

2022 CIRSA

GENERAL MEMBERSHIP MEETING

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Breckenridge



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The Law of Civility

Presented by Sam Light, CIRSA General Counsel

Introduction

- **INCIVILITY!** We hear about it all the time and everywhere!
 - According to a recent National League of Cities (NLC) survey and report, more than 81% of the local government officials surveyed have experienced some form of harassment, threats, or violence while in office.
 - Same report states 87% of the local government officials have observed an increase in such behavior, including a dramatic increase since the beginning of the pandemic.
- We know when we see it!
- From a legal perspective, what can we actually do about it?

Introduction

- That is: What are the laws governing our ability to control incivility?
- This presentation is not to suggest that vigorous or zealous enforcement of the Law of Civility is the solution to incivility, or even that legal approaches are the best first risk management step in addressing incivility, particularly given the civil liability risks.
 - Quite the contrary! It's our firm belief that many problems of incivility might be better addressed by steps short of "taking it legal".
 - But when tough situations arise—what does the law say, and what are the risks of enforcing the "Law of Civility".

Presentation Overview

- First Amendment – General Principles.
- The Law of Incivility in Context:
 - Public Comment Periods
 - Incivility at the Dais
 - In City/Town Hall – First Amendment Audits
 - In the Virtual World – Social Media
- Some suggestions short of legal action to encourage, foster and promote civility.
- *Note:* This presentation is not intended as legal advice. Check with your entity's own attorney on any legal questions: their views prevail!

First Amendment Principles & Enforcing Civility

- First Amendment principles are a cornerstone of the Law of Civility: “Congress shall make no law ... abridging the freedom of speech[.]”
- Local governments and their officials, employees and places and means of communication are subject to First Amendment principles, and risk-wise, are subject to civil rights liability, including the potential for individual liability per 42 U.S.C. § 1983.
- Forum (place) analysis informs the limits on what can be done, and your risks:
 - Traditional Public Forum
 - Designated Public Forum
 - Limited Public Forum
 - Nonpublic Forum

Traditional Public Forum

- Places traditionally open to political/free speech; e.g., public parks, sidewalks and other fora we'll discuss here. To enforce a **content-based exclusion**, government must show its regulation is necessary to serve a **compelling state interest** and that it is narrowly drawn to achieve that end.
- May regulate “time, place and manner” of expression but regulations must be **content-neutral, narrowly tailored** to serve a **significant government interest**, and leave open **ample alternative channels** of communication. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983).
- Those are high standards! Strict scrutiny applies!

Designated Public Forum

- That's a place that, though not a traditional public forum, has been opened for use by the public as a place for expressive activity.
- Although the government is not required to indefinitely retain the open character of a designated forum, **as long as the forum is open** it is bound by the **same standards** as apply in a traditional public forum. Thus, reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *Perry Educ. Assn.*
- So—still the highest standards!

Limited Public Forum

- Is a type of designated public forum—but here is where the government limits access to certain classes or types of speech.
- May not engage in viewpoint discrimination against speech otherwise within the forum's limitations and may not exclude speech in a manner that is not “reasonable in light of the purpose served by the forum.”
- Content discrimination permissible if it preserves the purposes of that limited forum.

Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995).

Nonpublic Forum

- That's a place that is neither traditionally used for expressive activities nor set aside or opened up in any substantial way for expressive activities.
- Limitations on a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788 (1985).
 - Samples of nonpublic forum:
 - Airport terminals
 - Jails
 - Interior of public polling place
 - Public entity's internal mail/email system

First Amendment

- Excepting nonpublic forums, as these provisions indicate, local governments are subject to high standards in imposing rules that seek to cure incivility on the premise that a person's words or behaviors are incivil. By the very nature of what's at stake, it's easy for a claimant to assert such efforts are viewpoint discrimination. And then we're off to the races...well, to a court or a civil rights enforcement agency. Their claims?
 - First Amendment-prior restraint, First Amendment-retaliation
 - Violation of First Amendment rights—free speech, right to petition government
 - Constitutional violations related to actions taken—unlawful arrest, etc.

