



ETHICS, LIABILITY, & BEST PRACTICES

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Best Practices to Protect Yourself from Liability – Embrace Your NEW Role

- Being newly elected, or a change in the balance of power on a Council/Board, means that your role may have changed:
 - Citizen-official
 - Outsider-insider
 - Minority-majority
 - Critic-representative
 - Single-issue proponent-all issues decision-maker

Recognize that your role may have changed

- Hanging on to “outsider” mentality can be destructive – when you were elected, you became the ultimate insider!
- Misunderstanding your role can increase the risk of liability for the City/Town and for yourself.
- It can also greatly reduce your own effectiveness: being part of a collective decision-making body requires collaboration and consensus-building.

Where are you focusing your efforts?

Ownership
 |
Governance
 |
Management
 |
Supervision
 |
Front Line Employment

Where are you focusing your efforts?

- **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!

Operate within the areas where immunities are strongest

- Understand your “job description” and stay within it.
 - Your liability protections hinge upon you being within the “scope of employment” (“SOE”), a term used in the Governmental Immunity Act
- Before acting, look for a charter provision, statute, ordinance, resolution, or motion that authorizes you to act.
 - Keep in mind you may need to reconcile conflicting and superseding authorities
- **If you can’t trace your action to a source of authorization, you may be outside your scope!**
- **If you know what the limits of your authority are, and you choose to ignore those limits, you may be acting willfully and wantonly!**
 - Be very cognizant of what applicable legal provisions say about your job duties, and respect what they say!
 - The legal framework you operate under likely creates a clear division between legislative and administrative responsibilities – ignoring that division may be risky

Operate within the areas where immunities are strongest

- As governing body members, you act primarily as a BODY.
- You exercise your responsibilities mainly by VOTING in a PUBLIC MEETING.
- When you find yourself doing *anything* other than that, it is particularly critical to make sure you are properly authorized!
- If your activities are taking you outside of the purview of the Council or Board as a whole, you could be entering risky territory

Operate within the areas where immunities are strongest

- “We” ... not “I”!
 - If you find yourself thinking (or more particularly, acting) in terms of “I” rather than “we”...that’s a red flag.
 - How does this happen? Maybe you’re looking to the wrong “model” – Council/Board is not analogous to a body like Congress or the state legislature
 - “Constituent service” by individual councilmembers or trustees isn’t part of your model – if you follow the wrong model, you may be getting crosswise with the charter or statutes and going outside your “scope of employment”!
 - Example: citizen contacts an individual councilmember about a permit issue. Should you go to the staff and “take up the cause” on the citizen’s behalf?
 - Example: a business contacts an individual trustee about an exciting development idea. Should you take a “dealmaker” role?
 - Example: an employee contacts an individual councilmember to say that they are having issues with their supervisor. Should you “run interference” on the issue for the employee?
 - Citizens DO expect you to be responsive to their concerns. But HOW you respond will keep you within or take you out of your authorized duties!

Operate within the areas where immunities are strongest

- Being “goaded” into outside-the-SOE conduct by political or citizen pressure?
 - “We want you to get rid of So-and-So.”
 - Are those citizens going to defend you if you’re sued?
- Improper personal motives?
 - Acting on the basis of such personal motives is likely to be outside your scope!
 - May also be willful and wanton
 - If a motivation can be described in any of these terms, it may be a red flag!
 - Retaliation
 - Revenge
 - Personal axe to grind
 - Out to “get” someone
 - Single-issue “agenda”
 - Personal benefit – financial or otherwise
 - Personal benefit is outside your scope – no immunity, no coverage!

Personal Conduct

- 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 and can impact your liability
- The incivility and divisiveness that characterize partisan politics need not be imported into nonpartisan local government!
- You are not only viewed as the City/Town’s highest leaders, but also as the highest representative of the City/Town as an employer – you are setting THE example and tone for the entire organization

Personal Conduct

- As elected officials, you hold both actual and “perceived” powers
- Understand that you are the center of the organizational universe
- Your words and actions may have an unintended but huge impact on others
- There is never a moment when you can put aside your elected official persona when you are dealing with others in the organizational universe

