



Ethics, Liability, & Best Practices
In “Interesting” Times
2018 CML Mayors Summit

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Symptoms of living in “interesting times”

- Hyper-partisanship and polarization
- Intolerance for differing views
- Confining oneself to an “echo chamber”
- Demonizing the opposition
- Insults and slogans substitute for thinking and dialogue; all yelling, no listening
- Death of civility and respect
- Disengagement, despair, giving up, “tuning out”
- Is this impacting us in municipal government?



What are YOU seeing?

- Lack of recognition of Mayor's responsibilities and authority?
- Meetings are long, contentious, and unproductive?
- Same issues "relitigated" over and over?
- Developing consensus is impossible? Every issue has "winners" and "losers"?
- "Incivility" doesn't even begin to describe the level of hostility and ill-mannered behavior that occurs before, during, and after meetings?
- Actual fears about one's personal safety?
- Symptoms of low morale, sense of defeat, or apathy among direct reports and other staff members? Or they're dropping like flies?



What are YOU seeing?

- Passive-aggressive behaviors, like crossed-arm silence during the meeting but nasty social media "shots" afterwards?
- Lots of speechifying, filibustering, and playing to the camera, but no actual communication?
- Perpetually divided vote no matter what the issue? Or you're breaking an unprecedented number of ties?
- Complaints flying in every direction? Lawsuits...from your own colleagues? Your colleagues are filing CORA requests...for each other's emails?
- Just flat-out meanness towards one another, a lack of a sense of "fair play," "gotcha" games, ambush tactics?
- Others?



What are WE seeing?

- The instances of “dysfunctional” or “troubled” governing bodies seem to be increasing
- Hostilities don’t seem to develop gradually over time, but rather, start instantly after swearing-in
- A direct report’s employment agreement with severance provisions doesn’t always mean a quiet exit and “moving on”
- Unprecedentedly short tenures for direct reports
- Challenges to city/town attorney’s authority to advise on behalf of the entire municipality – “I need MY attorney,” “I don’t trust lawyers”



Ok, then...

Let’s look at some
MADE UP, PURELY FICTIONAL,
IMAGINARY, HYPOTHETICAL
SCENARIOS,
shall we?



Scenario

Staff approved an extremely controversial site-specific land use proposal and building permit. Although no one thinks this is a desirable use for the property, the Town's hands were tied; the land use code defined it as a "use by right," and furthermore, called for final approval by staff, bypassing both the planning commission and the Town Board. Citizens are up in arms. They demand that the Board "call up" the approval and reverse it. A motion to that effect is made by a Board member. The vote: 3-3. Recognizing the clear language of the code and the Town Attorney's advice, you reluctantly cast a tie-breaking vote to kill the motion; you have too much respect for "the rule of law." The landowner begins work under the permit, and you are promptly recalled and replaced with someone who campaigned for your recall.

First order of business under the new Mayor: a motion to disapprove the use and revoke the building permit is made, seconded, and passed.



Do we see any problems here?

- Uh, hmm...vested property rights, anyone?
- What about the Town Attorney's desperate efforts to make her legal advice clear to the "old" and the "new" Board? Did they fall on deaf ears?
- "Well, that's why we have insurance"? Quite possibly nope!
- Who's to blame here? The staff? Attorney? Citizens? "Old" Mayor? Well, who adopted the land use code, hmmm?
- Yeah, we see some liability issues here, don't we?



Scenario

So who would have thought that the City's award of a contract to a "Golf Pro" for the City's new golf course would become such a controversy? The motion to approve the contract passed 4-3. But now the community is being pretty vocal on the issue, and it's getting acrimonious. The pro who got the contract immediately started work renovating the pro shop and ordering fresh inventory. But a couple of the councilmembers who voted for the contract are buckling under the pressure. They see that, under the City's rules of procedure, they can bring forward a motion for reconsideration at the next meeting. They do exactly that, the Council reconsiders the award, and awards the contract to someone else.



Do we see any problems here?

