



**ETHICS, LIABILITY AND BEST PRACTICES
FOR ELECTED OFFICIALS:
What You Need to Know Now!**

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Introduction

- Many of the governance issues you face are “perennials” – over your city or town’s history, they have come up over and over, and will continue to
 - If you’ve heard me or General Counsel Sam Light doing the “Ethics, Liability, and Best Practices” presentation, you know what those issues are
- But these are unprecedented times, so you’re “inventing the wheel” on a number of new, emerging, or evolving issues
 - Today’s presentation will focus on a few of those new issues – relationships with your direct reports, new liability concerns, and relationships with your colleagues
 - Sam or I are always happy to come out to CIRSA member municipalities to discuss these and other issues with your governing body!

Dealing with your “direct reports”: new dimensions

- Your “direct reports” typically include the Manager/Administrator and Municipal Attorney
- You already know that a successful relationship with your direct reports requires **mutual respect**:
 - For the boundaries of your respective “job descriptions” – “role discipline”
 - For the “chain of command” – not reaching below the level of your direct reports, not allowing those below the level of your direct reports to pull you into their business
 - For the fact that things can change – that’s why you typically have employment agreements: they are intended to allow for a mutual parting of the ways without undue pain for either side
 - For one another’s basic humanity! Decent, courteous, thoughtful treatment of one another always adds to the successful relationship.

New dimensions: the employment agreement

So, what's new here?

- Managing exits via an employment agreement is not always as easy as it once was.
 - Your perspective: we pull the trigger and we know what the consequences are – likely the payment of an agreed-upon severance
 - The other side's perspective: the severance provisions in the employment agreement were just a “starting point.”
 - Why does this seem to be happening?

New dimensions: the employment agreement

- Employment agreements are written in the first rush of good will, great intentions, and rosy expectations
 - You're hiring the best of the best, and you may not be contemplating the possibility of the relationship going awry
 - When things are not so rosy, you may find that what's been written around an exit is less clear than you intended
 - Those ambiguities are fodder for negotiated terms that are more generous than you may have contemplated
 - The exit may be much uglier than anyone contemplated....

New dimensions: the employment agreement

- The ugly exit: are we seeing more of these than we used to? If so, why?
 - Seen in just ONE recent article about a federal elected official interacting with administration personnel: He **“excoriated”** them. **“Tore into”** them. **“Lambasted”** them. **“Accused”** them of **“insubordination.”** **“Sharply criticized”** them.
 - People make headlines, and sometimes political points, with this kind of rhetoric
 - News outlets love to report on a good kerfluffle...and we like to read about them!
 - Even absent news outlets, there are plenty of social media outlets for engaging followers in this way
 - Is this kind of conduct filtering through to state and local governments?

New dimensions: the employment agreement

- The uglier the exit, the more likely it is that you'll be paying your “pound of flesh” ... and then some
 - It's human nature to want to hit back when hit
 - Real reputational harm can be caused by improvident comments in public settings
 - The possibility to turn those comments into a weapon in the form of a harassment or discrimination claim against you or your entity exists
- So, if you don't do your part to help keep the exit a dignified and discreet one, you may be paying a premium for that indiscretion

New dimensions: the employment agreement

So...what can be done?

- #1, Remember to respect one another's humanity. And even if you're on the receiving end of "excoriation," you're the ones who hold the ultimate power over your direct reports. Try not to respond in kind, especially in public.
- #2, Contemplate, before you enter into the relationship, that it may well turn into one that can't be saved. The employment agreement can light the way to a quiet, dignified, relatively simple mutual parting of ways.
 - Think "no fault divorce": we're just "irretrievably broken"!

New dimensions: the employment agreement

- #3, Scrutinize the severance provisions while they're still being negotiated. Are they:
 - Simple and straightforward – provide a clear path to the “how” of reaching a mutual parting, that doesn't drag on interminably?
 - In line with open meetings requirements?
 - Congruent with charter and/or statutory requirements?
 - Problem area: statutory town “officers”
 - Designed to address “no-cause” separations?
- #4, Recognize that the payment of a reasonable severance is the WD40 of a peaceful, dignified mutual parting! Expect to pay it, or expect trouble.

