



# SUGGESTIONS TO REDUCE THE RISKS OF LIABILITY

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# Speaker Bio

- **Tami Tanoue**

Tami Tanoue has been the in-house General Counsel/Claims Manager for CIRSA since July, 2002. 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.

# What is 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
- Out of 271 incorporated municipalities in Colorado:
  - 74% are members of our PC pool
  - 45% are members of our WC pool

# What is CIRSA?

- Member-owned, member-governed organization
  - No profit motive – sole motive is to serve our members effectively and responsibly
  - Have returned over \$30,000,000 in contributions to our membership
- CIRSA Board made up entirely of municipal officials
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities
- You have a City Manager protecting the City's interests from a liability and insurance standpoint
  - We are pleased to serve as a resource and partner on risk management issues

# Recognize that your role may have changed

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

# Recognize the change in roles

- When you took office, you took an oath to uphold constitution, laws, and ordinances
- What does that oath embody?
  - A commitment to respect the boundaries and allocations of responsibility set by law?
  - A commitment to stay within the parameters of the “job description” as set out in applicable laws?
  - A commitment to lawful conduct, including constitutional requirements such as providing due process in quasi-judicial matters, and following criteria set in ordinance in making decisions?
  - A commitment to ethical practices, including the avoidance of practices that lead to unwarranted financial or other gain?
  - A commitment to professional courtesy and respect for one another’s divergent viewpoints and styles?
- Being true to your oath will keep you on the path of best practices and keep you out of the path of liability

# Recognize that your role may have changed

- Whatever your role may have been previously, you are now all trustees – guardians – stewards – of the City
- The protection of the City’s interests and assets is perhaps your most critical function now
- Council is analogous to the board of directors of a multi-billion dollar corporation
- The guiding principle in decision making should always be, “what is the **right thing** for the **City**?”

# Recognize that your role may have changed

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



# Your Role: Personal Conduct

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

# Personal Conduct

- With respect to one another:
  - Are any members maintaining the “outsider” perspective even after becoming the ultimate “insiders”?
  - Is the “Outlier Syndrome” in effect? See Ch. 2 of the Elected Officials Handbook
  - Is anyone not recognizing that an elected official’s power can be exercised only through the body as a whole?
  - Is there an “imbalance of information” on the council/board?
  - 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?

# Personal Conduct

- With respect to staff:
  - Is staff viewed as “the enemy”?
  - Is there frequent second-guessing of staff, or a desire to do independent “research” on staff recommendations?
  - Is staff frequently blindsided by issues that are raised for the first time only in the middle of a council/board meeting?
  - Are you letting non-direct reports contact you directly with their personnel issues, or delving into such issues yourself?

# Personal Conduct

- With respect to the community:
  - Are “public comment” periods turning into “public inquisition” periods or “public argument” periods?
  - Is “staff bashing” or “elected official bashing” happening at council/board meetings?
  - Are you basing every vote on what you believe is popular sentiment?
    - Some decisions (such as on quasi-judicial matters) call for the application of legal criteria that are not a matter of counting how many people are for or against)

# Avoid “outside the scope” and “willful and wanton” conduct

- You have personal protection from liability under the Governmental Immunity Act (GIA) only if you are “within the scope of employment” and not acting “willfully and wantonly.”
- Concept of “scope of employment” applies to ALL persons covered by the GIA— including elected and appointed officials, employees, and authorized volunteers
  - Means everyone needs to know their “job description”!
- Conduct that is outside the “*scope of employment*” (SOE) or willful and wanton will result in a loss of governmental immunity.

# Avoid “outside the scope” and “willful and wanton” conduct

- Can also result in loss of coverage under liability insurance policies
  - We have to look at allegations of lawsuit. If allegations are of “outside SOE” conduct, we can’t defend/indemnify
- Can also result in personal liability, including punitive damages
  - Nightmare scenarios have become reality in Colorado
- You may become responsible for defending yourself and paying any settlement/judgment against you

# Avoid “outside the scope” and “willful and wanton” conduct

- Understand your “job description” and stay within it.
- Before acting, look for a law, 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 SOE!

# Avoid “outside the scope” and “willful and wanton” conduct

- Elected officials act primarily as a BODY.
  - Legislative responsibilities are vested in the COUNCIL as a body
  - Other than some responsibilities spelled out for the Mayor, statutes provide that all powers and duties of the Council are exercised by the body, not any individual
  - You exercise your responsibilities mainly by VOTING in a PUBLIC MEETING.
  - When you find yourself doing anything other than that ... make sure you are properly authorized!