- Just because your rules of procedure allow it, doesn't mean it's OK to do!
- Where contract rights are concerned, yanking out the rug from under a contractor who's been awarded a contract and begun work in reliance on the approval is a high-risk action!
- "Well, that's why we have insurance"? Most definitely probably nope!
- How in the world does the golf pro become so controversial, anyway?



Scenario

Your Board is divided 3-3 on a number of issues, and one of them is the potential repeal of your “pit bull” ordinance. Discussion of the draft ordinance, No. 18-32, has taken place over the past few meetings, and it’s back on the agenda tonight. At tonight’s meeting, two members of the “keep it” faction had unavoidable absences. One of the “repeal it” faction counts heads and seizes the opportunity. He makes a motion to “adopt Ordinance No. 18-32 as an emergency ordinance effective immediately.” The motion passes on a 3-2 vote. The “repealers” declare victory.



Do we see any problems here?

- Are there any provisions in your charter if any, or the statutes if applicable, that impose “extraordinary majority” requirements for certain actions...such as the passage of an emergency ordinance? (For statutory municipalities, CRS 31-16-105 imposes a three-fourths of the governing body requirement.)
- Any other contexts in which we’ve seen governing bodies get tripped up by extraordinary majority requirements?
- In matters involving the separation of your direct reports, for instance, t’s common for charters to have either an extraordinary majority or at least a “majority of the Board” requirement; in statutory towns, see 31-4-307, CRS; there may be contract conditions or other requirements that are applicable too.
- What if you discover that, indeed, three votes were insufficient? Sometimes the result is embarrassment + a do-over. Sometimes it’s embarrassment + a do-over + some other consequences.
- Is governance “by ambush” or “gotcha” ever a good idea?
- Are there any liability issues here?



Scenario

Ever since you became Mayor, your City has had a long run of “bad luck” with City Administrators. Not a single one has lasted two years. The City has paid out some pretty hefty severances, and in one case, you’re still in litigation years later because you refused to pay any severance. This time around, the recruitment has gone badly. There are only three applicants, and one seems remotely qualified, but she has a pretty spotty record in terms of continuity.

Oh, let’s mention that you’re a pretty “hands on” Mayor, and you pride yourself on being a “darn good manager” yourself. You were pretty insistent that the last City Administrator be personally accountable to you (and you’re not in a “strong mayor” city). You didn’t hesitate to correct him when you saw something being done wrong, and at times you were openly critical about him at meetings and in front of staff and citizens.



Do we see any problems here?

- What’s going on here? Why has there been such a long run of “not the right fit” hires?
- Why aren’t you having any luck with recruitment now?
- It couldn’t possibly have anything to do with the “hands on” Mayor, could it?
- Is it possible for a municipality to develop a “stay away” reputation among professionals? What’s the consequence of that?
- Any liability issues here?



Scenario

You have a newly elected Councilmember. He ran on a platform of “Let’s root out the corruption in City Hall.” At his first meeting, he accuses the City Manager and Finance Director of “cooking the books.” At each subsequent meeting, he hurls new accusations at both. He especially seems to relish attacking the Finance Director during department reports. She finally stands up to him at one meeting, stating, “I don’t appreciate the accusations. They are untrue, and they’re harming me personally and professionally.” His response: “Sweetheart, if you can’t stand the heat, get out of the kitchen.”



Do we see any problems here?

- Oh, no, he didn’t call the Finance Director “sweetheart”!!
- You can have legitimate concerns and questions, but is it appropriate – or fair – to lead off with accusations?
- Is there a point at which an employee may have to protect his or her reputational interests with drastic action?
- Even if the situation calls for a legitimate parting of the ways with the Manager, is lingering acrimony going to interfere with a clean exit?
- Are there any liability issues here?



