cooperation required
- Multi-disciplinary
  - Regional navigators
- Very Preliminary

Lakewood

City of Wheat Ridge

CITY OF ARVADA

JEFFERSON COUNTY COLORADO

Snapshot of Arvada's Responses

- In addition to our topics today, Arvada has implemented:
  - Dedicated page on City's website
  - Re-activating Olde Town square through movable furniture, yoga classes, library events, etc.
  - Portland Loo installation
  - Mobile shower trailer
  - Installing grates over culverts
  - Heightened patrols, including foot patrols, around Olde Town
  - Severe weather shelter network
  - Regular weed/overgrowth mitigation on publicly-owned vacant lands
  - Additional coordination with CDOT
  - Area closed signs
  - Trash and debris removal policy and procedure
  - Provided coordination and resources to faith community
  - Monthly inter-departmental staff meetings
  - Resources handout/flyer

Case Citations

- *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276
- *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218
- *People ex rel. R.C.*, 2016 COA 166
- *Lavan v. City of L.A.*, 693 F.3d 1022, 1032 (9th Cir. 2012).
- *Lyall v. City of Denver*, Civil Action No. 16-cv-2155-WJM-CBS, 2018 U.S. Dist. LEXIS 48846, at *43-44 (D. Colo. Mar. 26, 2018).

Take-Aways from Arvada's Experience

- Collaboration among our clients is critical
  - Varying resources required- there is no one solution.
- Educate your clients
  - As we tend to do… "Think like a lawyer"!
- Be prepared to try, fail, adjust, try again…
- Cooperation with other jurisdictions.
  - Issues often (always?) cross into neighboring jurisdictions.

Ordinance References

Arvada City Code:
https://library.municode.com/co/arvada/codes/code_of_ordinances

- 62-36. - Pedestrian hindering the flow of traffic.
- 62-36.5. - Pedestrian use of roadway center medians.
- 62-37. - Solicitation.
- 62-40. - Criminal trespass on private or public property.
- 62-40.5. - No trespass orders for city-owned property.

Colorado Revised Statutes:

- 18-9-102. Inciting riot
- 18-9-107. Obstructing highway or other passageway
- 18-9-110. Public buildings - trespass, interference
- 18-9-108. Disrupting lawful assembly
- 18-9-117. Unlawful conduct on public property

Questions?

97th CML Annual Conference

June 18–21, 2019 • Breckenridge, CO

Metropolitan District Regulation & Oversight
Friday June 21, 2019
Kim Emil, Assistant City Attorney, Windsor, CO
Doug Marek, City Attorney, Greeley, CO
Robert Sheesley, City Attorney, Commerce City, CO

COLORADO MUNICIPAL LEAGUE

Contents of this presentation reflects the view of the presenter, not of CML.

Metro District Oversight

- "A kind of regulatory Wild West"
- Common perceptions:
  - Confusion of service providers
  - Limited transparency
  - No control over debt, taxes, or decision-making
- What can or should municipalities do:
  - Under the Special District Act?
  - Through service plans?
  - Through local regulation?

Metro District Basics

- Metro Districts are special districts (local governments) authorized by Special District Act
- Provide two or more services as provided in the "service plan"
- Formation requires local jurisdiction and court approval and an election by eligible electors
- 1,794 active Metro Districts (per DOLA)

Colorado Metro Districts

Source: https://data.colorado.gov/Local-Aggregation/Metro-Districts-in-Colorado/krnbf-ggf2/data. "Aggregated from thousands of local jurisdictions by the Colorado Department of Local Affairs Demography office. Many of the district boundaries were created from scanned drawings or digitized PDFs, and therefore no guarantee of accuracy can be made for the data."

Statutory Powers

- Levy and collect taxes and fees
- Issue debt
- Provide services and facilities
- Own and dispose of property
- Manage its business and affairs
- Eminent domain (for limited purposes)
- "All rights and powers necessary or incidental to or implied from the specific powers granted . . ."

CRS 32-1-1001, 1101 *et seq.*

Development Metro District Services

- Street improvements, including drainage facilities, sidewalks, parking, lighting and landscaping
- Traffic safety improvements
- Covenant enforcement & design review*
- Parks or recreational facilities or programs
- Security services*

CRS 32-1-1004 (for a complete list)

Metro District Transparency

- Annual reports (CRS 32-1-207(3)(c-d)):
  - Mandatory for 5 years and then annually at the municipality's option (CRS 32-1-207(3)(c-d))
- Annual notice to electors (CRS 32-1-809(1)):
  - Governance, meeting, and election information
  - Mill levy and tax revenue for the prior year
- Public disclosure document and map (CRS 32-1-104.8)
- Open Meetings Law & Open Records Act
  - Plus meeting notices posted in 3 public places in the district and the clerk & recorder's office (CRS 32-1-903(2))
- Colorado Local Government Audit Law
- Local Government Budget Law of Colorado

Metro District Transparency?