New dimensions: the employment agreement

- #5, If you're a CIRSA member, we can help!
 - We do form working relationships with your direct reports. But everyone involved – you, your direct reports, and we – have a vested interest in making sure a separation doesn't go badly
 - Your City/Town Attorney is likely your #1 resource, of course, but we are happy to partner with him/her to make sure things go smoothly (or to work with you if your City/Town Attorney is the direct report in question!)
- #6, if these suggestions sound like they're aimed at protecting your direct reports, keep in mind:
 - It's not an equal relationship, and the consequences of the relationship going "south" aren't equal. You hold the ultimate power over the tone of the relationship, and what happens in the relationship.
 - Your direct reports do their work as a career. You do your work as a volunteer for a limited period. What happens in your city/town will follow them around for the rest of their careers, with impacts that are likely not the same as those you face as an elected officials.
 - Doing right by your direct reports is ultimately doing right by your city/town!

Liability issues: new dimensions

- Over the years, we've talked about – and you've heard about -- the Governmental Immunity Act, federal civil rights laws, and other sources of liability
 - We were privileged, for many years, to live in a state with great liability protections for public officials and public entities
 - We were fortunate that we didn't have “runaway juries” – Colorado juries were known for a common-sense approach to seeing the real issues in a case, and for an appreciation of law enforcement
 - We've had legal principles in place that didn't hold law enforcement officers and other public officials to the standard of being “supreme court justices” – “qualified immunity”

New dimensions: Toto, I have a feeling we're not in CO anymore!

- The liability picture is changing pretty dramatically in CO, and could change dramatically on the federal side
- We do still have significant state law protections in the Governmental Immunity Act, but there have been some recent erosions:
 - H.B. 20-217 expanded the liability of cities and towns, as well as individual officers, for law enforcement activities
 - This year, H.B. 21-1250 has made additional changes to the liability picture for law enforcement
 - CML (and CIRSA) will be reporting on the changes

New dimensions: Toto, I have a feeling we're not in CO anymore!

- Other changes are impacting the provision of law enforcement services in CO and elsewhere
 - Public sentiment (and therefore jury sentiment) is changing
 - Social forces (e.g., social media + body-worn cameras) mean “social inflation” factor for claims – not just local community sentiment, but national and even international perceptions, can influence the course of a claim
 - Much riskier to take law enforcement liability claims to trial
 - Much harder to settle law enforcement liability claims, especially for a reasonable amount
 - Until a few years ago, CIRSA never had a settlement of a member police liability claim of more than \$1 million. That has changed dramatically.

New dimensions: Toto, I have a feeling we're not in CO anymore!

- The change in the federal administration means that “pattern and practice” liability via the US Department of Justice is back in the picture (and S.B. 217 brought it into the state picture via the Attorney General)
- Law enforcement liability insurance will likely become much less affordable and less available, with more exclusions and lower limits of coverage
- We haven't seen the last of the legislative changes, either
 - Single party control of legislature means it's easier to pass legislation, with or without the input of stakeholders such as municipalities
 - Discussion of abolishing “qualified immunity” at the federal level (already abolished in law enforcement claims under state law in CO)

New dimensions: What do these changes in the liability picture mean for governing bodies?

- #1 In many areas, there is a disconnect between the community's perception of law enforcement, and the police department's perception of law enforcement. Ignore this disconnect at your peril!
- Is the governing body potentially a **bridge** between the two?
 - Many communities are seeing a call for greater "civilian oversight" of police departments. City Councils, Boards of Trustees, and Managers/Administrators can be part of that "civilian oversight."
 - If you choose not to embrace that role, then other forms of "civilian oversight" may be thrust upon you (or you may decide that those other forms are appropriate) – police oversight bodies, "independent monitors," etc.
 - "Pattern and practice" investigations can end up in a settlement agreement or "consent decree" that's an imposed form of oversight
 - If you can take a leading role as this "bridge," perhaps that oversight can be done more collaboratively than it might otherwise

New dimensions: What do these changes in the liability picture mean for governing bodies?

- #2: What else can the governing body do?
 - If you see law enforcement as a critically important community service, it MUST be treated that way with the selection of the people who perform that service, and with the prioritization of resources for training, supervision, equipment, staffing, policy development, compensation & benefits, etc.!
 - Some communities are discussing “defunding” their police departments...meanwhile, many other communities have never adequately FUNDED their departments.
 - You “can’t afford” to adequately fund your police department? You can’t afford NOT TO!!
 - Underfunding and/or understaffing your police department disserves EVERYONE: your officers, your municipality, and your citizens.
 - In short, if you want your community to provide law enforcement services, you MUST make a commitment to funding properly.

New dimensions: What do these changes in the liability picture mean for governing bodies?

