

PUBLIC OFFICIAL LIABILITY – A PRIMER

Effective Governance: Resources & Skills for Elected Officials
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Overview

- Sources of liability
- Governmental immunity
- Public official insurance
- Suggestions for avoiding liability
- Top ten ways to get sued

Sources of Liability

- State law claims
 - Torts
 - Contracts
 - Injunctive, declaratory & other relief
 - Certiorari review of quasi-judicial decisions
- State law - primary path for claims against the city or town for personal injury/property damage/non-compliance with law/reversal of an allegedly arbitrary decision

Sources of Liability

- Federal law claims
 - Constitutional violations
 - Due process, equal protection, etc.
 - Takings
 - Other first amendment claims
 - Employment practices claims
 - Discrimination, ADA, FMLA, ADEA
- Federal law – primary path for civil rights claims against municipal officials & employees

State Claims and the CGIA

- State tort claims are governed by the Colorado Governmental Immunity Act (CGIA)
- CGIA provides immunity from suit unless immunity is waived, which it is for certain claims, such as claims from a “dangerous condition” of a public building, street or other facilities; and claims arising from the “operation and maintenance” of water, sewer and other facilities (handout)
- Waiver of immunity ≠ liability. Immunity is a bar to suit, but if immunity is waived, liability must still be proven
- The CGIA sets liability limits of \$350,000/\$990,000. CGIA limits do not apply to claims under federal law

CGIA & public officials

- Under the CGIA:
 - You as an elected official have protection from personal liability against state tort claims, provided you are acting “within the scope of employment” and not acting “willfully and wantonly”
 - Concept of “scope of employment” applies to all persons covered by the CGIA, so everyone needs to know and abide by their “job description”
 - “Willful and wanton” conduct will result in a loss of governmental immunity. One statute defines it as “conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others.”

Federal civil rights claims against public officials

- Under federal law, the rules are different. CGIA doesn't apply and the primary path is often 42 U.S.C. Section 1983; it states:

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

- Liability attaches if there is (1) action under color of law that (2) violates a constitutional or other federally protected right.
- Actions of government entities and public officials in the course of their responsibilities will be considered actions "under color of law."

Federal civil rights claims against public officials

- Related federal law risks
 - For liability under Section 1983, there is no monetary limit on the damages a plaintiff can win
 - Additionally, a plaintiff who "substantially prevails" in a Section 1983 claim will be entitled to an award of attorney's fees (which can far exceed any damages award)
 - Given these risks, and the requirements of the due process clause, it is critical that you as elected officials commit to fair process in everything you do, especially in quasi-judicial hearings. Failure to provide due process is a constitutional violation that can be enforced by Section 1983 and all of the remedies available under federal law

Immunities against liability

- Per the CGIA, officials have immunity against state tort claims if acting within scope of duties and not willfully and wantonly. To maintain CGIA protections, including rights to a defense and to having a judgment against you paid:
 - Do not withhold information about potential claims- CGIA requires you give timely notice of problems
 - Timely notify the manager/attorney if you are sued or get a notice of claim
 - Don't compromise or settle a claim or suit without consent
 - Don't make a bad situation worse

Immunities against liability

- Under federal law
 - Public officials enjoy *absolute immunity* for certain functions. For example, a councilmember enjoys legislative immunity for legislative acts, but only legislative acts (and not all acts are legislative)
 - And, public officials enjoy *qualified immunity* against federal liability. This doctrine essentially provides that a public official is protected from liability if the official has a reasonable, good faith belief in the legality of the act that deprived the plaintiff of a federal right. This is an objective test and does not apply if there is law in place clearly putting the official on notice that his/her conduct was wrongful
 - In all situations, ask not "Am I immune?" but rather "How do we do it right?"

Immunities against liability

Two side notes:

- Capacity: a lawsuit naming a government official in his or her **official capacity is redundant** of suing the governmental entity itself. However, a lawsuit naming a governmental official in his or her **individual capacity** is an effort to hold him or her personally liable.
- Qualified immunity is a protection for the individual; it does not apply to suits against public officials in their official capacities.

