

WORK SESSION

- I. CALL TO ORDER
- II. PLEDGE OF ALLEGIANCE
- III. ROLL CALL
- IV. APPROVAL OF AGENDA
- V. PUBLIC COMMENT
- VI. PRESENTATIONS
  - a. Proposal to place sculptures in Basham Park – Scott Lamb;
  - b. Presentation by Sam Light, General Counsel for CIRSA – “Suggestions for Success (and Avoiding the Risk of Liability) for Municipal Officials”;
- VII. EXECUTIVE SESSION
- VIII. ADJOURN

---

OPEN TO THE PUBLIC

POSTED 7/12/2019







# Suggestions for Success (and Avoiding the Risk of Liability) for Municipal Officials

Sam Light, CIRSA General Counsel

City of Creede  
CIRSA Training 5-7-19

CITY OF CREEDE  
A COLORADO TOWN



# Introduction

---

## Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.



# Introduction

## Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations.
- Not an insurance company, but an entity created by IGA of our members.
- Total membership today stands at 275 member municipalities & affiliated entities:
  - 272 are members of the PC pool
  - 144 are members of WC pool
- CIRSA views pre-claim assistance and proactive approaches as critical member services – is a win-win.



# Introduction

## Presentation Overview

- Suggestions for Good Governance – Best Practices.
- Are based on my years as a public entity attorney and observing the ways in which elected bodies and their members can get into or stay out of trouble from a liability standpoint.
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues.
- In case of any inconsistency between author's remarks and views of your City Attorney...your Attorney's views prevail!



# Suggestion One:

## Recognize the Change in Roles

- Being a public official means your role has changed:
  - Citizen-official (government official 24/7!)
  - Outsider-insider
  - Critic-representative
  - Single-issue focus – broader policy focus



## Suggestion One:

### Recognize the Change in Roles

- When you took office, you took an oath to uphold constitution, laws and City ordinances. What does that oath embody?
- A commitment to respect the boundaries and allocations of responsibility set by law.
- A commitment to lawful conduct, including following laws that apply to how you do business and your constitutional obligations, such as providing “due process” and following criteria in making decisions.
- A commitment to ethical practices.
- A commitment to professional courtesy and respect for one another’s divergent viewpoints and styles?



## Suggestion One:

### Recognize the Change in Roles

- Whatever your role may have been to the City previously, you are now all elected leaders – guardians – stewards – of the City.
- The protection of the City's interests and assets is perhaps your most critical function now.
- The guiding principle in decision making should always be, “what is the right thing for the City?”

## Suggestion One:

### Recognize the Change in Roles

- To be effective, and avoid liability risks, recognize:
  - You are now part of a collective decision-making body.
  - Each individual has a fraction of the power of the body, but that power can't be exercised alone. Under law, the power and authority belongs to the Board itself.
  - Success in your position can't happen without collaboration and consensus-building: Getting to being on the prevailing side.

## Suggestion One:

### The Role – Good Governance is Part of the Job

- As elected leaders, part of your oath and “job duties” is good leadership which, at root, is based both practically and legally on a few core concepts:
- Openness & Transparency (open meetings/records laws);
- Fundamental Fairness (due process);
- Predictability (following applicable laws & ordinances); and
- Mutuality of Respect.



## Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- You have protection from personal liability under the Colorado Governmental Immunity Act (GIA) if you are “within the scope of employment” and not acting “willfully and wantonly.”
- Concept of “scope of employment” applies to everyone - elected & appointed officials, employees, and authorized volunteers.
- Means everyone needs to know and respect their “job description.”
- Conduct that is “outside the scope” or “willful and wanton” can create liability and result in a loss of governmental immunity.

## Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- Can also result in loss of insurance coverage. Public official liability policies provide for your defense and pay judgments where required.
- But, these policies follow “course and scope” and “willful and wanton” concepts. That is, they 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 & 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.



## Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- Understand “job description” & stay within it.
- Before acting, particularly if you are thinking of acting individually, ask whether you have authority to act (and if you don’t, don’t do it).
- Recognize that elected officials act primarily as a BODY, and exercise responsibilities mainly by VOTING in a PUBLIC MEETING.
- If you are doing anything other than that ... make sure you are properly authorized.

## Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

- “We” ... not “I”!
- If you find yourself about to act in terms of “I” rather than “we” ...that’s a red flag.
- Be particularly cautious once your body has voted on a matter.
- If you feel there is a need to change a decision, use proper channels.
- Recognize some decisions cannot be undone without liability.



## Suggestion Two:

### Roles & Liability Risks

- Why is understanding & respecting the role—i.e., “role discipline”—a liability issue; some real life examples:
  - An elected official directs or gets involved in a personnel decision entrusted to some other supervisor.
  - An elected official interferes with a routine item that is staff’s responsibility.
- Warning signs: “He/she/they did what?!” & “Can they do that?!”

