



Getting Real With Risk Management

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Sources of Liability

Some of the laws implicated in liability issues include:

- Colorado Governmental Immunity Act (GIA) - governs tort liability under state law
- Civil Rights Act of 1871, 42 USC Section 1983 - provides a money damages remedy for civil rights and other constitutional/federal law violations
- Federal and state employment laws – Title VII and other
- Federal and state wage laws
- Americans with Disabilities Act
- Family Medical Leave Act
- Open meetings law/open records act
- Breach of contract
- Ethics requirements
- Worker injuries: primarily governed by workers' compensation laws
- Assumption of liability via hold-harmless and indemnification agreements



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Sources of Liability

Law vs. Real Life

- In real life, you will not have to do much navigating of the intricacies of the GIA, federal civil rights laws, open meetings/open records laws, and other liability-related laws, but...
- You'll want to be a proficient issue-spotter, so that you don't walk into issues inadvertently
- You'll want to know where some of the big liability "traps" are
- You'll want to help others avoid common misunderstandings
- You'll want to know when you should reach out for assistance, and where the resources are



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Sources of Liability

Some Big Risk Management Issues – In No Particular Order

- Citizen issues - First Amendment "audits," free speech and meetings, etc.
- Open meetings law/open records act issues
- Bad workplace conduct (harassment, bullying, etc.) and other personnel issues
- Navigating turbulence on the governing body
- Bad process – due process issues
- Others? What's on your list?



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First Amendment Issues

- We're seeing a trend of citizens visiting City or Town offices, livestreaming a "First Amendment audit"
- The citizen may be there to make an open records act request, or be there to "test" municipal personnel's "knowledge" of the First Amendment
- Several Colorado municipalities were recently visited, and the visits were uploaded on YouTube for everyone to watch and learn from!
- Although City/Town employees are generally on the front lines of dealing with such visits, they may also impact governing body meetings, elected officials' Facebook pages, etc.



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Scenario

A citizen visits City Hall holding his phone on a "selfie stick," taking video of his visit as he walks around.

First, he walks up to the permits counter, and when the employee at the counter asks, "how may I help you," he says, "I don't need anything. I'm just taping."

The employee says, "If you don't have any official business, you're trespassing. This is private property."

The citizen says, "I'm not trespassing," and then points the phone at the employee. The employee then says, "Stop recording me! You're not allowed to record me without my permission."

The citizen says, "Yes, I can." The employee gets on the phone and calls the Police Department to report that "a trespassing citizen is recording me without my permission." After hearing the details, the police decline to come over.

The citizen then sees a large computer monitor nearby, where another employee is working. Everything on the monitor is plainly visible from where the citizen is standing. The citizen begins recording what's on the monitor. The employee says, "This is confidential information. You need to stop recording!!"

The citizen next walks over to the Council Chambers and tries the door. It's unlocked and empty. So he walks inside and begins recording the inside the Council Chambers. The employee rushes out, and yells, "Get out of there! You can't be in there when there's not a Council meeting going on!" The citizen says, "What do you mean? It's unlocked!"



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What Do You Think?

- City/Town Hall is a public space, at least those areas that are open to the public. “This is private property” is not an accurate description!
- Secure and mark those areas that are not intended to be public!
- Your consent is not required in order to take video of you in a public place
- A citizen doesn’t need to identify himself/herself or what he is doing, or be there for “official business”
- If you’re working with sensitive information, do not put it on a monitor that is visible to public view!
- “First Amendment audits” are a real phenomenon. Prepare accordingly!



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Scenario

We have a citizen who’s suing the Town. He signed up for public comment and when called to the podium, started to talk about his lawsuit. The Mayor told him to stop talking about the lawsuit. The citizen said, “F--- you! I know my First Amendment rights! I’m here to talk about my lawsuit!”

Upon hearing the “F-bomb,” the Mayor ordered a police officer to remove the citizen. The citizen was arrested for disorderly conduct.

See any problems here?



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What do you think?

- **“In the future, everyone will be famous for 15 minutes.” ~Andy Warhol**
- **“In Council meetings where a public comment period is provided, everyone gets to speak his or her mind for the allotted number of minutes.” ~Tami Tanoue**
- If you choose to provide a forum for public comments...such as a “public comment period” during your Council/Board meetings, 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...but it’s also time for patience and finesse
 - “Disarm” a tense situation. **Don’t** match tone for tone, and “out-shouting” doesn’t work.
 - If a response is necessary, the presiding officer should lower his/her tone to below the speaker’s.
 - Don’t let your buttons be pushed
 - Seek to de-escalate, not escalate; sometimes not responding is the best response
 - It’s public comment period, not public argument period!



