



## **Trends in Municipal Civil Liability and Insurance (or, “Tort Reform Ain’t What It Used To Be”)**

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**Tami A. Tanoue, CIRSA Executive Director**

# Introduction: A moment of nostalgia

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CIRSA was conceived by CML in the late 1970s, when concerns first began surfacing about the affordability and availability of public entity insurance

- Following some enabling legislation and a CML study group, CIRSA was created in 1982 as a separate legal entity, a public entity self-insurance pool established by IGA of its 18 founding member municipalities
- Then came the insurance crisis of the early 1980s, when municipal governments (and other insurance purchasers) found themselves with cancelled policies or massive price hikes
  - Regulators blamed insurance companies for creating “boom and bust” cycles with “cash flow underwriting” practices during “soft market” years
  - Insurance companies blamed the liability environment, and used the crisis as a “tort reform” opportunity
- Both CML and CIRSA were valuable for municipalities during this crisis
  - 1984-86 were peak “tort reform” years; CML was a major player, aided by the thoughtful work of municipal attorneys
  - CIRSA’s membership grew by “90 members in 90 days” during the early days of the crisis, and now encompasses 85 percent of Colorado’s municipalities

# Today's hard, cold realities....

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**“We don't get no respect at all.”**

**~ ~~Rodney Dangerfield~~ CML's exhausted lobbyists**

- “Tort Reform” doesn't mean what we used think it meant!
- A reality of one-party rule is that stakeholders' voices don't count the way they used to - legislation can be passed without listening to our concerns, and the legislative process itself seems to have become less transparent
- Although our primary source of state law liability protection – the GIA – remains intact in large measure, we are seeing some notable erosions
  - 2020 and 2021: Law enforcement liability
  - 2021: Sexual misconduct liability
- Changing juror perceptions – “social inflation” – means that we can no longer expect jurors to be sympathetic (or at least neutral) towards the endeavors of “the government closest to the people”
- These and other factors mean that the cost of risk is ever-increasing – hard insurance market – some insurers pulling out – some coverages becoming less available – limits of coverage being reduced
  - While we haven't seen the extremes of soft and hard market cycles in recent years, what we live with now are “hard market” and “harder market” cycles

# Trends in law enforcement liability

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- Negative perceptions between law enforcement and the communities they serve are a relatively new phenomenon in Colorado
  - Incidents nationwide and in Colorado have adversely affected community/police trust
  - In some communities, the resulting tensions have been explosive
  - Other communities may be one incident away from an explosive event
- The reach of social media means that local incidents are no longer local – they can go “viral” instantly, creating a feedback loop that can reverberate back into negative perceptions locally
- Even if your community is not experiencing negative perceptions of law enforcement, those perceptions are affecting the views of juries and judges
  - We don’t generally take members’ cases to trial unless we believe we have a reasonable chance of prevailing
  - Historically, this has meant that we’ve sometimes settled cases when defense counsel and/or the member wanted to try them
  - Today, it’s can be the member – and sometimes even defense counsel – who’s pushing for settlement!

# Trends in law enforcement liability

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These factors – “social inflation” – mean that the cost of claims is rising

- The negative societal/community environment affects juries’ views of law enforcement, their view of liability, and their view of the value of claims – and therefore our (and plaintiff counsel’s) view of the value of claims
- Our big concern in going to trial is the possibility of the “nuclear verdict”
  - What would happen if a verdict comes in higher than the maximum limit of your entity’s coverage?
- This concern in turn drives “nuclear settlements”:
  - \$1.3 million settlement in 2014 was our biggest ever at the time
  - A \$4 million settlement in 2017 was our biggest ever at the time
  - An \$8.75 million settlement in 2020 is now our biggest ever... at this time

# Trends in law enforcement liability

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- As settlements and judgments increase, the cost of coverage is increasing, too
  - In July, a 40-50 percent increase in the cost of law enforcement liability reinsurance was projected, and we sent out member quotes on August 31 with that in mind
  - Today, that projection appears to be too optimistic
  - Reinsurers now tell us to expect a larger premium increase, AND lower limits of coverage, AND larger self-insured retentions (SIRs)
  - Luckily, thanks to the downturns in the property market over the past few years, we've become accustomed to a "shared and layered" reinsurance approach, with multiple reinsurance partners sharing the risk along with us, so our plan going forward is to use a more "shared and layered" approach for law enforcement and other liability coverages as well
  - A higher CIRSA SIR means that we'll have more "skin in the game," but it also offsets the higher cost of reinsurance, and gives us a higher degree of self-determination over claims
  - If your entity purchases insurance individually, these factors will also affect you – and if your account is considered "loss affected," then you may experience even greater hesitancy from the market
  - For the same reasons that we have been taking increasingly higher self-insured retentions, your municipalities may wish to consider higher deductibles as well – we can do a deductible analysis to help members determine their deductible "sweet spot"

