

ETHICS, LIABILITY
& BEST PRACTICES
FOR ELECTED
OFFICIALS

HANDBOOK

SECOND EDITION 2019



CIRSA

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CML

COLORADO
MUNICIPAL
LEAGUE

ETHICS, LIABILITY &
BEST PRACTICES
HANDBOOK
FOR ELECTED OFFICIALS

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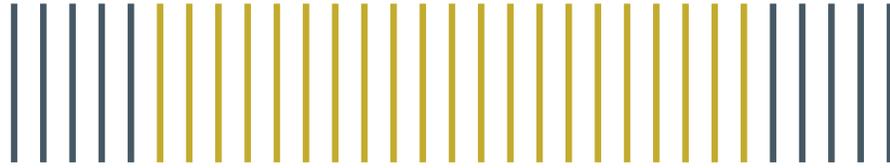


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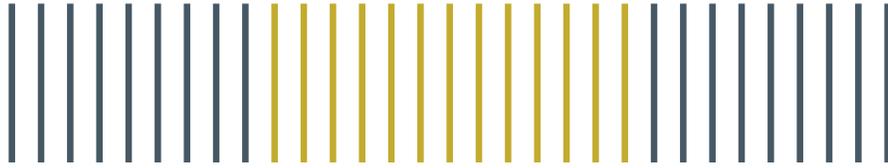
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PREFACE

If you've stepped up to the challenges of serving as an elected official in your community, congratulations! You're dedicating your energy, wisdom, and experience towards making your city or town the best it can be. But the job of an elected official is not an easy one. Missteps can make you less effective, undermine your credibility, and even lead to liability.

In this newly revised and expanded edition of the popular *Ethics, Liability & Best Practices Handbook for Elected Officials*, we discuss many of the issues of greatest concern to elected officials from the standpoint of maximizing excellence and effectiveness, while minimizing the risk of liability. The contributors have provided decades of service to municipalities, individually and collectively. We've tried to keep the content engaging, on-point, and light on the legalese.

At CIRSA and CML, we pride ourselves on partnering with our member local governments. CIRSA offers a wide range of risk management services, from providing property, liability, and workers' compensation coverage, to managing claims, assisting in managing your risks, providing training to elected officials and staff, and consulting on virtually every liability-related topic. Founded in 1923, CML is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing and serving Colorado cities and towns. CML works to empower Colorado cities and towns through legislative and legal advocacy, training, research and information, and leadership on matters of municipal interest.

We hope you will find this publication to be of value to you as you undertake the challenging and rewarding work of governing your community.

Tami A. Tanoue
CIRSA Executive Director

Kevin Bommer
CML Executive Director



FOREWORD

By: William E. Bell, MPA, ICMA-CM

City Manager for the City of Montrose & former Executive Board President of the Colorado Municipal League (CML) and the Colorado City & County Management Association (CCCMA).

We have all heard the old saying: “Ethics is doing the right thing when no one is watching.” Well, what about doing the right thing while everyone is watching? How refreshing it might be to sit in a nice quiet office or out on a park bench with the birds chirping in the distance, while pondering our options prior to making a decision that affects hundreds, or even thousands of people for years to come. How reassuring it might be to run all of our ideas by a panel of experts to vet the pros and cons over an extended period prior to making our next decision. Sound good? Of course it does! However, that is simply not reality for a local government official in today’s fast-paced world.

But no matter the pace or pressures, this overarching point of municipal leadership remains the same: MAINTAINING ETHICAL INTEGRITY—AND DOING THE RIGHT THING—AT ALL TIMES IS A REQUIREMENT for elected and appointed officials alike. Our communities are microcosms of our society, and with an ever-changing demographic we are facing ever-changing expectations as to what role we should play as local government leaders. We are all facing the unique pressures of being public servants and although it is most definitely a worthwhile and rewarding calling for most of us, it can also be frustrating, unpredictable and complicated at times.

More often than not, elected and appointed officials reach at least one point in their tenure where doubt creeps in, making them wonder about the true value of being in local government. Is it worth it? Can I handle this? Questioning oneself and our actions during times of uncertainty and chaos is normal and does not mean that we are doing anything wrong. In fact, I would argue the opposite.

In working with thousands of constituents, hundreds of employees, and dozens of elected officials during my 16 years of managing communities, it is those individuals who were interested in self-reflection and continuous improvement that I have truly admired for answering the call to public service. Theirs is an example worthy of emulation and one that safeguards public officials from ethical missteps.