Public Comment Periods

**“We’ve got a lot of official business
to be done this evening...”**

**“...but it will not be done this
evening.”**

- Ken Sanchez, City Council President



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Public Comment Periods

- What are some drivers of incivility during public comment periods?
 - Political or personal disagreements
 - Belief that local government has done them wrong
 - Sense of righteousness, entitlement, or that rights are being denied
 - Belief that City/Town is corrupt, hiding something, too cozy, not friendly, etc.
 - Speaker is speaking to an audience other than those holding the meeting
 - Speaker may be intending to “push buttons” or provoke a “free speech” fight
 - Others?

Public Comment Periods

- Whatever the drivers, the First Amendment requires tolerance of some level of incivility. Local government meetings—particularly public comment periods—are generally viewed as a traditional public forum, or at least a designated public forum.
 - E.g., “the [elected County] Commission designated [its] meeting a public forum when the Commission intentionally opened it to the public.”
 - The Tenth Circuit has held there is “no question” that speech during citizen communications portion of a public, governmental meeting is protected, political speech at a public forum. *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999).

Public Comment Periods

- Thus, First Amendment rights apply to public participation in governing body meetings:
 - Content restrictions or prohibitions are constitutionally problematic.
 - Time, place and manner (TPM) regulation is OK, *if legal standards met*
 - And dealing with actual disruptions is OK, *if legal standards met*
 - But objections to what is said is not.
 - Violations = civil rights liability.

Public Comment Periods: What Do You Think?

- “During public comment, some citizens speak on and on and on, simply ignoring the Mayor’s suggestion to wrap it up.” Can we impose a time limit on speakers to get a handle on this?
- Yes: A content-neutral time limit has been upheld as a reasonable TPM restriction:
 - *Shero v. City of Grove*, 510 F.3d 1196 (10th Cir. 2007)(three-minute time limit imposed during public comment portion of meeting not an unconstitutional prior restraint).
 - *Raygor v. Board of County Com'rs of County of El Paso*, 21 P.3d 432 (Colo. App. 2000)(upholding 90 second limit where 51 people signed up to speak at public hearing).
- The restriction must be evenly-handedly applied.
- Ways to enforce: Ask the person to yield the microphone, cut the mic, or take a recess.

Public Comment Periods: What Do You Think?

- “Our public comment period has devolved into personal attack time during which a few citizens with axes to grind direct false accusations and unsavory comments at staff and the Board. Can we impose a “no personal attacks” rule in order to stop this incivility?
- No: Absent more extreme circumstances, such a rule against personal attacks or negative comments will not pass constitutional muster.
 - *E.g., Griffin v. Bryant*, 30 F.Supp.3d 1139 (U.S. Dist. Ct., D.NM 2014): Striking down a village council rule that speakers shall not make “any negative mention ... of any Village personnel, staff, or of the Governing Body” during the public input portion of governing body meetings.

Public Comment Periods: What Do You Think?

- “Some attorney told us that we have to tolerate profanity during public comment periods. Is it true we can’t adopt and enforce a rule against profanity?”
- Well, yes and no. The specific words and context matter:
 - Offensive, profane or vulgar speech is protected, and **cannot be restrained on that basis alone.**
 - But fighting words are not protected: Narrow, limited to: “[E]pithets (1) directed at the person of the hearer, (2) inherently likely to cause a violent reaction, and (3) playing no role in the expression of ideas.” *Cannon v. City and County of Denver*, 998 F.2d 867 (10th Cir.1993).
 - Obscene speech is not protected...

Public Comment Periods – Actual Disruptions

- For actual disruptions there are criminal statutes that could be applicable; e.g.:
 - C.R.S. 18-8-102, Obstructing government operations
 - C.R.S. 18-8-306, Attempt to influence public servant
 - C.R.S. 18-9-108, Disrupting lawful assembly
 - C.R.S. 18-9-110, Trespass or interference in public building, hindrance of legislative body
 - C.R.S. 18-9-117, Unlawful conduct on public property
- But enforcement of criminal statutes is a matter of law enforcement discretion for law enforcement officials, and thus other officials participating in the meeting should not direct LE activity. Better to recess or gain control by other means, and LE can later explore whether criminal charges could be applicable.