- Meetings can be held far outside a district (CRS 32-1-903(1))
- Limited remedy for failure to file annual report, public disclosure, or notice to electors (CRS 32-1-104.8(2), 209)
- Annual notice to electors can be provided by posting to the Special District Association website (CRS 32-1-809(2)(d))

Metro Districts: Municipal Role

- Mandated by the Act:
  - Decision on service plan (CRS 32-1-204.5)
  - Decision on material modifications (CRS 32-1-207(2)(a))
  - Filling vacancies (CRS 32-1-905(2.5))
- Permitted by the Act:
  - Opposition to inclusions, exclusions, consolidations
  - Requesting dissolution
  - Oversight and enforcement

Municipal Review of Service Plan

- Must disapprove unless satisfactory evidence presented showing:
  - *Sufficient existing and projected need for organized service*
  - *Existing service is inadequate for present and projected needs*
  - *Proposed district is capable of providing economical and sufficient service*
  - *Area to be included has or will have financial ability to discharge the proposed indebtedness on a reasonable basis*

  (CRS 32-1-203(2), 204.5)
- May approve, disapprove, or conditionally approve
- Reviewed under an "arbitrary, capricious, or unreasonable standard" (CRS 32-1-206(1))

Metro Districts: Notable Litigation

- *Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.* (service plan enforceable unless not practicable*)
- *Todd Creek Village Metro. Dist. v. Valley Bank & Trust* (material modification not found)
- *Prospect 34, LLC v. Gunnison* County (mill levy cap enforceable)
- *Bill Barrett Corp. v. Sand Hills Metro. Dist.* (shift in location/purpose was material modification)

Material Modifications

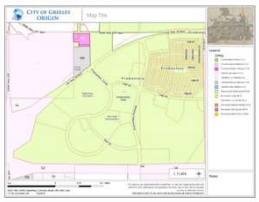
- "Changes of a basic and essential nature" to the service plan require municipal board approval (CRS 32-1-207(2)(a))
  - Does not include changes only to execute the original service plan or boundary changes
  - Material departure from service plan may be enjoined (CRS 32-1-207(3)(a))
- "So far as practicable" (*Plains; Prospect 34*)

Metro Districts in Greeley: Past

- Past City Councils have been skeptical:
  - 1999 – Approved first two Metro Districts
  - 2006 – Issued Moratorium on new Districts
  - 2007 – Adopted Regulatory Ordinances
  - 2008 – Adopted Model Service Plan
  - 2014 – Declined to approve new Districts

Tri-Pointe (Promontory) -- 1999

Residential & Commercial Metro Districts



State Farm Service Center
JBS USA Headquarters

Greeley's Primary Concerns

- Metro District residents may oppose City or School District tax increases
- Metro Districts may have better amenities than in other parts of the City, resulting in perceptions of inequality
- Metro District residents, especially subsequent buyers, may be uninformed and blame City for additional taxes
- Within commercial Metro Districts, major economic engines may seek relief from perpetual additional tax burden

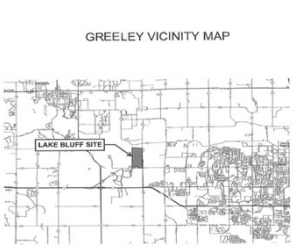
Metro Districts in Greeley: Present

Current City Council is more receptive:

- 2018 adopted Amended Model Service Plan
- Approved six new Metro Districts
- Why the change of heart?
  - Pressure for new housing stock in NOCO
  - Competition from neighboring towns
  - All new Districts in West Greeley, close to Interstate 25

Lake Bluff Metropolitan Districts

Declined approval in **2014.**



Approved resubmittal **2018**.

City of Greeley Metro Districts

City of Greeley Metro Districts

What does Greeley regulate?

- Location and size of District
- Capital and infrastructure improvements
- Mill levy caps and interest rates
- Disclosure statements
- Referral notices to other Districts
- Fees and costs
- Use of eminent domain
- Competitive grants

How does Greeley regulate?

- Require Metro Districts to file annual reports
- Require Council review and approval
- Sanction noncompliance with City ordinance or Special District Act
- Enforce contractual compliance with IGAs
  - Storm Water Facilities Construction & Maintenance
  - Dedication of land for public purpose
  - Collection and remittance of fees

Metro Districts in Windsor

- 1995 - first Metro District (Water Valley)
- 2005 - 6 Districts
- 2005-2007 – developed Model Service Plan
- 2015 – Revised Model Service Plan
  - Relaxed earlier requirements
  - More developer friendly
- 2019 – 20 active Districts

Windsor's First Model Service Plan

- Relied on home rule authority
- Desired because of lack of consistent policy
- Recognized economic inducement to developers (residential or commercial)
- Allowed use for "Enhancements"
  - Debt was limited for Metro Districts for enhancements only
  - Definition:
    - Entry features, non-potable systems, parkways with medians, etc.
    - Definition of enhancements was vague, causing issue with bond counsel
    - Town later required non-potable systems

Windsor's Primary Concerns

- Homeowner awareness of mill levy
- Resistance to future tax increases proposed by Town, special districts, and schools
- Inconsistency between service plans
- Protection of residents from excessive developer cost-shifting
- Potential for district default

Windsor's Current Regulations

- Model Service Plan
- Mill levy cap of 39 total mills – (4) operations; (35) debt service (adjusted for Gallagher, approx. 42 mills now)
- Limits developer cost reimbursements & interest rates for developer obligations
- Minimizes development fees/assessments
- Fees and cost reimbursement for Town review
- Transparency requirements for meetings, elections, notices
- Prohibits use of eminent domain
- Favors formation for mixed use, commercial and industrial developments, higher priced subdivisions and amenity driven developments.