We all struggle to find our place when we are new to an organization, and it is a time when we are most susceptible to outside persuasion and manipulation. During times of transition, it is especially important to rely on each other’s experience and expertise and to reach out for support and guidance whenever there is uncertainty. Here in Colorado we are lucky to have several well-versed organizations such as CIRSA and CML at our disposal to offer advice on how to handle ethical dilemmas and complex situations. However, we must be willing to tap these valuable resources prior to getting ourselves into trouble. Asking for help is not a sign of weakness, but is rather an indication of care, thoughtfulness and wisdom.

While there is no single blueprint to success for local government leaders, no recipe to follow to create the perfect outcomes, building strong and healthy relationships is the foundation of both achievement and sound ethical practice. Whether it is the idealistic vision shared between two newly elected officials, or the mutual respect and deference exhibited between a seasoned manager and his or her councilmembers; one thing is certain: the relationships connecting our local government leaders are what lay the foundation for sustainable and productive local governance in today’s society.

I hope you are able to spend some time reviewing the information in this second edition of *Ethics, Liability & Best Practices Handbook for Elected Officials* and taking to heart its content. This material offers a common ground from which all Colorado officials can work to make the communities of this great State even better.



CHAPTER 1

THE OATH OF OFFICE: ETHICS, LIABILITY AND BEST PRACTICES

By: Tami A. Tanoue, CIRSA Executive Director &
Sam Light, CIRSA General Counsel

A typical oath of office might go as follows:

“I solemnly swear or affirm that I will support the Constitution and laws of the United States of America and the State of Colorado, [the Charter,] the ordinances and other laws of the City/Town, and that I will faithfully perform the duties of the office upon which I am about to enter.”

With the passage of time since you took office, does your oath have continuing meaning as an ethical commitment? This chapter examines the oath as a commitment to best practices in carrying out your responsibilities, and as a path to avoiding liability. We'll focus on four key areas: allocation of responsibilities, transparency in meetings, quasi-judicial rules of engagement, and personal conduct.

Honoring the Allocation of Responsibilities

As in other levels of government, municipal powers and responsibilities are typically allocated among the governing body, judge, staff, and possibly others, according to charter or statutory requirements. Thus, for instance, the governing body is responsible for all legislation, the municipal judge is responsible for determining ordinance violations, and the manager/administrator and staff are responsible for administrative matters.

To the extent the charter or statutory provisions set forth a clear allocation of responsibilities, respecting that allocation is part of an elected official's oath. Inappropriate involvement in administrative matters, then, could be a violation of your oath.

Personnel matters are among those in which inappropriate involvement tends to occur. The governing body typically supervises a limited number of its own direct reports—for example, the chief administrator, judge, attorney, and perhaps a few others. As an individual elected official, if you are asked by an employee who's not one of the governing body's direct reports to become involved in an employment issue, or if you take the initiative to become involved, that could be a red flag in terms of your oath to respect the allocation of responsibilities.

From a best practices standpoint, inappropriate involvement in personnel matters can effectively destroy the chain of command. While most municipal offices are not operated according to a military-style chain of command, some version of a chain of command is critical for effective functioning no matter how large, small, formal, or informal your operations are. Once you allow inappropriate involvement to occur, you have effectively disempowered managers and supervisors throughout the organization, and sent the message that employees are free to disregard the chain of command.

Personnel matters are also a high-risk liability area. The more you're personally involved, the more likely it is that your name may some day appear on the wrong end of a lawsuit, or come up in an executive session where your fellow members are assessing the risks your conduct has created. So, you can see that honoring the allocation of responsibilities by staying out of most personnel matters is a means of avoiding or reducing liability.

Honoring Transparency in Meetings

In local government, transparency of the governing body in its discussions and decisions is a basic expectation of the citizenry. Citizens take great interest in the goings-on of the governing body, and are quick to notice when their transparency expectations are not met. A perception that governing body members are conducting discussions secretly, that executive sessions are being held for improper purposes, or that decisions are being made in "smoke-filled back rooms," can quickly erode trust and confidence in government.

Transparency in meetings means that governing body meetings are open to the public and held only after proper public notice, that executive sessions are strictly limited to the purposes authorized by law, and that discussions of public issues take place in a meeting setting rather than by email or in hidden locations. Is this part of your oath? Most certainly! The statewide open meetings law applies to all local public bodies, including city councils and boards of trustees. If you're a home rule municipality, there may be charter provisions concerning transparency as well.