# Trends in law enforcement liability

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Let's philosophize for a moment:

- Looking at the high-profile law enforcement incidents that have happened in Colorado in the last few years, can we point to common factors that led to those incidents?
  - Geographical – urban/rural? Resources – large, sophisticated department or small, under-resourced department? Demographics and community expectations?
  - Or are they more like lightning strikes? Are they incidents that could happen anywhere, at any time?
  - And if they're more like lightning strikes, then what can be done to prevent such incidents?
    - How do we apply risk management principles? What kinds of preventative programs would work?
    - How would insurers underwrite the risks of law enforcement, if a well-trained, well-supervised, well-resourced police department with a great loss history seems just as likely to experience a catastrophic incident as one that doesn't have those characteristics?
    - If these incidents are “lightning strike” in nature, then pooling those risks may be the most sensible approach to insuring them

# Trends in law enforcement liability

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And let's think about the policies and procedures that underlie police actions.

- Policies and procedures are (presumably) carefully vetted to reflect the limits of authority provided by federal and state laws and applicable court decisions
- In a number of high-profile incidents, initial supervisory review found that officers' actions were "within policy," but a subsequent public outcry led to a different result – a "not within policy" determination, disciplinary action, and/or even criminal prosecution
- There seems to be an increased willingness on the part of prosecutors to bring charges against LEOs for actions that might once have been considered "judgment calls"
- Why is this happening? Does this reflect a disconnect between public expectations and what policies are allowing? This disconnect seems to be a driver of the public's discontentment about law enforcement. **Do we need to be rethinking some policies?** Or...?
- If this disconnect isn't addressed, then LEOs will continue to leave the profession, and will continue to have the threat or reality of criminal prosecution over their heads. The cost to operate, manage, and insure a police department will continue to escalate. The cost of settlements and verdicts will continue to increase. Public discontentment will not subside.

# Trends in employment liability

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- The municipal workplace is changing, and not entirely for the better
  - It was once a congenial and desirable place to work – a sense of shared mission and meaning, career advancement opportunities, reasonable pay and benefits
  - Today, “the government closest to the people” is getting lumped in with other, less popular levels of government, and there’s more division and stridency from outside and inside, permeating the organization at every level
  - Novel challenges, such as “doxxing” unpopular officials, “First Amendment audits,” and the increased chance of being embarrassed (or worse) in social media, have appeared
- Some positions have always had a shorter “shelf life” than others – notably, direct reports such as City/Town Manager and City/Town Attorney have always had a greater chance of being on “the firing line”
  - But now, the “shelf life” may be getting even shorter

# Trends in employment liability

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- For direct reports, particularly City/Town Managers, the employment agreement has been the primary means of protecting both parties – the municipality and the manager – from the uncertainties of continued employment
- In return for agreeing to a clean, fast separation, it was expected that a reasonable, agreed-on amount of severance would be paid
- But today, that employment agreement doesn't seem as solid a protection for either party as it once was.
- What is happening, and why??

# Trends in employment liability

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The “what”:

- For the municipal attorney, helping to manage exits via an employment agreement is not always as easy as it once was
  - Your perspective: Thanks to the great contract I drafted/reviewed, the Council/Board can opt to “pull the trigger” without liability, and it knows in advance what the costs of exercising that option are
  - The other side’s perspective: I know I agreed to a certain amount of severance, but things have changed, and now I view that amount as a “starting point” for further negotiations
  - There’s less hesitation to pursue litigation than there once was – at one time, factors like professional pride, the relative insularity of the profession, and the transparent, public nature of municipal government, created some reluctance to air out “dirty laundry” in court
  - These issues are affecting “direct report” positions other than the Manager, too

# Trends in employment liability

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The “why”:

- Thanks to YouTube, FaceBook Live, and other electronic/social media, ALL the laundry – clean, dirty, or otherwise – is regularly aired out in public anyway
- If ugliness is being played out in public (and being recorded), such as in Council/Board meetings, then anyone can do a Google search and see *all* of it, forever – and it will follow your soon-to-be-former Manager forever, too
  - 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, whistleblower, or discrimination claim against you or your entity exists
- Under these circumstances, the incentive to respect the City/Town’s desire for a quick, clean exit may be greatly reduced, and the agreed-upon severance may feel like inadequate compensation from the Manager’s perspective
- And if the employment agreement isn’t written with absolute clarity, adherence to applicable laws, and SIMPLICITY, then it may be weaponized against your client