Windsor: Current Trends

- Traditional developer financing
- Metro Districts serving HOA functions
  - Tax advantages for property owners have changed
- Metro District created water enterprise to deliver water to all the areas served within the metro district (Poudre Tech)
- Outsourcing legal, accounting, and financial functions

Windsor: Oil & Gas

- Raindance will have 100+ producing wells
- Benefits:
  - Developing a $10 million recreation center paid for by oil and gas revenues from ad valorem tax
  - 45-50 acres devoted to farm land and open space.
- Developer claimed services would not be possible without oil and gas development

Municipal Oversight: Policy Questions

- Service plans and IGAs; regulations

Mill levy term & caps	Debt controls: max; fairness/interest rates
Expense limits	Enhanced public benefit
Minimum size/value	Early end user/resident control
Transparency	Sanctions/enforcement mechanisms
Reimbursement limits	Social policy

- Annual reports (potentially expanded)
- Annual fees & review fees
- Statutory remedies
- Litigation
  - Material departures from service plans/modifications
  - Breach of IGA terms
  - Application of municipal laws and standards

MUNICIPAL DUTY TO INDEMNIFY: OBLIGATIONS AND LIMITATIONS

COLORADO MUNICIPAL LEAGUE
ANNUAL CONFERENCE

JUNE 21, 2019

Nancy Rogers, Deputy City Attorney
City of Aurora
15151 E. Alameda Parkway, 5th Floor
303-739-6014
nrodgers@auroragov.org

Steven J. Dawes
The Law Office of Steven J. Dawes, LLC
100 Fillmore Street, Suite 500
Denver, CO 80206
303-720-7541
steve@sdaweslaw.com

Sophia H. Tsai
Morgan Rider Riter Tsai, P.C.
1512 Larimer Street, Suite 450
Denver, CO 80202
303-623-1832
stsai@morganrider.com

Table of Contents:

I. COLORADO LAW PROVIDING FOR DEFENSE AND INDEMNIFICATION[1]

A. COLORADO GOVERNMENTAL IMMUNITY ACT (CGIA)

24-10-110. Defense of public employees - payment of judgments or settlements against public employees.

(1) A public entity shall be liable for:

(a) The costs of the defense of any of its public employees, whether such defense is assumed by the public entity or handled by the legal staff of the public entity or by other counsel, in the discretion of the public entity, where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton;

(b) (I) The payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton or where sovereign immunity bars the action against the public entity, if the employee does not compromise or settle the claim without the consent of the public entity; and

(II) The payment of all judgments and settlements of claims against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his or her duties and within the scope of employment, except where such act or omission is willful and wanton, even though sovereign immunity would otherwise bar the action, when the public employee is operating an emergency vehicle within the provisions of section 42-4-108 (2) and (3), C.R.S., if the employee does not compromise or settle the claim without the consent of the public entity.

(1.5) Where a claim against a public employee arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, the public entity shall be liable for the reasonable costs of the defense and reasonable attorney fees of its public employee unless:

(a) It is determined by a court that the injuries did not arise out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment or that the act or omission of such employee was willful and wanton. If it is so determined, the public entity may request and the court shall order such employee to reimburse the public entity for reasonable costs and reasonable attorney fees incurred in the defense of such employee; or

(b) The public employee compromises or settles the claim without the consent of the public entity.

(2) The provisions of subsection (1) of this section shall not apply where a public entity is not made a party defendant in an action and such public entity is not notified of the existence of such action in writing by the plaintiff or such employee within fifteen days after commencement of the

action. In addition, the provisions of subsection (1) of this section shall not apply where such employee willfully and knowingly fails to notify the public entity of the incident or occurrence which led to the claim within a reasonable time after such incident or occurrence, if such incident or occurrence could reasonably have been expected to lead to a claim.

(3) Repealed.

(4) Where the public entity is made a codefendant with its public employee, it shall notify such employee in writing within fifteen days after the commencement of such action whether it will assume the defense of such employee. Where the public entity is not made a codefendant, it shall notify such employee whether it will assume such defense within fifteen days after receiving written notice from the public employee of the existence of such action.

(5) (a) In any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint.

(b) Failure to plead the factual basis of an allegation that an act or omission of a public employee was willful and wanton shall result in dismissal of the claim for failure to state a claim upon which relief can be granted.