Is honoring transparency in governing body meetings a best practice? It is, if you want to maintain the public's confidence and trust! Citizens expect and appreciate your body's commitment to discussing and deciding difficult issues with full transparency. And making a commitment to transparency can also help ensure that your municipality doesn't become Exhibit A in an effort to make draconian changes to the open meetings law. You surely don't want to be held up as a bad example in the legislature. It's happened.

Is honoring transparency a liability-reducing suggestion? At CIRSA, we've seen our members become involved in litigation over their meeting practices. Based on our experience, the answer to that question is yes. There are watchdogs out there scrutinizing you, and they will pounce on you with allegations of violations and a lawsuit if your meetings practices don't pass muster under the law. CIRSA has open meetings/executive session defense cost coverage for member governing bodies, but by honoring the letter and spirit of the open meetings laws, you can avoid costly and potentially embarrassing litigation.

Honoring the Quasi-Judicial Rules of Engagement

Governing body activities can be pigeonholed broadly into two areas: legislation and quasi-judicial decision-making. The rules of engagement differ depending on which pigeonhole fits. For legislative matters, the rules of engagement are free-wheeling. Think of the state legislature when it's in session, and the lobbying that goes on there. But for quasi-judicial matters, the rules of engagement have a basis in constitutional due process requirements: when you are making a decision that affects individual property rights, the constitution requires a properly noticed and fair hearing before a neutral decision maker—you. Thus, in quasi-judicial matters, you must conduct yourself similarly to the way a judge does in deciding a case.

No doubt your municipal attorney has discussed the quasi-judicial rules of engagement with you. The attorney is trying to protect the integrity of the hearing process, the defensibility of the outcome, and your prerogative to participate as a decision-maker. These rules of engagement include:

- You will follow the applicable legal criteria and apply those criteria to the evidence you hear at the hearing, to arrive at your decision.
- You will refrain from “ex parte” or “outside the hearing” contacts regarding a pending quasi-judicial matter.
- You will not participate in decision-making in a quasi-judicial matter in which you have a conflict of interest.

These rules flow from constitutional due process requirements, so they are most certainly a part of your oath. Following these rules is also a way to avoid or reduce liability. In quasi-judicial matters, the process by which you arrive at a decision is at least as important as the substance of the decision itself. If you've ensured that the process is letter-perfect, then you have eliminated a huge portion of the possible quarrels that could turn into a claim. And it's a best practice, because following the rules of engagement will enhance the reality and the perception that all who come before you with quasi-judicial matters will be heard and treated fairly.

Honoring Standards of 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. No matter where you are on the political spectrum, you can probably agree that politics today are infected with divisiveness and incivility. Municipal government being non-partisan, its elected officials should, at least in theory, be able to rise above the nastiness of partisan politics!

With respect to the governing body, do all members understand that governance is a team activity? An individual elected official does not have the power to accomplish anything on his or her own. Rather, the allocation of responsibilities to the governing body is to the body as a whole. Only through collaboration and consensus-building can an individual's priority become the priority of the governing body. While the governing body is comprised of individuals and will “deliberate with many voices,” all members must recognize the governing body “acts with one voice.”

Has the governing body been able to “gel” as a team, or are members viewing one another with a sense of distrust? Are you lining up along the same divisions on every issue? Are you unable to disagree without being disagreeable? Perhaps some team building is in order if these things are happening.

With respect to staff, is an incoming council or board viewing staff as the “enemy”? A staff exists to carry out the goals set by the governing body. Sometimes, with the changing of the guard at the governing body level, there’s an assumption that there needs to be a changing of the guard at the staff level, too. But if this staff faithfully carried out the goals of the prior governing body, why wouldn’t you expect that they will be equally able and willing to carry out the goals of the new body?

With respect to the community, are public comment periods turning into “public inquisition” or “public argument” periods? Is “staff bashing” or “elected official bashing” happening at meetings? Perhaps another look at your rules of order, and your approach to meetings, would be appropriate. Certainly the public has every right to appear at meetings and make complaints. It’s a sign of faith in local government that people care enough to complain! But the manner in which those complaints are made, and the manner in which you respond, can mean the difference between a constructive, productive exchange or a nasty, embarrassing, unproductive, or morale-crushing attack.