Public Comment Periods – Non-legal Tools

- Set the stage for civility via introductory comments.
- Insist on routine formalities; e.g., speak from podium, one at a time.
- Resist answering questions as they arise or engaging in back-and-forth.
- Use a time limit and be consistent.
- Consider an overall time limit for the public comment period.
- Give appropriate attention to physical layout and security considerations.
- If all else fails...take a recess.

Public Meetings – Incivility at the Dias

- Local governments are not immune to incivility at the dais.
- Is it a more common occurrence than in the past?
- What are the drivers?
 - Increased pressures upon elected and appointed officials
 - Strong convictions → stronger frustrations
 - T-N-T issues
 - Partisanship divides carrying over into council/board chambers
 - Borrowed behaviors from other arenas—news commentators, social media, etc.
 - Virtual meeting dynamics
 - Others?



Hudson County TV
.COM

Incivility at the Dais – What Do You Think?

- Call to Municipal Attorney: “We have a few members of the governing body who will not follow our own, council-adopted rules of conduct that say we should treat each other with professionalism, courtesy and respect. Member Wilson repeatedly asserts we are “breaking the law” when a proposed action runs counter to his views. We’d like to censure him for violating our rules. Can we do that?”
- Censure: “a judgment or resolution condemning a person for misconduct; specif., an official expression of disapproval passed by a legislature.”

Incivility at the Dais - Censure

- Follow-up call to Municipal Attorney: “Oh, BTW, our rules are silent on how we enforce them. 😊.”
- Does a municipal governing body have a right to censure its members?
 - Not expressly addressed in title 31 of the Colorado Revised Statutes.
 - Home rule? What does your charter say?
 - Do you have any ordinance, resolution or rule on censure? Have you adopted Robert’s Rules of Order? If so, see Chapter XX (12th Ed. 2020).

Incivility at the Dais - Censure

- None of the above? Well...doesn't the governing body have inherent authority to censure a member whether it has a written rule or not?
- This issue was recently addressed by the U.S. Supreme Court in *Houston Comm. College System (HCC) v. Wilson*, 42 S.Ct. 1253 (2022):
 - “Mr. Wilson often disagreed with the Board about the best interests of HCC...and charge[d] the Board—in media outlets as well as in state-court actions—with violating its ethical rules and bylaws .”
 - In response, the Board resolved that “Mr. Wilson is hereby PUBLICALLY CENSURED” for repeated conduct “not consistent with the best interests of the College” and “not only inappropriate, but reprehensible.”

Incivility at the Dais - Censure

- The Supreme Court rejected Wilson's First Amendment claim based on the board's *purely verbal censure*. Takeaways?
- A *purely verbal* censure is not a basis for a First Amendment retaliation claim. And getting "called out" by one's colleagues sometimes go with the territory:
 - "Mr. Wilson was an elected official. In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes."
 - "Second, the only adverse action at issue before us"—a purely verbal censure—"is itself a form of speech...that concerns the conduct of public office."

Incivility at the Dais – Removal

- 3rd Call to Municipal Attorney: “The verbal censure you suggested isn’t working and in fact has made matters worse. The member even told us ‘Your censure isn’t gonna stop me. Nothing’s gonna stop me from calling out the corrupt elected officials I was elected to call out.’ So, we’re going to remove him from office. That will restore some civility around here.”
- Removal from office for “mere incivility” is fraught with peril:
 - Essentially an override of the will of the people who elected the official.
 - May lead to “weaponization” of removal, which probably won’t cure incivility.
 - Legally, may not be possible or defensible.

Incivility at the Dais – Removal

- Home rule? What does your charter say? Is removal mentioned? If so, for what grounds? If not mentioned, would an ordinance authorizing removal be consistent with the charter?
- Statutory city or town? Depending on status, “good cause” or a “charge” must be established. Further the basis for removal must be “misconduct or malfeasance in office,” as those terms are used in Article XIII, Section 3 of the Colorado Constitution; i.e.:
 - Official misconduct of such magnitude that it affects performance of duties, or offenses against the town “of a character directly affecting its rights and interests.” *Board of Trustees v. People ex rel. Keith*, 59 P. 72 (Colo.App. 1899).
 - Political or personal disagreements, or a stalemate or generalized incivility unlikely to be sufficient grounds. *Russell v. Buena Vista*, 2011 WL 288453 (D. Colo. 2011).