Use your power wisely and humanely

- Whether you know if or not, you set the tone for the entire organization in terms of the treatment of citizens, the business community, staff, and one another.
- If the tone you set is negative, demeaning, distrustful, disrespectful, discriminatory, etc., you are setting yourself and the organization up for liability. . . . And guess what rolls downhill?
- If you sense that there is dysfunction within the organization, start by looking at the example you may be setting

Use your power wisely and humanely

- Is “equality” (of voice, power) among the members a value that is embraced?
 - There are many ways to violate that sense of equality – information imbalances, dominating discussion, asserting special “expertise”
- 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

Use your power wisely and humanely

- Treat each other with respect
- Discussion and disagreement are a healthy part of the decision-making process, but must be done respectfully
 - Leave behind the “residue” of prior disagreements
 - No fisticuffs, physical or verbal!
 - No personal jabs in or out of meetings! This includes social media jabs!
 - If there is a perpetual division in the governing body, look for ways out of it
 - Rules of Procedure, Rules of Conduct that reflect your agreed-upon values for meeting conduct
 - Retreat to hash out issues, perhaps with a mediator or facilitator

Use your power wisely and humanely

- And by the way, how’s your “public comment period” going?
- Should be the opportunity for the public to comment – not for you to comment back!
- Your conduct at meetings serves as the model for everyone else.
 - If you argue back during public comment, it turns into public argument period
 - If you allow or participate in personal attacks during public comment, it turns into public attack period
 - If you try to answer every question on the spot during public comment, it turns into public cross-exam period
 - “I see the Administrator is taking note of your questions, and you can expect a response back from him”
- If public comment period gets heated, how do you react?
 - This is a liability issue!
 - Pending case before the Supreme Court may help clarify limits of authority to deal with disorderly public comment periods

What about the role of the Mayor?

- The Mayor’s role is a critical one on the Board or Council
- A governing body without an effective Mayor is a rudderless ship!
- But what the Mayor does in one community does not necessarily fall within the legal provisions that apply in YOUR community
- At CIRSA, we are seeing tensions and discord around the Mayor’s role in some communities

Mayor – Statutory Towns

(Examples: Otis, Julesburg, Hugo, Limon, Ordway, Collbran, and many others)

- In statutory towns, the operative statute provides:

“Mayor - powers. The mayor or, in his absence, one of the trustees, who may be elected mayor pro tem, shall preside at all meetings of the board of trustees and shall have the same voting powers as any member of said board. The mayor shall be considered a member of the governing body and the board of trustees.”
- So the statute specifies only one power: *presiding at meetings!*
- This is distinct from statutory mayor-council cities, statutory manager-council cities, and home rule municipalities
 - In these other types of municipalities, the role of the mayor is considerably more fleshed out in statute or charter provisions...

Mayor - Statutory Council-Manager Cities

(Rocky Ford, Florence)

- The Mayor shall be the presiding officer of the city council and shall have the same voting powers as any member of said council
- The Mayor shall be considered a member of the governing body and the city council and shall be recognized as the head of the city government for all ceremonial purposes, by the courts for serving civil processes, and by the government for purposes of military law.
- The Mayor shall exercise such other powers and perform such other duties as are conferred and imposed upon him by CRS 31-4-201 et seq. or the City’s ordinances

Mayor – Statutory Mayor-Council Cities

(Brush, Castle Pines, Cripple Creek, Fort Lupton, Idaho Springs, Las Animas, Leadville, Ouray, Salida, Victor, Walsenburg)

The Mayor shall:

- keep an office at some convenient place in the city, to be provided by the city council
- sign all documents which by statute or ordinance may require his or her signature.
- be its chief executive officer and conservator of the peace
- cause the ordinances and the regulations of the city to be faithfully and constantly obeyed.
- supervise the conduct of all the officers of the city, examine the grounds of all reasonable complaints made against any of them, and cause any violations or neglect of duty to be promptly corrected or reported to the proper tribunal for punishment and correction.
- exercise, within the city limits, the powers conferred upon the sheriffs of counties to suppress disorders and keep the peace
- perform such other duties compatible with the nature of his office as the city council may from time to time require
- be the presiding officer of the city council and have the same voting powers as any member of said council
- be considered a member of the governing body and the city council
- If so provided by ordinance, not be entitled to vote on any matter before the council except in the case of a tie vote, and approve or disapprove any ordinance adopted and all resolutions authorizing the expenditure of money or the entering into of a contract