(c) In any action against a public employee in which exemplary damages are sought based on allegations that an act or omission of a public employee was willful and wanton, if the plaintiff does not substantially prevail on his claim that such act or omission was willful and wanton, the court shall award attorney fees against the plaintiff or the plaintiff's attorney or both and in favor of the public employee.

(6) The provisions of subsection (5) of this section are in addition to and not in lieu of the provisions of article 17 of title 13, C.R.S.

24-10-113. Payment of judgments.

(1) A public entity or designated insurer shall pay any compromise, settlement, or final judgment in the manner provided in this section, and an action pursuant to the Colorado rules of civil procedure shall be an appropriate remedy to compel a public entity to perform an act required under this section.

(2) The state and the governing body of any other public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment out of any funds to the credit of the public entity that are available from any or all of the following:

(a) A self-insurance reserve fund;

(b) Funds that are unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes;

(c) Funds that are appropriated for the current fiscal year for the payment of such judgments and not previously encumbered.

(3) If a public entity is unable to pay a judgment during the fiscal year in which it becomes final because of lack of available funds, the public entity shall levy a tax, in a separate item to cover such judgment, sufficient to discharge such judgment in the next fiscal year or in the succeeding fiscal year if the budget of the public entity has been finally adopted for the fiscal year in which

the judgment becomes final before such judgment becomes final; but in no event shall such annual levy for one or more judgments exceed a total of ten mills, exclusive of existing mill levies. The public entity shall continue to levy such tax, not to exceed a total annual levy of ten mills, exclusive of existing mill levies, but in no event less than ten mills if such judgment will not be discharged by a lesser levy, until such judgment is discharged. In the event that more than one judgment is unsatisfied and a ten-mill levy is insufficient to satisfy the judgments in one year, the proceeds of the ten-mill levy shall be prorated annually among the judgment creditors in the proportion that each outstanding judgment bears to the total judgments outstanding.

24-10-114. Limitations on judgments - recommendation to general assembly - authorization of additional payment - lower north fork wildfire claims.

(1) (a) The maximum amount that may be recovered under this article in any single occurrence, whether from one or more public entities and public employees, shall be:

(I) For any injury to one person in any single occurrence, the sum of three hundred fifty thousand dollars;

(II) For an injury to two or more persons in any single occurrence, the sum of nine hundred ninety thousand dollars; except that, in such instance, no person may recover in excess of three hundred fifty thousand dollars.

(b) The amounts specified in subsection (1)(a) of this section shall be adjusted by an amount reflecting the percentage change over a four-year period in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Aurora-Lakewood for all items and all urban consumers, or its applicable predecessor or successor index. On or before January 1, 2018, and by January 1 every fourth year thereafter, the secretary of state shall calculate the adjusted dollar amount for the immediately preceding four-year period as of the date of the calculation. The adjusted amount shall be rounded upward to the nearest one-thousand-dollar increment. The secretary of state shall certify the amount of the adjustment for the particular four-year period and shall publish the amount of the adjustment on the secretary of state's website.

(1.5) For purposes of subsection (1) of this section, an assignment or subrogation to recover damages paid or payable for an injury shall not be deemed to be a separate occurrence.

(2) The governing body of a public entity, by resolution, may increase any maximum amount set out in subsection (1) of this section that may be recovered from the public entity for the type of injury described in the resolution. The amount of the recovery that may be had shall not exceed the amount set out in such resolution for the type of injury described therein. Any such increase may be reduced, increased, or repealed by the governing body by resolution. A resolution adopted pursuant to this subsection (2) shall apply only to injuries occurring subsequent to the adoption of such resolution.

(3) Nothing in this section shall be construed to permit the recovery of damages for types of actions authorized under part 2 of article 21 of title 13, C.R.S., in an amount in excess of the amounts specified in said article.

(4) (a) A public entity shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct, except as otherwise determined by a public entity pursuant to section 24-10-118 (5).

(b) A railroad operating in interstate commerce that sells to a public entity, or allows the public entity to use, such railroad's property or tracks for the provision of public passenger rail service shall not be liable either directly or by indemnification for punitive or exemplary damages or for damages for outrageous conduct to any person for any accident or injury arising out of the operation and maintenance of the public passenger rail service by a public entity.

(5) Notwithstanding the maximum amounts that may be recovered from a public entity set forth in subsection (1) of this section, an amount may be recovered from the state under this article in excess of the maximum amounts only if paragraph (a) or (b) of this subsection (5) applies:

(a) The general assembly acting by bill authorizes payment of all or a portion of any judgment against the state that exceeds the maximum amount. Any claimant may present either proof of judgment or an order of a district court granting a claimant's request for entry of judgment in the amount of an award of damages recommended by a special master or a comparable order to the general assembly and request payment of that portion of the judgment or order that exceeds the maximum amount. Any such judgment or order approved for payment by the general assembly shall be paid from the general fund.

