



# **Ethics, Liability, and Best Practices for Elected Officials**

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# Introduction

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- Congratulations on becoming a member of your city or town's governing body!
- If you're new to municipal service, you will find some elements of your new position to be very different from what you may encounter in your other pursuits.
- The purpose of this webinar is to introduce you to some practices that will maximize your effectiveness, while minimizing your potential liability, in these areas:
  - Governance versus administration;
  - Personal conduct; and
  - Meeting practices.

# Governance versus Administration

- John Carver’s work on “policy governance” is perhaps the most comprehensive model for board governance
- The model addresses many common and recognizable efficiencies in board-staff relationships
- Carver’s book, “Boards That Make a Difference” is an excellent resource, as is the accompanying booklet, “The Policy Governance Model and the Role of the Board Member”
- We also have a local expert, Ken Schuetz, whose take on a governance model is called “Aligned Influence” ([www.alignedinfluence.com](http://www.alignedinfluence.com))
  - CIRSA will cover 50 percent of your entity’s exploration of Aligned Influence – please contact CIRSA if interested

# Policy Governance Basics

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**Ends versus means:** Governing body determines the “ends,” and CEO and staff determine and carry out the “means”

- Ends: the outcomes to be achieved, for whom, and at what costs

**Executive limitations:** Governing body sets forth the boundaries of ethics and prudence, in carrying out the means, beyond which the CEO and staff must not cross

- But within those boundaries, the CEO is free to choose the means to the board’s ends

**Board-staff linkage:** Governing body determines the manner in which it delegates authority to the CEO, how it will evaluate CEO performance (in achieving the “ends” and meeting the executive limitations)

**Governance process:** Governing body determines its own philosophy, the specifics of its own job, and its accountability

# Governance Characteristics

- Is your focus on governance rather than management or administration?
  - Management is not the same thing as governance! Being a “super-manager” is still not governing.
  - Governance is primarily policy-setting, big picture, and forward-looking, rather than making reactive, case-by-case decisions as issues arise, or after-the-fact after a problem surfaces
    - Exception: Councils, boards, and commissions also engage in fact-specific, case-by-case decision-making when acting in a quasi-judicial capacity
      - Planning Commission, Board of Adjustment
    - How you exercise your quasi-judicial responsibilities can have constitutional implications!

# Where are you focusing your efforts?

Ownership

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Governance

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Management

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Supervision

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Front Line Employment

- **Time Horizons:** Yours should be the furthest out!
- **Dealings within Chain of Command:** Don't jump more than one level!
- **No Redundancy:** Unlike other levels in the organization, there is no one else who can step in and do your job!

# Governance characteristics

- Does your body speak with one voice?
  - “Deliberate in many voices, but speak with one”
- Recognize that, while there may be dissension or disagreement, the CEO (the Town Manager/Administrator) and staff are accountable only for directions given by the body as a whole
- Is the voice directed at the CEO, the governing body’s primary employee?

# Honoring the Governance-Management Distinction

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- Why is this a liability issue?
  - Public officials have protection from liability when they are within the “scope of employment” – term used in Colorado Governmental Immunity Act
  - “Scope of employment” means everyone must respect the parameters of your job description
  - So to the extent you have organizational parameters that include an allocation of responsibilities, those parameters are part of your job description; honoring those parameters will help keep you within the “scope of employment”
  - Liability coverages also hinge on your being within the scope of your authorized duties
  - If you are going outside the parameters, you could be outside the scope of your job description...and outside the scope of your liability protections!
  - If you’re doing management/administration, then who’s doing the governance? And what about those who are supposed to be doing the management/administration? What are they doing?



# Personal Conduct

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- The way you conduct yourself in relation to other members of the body, staff, and the community greatly impacts your effectiveness as a governing body member
- The incivility and divisiveness that characterize partisan politics need not be imported into nonpartisan local government!