## Suggestion Two:

---

### Roles & Liability Risk

At the annual Board retreat, the Board directs staff to update the nuisance ordinance, to expand the list of what constitutes a nuisance. There is admittedly an increasing problem with junk in front yards, but the ordinance is not clear on this point. Boardmember Smith has been getting lots of calls about the junk at the Hooper's house. Smith wants something done and confronts Mr. Hooper, telling him to clean up his mess or the City will. Time drags on and Smith finally decides to direct a City equipment operator to take a trailer and crew and remove the junk from Hooper's yard. When Hooper shows up at the Board meeting to complain, Smith makes a motion to have him removed from the meeting. That vote passes and he's escorted out. Problems? Individual problems?



## Suggestion Three:

### Protect the City's Confidences

- Government is conducted in the open – but there are legitimately confidential matters, including:
  - Legal advice, litigation issues
  - Personnel matters
  - Issues being negotiated
- Make sure your systems for executive sessions and for identifying and protecting confidential information are well-established, understood and followed.

## Suggestion Three:

### Protect the City's Confidences – Executive Sessions

- Executive sessions may be held only for limited purposes defined by statute (e.g., legal advice, purchase/sale of property, matters subject to negotiation, certain (but not all) personnel matters).
- Use executive sessions only when absolutely necessary.
- Make sure you follow a script when making a motion to go into executive session and when conducting the executive session itself.
- The executive session must be recorded and the tape retained—in strict confidence—for a 90 day period.
- Do not share confidential discussions unless there is Board agreement.



## Suggestion Three:

### Protect the City's Confidences - Scenario

In executive session the Board develops a strategy for negotiating the purchase of the old ice rink, which the City intends to develop into a public rink. It will at some future time hire a private firm to manage the facility. The appraiser's confidential report states a value range of \$275,000-325,000, and the Board consensus is that the Mayor and Manager should meet with the landowner and negotiate for a contract up to \$300,000. Boardmember Jones, who also manages a private gym and intends to propose to contract with the City to manage any City-owned rink, sees the landowner at the coffee shop the next day and, eager to get the deal moving, tells him the City is willing to pay \$300,000 and may go higher as the appraiser thinks the property may be worth up to \$325,000. Problem?



## Suggestion Four:

### Honor Transparency

- Transparency is a basic expectation for public entities.
- Citizens take interest in the goings-on of the City, how/when those goings-on are discussed, and the opportunities afforded to them to listen in on/participate in the discussion.
- A lack of transparency can cause massive trust and credibility issues, and potential claims/disputes over compliance.

## Suggestion Four:

### Honor Transparency – Colorado Open Meetings Law

- Open Meetings Law (OML) applies to all meetings of the governing body, boards, commissions, committees, etc.
- Applies to 3 or more or a quorum, whichever is less.
- Requires discussion/action on public business to take place at a meeting open to the public and, if action will be taken or a quorum will be present, there must also be timely notice given—agenda posted at least 24 hours in advance.
- The OML permits executive sessions only for limited and specified purposes and following specified procedures.

## Suggestion Four:

### Honor Transparency – Colorado Open Meetings Law

- How can you break faith with the OML? Let's count some ways...
  - Three or more members Boardmembers hold “meetings before the meetings” to sort things out.
  - You hold executive sessions for purposes not listed in the OML, or your executive sessions veer “off topic.”
  - Members of the Board add high profile and/or impactful items to the meeting agenda on the night of the meeting.
  - Using e-mail as a substitute for a meeting. See Handout.





## Suggestion Four:

### Honor Transparency – OML Scenarios

- Two members of the Board meet with the City Clerk; is that required to be an open meeting?
- Three members of the Board attend a County Commissioners meeting. Must the City post a notice and agenda for that meeting?
- There is an urgent need to approve a contract to repair a water main break but the Board does not meet until next week. The suggestion is made to “poll” each member by e-mail for their vote. Is that allowed?

## Suggestion Five:

### Honor Due Process

- Sometimes you are “legislators” —making general rules that apply generally.
- But sometimes you decide specific “cases,” and for these “quasi-judicial” matters—for example, licensing and zoning decisions—you are essentially acting as judges and therefore must behave like judges.
- In this role you are required by law to provide “due process” and a failure to provide due process exposes you and the City to liability.
- See Handout.

## Suggestion Five:

### Honor Due Process – Avoid Trouble as a Quasi-Judge

- Consider land use and other quasi-judicial matters only at the duly notice public hearing.
- Remain fair and unbiased; don't make up your mind before the hearing.
- Don't participate if you have a financial or other personal interest in the matter (code of ethics).
- Don't make your decision on the basis of irrelevant or non-existent criteria.
- Don't engage with one side or the other before a hearing (ex parte contacts).