# Trends in employment liability

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Problems with employment agreements:

- They're written in the first rush of good will and rosy expectations
  - The City/Town is hiring its new superstar, and may not be contemplating the possibility of the relationship ever going awry
- The City/Town's focus may be on hard cash items - pay and benefits, severance amount, relocation allowance, etc.
- But the Manager-to-be may be paying greater attention to process issues, especially if he/she's been through this previously
- When things are not so rosy, you may find that what's been written around an exit is problematic: ambiguous, cumbersome, too lengthy, or even impracticable to fulfill
- Those ambiguities are fodder for negotiated terms that are more generous than may have been contemplated

# Trends in employment liability

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So...what can be done?

- KISC: KEEP IT SIMPLE, COUNSELOR!!
- Ideally, you should be in charge of drafting the agreement, but especially any provisions around performance, dissatisfaction with performance, process around dissatisfaction, no-cause terminations, and payment of severance
- Particular scrutiny is needed for any provisions that call for a public airing of concerns, some kind of “right to cure” performance problems, undue complexity and reciprocal rights around performance evaluations, provisions permitting any “waiver” of performance evaluations
- Separation/severance provisions must be simple and straightforward – provides a clear path to the “how” of reaching a mutual parting, doesn’t drag on interminably, and is practicable under open meetings laws and other transparency requirements

# Trends in employment liability

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So...what can be done?

- Before finalizing, “test” the separation/severance provisions against every detail of a “real life” separation scenario: How is this matter agenda-ized and public-noticed? How is it addressed by the governing body? How many days/weeks/months will it take? Who does what? Etc., etc.
- Provide for a clean ending – no staying on the payroll, no “shall be available for consultation,” no further obligations, etc. – one clean payment, and done!
- Don’t agree to stuff that can’t actually be done! Example: “Health insurance coverage for the Employee and Employee’s dependents shall be maintained for a 12-month period after separation”: This can’t be done, so figure out what it would cost for the Employee to maintain his/her own COBRA coverage, and add it to the payout

# Trends in employment liability

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Also, some of you are too clever by half, and it shows. 😊

- Some charter provisions, and various provisions for statutory cities and towns, are somewhat incongruent with the concept of a clean, quick separation in return for a reasonable severance
  - Statutory towns must deal with CRS 31-4-307, applicable to the Town Clerk, Treasurer, and other “officers of the town.” Is the Town Administrator an “officer of the town”? Yes: 31-4-304!
    - “By a majority vote of all members of the board of trustees, the mayor, the clerk, the treasurer, any member of the board, or any other officer of the town may be removed from office. **No such removal shall be made without a charge in writing and an opportunity of hearing being given** unless the officer against whom the charge is made has moved out of the limits of the town.”
  - “Creative” efforts to reconcile a no-cause, no-hearing separation with this statute may or may not be workable!
  - You may think you’ve arrived at the perfect creative language, but creativity doesn’t always impress regular people...like the ex-employee in question, the average juror, the average judge, or, most importantly, your average claim adjuster who’s been assigned work with you in the ensuing lawsuit – caution is required
  - For the few remaining statutory Council-Manager cities in existence, 31-4-210 provides its own separation conundrum: The Manager may be “removed **at the pleasure of the city council for cause.**” Wha-??

# Other insurance trends and issues

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- In addition to general liability, public officials errors and omissions (including employment liability), municipalities typically purchase property coverage, crime coverage, and cyber coverage
  - CIRSA property/casualty members have all of these coverages as a package
- Where optional coverages or coverage limits are offered, it's critical for municipalities to know what they're opting for, and the consequences of their choices!
  - Example: A few municipalities have been surprised to discover they only had \$150,000 in crime coverage, after a multiple-year, multi-million dollar employee theft event
    - They've been even more surprised to learn that the limit of coverage for crime doesn't cumulate from year to year
    - Advisable for most larger municipalities to purchase higher crime coverage limits than \$150k
  - Example: There can be coverages where the member deductible equals or exceeds the limit of coverage
    - We try to make "specialty" coverages available to all members by making them zero-deductible coverages, but there are some coverages – such as cyber crime coverage – where that isn't the case – if we provide \$150k in cyber crime coverage, but you have a \$150k property deductible...guess what? (We're looking at options to address this issue.)