# Personal Conduct

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- With respect to one another:
- Is someone maintaining the “outsider” perspective even after becoming the ultimate “insider”?
  - You may have started as a “critic” of the status quo, or been propelled to seek public office because of one particular issue of interest to you, but changes to your focus and perspective may need to change once you are in public office
- Is someone not recognizing that a governing body member’s power can be exercised only through the body as a whole? Acting as “I” rather than “we”?
  - Other than certain Mayoral responsibilities, there are NO individual responsibilities given to individual elected officials!
    - Same – members of boards and commissions
  - Inappropriately acting as “I” can be associated with Individual liability!

# Personal Conduct – More About the Mayor

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- In Colorado, the Mayor's role is defined differently depending on whether your municipality is a statutory town, a statutory mayor-council city, a statutory council-manager city, or a home rule municipality
- So what the Mayor does in one community does not necessarily fall within the legal provisions that apply in YOUR community!
  - Of course, in many communities, the leadership role of the mayor extends significantly beyond statutory/charter responsibilities
    - Consensus-builder, lead representative of the community, the “face” of the governing body, liaison role, others?
  - But especially in statutory towns, governing bodies govern by consensus, mayors lead by consent
- For the Mayor's role to be respected by the rest of the governing body, citizens, and staff, it's important to make sure the legal authority is identified and followed, and that everyone understands and “buys in” to that portion of the role that isn't defined by law
  - If unclear, obtain legal advice; have a discussion, and build a consensus

# Personal Conduct

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- Is there an “imbalance of information” on the body?
- Is there a sense of distrust among one another? Is there constantly the same split vote on every issue with the same people lining up on the same side every time?
  - This could mean that the entire power of the governing body is always being given over to the one “tie breaker”!
  - Or that you are always on the losing side of a vote!
- If there is a perpetual division in the body, look for ways out of it: establish and make a commitment to abiding by norms of conduct
  - Rules of Procedure, Rules of Conduct
  - Retreat to hash out issues, perhaps with a mediator or facilitator

# Personal Conduct

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- Treat each other with respect
  - Discussion and disagreement are a healthy part of the decision-making process, but must be done respectfully
  - No fisticuffs, physical or verbal!
  - No personal jabs
- Say it once, say it succinctly, no filibustering!
  - Respect includes being respectful of the time of the body and other members
  - If one person dominates the discussion, what kind of example is being set?
  - Can you really run on all cylinders if “equal participation” is not encouraged?
  - Have a formal or informal “policy” of going around the dais and letting each person have one shot at speaking?
- No arguing back and forth among members
  - All comments should be addressed to the CHAIR!

# Personal Conduct

- With respect to staff:
  - Is staff viewed as “the enemy”?
  - Is there frequent second-guessing of staff, or a desire on the part of one or more members of the body to do individual “research” on staff recommendations?
  - Is staff frequently blindsided by issues that are raised for the first time only in the middle of a meeting?
- With respect to the community:
  - Are “public comment” periods turning into “public inquisition” periods or “public argument” periods? (see previous slides)
  - Is “staff bashing” or “member bashing” happening at your body’s meetings?
    - Unproductive, unseemly, and morale-crushing!

# Honoring Personal Conduct Guidelines

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- Why is this a liability issue?
  - CIRSA's observation: How the governing body's members interact with one another and with staff is a great predictor of liability. A dysfunctional body inevitably attracts claims.
  - A body that mistreats staff or citizens is modeling bad behavior organization-wide. "You know what" rolls downhill!
  - A body that creates or allows chaos in the chain of command is asking for employment claims!
  - A body that is over-involved in administrative matters is straying away from its "job description" as well as its best areas of immunity.