(b)

(I) Except as otherwise provided in subparagraphs (II) and (III) of this paragraph (b), the state claims board created in section 24-30-1508 (1), referred to in this paragraph (b) as the board, acting in accordance with its authority under section 24-30-1515, compromises or settles a claim on behalf of the state for the maximum liability limits under this article and determines, in its sole discretion, to recommend to the general assembly that an additional payment be made and the general assembly, by bill, authorizes all or any portion of the additional payment. In determining whether to make such recommendation, the board shall consider interests of fairness, the public interest, and the interests of the state. A recommendation made under this paragraph (b) shall not include payment for noneconomic loss or injury and shall be reduced to the extent the claimant's loss is or will be covered by another source, including, without limitation, any insurance proceeds that have been paid or will be paid, and no insurer has a right of subrogation, assignment, or any other right against the claimant or the state for any additional payment or any portion of such payment that is approved by the general assembly. Any additional payment or any portion of such payment approved by the general assembly shall be paid from the general fund. For purposes of this paragraph (b), an "additional payment" means the payment to a claimant in excess of the maximum liability limits pursuant to this paragraph (b) that may be authorized by the general assembly upon a recommendation from the board.

(II) In connection with a recommendation made by the board under subparagraph (I) of this paragraph (b) to make an additional payment to one or more claimants resulting from a claim of an injury arising out of the lower north fork wildfire in March 2012 that is received by the general assembly while the general assembly is adjourned sine die, upon certification from the department of law that the requirements of this paragraph (b) have been satisfied and on or after July 1, 2013, the office of the state controller may pay one or more additional payments to such claimants from moneys previously appropriated by bill until such specifically appropriated moneys are exhausted or replenished.

(III) In connection with any claim arising out of an injury occurring on or after May 25, 2013, that is not described in subparagraph (II) of this paragraph (b), where the board has made a recommendation to the general assembly for an additional payment under this paragraph (b) while the general assembly is adjourned sine die, the payment is authorized where all of the members of the joint budget committee have voted to authorize the additional payment; except that payment in accordance with the recommendation shall not be made until the general assembly has ratified by bill the authorization to make the payment.

24-10-115. Authority for public entities other than the state to obtain insurance.

(1) A public entity, other than the state, either by itself or in conjunction with any one or more public entities may:

(a) Insure against all or any part of its liability for an injury for which it might be liable under this article;

(b) Insure any public employee acting within the scope of his employment against all or any part of such liability for an injury for which he might be liable under this article;

(c) Insure against the expense of defending a claim for injury against the public entity or its employees, whether or not liability exists on such claim;

(d) Insure against all or part of its liability or the liability of a railroad for claims arising from the passenger rail operations of a public entity on property or tracks owned by, or purchased from, a railroad.

(2) The insurance authorized by subsection (1) of this section may be provided by:

(a) Self-insurance, which may be funded by appropriations to establish or maintain reserves for self-insurance purposes;

(b) An insurance company authorized to do business in this state which meets all of the requirements of the division of insurance for that purpose;

(c) A combination of the methods of obtaining insurance authorized in paragraphs (a) and (b) of this subsection (2);

(d) Any risk management pool of public passenger rail services authorized to be created pursuant to the federal "Product Liability Risk Retention Act of 1981", 15 U.S.C. sec. 3901 et seq., as amended.

(3) A public entity, other than the state and other than a school district, may establish and maintain an insurance reserve fund for self-insurance purposes and may include in the annual tax levy of the public entity such amounts as are determined by its governing body to be necessary for the uses and purposes of the insurance reserve fund, subject to the limitations imposed by section 29-1-301, C.R.S., or such public entity may appropriate from any unexpended balance in the general fund such amounts as the governing body shall deem necessary for the purposes and uses of the insurance reserve fund, or both. A school district shall establish and maintain an insurance reserve fund in accordance with the provisions of section 22-45-103 (1)(e), C.R.S., for liability and property damage self-insurance purposes, including workers' compensation pursuant to section 8-44-204 (2), C.R.S., using moneys allocated thereto pursuant to the provisions of section 22-54-105 (2), C.R.S. The fund established pursuant to this subsection (3) shall be kept separate and apart from all other funds and shall be used only for the payment of administrative and legal expenses

necessary for the operation of the fund and for the payment of claims against the public entity which have been settled or compromised or judgments rendered against the public entity for injury under the provisions of this article and for attorney fees and for the costs of defense of claims and to secure and pay for premiums on insurance as provided in this article.

(4) Policies written pursuant to this section and section 24-10-116 shall insure all of the risks and liabilities arising under this article, including costs of defense, unless the public entity requests in writing and obtains lesser coverage, in which event the policy issued shall conspicuously itemize the risks and liabilities not covered.

(5) A self-insurance fund established by a public entity which is subject to section 29-1-108, C.R.S., shall not be construed to be unexpended funds for budgetary purposes and shall be accumulated and held over for use in subsequent years.

(6) Repealed.