Is the observance of personal conduct standards part of your oath? At least arguably, yes. After all, the oath implies faithfully performing a role where you must work with others. And you have a fiduciary duty to act in the best interests of your municipality. It doesn’t seem a far stretch to impute to your oath a commitment to respectful conduct towards one another and the best interests of the municipality.

Is it a best practice to observe personal conduct standards? It certainly seems so. Maintaining harmonious and productive working relationships with your fellow elected officials, staff, and the public can only increase your effectiveness. And keep in mind that harmony doesn’t mean you all have to agree all the time. Indeed, healthy discussion, debate, and disagreement are the engine for understanding issues and solving problems. But the idea of disagreeing without being disagreeable is important to keep in mind.

Does the observance of personal conduct standards help with liability reduction? We think so. In CIRSAs’ experience, turmoil at the top levels of the municipality means turmoil throughout the organization. After all, you know what rolls downhill. Over and over, we’ve seen that disharmony and dysfunction at the top means claims throughout the organization. These types of claims not only cost dollars to defend, but also can sap the governing body’s energy, destroy staff morale and cause reputational harm, all with long-lasting impacts.

Conclusion

Honoring your oath of office isn’t just something you do when you raise your right hand at the beginning of your term. You can look at just about any arena in which you operate as an elected official, and ask yourself, “What did I commit to do when I took my oath?” By asking and answering this question, you can stay on the path of best practices, and avoid or reduce personal liability.



CHAPTER 2

HEALING DIVISIONS ON THE GOVERNING BODY: CAN'T WE ALL JUST GET ALONG

By: Tami A. Tanoue, CIRSA Executive Director

At CIRSA, we're seeing more and more instances of governing bodies with intractable divisions that cut across virtually all of the body's decision-making. This division is affecting productivity, driving away opportunity, and undermining citizen confidence. It also lends itself to disputes and claims, with corresponding risks of liability. In this chapter, we'll explore the causes and impacts of such divisions, and explore some possible ways to break out of the patterns that cause them.

Introduction

First, though, let's be clear about the situation we're discussing: Every governing body has disagreements, and there's nothing wrong with that. It would be strange, indeed, if all members agreed on all issues all the time. If that were the case, why would we even need five, seven, or nine members?

Sometimes, disagreements create a residue of misunderstanding or hurt feelings, but that's to be expected, too. Most governing body members are able to leave that residue behind and move on to the next matter at hand.

We're also not talking about the "outlier" issue, where one or some members of the governing body have made it their mission to separate themselves from the rest of the group, with the sole goal of embarrassing the rest and proving that they are the only "ethical," "transparent," or "responsive" (or insert description of your choice) member of the body, at least in their opinion. There are ways to address the "outlier" issue (see Chapter 3).

What we're talking about here is a governing body in a state that we can all agree is severely dysfunctional. We're talking about a body that's intractably divided, and whose every debate, discussion, and decision are characterized by lingering unresolved matters, mutual contempt, and hard feelings that calcify into hardline positions. We're talking about meetings that staff and citizens refer to as the "Thursday night fights" (or insert evening of your choice). We're talking about meetings where members regularly yell or snipe at each other, name-call, storm out, or maybe even resort to threats or fisticuffs.

And even if it's not that dramatic, meetings may still be characterized by tension, frustration, passive-aggressive behavior, an inability to see beyond the players and focus on the merits of any issue, and maybe an angry social media post or two after the meeting.

Whatever the level of dysfunction, destructive consequences can result. Once you "write off" or "demonize" your colleagues ("she's just clueless," "he's completely hopeless," "I can't even look at the guy," "there's no reasoning with her, so why even bother"), there may be no coming back.

Why Can't We All Get Along? A Look at Some Possible Causes

*"Happy families are all alike; every unhappy family is unhappy in its own way."
~Tolstoy*

*"Happy councils are all alike; every unhappy council is unhappy in its own way."
~Tanoue*

There are any number of reasons why the "marriage" of governing body members can go bad. Here are a few:

Underlying divisions. Underlying divisions within the community may be reflected on the governing body. Communities can have fracture lines. There may be friction between the "old timer" part of the community and more newly developed areas that are full of "newcomers." The interests of "old timers" and "newcomers" may not always be the same. "Newcomers" may not recognize the history and traditions of the community in the same way that "old timers" do. "Old timers" may discount the concerns raised by "newcomers," or vice versa. These differences may be reflected in the makeup of the governing body.