Mayor – Home Rule Municipalities

(Examples: Basalt, Burlington, Carbondale, Fort Morgan, Glenwood Springs, Kiowa, La Junta, Parachute, Sterling, and many others)

In home rule municipalities, the Mayor's role varies by charter. As one example, in La Junta:

- The mayor shall preside at the meetings of the Council and shall exercise such powers and perform such other duties as are or may be conferred and imposed upon him by this Charter or the ordinances of the City.
- The mayor shall have all of the powers, rights and privileges of a Council member and shall vote in the same manner as other Council members.
- The mayor shall be recognized as the head of the City government for all ceremonial purposes by the courts for serving civil process and by the government for purposes of military law.
- The mayor shall be a conservator of the peace, and in emergencies may exercise within the City the powers conferred by the Governor of the State of Colorado for purposes of military law, and shall authority to command the assistance of all able-bodied citizens to aid in the enforcement of the ordinances of the City and to suppress riot and disorder.
- Except as may be required by statute, the mayor shall exercise only such power as this Charter or the Council shall specifically confer upon him.

Personal Conduct - Mayor

- 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**
 - Consent can be explicit (ordinance or rules of procedure)
 - Or implicit (history, oral tradition, "we've always done it this way and it works for us")
 - Or may be by default, vacuum-filling, or apathy (it was just allowed to happen)
 - **How would you rate the state of the Board's or Council's "consent" in your city/town?**

Personal Conduct

- *If there's no meeting of the minds between the Mayor and the rest of the Board or Council on what the Mayor's role should be, then there may be a day of reckoning – the rest of the Board/Council could decide to get explicit on the parameters of the Mayor's leadership role*
- In towns that have a City/Town Administrator or Manager position in place, additional issues can arise between that role and the Mayor's role
- So mayoral leadership can be a tightrope-walk
 - What are the governing body's expectations?
 - What are the responsibilities that have been delegated to the staff?
- If these issues are ignored, worst case scenarios can result
 - A governing body that refuses to recognize any role for the mayor beyond the strictest interpretation of 31-4-302
 - A governing body that chafes under what it views as an unsanctioned "power grab"
 - Administration and staff struggling with what has or has not been delegated to them

Use your power wisely and humanely

- With respect to staff:
 - Is staff viewed as "the enemy"?
 - Is staff treated with disrespect or dismissively?
 - Do you participate in "bad-mouthing" of staff, especially in a public setting?
 - Do you allow yourself to be pulled into speculation or gossip about staff?
 - Do you choose the wrong time, place, and manner for leveling criticisms of staff?

Use your power wisely and humanely

- Don't allow governing body meetings to be used as an opportunity to berate your staff members
- Citizens have every right to raise concerns and to be critical about the way local government conducts business
 - Use the meeting as an opportunity to RECEIVE citizen feedback for appropriate follow-up
 - Do not join in the staff-bashing, if it's happening!
 - Set the example for "no personal attacks" in your council chambers or board room

Speak with One Voice

- The governing body is made up of individuals, each with different goals and priorities
- How would you like to report to several different bosses?
 - Sorting out and reconciling what several different people want is impossible
- Resolve to direct your voice primarily to your own direct reports (Manager, Attorney, etc.) and speak with ONE voice to them
- This puts the burden on the governing body to sort out and reconcile the goals and priorities of several different elected officials, and to establish a singular set of goals, priorities, and directions for your direct reports

Use your Manager as a Resource

- Use your Manager/Administrator as a resource to help you do well, and look good while doing it!
- Commit to a “no surprises” approach
- Avoid “gotcha” or “deer in the headlights” moments by giving an appropriate “heads up”
 - Don’t play “stump the staff”!
 - Blindsiding is counterproductive and hurtful, and doesn’t benefit anyone
- Nothing wrong with asking for advance assistance in the best time, manner, and approach to raising an issue, and giving staff some research/prep time

Use your Manager as a Resource

- Keep in mind that the Manager/Attorney/staff’s work is a reflection of YOUR policy directions.
 - Important to keep this in mind, especially if you are new to the governing body and have questions/concerns about prior policy directions
 - Resist reflexive urge to “clean house” because you are newly elected and want to change policy directions
 - “Cleaning house” is a characteristic of partisanship

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!

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 273 member municipalities and affiliated legal entities
- Of the incorporated municipalities in Colorado:
 - 84% 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