# Avoid “outside the scope” and “willful and wanton” conduct

- “We” ... not “I”!
  - If you find yourself about to act in terms of “I” rather than “we” ...that’s a red flag.
- Be particularly cautious once you’ve voted on a matter.
  - Get behind the decision, don’t undermine.
  - If you feel there is a need to change it, use proper channels only.
  - Recognize that some decisions CANNOT be undone without liability.

# Avoid “outside the scope” and “willful and wanton” conduct

- Avoid acting out of personal motives
  - Acting on the basis of personal motives is likely to be outside your SOE!
  - May also be willful and wanton
- Don’t be “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?

# Protect the City's confidences

- Government is conducted in the open – but there are legitimately confidential matters, including:
  - Legal advice, litigation issues
  - Personnel matters
  - Issues being negotiated

# Executive Sessions

- Discussion of attorney-client privileged matters in executive session:
  - Who is the client?
    - Issue-by-issue analysis needed: who “speaks for” the client?
  - If the entire Council “speaks for” the client, then it is the entire Council that has the right to the privilege - and to keep or waive it.
    - This means that an individual member who breaches confidentiality may be acting outside the scope of his/her authority.

# Executive Sessions

- Executive sessions are permitted for only one reason: a legitimate need for confidentiality.
- This means confidentiality ***must*** be maintained after you get out of the session.
- Executive sessions should not be abused!
  - Will undermine public confidence, create suspicion, provoke the press and citizens!

# Protect the City's confidences

- Protection of confidences is particularly important in the personnel context
  - Inappropriate disclosure of personnel matters can be destructive and may invite liability
- Make sure your procedures are set up in a way that doesn't invite confidentiality breaches
  - Stay out of the loop on most personnel matters
  - Delegate personnel matters to your City Administration to handle

# Run a good meeting!

- Outside of appropriately confidential matters discussed in a properly convened executive session, ALL matters before a public body are to be discussed AND decided only in a properly noticed public meeting.
- Don't hold a private “meeting before the meeting”
- Be cautious about using email to discuss public business
- No public “rubber stamping” of decisions already made in private
  - If some or all members have already decided an outcome in private, then the concept of public participation in a public meeting has been effectively destroyed

# Run a good meeting!

- Don't hold the meeting if timely notice hasn't been given
- Don't end up having an inadvertent "meeting"
  - 3 or more or a quorum gathered to discuss public business = a meeting!
  - If you find yourself together by accident ... DON'T discuss public business!
  - Keep appearances in mind
- Be very cautious about email discussions
  - Can implicate open meetings law, open records act, and civil discovery requirements



# Electronic Communications

- Abraham Lincoln said:  
    **"Men should utter nothing for which they would not willingly be responsible through time and eternity."**
- These words ring especially true in an age when it must be assumed that ***nothing*** uttered in an electronic medium can be deleted or kept private!
  - Blogs, emails, texts, voice mails, websites, instant messaging, Tweets, Facebook postings, etc., may all come back to hurt you

# Run a good meeting!

- Understand the difference between legislative and quasi-judicial matters, and observe the different requirements applicable to each!
- In a quasi-judicial hearing, an array of special procedural requirements apply.
- Violation of those requirements is a violation of due process – a constitutional/civil rights violation!

# Quasi-Judicial Hearings - Personal Conduct Dos and Don'ts

- The essence of a good hearing is **fairness** and the **appearance of fairness**
- Don't sign any "pro" or "con" petitions!
  - Common in liquor licenses
- Don't make up your mind before the hearing
- Don't speak with one side or the other before a hearing (**ex parte contacts** – about which more later), and don't assume the role of negotiator or advocate

# Other suggestions – avoid ex parte contacts

- An ex parte contact is an “outside the hearing” contact with someone who has a stake or interest in the subject matter of the hearing
  - The contact is impermissible whether with the **applicant, citizens, staff, or others**
- When your City Attorney advises against them, she is protecting YOU, your ability to participate in the decision-making, and your ultimate decision
- Improper ex parte contacts **disempower you** as the decision-maker!

# Ex parte contacts, cont'd

- A Councilmember doesn't wear a robe, is easily recognized on the street, and is expected by citizens and others to be "accessible" at all times, but . . .
  - A judge reviewing a quasi-judicial decision in an appeal proceeding will judge the Council's conduct against the way he/she would behave as a judge in his own courtroom – so keep the "judge – courtroom" scenario in mind when deciding on your own conduct in quasi-judicial matters
  - So "think like a judge" in your personal conduct when a quasi-judicial matter is pending. . .