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What do you think?

- 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.”
 - This approach will NOT work with someone who’s “testing” you on the First Amendment! But it may be helpful when someone is just unclear on the prevailing “culture” in the council chambers.
- Understand that you cannot control the content or even the tenor of speech, if you have chosen to allow public comment.
- It may be necessary to “grit your teeth” for the 3 to 5 minutes allotted, and then say “thank you” and move on!
- Remember, it is possible you are being “tested”! Think about these situations so that you can be prepared to do the right thing, especially if you’re the one holding the gavel.



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What do you think?

"We allow people to curse at the council. We allow them to wear dollhouses strapped to their heads. We aren't that tight on it. Yet we still have a constant battle over what is allowed."

-- Paul Koretz, Los Angeles City Councilmember (LA Times, February 23, 2014)



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Open Meetings Law/Open Records Act Issues

- Transparency is a basic citizen expectation when it comes to the goings-on of municipal government, especially at the governing body level
 - The Colorado Open Meetings Law (OML) and Open Records Act (CORA) ensure transparency
 - Executive sessions permitted only for limited purposes
- Most governing body work must take place in public view at a duly-noticed public meeting
- 3 or more or a quorum, whichever is less, triggers OML requirements
- Although OML and CORA have been around for decades, new questions continue to arise as methods of electronic communication, including social media, have taken hold, and the answers are not always clear



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Scenario

The Town has provided each of its elected officials with an “official” email using @townofgreentree.org addresses. The Town Attorney has done training on CORA requirements as they apply to email, and explained that citizens can make a CORA request to view emails that pertain to Town business.

As a newly elected Trustee, you’re a little creeped out by the fact that your Town-related emails could be subject to public scrutiny. You decide, “I’m just gonna continue to use my partyheartyyhardyyharhar@aol.com personal email for all of my Town-related correspondence. That’ll keep me from having to cough up my emails in response to a CORA request!”

TRUE??



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What do you think?

- Do you think the Trustee can escape compliance with a CORA request by using a personal email address for Town business?
- Or does someone need to let Mr. or Ms. Party Hearty know that he or someone else will have to go through each of his/her partyheartyyhardyyharhar@aol.com emails to root out the ones that pertain to Town business?
- Does a citizen ever make a CORA request along the lines of “all emails pertaining to Town business received by Trustee Hearty from ____ to ____”?
- Wouldn’t it be a lot easier to just have all municipal business-related correspondence in the email addy that has been conveniently provided by the Town?



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Scenario

You have created a Facebook page for yourself under the category of “Government Organization.” You post information about city happenings and resources, and welcome others to post there as well. One day, you post on a controversial topic that the Council will soon be tackling, and two of your fellow councilmembers get wind. All three of you go back and forth on the post about your respective views.

Is this a meeting within the meaning of the Open Meetings Law?



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What do you think?

- “Meeting” is defined in CRS Section 24-6-402(1)(b) as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” Three or more members of the local public body (or a quorum, whichever is less) in such a gathering will trigger the notice and “open to the public” requirements of the OML.
- How do you comply with the 24-hour “timely” posting requirement in the OML when you’re posting on Facebook? How do you meet the “open to the public” requirement? There isn’t a clear answer to these questions, but discussions of public business by the requisite number of governing body members can certainly take place in an electronic forum, and then these questions (and others) may come into play.



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Scenario

You post about an upcoming agenda item on the Facebook page featured in the previous scenario. For some reason, the discussion on the post starts to go completely sideways, with lots of negative comments, and some uncalled-for memes and photos. You start deleting some of the particularly disagreeable comments, and ultimately decide that the better part of valor is to just delete the whole darn post, but not before you “block” some of the most disagreeable people from your page forever

Are the post, and the comments, considered “public records” within the meaning of the Colorado Open Records Act (CORA)? Any other issues here?



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What do you think?

- The term “public records” is defined to include “the correspondence of elected officials,” subject to certain exceptions, under CRS Section 24-72-202(6). Public records are open for public inspection and copying under CRS Section 24-72-203.
- Your municipality has most likely adopted a records retention and destruction schedule that governs how long various documents, including electronic documents, must be maintained prior to destruction.
- So, could someone request a copy of a post that was on your Facebook page under CORA? What if you deleted the post? Is there a record retention schedule that applied? Was that schedule violated when you deleted the post?
- If there’s a chance that the posts are subject to CORA, then the smarter course of action might be to tolerate the replies you get on your post.