Public official insurance

- Public official liability policies (or self-insurance, or a combination) will provide for your defense and pay judgments where required
- But, these policies follow the "course and scope" and "willful and wanton" concepts. That is, most extend coverage to elected and appointed officials "in their capacity as such" (or similar) and have provisions excluding coverage where liability is based on willful and wanton conduct, fraud, ill-gotten gain or malicious acts
- Insurers must look to the allegations to assess coverage. If allegations are of willful and wanton or other bad conduct, the insurer may not cover, or cover under a reservation of rights
- PEL policies do not insure against punitive damages

Suggestions for avoiding liability
One: Recognize your role

- As an elected official, your role/relationship changes
 - You are now an official, an insider, a representative, and not merely a citizen, an outsider, or a critic or proponent of one issue
 - You also took oath to uphold the constitution, laws, and ordinances, and in so doing you committed to:
 - Follow proper procedures
 - Follow and properly apply ordinances and other rules
 - Failure to live up to that commitment will expose you to liability
 - You also committed to a particular role
 - Generally, policy maker (legislator) and in certain areas “quasi-judge”

Suggestions for avoiding liability
One: Recognize your role

- Council/board members act as part of a body
- If you find yourself thinking in terms of “I” rather than “we” ...that’s a red flag
- You exercise your responsibilities mainly by VOTING as part of the BODY in a PUBLIC MEETING. Therefore, it follows that your best legal protection is available when:
 - You act as a group in a proper manner
 - You act in the proper setting
- When you find yourself doing *anything* other than that ... make sure you are properly authorized

Suggestions for avoiding liability
Two: Avoid “off-script” conduct

- Don’t subscribe to any “parallel process” prior to making a decision, particularly on quasi-judicial matters
- Be cautious once you’ve voted on a matter. Irrespective of the outcome, don’t undermine the decision or seek to change it except through proper channels. Recognize that some decisions cannot be undone without liability
- Don’t be pressured into making unsupported decisions, or into making decisions based on citizen or political pressure, or out of personal motives or bias

Suggestions for avoiding liability
Three: Run a good meeting

- Understand the difference between legislative and quasi-judicial matters, and observe the different requirements applicable to each
- In a quasi-judicial hearing, an array of special procedural requirements apply and violation of those requirements is a violation of due process

Suggestions for avoiding liability
Three: Run a good meeting

- A legislative action reflects general public policy, is usually prospective, usually affects a large group, and affects the legal rights of specific individuals only in the abstract
 - Think: “Acting Like a Legislator.”
- By contrast, a “quasi-judicial” action determines the rights, duties or obligations of a specific person or entity. It’s a decision based on facts developed at a hearing to resolve the particular interests in question. It is usually where the general rules are applied to a particular person or property.
 - Think: “Acting Like a Judge.”

Suggestions for avoiding liability
Three: Run a good meeting

- For liability purposes, under both state and federal law, having a good process is just as important as the substance of the decisions you reach. Particularly with regard to quasi-judicial proceedings:
 - **IF** the hearing has been carried out properly, and **IF** the decision has been issued based on facts in the record and application of proper legal criteria, then in all likelihood
 - The decision will be upheld; and
 - Other recourse (such as a claim of a constitutional violation) will likely be unavailable or unsuccessful

BECAUSE OF THE PROPERTY INTERESTS INVOLVED, THERE IS A HEIGHTENED RISK AND STANDARD OF REVIEW FOR QUASI-JUDICIAL ACTIONS AS TO PROCESS:

FROM A LIABILITY AND JUDICIAL REVIEW POINT OF VIEW, WHAT YOU DECIDE IS NOT AS IMPORTANT AS HOW YOU ARRIVE AT YOUR DECISION

- **Process/How you decide:**
 - Unsupported and legally reversible decisions are almost always based on a lack of due process or procedural irregularities with an applicant or opponent
- **Substance/What you decide:**
 - The basis or “logic” of a decision is afforded great deference under Colorado law, where the standard of review, generally speaking is whether there was any competent evidence in the record to support your decision

Suggestions for avoiding liability
Three: Run a good meeting

To reduce liability on land use and other quasi-judicial decisions:

- Avoid ex-parte (outside the hearing) contacts; disclose unavoidable ex parte contacts
- Avoid inappropriate confrontations or inquisitions
- Take time (and ink) to decide - consider making a preliminary decision and directing staff to prepare a draft resolution, with conclusions of law and factual findings, for further consideration at your next meeting
- Don't sign any "pro" or "con" petitions
- Don't make up your mind before the hearing (bias)
- Ask for advice on criteria, or on application of criteria to facts

Suggestions for avoiding liability
Three: Run a good meeting

To reduce liability on land use and other quasi-judicial decisions:

- Stick to your criteria – have a criteria worksheet available
- Don't make your decision on the basis of irrelevant criteria
- Don't make your decision based on things you “know” but did not “learn” at the hearing
- Don't participate if you weren't there for the whole hearing (or at least listened to the tape of any portion you missed)
- Don't participate if you have a conflict of interest...and know an appearance of impropriety can be just as damaging

Suggestions for avoiding liability
Four: Reduce involvement in administrative matters

- If you have a manager/administrator form of government, you have likely delegated administrative matters to that person; therefore:
 - In these areas, individual elected officials should avoid becoming “hands on” because it is not part of the job description
- Inappropriate involvement in administrative matters by elected or other officials without authority, collectively or individually, can:
 - Undermine the chosen form of government
 - Undermine staff, morale and/or your standing as a group
 - Waste resources
 - Be a backwards step in municipal government evolution
 - Increase the risk of liability for yourself

Suggestions for avoiding liability
Four: Reduce involvement in administrative matters

- For liability risks, such involvement can:
 - Become fodder for “quasi-contract” claims based on something an official may have said
 - Support claims that policies/procedures don't apply or aren't being followed
 - Heighten risks, particularly for employment claims, that decisions are being made through improper channels
 - Increase the risk of potential personal liability for actions outside the scope of duties
 - Impair the defense of a claim and heighten the risk of conflicts among defendants, particularly if it is belatedly discovered that numerous individuals may have played different, conflicting and/or unauthorized roles in a matter

Suggestions for avoiding liability
Five: Use your power wisely and humanly

- As a municipal official, you now have a leadership role on behalf of your community
- Irrespective of the myriad of laws, rules and theories of liability and how they can be argued, applied or interpreted, the risk of lawsuits and liability is perhaps reduced the most by:
 - Openness;
 - Fairness;
 - Predictability; and
 - Mutuality of Respect

**Suggestions for avoiding liability
Five: Use your power wisely and humanly**

- As its leaders, you set the tone for your city/town. If the tone you set is demeaning, discriminatory, etc., you are setting up potential liability
- Understand you are perceived as holding one of the most powerful positions in city/town
- Use courtesy, tact, and diplomacy in interactions, especially in public settings. Avoid acting in a reactive, explosive or off-the-cuff manner
- Remember that while you may be familiar with one another and your own rules and ways of doing business, each meeting, public hearing, action, etc. is new and unique
- Give every act you take as an official the attention it deserves

Top ten ways for an elected official to get sued

10. **Don't tell the applicant what the rules are.**
9. **In quasi-judicial proceedings, engage in ex parte communications.**
8. **Refuse to consider your own codes, ordinances or regulations.** (Woodwind Estates, Ltd. v. W.J. Gretkowski, 205 F.3d 118 (3rd Cir. 2000))
7. **Make a decision that exceeds your authority.** (County of Adams v. Hibbard, 918 P.2d 212, 221 (Colo. 1996))
6. **In a quasi-judicial matter, ignore the record.**

Top ten ways for an elected official to get sued

5. **Ignore the advice of your staff and government attorney.** (Holman v. City of Warrenton, 242 F. Supp. 2d 791 (D. Or. 2002))
4. **Conspire to impede a development.** (Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 269 (3rd Cir. 1995))
3. **Make a quasi-judicial decision on the basis of religious or political views.** (Chicago Miracle Temple v. Fox, 1994 WL176189 (N.D. Ill. 1994))
2. **Retaliate against your political opponents.** (MIMICS, Inc. v. The Village of Angel Fire, 394 F.3d 836 (10th Cir. 2005))
1. **Act willfully and maliciously.** (Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996)).