- #3: Another phenomenon holding back police departments: “piling on” of service after service, expectation after expectation, without seeing what you’re doing to their workload and their ability to fulfill their fundamental mission
 - Police are expected to solve all of the ills of the world in addition to crime-fighting. Homelessness? Opioid abuse? The pandemic? Oh, and let’s throw animal control, code enforcement, and traffic enforcement on top of everything else!
 - You cannot ask “too much” of law enforcement without that pressure causing cracks somewhere...officer burnout and attrition, mistakes leading to injury to themselves or to others, erosion of community trust, etc.
 - Is your PD adequately staffed? Example: can a three-member department really be adequately staffed”?
 - It’s critical to prioritize what you want your PD to do. They can’t do everything.

New dimensions: What do these changes in the liability picture mean for governing bodies?

- #4: Considering a “startup” police department? Please consider all of the above and more!!
 - We’ve seen several “startup” PDs in recent years. The motivations are understandable.
 - But make sure that you hire the best you can to lead your department, and make sure that they know their priorities!
 - Example: Does it really make sense to hire officers and put them on the street BEFORE you have policies and procedures in place?
 - And make sure that you know the true cost of operating a police department. The insurance costs themselves are daunting.
 - For CIRSA members, the cost of law enforcement liability coverage makes up about 80 percent of the total cost of liability coverage!
 - We don’t yet have an indication of how much law enforcement liability coverage will cost for 2022. Entities that have a July renewal in other states are indicating that LEL coverage will cost at least 40-50 percent more. There may be more exclusions, with high limits of coverage becoming less available.

New dimensions: but let's not just pick on police departments!

- Another area where liability is significantly expanding, primarily as a result of S.B. 21-88, is in sexual abuse/sexual molestation claims by minors.
 - CML (and CIRSA) will report on the details of this liability expansion, which becomes effective January 1, 2022.
 - But suffice it to say that the ramifications of this liability expansion will need to be considered in any youth-related programs you are providing, or contemplating providing

New dimensions: but let's not just pick on police departments!

- Have you noticed that there is a greater demand by citizens for youth-related services?
 - There are gaps in child- and youth-related services that may not be practicable for schools and the private daycare industry to fill
 - What are you seeing? After-school care, summer programs, parks & rec programs, daycare for municipal employees' children, others?
- There was a time (as recently as last year!) when we were able to tell our reinsurers: liability arising out of child/youth sexual abuse/molestation claims is not a significant municipal concern
 - We had good protections under the Governmental Immunity Act
 - Unlike other sectors (like schools), we saw few, if any, actual claims

New dimensions: so what's a governing body to do?

- Of course, any discussion of liability must be preceded by a discussion of SAFETY to children and youth. That's the critical thing. A successful claim won't happen absent the failure to keep children and youth safe.
- Services to children and youth are very much like law enforcement services, in that the stakes are extremely high unless everything is done right – recruitment, screening, hiring, supervision, care, staffing levels, policy, management, oversight, etc.
- Scrutinize any existing services between now and 1-1-2022 to make sure you're doing all you can to ensure that children and youth are not placed at risk
- Are any third-party providers involved? Make sure they're not putting you, and the population they serve, at risk
 - Ensure contracts and insurance are reviewed, make sure the right questions are being asked
 - Ensure an effective transfer of risk, if a third party is in control of the circumstances that create risks

New dimensions: so what's a governing body to do?

- Contemplating new or expanded services involving children or youth? Then all of the preceding questions, and more, need to be explored.
 - Again, as with law enforcement, if the services can't be funded and provided to meet a high degree of care, then you may need to question whether your city/town should be involved – either directly or through a third party
- Whether with new or existing services, the cost, availability, and scope of insurance will need to be factored in
 - We won't be able to give our reinsurers the assurance we gave in the past about Colorado's liability picture
 - Cost, availability, and scope (e.g., exclusions and limitations on coverage) will likely be issues

Working with your colleagues: new dimensions

- We've talked with you for years about governing body relationships – divisions, “outliers,” and other internal issues that drain your energy and impair your productivity
- So...how are things going in that regard?
 - Is the “outlier” issue more troubling than ever?
 - Are divisions ever more challenging to bridge?
 - Are any of your colleagues finding ever more effective and pervasive ways to get on your last nerve?
 - Social media posts, outright trolling, playing to the camera, “doxxing,” exploiting policy differences for political “gain”?
 - Are processes being “weaponized” with complicity from your colleagues (public comment periods, recall threats, protests inside and outside city/town hall)?