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What do you think?

- Also, let's go back to the First Amendment! Some courts have taken the view that a social media page that "walks and talks" like a governmental forum is subject to "free speech" principles.
 - This may mean that there may be circumstances where a public official can't "block" critics or remove disagreeable comments from a Facebook page
 - Be careful what type of "page" you set up! If you've set it up under "Governmental Organization and then borrowed the City/Town logo as your "profile pic," how's that going to look? Maybe "politician" is more accurate, and don't be "borrowing" logos!
 - The law in this area is still developing, so stay alert, be cautious, and get your City/Town Attorney's advice!



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Due Process: Quasi-Judicial Matters

- You know that your work can be broadly divided into the legislative and quasi-judicial arenas
- An example of a quasi-judicial matter would be a decision involving individual property rights, arrived at by applying a set of pre-established legal criteria to the facts deduced at a hearing, e.g.:
 - Site-specific land use decision
 - Permit or licensing decision involving a particular licensee or applicant
- In a quasi-judicial matter, constitutional "procedural due process" rights are implicated
 - Notice and the right to a fair hearing before an unbiased decision-maker
- In quasi-judicial matters, the PROCESS you follow to get to a decision is as important – if not even more important – than the decision itself!



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Scenario

A site-specific land use application is scheduled to be considered by the Planning Commission on an upcoming agenda, with the Commission's recommendation to be referred to the Council for final action at a later date. You consider the proposed use to be an extremely controversial one. But you're worried that it's a bit "under the radar," what with summer vacations, holidays, and all. Of course, proper notice has been given by the Planning Department, but you're still concerned that the proposal may get a favorable recommendation from the Commission without any citizen testimony. You decide to post this on your Facebook page:

"Citizens, please read this IMPORTANT NOTICE! You need to know that the Planning Commission is going to be considering a proposal for _____ at its upcoming meeting on _____ at 7:00 p.m. As a Councilmember, I am taking no position on the proposal at this time. But if you care about our community's future, then you will want to attend this very important hearing before the Planning Commission."

See any problems here??



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What do you think?

- You've stated that you're "taking no position" at this time, but it may appear to others, particularly the applicant, that you are opposed to the proposal and are trying to "gin up" opposition to it.
- Is that congruent with the "neutral decision-maker" role that you will need to take on once this quasi-judicial proposal goes up to the Council?
- Could the applicant take the position that it looks like you made up your mind, without evidence, long before the Council hearing, and therefore, you should be recused from participation?
- Even if you think you're just making sure "the public knows about this proposal," do you do that with EVERY proposal that comes before the Planning Commission, or did you just happen to pick out this one for the Facebook spotlight?
- The essence of procedural "due process" rights that attach to a quasi-judicial matter is notice and a fair hearing before neutral, impartial decision-makers. Even if your intentions may have been honorable, you may have cast doubts on your impartiality and neutrality with a post like this.



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Scenario

After you post the foregoing “IMPORTANT NOTICE,” citizens start commenting. The flavor of the comments you get is captured by this one:

Councilmember, THANK YOU! I am outraged by this proposal, and cannot believe that the planning commission is even considering it!!! There’s one of these developments in the town next door. It’s become nothing but a haven for criminals. If the yahoos on the planning commission recommend approval, then I sure hope I can count on you to do the right thing on the Council and VOTE NO!!!!

Carried away in the moment, you reply: “You can count on me!!!!!!”

See any problems here??



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What do you think?

- Did you just reveal that perhaps you’re not exactly going to be a neutral decision-maker on this topic?
- Did you just leave a breadcrumb trail that you’ve had an “ex parte” or “outside the hearing” contact on this matter?
- And, maybe, did you reveal that your vote is going to be based on factors other than the criteria that your land use code will require you to consider?
- Woo hoo! Is this scenario a winning trifecta of quasi-judicial “don’ts”?
- Oh, and did you just jump right over, diss, and disempower the Planning Commission?