(7) Policies written, self-insurance funds established, or risk management pools entered into by a public entity for the purpose of insuring a public entity as described in paragraph (d) of subsection (1) of this section shall maintain such levels of insurance as are sufficient to insure against the maximum liability permitted against a railroad or its indemnitor pursuant to 49 U.S.C. sec. 28103.

24-10-115.5. Authority for public entities to pool insurance coverage.

(1) Public entities may cooperate with one another to form a self-insurance pool to provide all or part of the insurance coverage authorized by this article or by section 29-5-111, C.R.S., for the cooperating public entities. Any such self-insurance pool may provide such coverage by the methods authorized in sections 24-10-115 (2) and 24-10-116 (2), by any different methods if approved by the commissioner of insurance, or by any combination thereof. Any such insurance pool shall be formed pursuant to the provisions of part 2 of article 1 of title 29, C.R.S. The provisions of articles 10.5 and 47 of title 11, C.R.S., shall apply to moneys of such self-insurance pool.

(2) Any self-insurance pool authorized by subsection (1) of this section shall not be construed to be an insurance company nor otherwise subject to the laws of this state regulating insurance or insurance companies; except that the pool shall comply with the applicable provisions of sections 10-1-203 and 10-1-204 (1) to (5).

(3) Prior to the formation of a self-insurance pool, there shall be submitted to the commissioner of insurance a complete written proposal of the pool's operation, including, but not limited to, the administration, claims adjusting, membership, and capitalization of the pool. The commissioner shall review the proposal within thirty days after receipt to assure that proper insurance techniques and procedures are included in the proposal. After such review, the commissioner shall have the right to approve or disapprove the proposal. If the commissioner approves the proposal, he shall issue a certificate of authority. The costs of such review shall be paid by the public entities desiring to form such a pool. Any such payment received by the commissioner is hereby appropriated to the division of insurance in addition to any other funds appropriated for its normal operation.

(4) Each self-insurance pool for public entities created in this state shall file, with the commissioner of insurance on or before March 30 of each year, a written report in a form prescribed by the commissioner, signed and verified by its chief executive officer as to its condition. Such report shall include a detailed statement of assets and liabilities, the amount and character of the business transacted, and the moneys reserved and expended during the year.

(5) The commissioner of insurance, or any person authorized by him, shall conduct an insurance examination at least once a year to determine that proper underwriting techniques and sound funding, loss reserves, and claims procedures are being followed. This examination shall be paid for by the self-insurance pool out of its funds at the same rate as provided for foreign insurance companies under section 10-1-204 (9), C.R.S.

(6) (a) The certificate of authority issued to a public entity under this section may be revoked or suspended by the commissioner of insurance for any of the following reasons:

(I) Insolvency or impairment;

(II) Refusal or failure to submit an annual report as required by subsection (4) of this section;

(III) Failure to comply with the provisions of its own ordinances, resolutions, contracts, or other conditions relating to the self-insurance pool;

(IV) Failure to submit to examination or any legal obligation relative thereto;

(V) Refusal to pay the cost of examination as required by subsection (5) of this section;

(VI) Use of methods which, although not otherwise specifically proscribed by law, nevertheless render the operation of the self-insurance pool hazardous, or its condition unsound, to the public;

(VII) Failure to otherwise comply with the law of this state, if such failure renders the operation of the self-insurance pool hazardous to the public.

(b) If the commissioner of insurance finds upon examination, hearing, or other evidence that any participating public entity has committed any of the acts specified in paragraph (a) of this subsection (6) or any act otherwise prohibited in this section, the commissioner may suspend or revoke such certificate of authority if he deems it in the best interest of the public. Notice of any revocation shall be published in one or more daily newspapers in Denver which have a general state circulation. Before suspending or revoking any certificate of authority of a public entity, the commissioner shall grant the public entity fifteen days in which to show cause why such action should not be taken.

(7) Any public entity pool formed under this article and under article 13 of title 29, C.R.S., and the members thereof, may combine and commingle all funds appropriated by the members and received by the pool for liability or property insurance or self-insurance or for other purposes of the pool.

(8) (a) Any self-insurance pool organized pursuant to this section may invest in securities meeting the investment requirements established in part 6 of article 75 of this title and may also

invest in membership claim deductibles and in any other security or other investment authorized for such pools by the commissioner of insurance.

(b) Any public entity which is a member of a self-insurance pool which is organized pursuant to this section or any instrumentality formed by two or more of such members may invest in subordinated debentures issued by such self-insurance pool.

(9) In addition to liability coverage pursuant to subsection (1) of this section and property coverage pursuant to section 29-13-102, C.R.S., a self-insurance pool authorized by subsection (1) of this section may provide workers' compensation coverage pursuant to section 8-44-204, C.R.S., and firefighter heart and circulatory malfunction benefits pursuant to section 29-5-302, C.R.S.

24-10-118. Actions against public employees - requirements and limitations.