# Ex parte contacts, cont'd

- Would a judge seek out citizens and invite or ask them to come and testify as witnesses in a pending case before him/her?
- Would a judge allow himself/herself to be “lobbied” on a pending matter at home or at the local supermarket?
- Would a judge compromise the appearance (and possibly reality) of fairness by singling out one side or another to be overly friendly with?
- Would a judge make a decision in a matter in which he/she had a financial interest, or in which he/she had already made his mind up?
- Would a judge make a public statement that could come back to haunt him/her later on in terms of displaying a possible bias?
- Would a judge decide to ignore the law and/or the facts in rendering a decision, and make his/her decision on the basis of factors that he/she knows are not relevant?

# Put ethics first!

- Standards set by state conflict of interest laws are minimums
- This is why municipalities frequently establish their own requirements regarding such matters as
  - Scope of conflicts – who is a “family” member
  - Purchasing
  - Nepotism in employment
  - Disclosure of conflicts

# Put ethics first!

- In Colorado, ethics scandals are rare – but happen from time to time
- Ethical misjudgments greatly undermine public confidence in government
- Can result in criminal and civil liability
- “Personal benefit” exclusion from liability coverage!
- Gaining a personal benefit is NOT in one’s SOE!
- Amendment 41 concerns



# Put ethics first!

- Disclose any personal or private interest in any pending matter to governing body; don't vote (except in very limited circumstances); and don't influence other members
- Don't have a financial interest in any contracts or purchases
- Don't disclose any confidential information you gain

# Put ethics first!

- Avoid acceptance of gifts
- Don't engage in private business transaction with someone you inspect or supervise
- Don't take actions to benefit a business in which you have a financial interest

# Put ethics first!

- The bottom line: **No one should derive a personal or private benefit from holding public office**
- Any such benefit raises red flags from an ethical, civil liability, and criminal liability standpoint!

# Reduce your involvement in administrative matters

- Understand and observe the difference between legislative and administrative matters!
- A municipality evolves from “hands on” elected official involvement in administrative issues to a City Manager form of government as the municipality’s operations become more sophisticated and complex.
  - City Manager format: The gold standard of municipal government!
  - Effective City management = effective risk management
- Council’s role: establish “corporate” values and mission, set overall goals and priorities, and give broad direction, leaving details of execution to staff.
- John Carver: Boards should develop a taste for the “grand expanse of the big picture”!

# Reduce your involvement in administrative matters

- Inappropriate involvement in administrative matters by elected officials, collectively or individually, can:
  - Undermine the chosen form of government
  - Waste the resources you've committed to the form of government
  - Be a backwards step in municipal government evolution
  - Increase the risk of liability for yourself

# Reduce your involvement in administrative matters

- The legislative-administrative distinction is particularly important in personnel matters.
- Council has an appropriate role – the “big picture” issues:
  - Selection of your “direct reports”
  - Budget
  - Overall City-wide goals and priorities

# Reduce your involvement in administrative matters

- Make sure your involvement in these “big picture” issues doesn’t devolve into the details:
  - Selection, evaluation, or disciplinary matters involving a specific individual who’s not a direct report
  - Salary of specific individuals who aren’t direct reports
  - Details of a specific individual’s duties or job performance
- Other than your “direct reports,” if you are looking at issues involving a single employee rather than the group as a whole, that is likely an administrative issue that should be entrusted to your City Manager
  - There is a chain of command in every organization. Part of your oath is to respect that chain of command.
  - Don’t reach below the level of your “direct reports” on personnel matters, and don’t be pressured to bypass the chain of command to deal with a specific employee – if you do it with one employee, how can you **ever** return to the proper chain of command?

# Reduce your involvement in administrative matters

- Your BEST immunities as elected officials are in the legislative and quasi-judicial arena.
  - Courts recognize legislative and quasi-judicial immunities
- Venture into administration, and you're venturing into "outside the SOE" territory!



# Use your power wisely and humanely

- Whether you know if or not, you set the tone for the whole City in terms of the treatment of employees, citizens, and the business community.
- If the tone you set is negative, demeaning, distrustful, discriminatory, etc., you are setting yourself and the City up for liability. . . . And guess what rolls downhill?
- Understand that you are perceived as holding the most powerful positions in the City
- Use courtesy, tact, and diplomacy in interactions, especially in public settings
- Your staff members are professionals, but they are humans too.
  - Avoid acting explosively or with the intent to demean or embarrass
  - Think before speaking off the cuff, especially in a public setting
  - No “surprises,” no “gotcha” games

# Use your power wisely and humanely

- Do not allow Council 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 City 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!

# Conclusion

- Always keep in mind that you are the stewards of the City's best interests and assets
- Stay within your "scope of employment"!
- Act as "we," not as "I"
- Observe best practices in meetings
- Meet high ethical standards
- Use your powers wisely and humanely

QUESTIONS?