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Harassment issues

- Every municipality needs to have a harassment policy in place, and take it seriously
- Harassment policies typically contain definitions and examples of prohibited conduct, include complaint avenues, provide investigation and follow-up procedures, and establish consequences
- Some observations about typical policies:
 - The higher up a complaint originates, the harder it is for the organization to deal with it
 - If a complaint is against an elected official, others in the organization may feel that “this is above my pay grade” – and they are probably right
 - Policies that explicitly address what happens at the governing body level may be lacking
 - Governing body is subject to transparency laws when dealing with issues that occur within their ranks
 - How do you impose “consequences” on a governing body member found to have engaged in problematic conduct?



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Harassment issues

- Harassment definitions tend to set a high bar for violations, but a low bar for appropriate conduct
 - Terms such as “severe and pervasive” “unreasonable interference with an individual’s work performance,” “creating an intimidating, hostile, or offensive working environment” are used
- Harassment laws (and most policies) take a “fill up the trash bin” approach
 - Sends the message that conduct short of “severe and pervasive” is not a problem
 - Encourages the view that it’s not a violation until and unless the problematic conduct builds up to a point where the trash bin is overloaded to the point that it finally overflows
 - Or the trash bin is overloaded all at once with one large item
 - How is someone supposed to know what the “overload” point is?
 - Is conduct leading up to the “overload” point OK, or can/must it be ignored?



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Harassment issues

- Modern workplaces have explicit conduct expectations for – and expect excellence in – virtually every area of workplace conduct!
 - How to perform our jobs in a responsible and prudent manner
 - How to be responsive to citizen concerns
 - How to steer clear of ethical and conflict of interest issues
 - How to maintain and provide access to records
 - Even right down to dress code expectations
- So why shouldn't we set high expectations for how we behave towards one another in the workplace?



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Harassment issues

- So let's put into place AFFIRMATIVE conduct expectations for the workplace. An example:
 - “Elected Officials and Appointed Officials are expected to:
 - Treat fellow elected and appointed officials, staff, citizens, the business community, and others with whom you interact as an elected official with respect, professionalism, and civility.
 - Exercise emotional self-control and sensitivity to the feelings of others.
 - When differences arise, address them with a constructive, problem-solving approach, rather than with blame or recrimination.
 - Avoid situations where you may think your behavior is acceptable even though it falls short of professional dignity and respect.
 - Avoid rationalizations or excuses for such behavior, such as “I wasn't the first to tell an off-color joke,” “I was just trying to be friendly,” “I only made fun of my own [ethnicity, gender, race, religion, etc.],” “No one complained or seemed uncomfortable about my behavior,” or “I only said what I said because he started it and made me mad.”



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Scenarios

#1 A government official makes this statement in defending himself against an allegation of workplace harassment:

"I have done nothing that can be described as criminal."

#2 Following an investigation into harassment allegations against the mayor, the City issues the following statement:

"The City does not, in the opinion of the City Attorney's office have any civil or criminal liability as a result of the allegations made against the city mayor, because based on the law, he did not engage in sexual harassment."



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What Do You Think?

- Since when did we accept "I did not commit a crime" as the bar for conduct in local government?
- Or accept "My conduct did not actually rise to the level of creating a successful claim against the City" as an excuse for one's inappropriate behavior?
- So you can see how harassment definitions can be parsed into providing excuses for behavior in the workplace
- We need to do better than this, and can!
- Contact CIRSA for a sample policy!



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Scenario

One of our new councilmembers is very blunt. He doesn't hesitate to criticize department heads at our meetings. He talks to us in public like he thinks we're idiots or criminals. Someone in the Clerk's Office recently observed that she feels like he comes down especially hard on her and other women.



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What do you think?

"Disrespect" is a key concept here

A disrespectful workplace is an inhumane workplace

Elected officials are the center of the municipal universe; their treatment of employees, especially in public settings, speaks volumes, will be taken very personally, and can HURT

Employees who aren't treated like adult human beings, aren't treated as professionals, are viewed with suspicion, or are not accorded basic courtesy and respect, are going to search for reasons why

"Is it because I'm _____?" is a natural question that will come to people's minds



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Governing Body Discord

- In these divided times, it seems inevitable that discord and division may creep into the work of a municipal governing body
 - This may be so even though municipal government is supposed to be partisan!
- What's your observation – are things getting more contentious?
- What are the consequences of dysfunction at the governing body level?



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Scenario

Our new Board is not really getting along. Every meeting is characterized by hostility, and afterwards, everyone gets on Facebook to continue the sniping. They tend to engage in name-calling and loud, ugly arguments during meetings. There are a couple of factions, and each is dead set against the other. I'm afraid a fist fight is going to break out one of these nights.