Scenario

A few years ago, the Council hired a Manager and specifically charged him with “shaping up” the City’s work culture. One of the things he put in place in 2017 was a “nepotism” policy; previously, kids of staff members were pretty much guaranteed “first dibs” on seasonal jobs with the City. There are also many instances of family members working for the City, sometimes in the same department. This new policy was deeply unpopular with the staff. A couple of councilmembers elected this year ran on the basis that they would “do something” about the Manager. Staff members are now going directly to their new favorite councilmembers whenever they have a gripe about their supervisor or the Manager, and the new councilmembers encourage this.



Do we see any problems here?

- Is it appropriate in a Council-Manager city for employees to be allowed or encouraged to bypass their supervisors, department heads, and Manager, and go directly to one or more members of the Council?
- Does any disempowerment happen in levels of the organization when that is allowed to happen?
- Can an organization claim to follow a “chain of command” if that is allowed to happen?
- Are there any liability issues here?



So...What can you do?

- Mayor's role is much more than presiding over meetings
- Your smooth mayoral skill set can help vaccinate the governing body against toxic influences!
- What skills and characteristics have you found most useful in building a high-functioning body during dysfunctional times?
 - Consensus-building
 - "Shepherding" – leading from behind
 - Liaison between interest groups
 - Building one-on-one relationships with each member
 - Engineering win-win outcomes



So...What can you do?

- Skills and characteristics, cont'd
 - Mentoring
 - Listening
 - Sense of humor, generosity of spirit, courteousness, not taking oneself too seriously
 - Building a sense of inclusivity
 - What else?



And what can we do?

- Tell us how we – your staff and advisors – can help!
 - Council/Board orientation at start of term?
 - Don't play "favorites" with elected officials?
 - Respect each elected official, even the ones who make it hard?
 - Share information equally?
 - Be open to one-on-one meetings?
- What else can we do? In what ways do you see us being part of the problem, not the solution? How can we contribute to the building of a high-functioning team?



Conclusion

- There's an element of entertainment in the political turmoil, division, and dysfunction we are observing around us
- But it's not a spectator sport! Especially at the municipal level, there are real, tangible, measurable consequences to dysfunctional governance
- No community can AFFORD to be dysfunctional on a sustained basis – it takes a toll
 - Community credibility issues
 - Driving away the "best and brightest"
 - Service quality impacts
 - Stumbling block to economic development



Conclusion

- Historically, municipal leaders have set the example as the political “adults in the room”
 - Yours is the level of government that GETS STUFF DONE, without partisanship, fanfare, grandstanding, or rancor!
- Now, more than ever, that shining example is needed everywhere!
- Don’t let that example be dimmed:
 - Let’s not emulate the noise and bluster seen at other levels
 - Let’s keep the level of discourse high, maintain high standards for respectful and courteous behavior, and keep the insults at bay
 - Let’s hold ourselves to the highest levels of integrity, honor, and truthfulness
 - Let’s remember that we are citizens with common goals, aspirations and desires, and much more that unites us than divides us



Speaker Bio

Tami Tanoue has been in-house with CIRSA since July, 2002, first as General Counsel/Claims Manager, then as General Counsel/Deputy Executive Director and, since August, 2018, as Executive Director. She was previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, where she served CIRSA as its contract General Counsel for 12 years, and was City or Town Attorney for several Colorado municipalities. Prior to that, she was Staff Attorney for the Colorado Municipal League, where she represented the collective interests of Colorado municipalities. Tami is a regular speaker on local government liability topics, and has written several publications on liability issues.

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Note: The information in the foregoing presentation is provided solely as a training resource, and is not a substitute for obtaining the advice of your City/Town Attorney on any legal question.



About CIRSA

- 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 intergovernmental agreement of our members
- Total membership today stands at over 276 member municipalities and affiliated legal entities
- Out of 271 incorporated municipalities in Colorado:
 - 85% are members of our PC pool
 - 46% are members of our WC pool



About CIRSA

- Member-owned, member-governed organization
 - No profit motive – sole motive is to serve our members effectively and responsibly
 - Have returned over \$35,000,000 in contributions to our membership
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, 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
- Contact Courtney Fagan for more information – courtneyf@cirsa.org