Incivility at the Dais - Solutions

- In the end, perhaps the most effective Law of Civility for addressing incivility at the dais is not the enforcement provisions of a charter, statute, ordinance or code of conduct.
- Rather, it is “buy-in” by those at the dais that one of the job duties is the general obligation to uphold the “law”, and the law includes whatever lawful rules (or guidelines) members put in place to address their own conduct and promote civility.
- When members of an elected or appoint body practice civility, that sets a precedent. And when they don’t, well....
- Whatever rules (or guidelines) you adopt, make them your own from the ground up. Samples are fine, but sometimes you may be borrowing trouble. So, take your own path and your own time in putting rules in place.

Incivility in City/Town Hall - First Amendment Audits



- We've presented and written elsewhere about "First Amendment Audits"-the practice by which citizens visit City/Town offices while on a video livestream, often solely for the purpose of simply exercising one's First Amendment rights and "testing" municipal personnel.



First Amendment Audits

- Undoubtedly, these visits can be less than civil, as well as unexpected stressors for employees.
- These visits can also make people uncomfortable—after all, when’s the last time you were videotaped in your workplace by someone you’ve never met?
- But, legally, can we prohibit an auditors from making video recordings in public places within City Hall/Town Hall?
- Short answer: no. And doing so is not going to gain an auditor’s civility—it’s more likely to garner a First Amendment claim.

First Amendment Audits

- Long answer: The finer legal points of whether persons have a constitutionally protected right to record in public places generates a lot of legal debate...and litigation! Whether any specific situation gives rise to First Amendment liability involves very fact-specific questions of fora analysis and qualified immunity. For example:
 - *Frasier v. Evans*, 992 P.3d 1003 (10th Cir. 2021): holding that the “right to record the police performing their official duties in public spaces” was not clearly established law in August 2014 but declining to state whether such a right has been clearly established since that time.
 - *Kerr v. City of Boulder*, 2021 WL 2514567 (U.S. Dist. Ct., D. Colo. 2021): holding Plaintiffs did not have a clearly established First Amendment right to film on jail property, as jail property was not a traditional public forum.

First Amendment Audits

- But, it's prudent to assume from a risk management perspective that the right of persons to make video recordings of police incidents and in open public areas of City Hall/Town Hall is generally well-established.
- Colorado is a one-party consent state. Thus, generally, the consent of the subject being taped is not required. Further, state laws (C.R.S. 16-3-311 & 13-21-128) confirm right to lawfully record “any incident involving a peace officer” (and officers and their employers can be liable for retaliation, etc.).
- Increasing number of decisions elsewhere hold that the First Amendment generally protects filming and audio recording of government officials engaged in their duties in a public place, subject to reasonable TPM restrictions.

First Amendment Audits

- Given these principles, local governments and their employees can be subject to First Amendment retaliation claims if an interaction with a First Amendment auditor is mishandled. Some inappropriate responses that will inflame the situation:
 - “You can’t record here”.
 - Demanding the auditor turn over their recording devices.
 - Ejecting the auditor from the building for recording or for vulgar language.
 - Treating their presence as a trespass or requiring they leave if not visiting for “official business”.

First Amendment Audits

- If a First Amendment audit interaction is truly out-of-hand, then certain criminal statutes may also be applicable to actual disruptions in this context:
 - C.R.S. 18-8-102, Obstructing government operations
 - C.R.S. 18-9-110, Trespass or interference in public building
 - C.R.S. 18-9-117, Unlawful conduct on public property
- But, as noted enforcement of criminal law is matter of law enforcement discretion.
- In appropriate circumstances, a civil protection order may be a possibility (C.R.S. 13-14-101).

First Amendment Audits – Non-legal Tools

- While First Amendment auditors can be less than compassionate, a few non-legal best practices can be a good approach:
 - Remain civil in the face of incivility
 - Don't try to outshout or match tactics
 - Clobber them with kindness
 - You have the right to disengage
 - Grant them the “right to be left alone”
 - Clearly mark non-public areas
 - Get help as needed





Incivility in the Virtual World – Social Media

Florida Man Arrested for Making Racially-Motivated Threats in Interference with Election in Charlottesville and Cyberstalking

Escondido Mayor Sued for Blocking Profile on Facebook
Mayor Sam Abed is one of dozens of politicians found to be blocking profiles on their social media accounts, according to records obtained by NBC 7 Investigates.