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What do you think?

- Does the scenario bode well for a productive governing body?
- Could there be any liability consequences that flow from ugliness at the very top levels of the organization?
- Are staff and citizens starting to feel embarrassed or stressed by what's going on?
- Is staff getting pulled into one faction or the other?
- Is staff feeling responsible for trying to straighten this mess out?



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What do you think?

- Our observation: When things are ugly at the top, that tone permeates the entire organization, and claims follow
- An organization that is perceived to be dysfunctional will drive away its best and brightest – from the governing body level down
- Good people may leave, or feel like they would be wasting their time if they stepped up
- Then the organization will be in a downward spiral – it can't do its best without good people, but the good people it needs won't want to be part of the organization
- A governing body that stages regular "Thursday Night Fights" may attract regulars who enjoy the entertainment...but may be driving away opportunities for growth, business, economic development, etc.
- Frustration will only increase if your time and energy are diverted into fighting, and away from productive work and goal achievement
- And no, the staff can't fix this. It's something only the governing body can fix.



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Communications about liability matters

- Most municipal officials pride themselves on accessibility to their citizens...and accessibility is a basic citizen expectation
- But sometimes, you'll be put on the spot about a matter that should be (and most likely is being) handled by the staff
- "Prime time" for an unexpected citizen contact: When someone is REALLY MAD about an awful thing that has happened
- Be prepared, so that you're not caught off-guard, and possibly find yourself saying the wrong thing



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Scenario

I'm a newly elected Councilmember. A citizen just came up to me on the street SCREAMING. His basement is filled with sewage. He yelled something to the effect that "That @\$% CIRSA is denying my claim and the Public Works Department keeps referring me back to them!!"

To calm him down, I told him that the Town would take care of everything, starting with me ordering one of the public works guys to call a remediation company I know, and get them out to the home STAT.

Uh-oh! Any issues here?



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What do you think?

- Do you know what the cause of the sewer backup was?
- Do you know for sure that the Town (or its insurer) is going to “take care of everything”?
- What if investigation had already determined that the backup was caused by his own misuse of the sewer system, a detail the citizen omitted when yelling at you?
- If the Town picked the remediation company, is the company going to bill you, or the Town, or the insurer? If the citizen is unhappy with the remediation company, what then?
- Inflating the citizen’s expectations may mollify him in the short run, but he may be twice as angry later
- Or you may have put the Town in an extremely awkward position
- And oh, by the way, do you have the authority to give directions to a Town employee?



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What do you think?

- Of course, the citizen deserves answers (although the answer is not always the one he or she wants)
- But the only commitment you should make in such a scenario is that you will absolutely relay his concerns to the Town Manager (or other appropriate contact point) right away
- Colorado’s liability laws are complex; there may be sound reasons, based on applicable laws and the circumstances, for the Town (or its insurer) to deny a citizen’s claim
- A promise or commitment in this scenario will make things very awkward...or worse
- Do your best to have communications about liability matters be handled through the appropriate Town personnel!



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Conclusion

“May you live in interesting times.” ~Chinese curse

- We are living in interesting times, and the challenges of serving in municipal office have never been greater
- You’re not expected to be liability experts, but honing your issue-spotting skills will enable you to navigate the turbulence that you WILL encounter
- Keep an eye out for the possibility of common scenarios where things can go seriously awry during meetings, in contacts with citizens, and on social media



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Conclusion

- “Rehearse” what your reaction would be in some of the situations we’ve discussed
- Use your City/Town Attorney as a resource
- CIRSA is always available as a member resource, too
- Please grab a copy of the second edition of our popular Ethics, Liability, and Best Practices handbook that we have created for you
 - Contains updated “old favorites” as well as new chapters on topics such as social media, harassment issues at the governing body level, and others



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And finally...

THANK YOU!

- For taking on a most challenging and rewarding position
- For choosing to give your time and energy in service to your community
- For seeking out ways to continually elevate your governance game
- For joining me today!



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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
- Of the incorporated municipalities in Colorado:
 - 84% are members of our PC pool
 - 46% are members of our WC pool



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About CIRSA

- 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 evolving liability-related needs of our membership – coverages and associated risk management services, sample materials and 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



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About the Speaker

Tami A. Tanoue

- CIRSA Executive Director; previously in-house General Counsel/Deputy Executive Director and Claims Manager 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.

Note: The information in this 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.



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