# Other insurance trends and issues

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- Speaking of cyber coverage, this is one market where CHAOS is currently reigning
  - Non-renewals if loss-affected, huge premium increases, stringent underwriting criteria and application process, coverages and limits being cut back
  - There is a laundry list of cyber protection measures the market is looking for its insureds to have in place, starting with multi-factor authentication (MFA) for passwords – insureds who don't have MFA in place will have problems at renewal
  - This chaos will particularly impact municipalities purchasing their own cyber coverage, especially if they've been "loss affected"
- The property coverage market, in general, continues to reel from the regular occurrence of climate-related losses in the billions – and some, such as the Texas freeze, the extreme wildfire activity in western states, and the multi-day, multi-state impact of Hurricane Ida, were not on anyone's bingo card. As one property reinsurer put it: "WE NEED MORE RATE!"
- Although reinsurers have taken notice that western Colorado is wildfire country and eastern Colorado is hail/windstorm country, the property market is also strongly affected by events all over the country and the world
- CIRSA has been able to keep property rates reasonable by an intricate "shared and layered" approach – we are up to 20 reinsurance partners (and 6 different Lloyds syndicates) this year – and some form of "shared and layered" may be the way going forward for liability coverages as well

# Other insurance trends and issues

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- 2020 police liability legislation established an up-to-\$25k personal liability for police officers under certain circumstances. We provide coverage for this exposure at no cost to our members – as an “opt in” coverage, with some conditions to ensure careful coordination with the many aspects of a claim where this exposure exists
- We provide a large array of other “no deductible,” sublimited, mostly defense-cost coverages. Examples: Rule 106(a)(4) defense; executive session violation allegations; criminal defense reimbursement; and disciplinary proceedings defense for employee professional/occupational licenses (yes, this includes law licenses!)
- We will pay for our members’ cost to use KnowB4 as a training resource for cyber liability prevention
- And even though we wonder whether large law enforcement liability events might be “lightning strikes,” we still are devoting many risk control resources to law enforcement:
  - SIGMA Tactical Wellness
  - Cordico Mental Wellness App
  - Access to Dr. Jaime Brower – Brower Psych Services for LEOs
  - We’re exploring, for 2023 and beyond, other ways to support the law enforcement mission – we may look again at providing a subsidy for the use of Lexipol’s policy development/maintenance and training service
  - See our law enforcement resources page at <https://www.cirsa.org/law-enforcement/> for details

# Summing up

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What else can be done?

- Counsel against “piling on” of service after service on the shoulders of law enforcement. There’s enough on their plate without expecting them to solve all of society’s ills, such as the opioid crisis, homelessness, the mental health crisis, etc., etc.
- Make your clients aware of the significant expansion of liability, primarily as a result of S.B. 21-88, in the area of sexual abuse/sexual molestation claims by minors.
  - The ramifications of this liability expansion will need to be considered in any youth-related programs your municipality is providing, or contemplating providing – expansion into municipality-wide child/day care, for instance, is happening or being considered by a number of municipalities
  - The protection of minors in the workforce is just as important as minors being served in current or contemplated programs
- Chime in in favor of adequate budgets for these and other high risk endeavors – they deserve the best possible personnel, supervision, training, equipment, and other resources

# Summing up

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What else can be done?

- If your municipality is considering a “start-up” police department, offer your assistance in making sure things are done in the right order, and resourced adequately
  - Example of wrong order: Hire chief, hire a bunch of officers, put officers on street, put off working on police policy/procedure manual until later
  - Example of right order: Hire chief, lock chief in windowless room until he/she creates or borrows a policy/procedure manual
- Remind your governing body members that their colleagues, the people they serve, and the people who serve them, are humans who should be treated with dignity, courtesy, and respect;
  - And as the center of the municipal universe, to exercise their powers – including their perceived powers – with care and empathy.

# Summing up

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And will there be another “insurance crisis”? The Magic 8-Ball says” “Reply Hazy, Try Again.” But:

- The industry seems to have modified its underwriting practices – “cash flow underwriting” seems to be a thing of the past
- Insurance cycles seem to be less “soft market-hard market” and more “hard market-harder market”
- Pools have become an established alternative to commercial insurance in Colorado and elsewhere
  - The very existence of pools and other alternatives (such as self-insurance) may help keep the brakes on wild cost swings that made insurance unaffordable or unavailable in the 1980s
  - Pooling cost advantages include a pricing structure aimed at stability in pricing from year to year
- We need to hang on to as many liability protections as we can, and fight further encroachments on those protections - even if we’re not in 1980s-style crisis, the law enforcement liability and cyber markets are seeing too many adverse untenable trends

***Thank you for being the front line of protection for your client municipal governments!***

# About CIRSA

## Colorado Intergovernmental Risk Sharing Agency

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- 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

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- 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 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 your advice...you are always right, and I am always wrong. 😊