E-mail threat to hunt down Youngstown council members with AR-15 rifle

An Alarming threat against Youngstown city council members sent through e-mail states, "Today I will be taking my AR-15 and hunting down as many council members I possibly can."



Federal Court: Public Officials Cannot Block Social Media Users Because of Their Criticism

Durham man charged with harassing and cyberstalking Raleigh City Council member

Can Elected Officials Censor Their Critics on Social Media?

Nebraska man pleads guilty to threatening election worker

A Nebraska man pleaded guilty Thursday to issuing threats against an election official via Instagram.

Idaho extremists target judges, prosecutors, health workers in doxxing campaigns

Idaho activists have shared photos and home addresses in effort to interfere with court, child protection cases



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NYC council members 'doxxed' by anti-cop activists before budget vote

Incivility in the Virtual World – Social Media

- Public officials and employees can be the targets of some beyond the pale social media traffic. What can be done about incivility online? It depends.
- May be protected speech, but “true threats” are not protected. A true threat “is a statement that, considered in context and under the totality of the circumstances, an intended or foreseeable recipient would reasonably perceive as a serious expression of intent to commit an act of unlawful violence.” *People In Interest of R.D.*, 464 P.3d 717 (Colo. 2020).
- True threat may constitute criminal conduct (e.g., harassment, stalking). May constitute retaliation against an elected official prohibited by C.R.S. 18-8-615 (as amended by Senate Bill 21-64, effective 7/1/2021).

Incivility in the Virtual World – Social Media

- Doxing: “To publicly identify or publish private information about someone especially as a form of punishment or revenge.”
- Colorado’s recently adopted “doxing” bills—House Bills 21-1015, 21-1107, 22-1041, and 22-1273—prohibit “doxing” of certain municipal employees, for example: peace officers, elections officials, judges, city attorneys, code enforcement officers, animal control officers, and certain public safety workers.
- In the face of true threats, criminal conduct or doxing, reporting to and intervention by others can be an appropriate course.

Incivility in the Virtual World – Social Media

- However, courts have held that official social media sites of municipalities and elected officials are a designated public forum. *Davison v. Randall*, 2019 WL 114012 (4th Cir. 2019); *Swanson v. Griffin*, 2022 WL 570079 (10th Cir. 2022)(observing that First Amendment principles also apply to “metaphysical” forums and thus “protect[] against viewpoint discrimination by the government in government-created public forums on social media.”)
- Thus, do not block users or delete comments on the basis that they contain critical content (impermissible content-based regulation). *Knight First Amend. Inst. v. Trump*, 928 F.3d 226 (2nd Cir. 2019), cert granted, judgment vacated, 141 S.Ct. 1220 (2021).*
- As with other fora, certain speech is not protected—e.g., illegal activity, pornographic, “true threats”—but such exceptions are narrow.

Incivility in the Virtual World – Tips

- While it's true social media sites can be a limited public forum—with limited purposes—defining and enforcing limits carries the same risks as determining whether incivil speech or conduct at a public meeting has crossed the line. Thus,
 - Have a clear and defensible social media policy. Persons charged with regulating content must be familiar with the legal principles involved. If a determination is made that content can/must be removed, keep a record of when and why.
- To protect yourself from online incivility: Keep personal sites separate, be cautious what information you put online, consider “keeping it light,” use settings and passwords effectively.

Conclusion

- Incivility isn't a new phenomenon. After all, "Where there is disagreement, there is a risk of incivility." But incivility certainly seems more front and center.
- "Enforcing" civility has always been challenging, but the law offers assistance when conduct crosses the line.
- Hopefully this presentation has helped to clarify how and where some of the lines are drawn and has provided some useful "best practices" to help your entity deal with difficult situations and further a culture of civility in all that you do.
- **Thank you!!**

References / Resources

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About CIRSA

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created by intergovernmental agreement of our members
- Total membership today stands at 283 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities



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.

Note: This presentation is a training resources only and the suggestions herein are those of the author, who takes full responsibility for them. This presentation is not intended as legal advice and members should consult with their entity's own attorney for legal advice and regarding specific legal questions.