Working with your colleagues: new dimensions

- To the extent that cues are being taken from other levels of government on appropriate behaviors inside and outside of governing body meetings:
 - It's no wonder that the quality of discourse, debate, and disagreement is seeing a decline!
 - And even more so, the work of compromising, negotiating, bridging divides, looking for win-win solutions, bringing the "margins" closer to the middle, and respecting "majority rule"!
- But does it have to be this way? Municipal government, in particular, is supposed to be non-partisan. And, in practice, most municipal governing bodies do a great job of being "the grown-ups in the room"!
- So, how are things going in YOUR city or town?

New dimensions: what's a governing body to do?

- We've long talked about the importance of having rules of conduct and rules of procedure in place, so that everyone knows what's expected.
- But we need to “front load” the process of GETTING TO rules of conduct/rules of procedure with a lot more groundwork
- Rules of conduct/rules of procedure are the CULMINATION of that groundwork. If you start with rules, they are likely to feel “foreign” to you, or you will not have buy-in.

New dimensions: what's a governing body to do?

- The first place to start: talk about what VALUES each of you individually, and all of you together, believe are important as you work together with your colleagues, direct reports, other staff, and the citizens
 - Brainstorm in a comfortable setting (such as a retreat). Everyone contributes their own thoughts, there are no wrong answers!
 - Make a list of all the values that everyone contributes.
 - With the help of a facilitator, pull out the values that seem to relate to how you work together – how you interact together

New dimensions: what's a governing body to do?

- Create a distilled, second list that relates to meeting conduct values, values in how you will interact with one another, values in how you will interact with your direct reports, etc.
- And then turn that list into individual CONDUCT COMMITMENTS.
- Example: let's say that “collaboration” among governing body members is a value that you hold in common. How will YOU turn that into a conduct commitment? Brainstorm your individual ideas about how to “live” collaboration as a value:
 - “I will bring my ideas forward early in my thinking, so that I can get the benefit of others’ thoughts before I lock into a priority.”
 - “I will particularly seek out and consult with colleagues whose wards or districts or neighborhoods that have issues in common with mine.”
 - “I’ll take a “no surprises” approach by avoiding springing an idea onto staff in a public meeting where I might get a “deer in the headlights’ response

New dimensions: what's a governing body to do?

- And then finally, once you get a list of “conduct commitments” that you can co-sign as a group, then formalize that list...keep it a list to remind yourselves, or potentially, turn it into a code of conduct!
- You don't all have to “sign on” to everything. The discussion, and the process of listening to/hearing/accommodating each other's concerns, can lead to the creation of a working set of commitments that most of you can live by most of the time!
- I recently had the privilege of working with the Denver City Council on this process. Although Denver's not a CIRSA member, it was a great opportunity to flesh out a processing a “live” environment and put it into practice with the very smart group of independent thinkers on the Council!
 - This process is replicable and scalable to municipalities of different sizes and structures. I'll be collaborating on a presentation and article with Denver's Council President/Vice-President and bringing it to CIRSA's (and CML's) members in coming months.

Summing Up

- You've entered into a most worthy public service by becoming a municipal elected official.
- But you've chosen to do so during a time when the challenges, the social environment, and the barriers to success, effectiveness, and "job satisfaction," are more daunting than ever.
- CML and CIRSA share a goal: to help you govern effectively. The "best practices" for maximizing your effectiveness also help you avoid ethical dilemmas.
- And, good governance is its own liability preventative!
- That's why we call it "Ethics, Liability, and Best Practices": there are many dimensions of governance, but you can take one path to address all of those dimensions.
- Thank you for your service in "the government closest to the people"!

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 280 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

- Tami A. Tanoue, CIRSA Executive Director
- Previously in-house General Counsel/Deputy Executive Director for CIRSA
- Previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, serving CIRSA as its contract General Counsel for 12 years, and serving as City or Town Attorney for several Colorado municipalities.
- Previously Staff Attorney for the Colorado Municipal League, representing the collective interests of Colorado municipalities.
- Regular speaker on local government liability topics; author of several publications on liability issues.
- Suggestions today are based on my years as a municipal attorney and observing the ways in which governing bodies can get into or stay out of trouble from a liability standpoint
- Suggestions are those of the author, who takes full responsibility for them...any resemblance strictly coincidental, etc. 😊
- Here as a training resource; in the event of any conflict between my training tips and the advice of your entity's attorney, the advice of your attorney prevails!