(1) Any action against a public employee, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant and which arises out of injuries sustained from an act or omission of such employee which occurred or is alleged in the complaint to have occurred during the performance of his duties and within the scope of his employment, unless the act or omission causing such injury was willful and wanton, shall be subject to the following requirements and limitations, regardless of whether or not such action against a public employee is one for which the public entity might be liable for costs of defense, attorney fees, or payment of judgment or settlement under section 24-10-110:

(a) Compliance with the provisions of section 24-10-109, in the forms and within the times provided by section 24-10-109, shall be a jurisdictional prerequisite to any such action against a public employee, and shall be required whether or not the injury sustained is alleged in the complaint to have occurred as the result of the willful and wanton act of such employee, and failure of compliance shall forever bar any such action against a public employee. Any such action against a public employee shall be commenced within the time period provided for that type of action in articles 80 and 81 of title 13, C.R.S., relating to limitation of actions, or it shall be forever barred.

(b) The maximum amounts that may be recovered in any such action against a public employee shall be as provided in section 24-10-114 (1), (2), and (3).

(c) A public employee shall not be liable for punitive or exemplary damages arising out of an act or omission occurring during the performance of his duties and within the scope of his employment, unless such act or omission was willful and wanton.

(d) The fact that a plaintiff sues both a public entity and a public employee shall not be deemed to increase any of the maximum amounts that may be recovered in any such action as provided in this section or in section 24-10-114.

(2) (a) A public employee shall be immune from liability in any claim for injury, whether brought pursuant to this article, section 29-5-111, C.R.S., the common law, or otherwise, which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant and which arises out of an act or omission of such employee occurring during the performance of his duties and within the scope of his employment unless the act or omission causing such injury was willful and wanton; except that no such immunity may be asserted in an action for injuries resulting from the circumstances specified in section 24-10-106 (1).

(b) Any member of any state board, commission, or other advisory body appointed pursuant to statute, executive order, or otherwise, and any other person acting as a consultant or witness before any such body, shall be immune from liability in any civil action brought against said person for acts occurring while the person was acting as such a member, consultant, or witness, if such person was acting in good faith within the scope of such person's respective capacity, makes a reasonable effort to obtain the facts of the matter as to which action was taken, and acts in the reasonable belief that the action taken by such person was warranted by the facts.

(2.5) If a public employee raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery; except that any discovery necessary to decide the issue of sovereign immunity shall be allowed to proceed, and the court shall decide such issue on motion. The court's decision on such motion shall be a final judgment and shall be subject to interlocutory appeal.

(3) Nothing in this section shall be construed to allow any action which lies in tort or could lie in tort regardless of whether that may be the type of action or the form or relief chosen by a claimant to be brought against a public employee except in compliance with the requirements of this article.

(4) The immunities provided for in this article shall be in addition to any common-law immunity applicable to a public employee.

(5) Notwithstanding any provision of this article to the contrary, a public entity may, if it determines by resolution adopted at an open public meeting by the governing body of the public entity that it is in the public interest to do so, defend a public employee against a claim for punitive damages or pay or settle any punitive damage claim against a public employee.

24-10-119. Applicability of article to claims under federal law. The provisions of this article shall apply to any action against a public entity or a public employee in any court of this state having jurisdiction over any claim brought pursuant to any federal law, if such action lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by the claimant

B. DO THE DEFENSE AND INDEMNIFICATION OBLIGATIONS OF THE CGIA APPLY TO FEDERAL CLAIMS?

See Robbins v. Jefferson County School Dist. R-1, 186 F.3d 1253 (10th Cir. 1999):[2]

> We first note that § 24-10-119 simply makes clear that the Colorado Governmental Immunity Act…also applies to federal claims brought in state courts."[3]…Nothing in *Griess*[4] or § 24-10-119 indicates that a federal court cannot apply the attorney fee provision, § 24-10-110(5)(c), to state claims over which the federal court exercises supplemental jurisdiction.[5] Tenth Circuit case law acknowledges that federal courts may apply the CGIA to state claims not barred by the Eleventh Amendment.[6]

See Haynes v. City of Gunnison, 214 F. Supp. 2d 1119, 1120 (2002): C.R.S. § 24-10-110(5)(c) applies only to claims made under state law against public employees in which exemplary damages are sought based on allegations that the public employee acted willfully or wantonly, citing *Cherry Creek Aviation, Inc. v. City of Steamboat Springs*, 969 P.2d 812, 814 (Colo. App. 1998), (holding that the statute is not applicable to federal civil rights claims). A defendant may not rely on the statute to recover attorney fees incurred in defending a § 1983 action. Fees cannot be awarded under Colorado law for work performed defending the overlapping § 1983 claims. *Id*. at 1122.

See also Carani v. Meisner, D. Colo. 2011, (not reported in F. Supp. 2d), 2011 WL 1221748: C.R.S. § 24-10-110(5)(c) applies to all state-law claims, regardless of whether they are brought in state court or federal court; however, attorney fees are not automatically awarded under this statute for claims brought under federal law. The award of attorney fees for unsuccessful federal civil rights claims is governed by 42 U.S.C. § 1988.

C. LIABILITY OF PEACE OFFICERS STATUTE

29-5-111. Liability of peace officers.