## Suggestion Five:

### Honor Due Process – Avoid Trouble as a Quasi-Judge

- A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing.
- A proceeding loaded with “ex-parte” contacts is a path to having your decision overturned and, as important, having the integrity of your process eroded.
- When we advise against ex-parte contacts, we are protecting your ability to participate, and your ultimate decision.
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.

## Suggestion Five:

### Honor Due Process – Avoid Trouble as a Quasi-Judge

- Contrast – For your general legislative and policy making discussions and matters, it is okay: to lobby (and be lobbied) outside the meeting; to base your decision on your own personal policy perspectives, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial matter, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon legal standards, and you may not engage with interested parties about the case outside the hearing.

## Suggestion Five:

### Honor Due Process – Deliberations Matter!

- Discussion of the evidence is critical; this is where:
  - The Board formulates the bases of its impending decision
  - The applicant and others gain an understanding of your position
  - Interested persons (and any reviewing judge) look to understand why you decided the matter as you did (and whether it comports with your criteria and the law)
- Deliberate – Talk Amongst Yourselves

## Suggestion Six:

### Put Ethics First

- In Colorado, ethics scandals are rare – but happen from time to time.
- Ethical misjudgments greatly undermine public confidence in public bodies, and appearances of conflicts can be just as damaging as actual conflicts.
- Can result in personal criminal and civil liability.
- There is often a “personal benefit” exclusion from public officials liability coverage.

## Suggestion Six:

### Put Ethics First

- The theme that runs through codes of ethics is: It is not permissible to gain a personal benefit by virtue of holding public office.
- Main rule – Conflicts of Interest: Disclose any conflict situation, don't vote (except in very limited circumstances); and don't influence other members.
- Don't have a financial interest in City contracts or purchases, and if you will have such interest follow all rules.
- Don't disclose or use any confidential information for personal benefit.
- Decline any gifts that seem to be connected to your service (and abide by gift rules).





## Suggestion Seven:

### Be Cautious in Administrative Matters

- Inappropriate involvement in administrative matters by members of the governing body, collectively or individually, can:
  - Undermine the structure of the body or organization.
  - Waste resources.
  - Be a backwards step in City evolution.
  - Increase the risk of liability for yourself.

## Suggestion Seven:

### Be Cautious in Administrative Matters

- Understand and observe “role discipline” between policy and administrative matters.
- The Board Role - help establish policies for the City as a whole; set overall goals and priorities; make specific decisions within the Board’s role; BUT, leave details and execution to staff.
- The City Staff’s Role – Manage and accomplish the work as defined by the Board, within the City’s established parameters.

## Suggestion Seven:

### Be Cautious in Administrative Matters

- The distinction is particularly important with respect to personnel matters assigned to staff.
- For example, the Board has an appropriate role:
  - Setting general personnel rules.
  - Selecting and supervising the Board’s “direct reports”.
  - Determining overall personnel items; e.g., positions & number of employees.
- But, no one member has these powers, and...

## Suggestion Seven:

### Be Cautious in Administrative Matters

- Therefore, your involvement in these “big picture” issues must not devolve into:
- Selection, evaluation, salary details, or disciplinary matters involving a specific individual who is not the Board’s direct report.
- Becoming inappropriately individually involved in an administrative matter the Board has already assigned (delegated) to staff.
- Becoming an individual “HR Manager” – if folks are inappropriately inserting themselves into, or are bypassing, the chain of command, how can the City return to the proper chain of command.

## Suggestion Seven:

### When dealing with staff – speak with one voice

- The Board is made up of individuals, each with different goals and priorities; however; it is not a group of seven bosses.
- Therefore, resolve to speak with one voice to your staff.
- There is but one Board and it should commit to act as one. It alone can—and should—carry the burden of sorting out and reconciling the goals and priorities of its members with the goal of establishing a singular set of goals, priorities and directions to staff.
- This can be done even if there are strong differences of opinion or a split vote.

## Suggestion Eight:

### Use Your Power Wisely and Humanely

- You set the tone for the whole organization in terms of the treatment of employees, citizens, and the business community.
- Understand that you are perceived as holding the most powerful positions in your local government.
- Use courtesy, tact, and diplomacy in interactions, especially in public settings.
- Recognize that certain liability risks—in particular civil rights claims—can be exacerbated by “bad facts” that suggest (or are perceived to be based upon) retaliatory or reactive conduct.

## Suggestion Eight:

### Use Your Power Wisely and Humanely

- As a Board, commit to a “no surprises” approach with one another and staff, and to speaking with one voice.
- Use your staff as a resource to help you do well, and look good while doing it.
- Commit to act as “we” and not as “I,” to build strong relationship between the Board and staff.
- And, always keep in mind that you are the stewards of the your City’s best interests and assets.

## Conclusion

**And thank you for your public service!**

**And for the opportunity to present.**