# Transparency and Public Participation - Meetings

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- Transparency is a basic expectation of the citizens for meetings of the governing body
- Citizens take great interest in the goings-on of their community, how/when those goings-on are discussed, and opportunities to listen in on and/or participate in the discussion
- “Watchdogs” may be present to ensure transparency is maintained and appropriate participation is afforded
- A lack of transparency or a perception of inadequate or ineffective opportunities for public participation can cause massive trust and credibility issues



# Honoring Transparency

- 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 all public business to take place only at a meeting open to the public and of which timely notice has been given
  - Permits executive sessions only for limited and specified purposes and following specified procedures
- It's critical to conform to the letter and the spirit of the OML in conducting meetings

# Orderly and constructive public participation

- Lay the groundwork for orderly public meetings
- Council/Board rules of procedure/rules of conduct should address matters such as:
  - Time limits for speakers
  - Be consistent about enforcing time limits
  - No “out of order” comments
  - Recess or adjournment for disruptions
  - And in these times, whether “virtual” meetings are allowed, and if so, what the protocols are
    - See CIRSA articles: <https://www.cirsa.org/blog/remote-council-board-meetings-during-pandemic-times/> and <https://www.cirsa.org/blog/concerns-about-quasi-judicial-hearing-electronically/>

# Public participation, cont'd

- Governing body presiding officer (Mayor or Chairperson) is crucial in maintaining order
- Culture of civility flows from the top down – if members practice incivility towards one another or towards staff/citizens, they can expect incivility from citizens in return
- Maintain a degree of formality at meetings – use titles, insist that speakers come to podium to be recognized, etc.
- Discreet law enforcement presence can be helpful
- CIRSA training session on orderly meetings and sound quasi-judicial practices available

# Public participation, cont'd

- Are “public comment” periods turning into “public inquisition” periods or “public argument” periods?
- What are the dynamics that are allowing this to happen?
  - “I’d like to respond to what you just said.”
  - “I’d like to answer that question.”
- Members of the body should not be baited into responding inappropriately when someone says something inflammatory
  - You always have the last word: you’re the decider. You don’t need to engage in argument, stop the offending remarks, or try to have the last word during “public comment.”
- And be very, very aware that City/Town Hall operations, including public comment period at your meetings, can become a “testing ground” for citizens and First Amendment issues – see CIRSA article:  
<https://www.cirsa.org/news/first-amendment-audits-coming-to-your-town/>

# Public participation, cont'd

“In the future, everyone will be famous for 15 minutes.” ~Andy Warhol

“In Council meetings, everyone gets to speak his or her mind for the allotted period.”

~Tami Tanoue

- Don't try to suppress the content of citizen speech! It's not just unlawful, it's futile! People do not take well to being suppressed.
- But if someone is being disruptive, engaging in personal attacks, etc., then a response may be appropriate.
  - “Disarm” a tense situation. Don't match tone for tone, and “out-shouting” doesn't work.
  - If a response is necessary, lower your tone to below the speaker's.
  - De-escalate, don't escalate!
  - Establish and communicate shared norms for meetings, e.g., “We appreciate everyone's viewpoints, but not personal attacks. Personal attacks are unproductive and unhelpful. Please redirect your comments towards the issues, and away from personalities, so that we can better understand your concerns..”

# Conclusion

- Ethical behavior is not just about instances where a financial or other conflict of interest may exist
- In a larger sense, ethical issues are present in all of your dealings with one another, staff, and the community
- The ethical choices you make in those dealings will either enhance or reduce your effectiveness, and enhance or reduce your liability
- Following best practices for maximizing your effectiveness as a governing body member also maximizes your liability protections!

# Resources

- Ethics, Liability and Best Practices, 2<sup>nd</sup> Edition:  
<https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>
- Video training on liability issues:  
[https://www.cirsa.org/member\\_resource/in-the-scope-of-your-authority-preventing-public-officials-liability/?member=true](https://www.cirsa.org/member_resource/in-the-scope-of-your-authority-preventing-public-officials-liability/?member=true)
- CIRSA's resource page for elected officials:  
<https://www.cirsa.org/safety-training/elected-officials/>
- CML's website contains many elected official resources:  
[www.cml.org](http://www.cml.org)

# About CIRSA - Colorado Intergovernmental Risk Sharing Agency

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- Public entity self-insurance pool for property, liability, and workers' compensation coverages, formed 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 281 member municipalities and affiliated legal entities
- Member-owned, member-governed organization, with a 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
- Largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities



# About the Speaker

Tami A. Tanoue

- Executive Director for CIRSA since August, 2018
- 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.

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# Thank you!

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