(1) Notwithstanding the doctrines of sovereign immunity and respondeat superior, a city, town, county, or city and county or other political subdivision of the state or a state institution of higher education employing peace officers in accordance with article 7.5 of title 24, C.R.S., shall indemnify its paid peace officers and reserve officers, as defined in section 16-2.5-110, C.R.S., while the peace officers and reserve officers are on duty for any liability incurred by them and for any judgment, except a judgment for exemplary damages, entered against them for torts committed within the scope of their employment if the person claiming damages serves the political subdivision or state institution of higher education with a copy of the summons within ten days from the date when a copy of the summons is served on the peace officer or reserve officer. In no event shall any political subdivision or state institution of higher education be required so to indemnify its peace officers in excess of one hundred thousand dollars for one person in any single occurrence or three hundred thousand dollars for two or more persons for any single occurrence; except that in such instance no indemnity shall be allowed for any person in excess of one hundred thousand dollars. It is the duty of the city, town, county, city and county, or other political subdivision and of the state institution of higher education to provide the defense handled by the

legal staff of the public entity or by other counsel, in the discretion of the public entity, for the peace officer in the claim or civil action. However, in the event that the court determines that a reserve officer, as defined in section 16-2.5-110, C.R.S., incurred the liability while acting outside the scope of his or her assigned duties or that the reserve officer acted in a willful and wanton manner in incurring the liability, the court shall order the reserve officer to reimburse the political subdivision or the state institution of higher education for reasonable costs and reasonable attorney fees expended for the defense of the reserve officer. With the approval of the governing body of the city, town, county, city and county, or other political subdivision or of the state institution of higher education, the claim or civil action may be settled or compromised. A city, town, county, city and county, or other political subdivision or a state institution of higher education may carry liability insurance to insure itself and its peace officers. If the political subdivision or state institution of higher education purchases insurance that provides substantial coverage for the peace officers with a policy limitation of at least one hundred thousand dollars for one person in any single occurrence and three hundred thousand dollars for two or more persons for any single occurrence, except that in such instance no indemnity shall be allowed for any person in excess of one hundred thousand dollars, then the political subdivision or state institution of higher education shall be liable under this section to indemnify the peace officers only to the extent of the limits and for such torts as are covered by the policy and only to the extent of the coverage of the policy. Nothing in this section shall be deemed to condone the conduct of any peace officer who uses excessive force or who violates the statutory or constitutional rights of any person.

(2) This section shall apply only with respect to causes of action accruing on or after July 1, 1972.

II. INSURANCE CONTRACTS PROVIDING FOR DEFENSE AND INDEMNIFICATION FROM STATE AND FEDERAL TORTS

A. CASE LAW

When determining whether coverage exists under an insurance contract, a court looks to the factual allegations in the complaint. *Hecla Mining Co. v. New Hampshire Ins. Co*., 811 P.2d 1083 (Colo. 1991). If the factual allegations in the underlying complaint reveal a situation that is entirely within the exclusions of the policy, the insurer has no duty to provide coverage for the claim. *Colo. Farm Bureau Mut. Ins. Co. v. Snowbarger*, 934 P.2d 909 (Colo. App. 1997), citing *Allstate Ins. Co. v. Juniel*, 931 P.2d 511 (Colo. App. 1996).

However, an insurer's duty to defend arises when the underlying complaint alleges any facts that might fall within the Policy's coverage. *See Hecla, supra*. When determining the rights and obligations that exist under an insurance policy, courts apply principles of contract interpretation and attempt to carry out the parties' reasonable expectations when the policy was issued. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co*., 90 P.3d 814 (Colo. 2004).

B. INSURANCE – COVERAGE DETERMINED BY THE EXPRESS PROVISIONS OF THE INSURANCE CONTRACT

KEY CONSIDERATIONS

1. Coverage for conduct of municipal employee/representative/official while in the performance of duties and within the scope of employment by the municipality.

2. Coverage for State and Federal Torts.

3. Common Exclusions
   - Willful and Wanton Conduct.
   - Punitive/Exemplary Damages.
   - Breach of Contract.
   - Expected or Intended Injury.
   - Professional Liability from Legal Staff.
   - Criminal Conduct.
   - Condemnation, including inverse condemnation, eminent domain, taking of property rights without just compensation, impairment of vested rights.
   - Non-monetary Claims for injunctive relief, declaratory judgments.
   - Government Fines or Penalties.

4. Rule 106(a)(4) Claims – CIRSA $10,000 Sublimit.

5. Defense under a reservation of rights.

6. Indemnification Coverage Limits.

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[1] Distinguish official liability from individual liability.
[2] Federal district court did not err in awarding attorney fees under § 24-10-110(5)(c) due to the plaintiff's failure to substantially prevail on her state exemplary damages claim.
[3] *Id.* at 1260.
[4] *Griess v. Colorado*, 841 F.2d 1042 (10th Cir. 1988).
[5] *Id.*
[6] *Id.* at 1261.