Members may have been swept into office as a result of a controversial issue that divided the community. Perhaps there was a recall election. Unless the slate was wiped clean, the governing body makeup may reflect the divisions that grew from the underlying issue. It may be difficult to get past that issue.

New or younger members may clash with veteran members. Sentiments that "you young 'uns haven't been around long enough to understand this town" or "you old timers are stuck in your ways" may cause unwarranted rifts. And expressing or acting on such sentiments can contribute to a feeling that each member isn't being accorded an equal voice in discussion and decision-making.

That sense of inequality can also be the result of partisanship, and partisanship doesn't necessarily have to spring from the type of political partisanship that exists at other levels of government. Of course, municipal government is avowedly and proudly non-partisan in the political sense (and by law its elections are non-partisan). But an "in crowd" and an "out crowd" based on other considerations can be a type of partisanship that's just as problematic.

Personalities. Voters aren't judging whether the individuals they elect will be compatible with each other, so it's possible that fundamentally incompatible personalities will end up on the body. If you have some "alpha dogs" on the body who are in constant competition, friction might be a predictable result. If others then line up behind their favorite "alpha," division can ensue. If several "alphas" dominate the meetings, resentments may arise.

Sometimes, an elected official's personality and proclivities seem to be just plain incompatible with holding elected office! Politics, at the governing body level, has to be a team sport: decision-making requires collaboration and consensus. One member's "agenda" can become the "agenda" of the body only by successful team play. A "lone wolf" who lacks the capacity or desire to be a team member is not going to be successful on the body. Add a few more "lone wolfs," and frustration and paralysis may result.

Governance is also about leadership. If the voters put someone in office who is afraid to take a stand, is perennially "on the fence," or is strictly a follower, leadership qualities may be lacking. A majority of non-leaders can create a perception of a "rubber stamp" governing body, resulting in extreme frustration for those members who are willing to stick their necks out.

Preconceived personal agenda. There are many good reasons why citizens run for public office. However, the workings of municipal government are not always clear until well after you're seated. So the agenda that a candidate ran on may collide with reality, and turn out not to be a workable agenda after all. Under those circumstances, clinging to the preconceived agenda is only going to sow the seeds of discord. If you have several members, each bent on pursuing only his or her own particular agenda, a fractured body can result.

I once spoke with a newly elected councilmember who said his one campaign promise was to ensure that water and sewer rates were lowered. But when he took office, he began to understand the economic realities of operating the town's water and sewer system, and he saw that demanding the lowering of rates was unrealistic and fiscally irresponsible. He said he had some explaining to do to the citizens, but he wasn't going to cling to his agenda given the realities he now understood. That's a smart elected official.

Impacts

The impacts of severe dysfunction and discord are manifold. They include:

- **Lack of productivity.** The body's agenda may hit a standstill. Or getting through it might be slow and painful. Even if decisions are made, they may not necessarily be the best decisions.
- **Power transfer to tie-breaker.** If you're constantly split down the middle, then you may be transferring all decision-making power to the tie-breaker (often the Mayor). Is that desirable?
- **Financial consequences.** If you've developed a public reputation as a dysfunctional body, then your community may be missing out on economic opportunities. Businesses want a predictable environment. Volatility may be driving them away.
- **Public embarrassment and loss of public confidence.** If you're airing your discord for the camera, your viewership may be up, but public confidence will be down! Residents want to be confident that their elected leaders function at a high level and in their best interests.
- **Driving away the best and brightest.** I've heard people say they were reluctant to run for office because they witnessed the discord and didn't want to be a part

of it. So you may end up repelling, not attracting, potential leaders who could make great contributions to the community. Or you may lose great members to “burnout.” Likewise, if your community’s developed a reputation for governing body dysfunction, you may not be able to attract and keep the “best and brightest” for key staff positions.

So You Think You May be Part of a Dysfunctional Governing Body?

You may have experienced some jolts of recognition in reviewing the foregoing. If so, condolences and congratulations! The condolences are self-evident, but congratulations are also due, because recognition of a problem is the first step to dealing with it! So now, what do you do? Here are some steps to consider:

- **See if you can gain a consensus that there’s a problem.** Even if you recognize it, if no one else does, you’re not going to get anywhere. If there’s a consensus, then you’re halfway to solving the problem!
- **Start by talking about “values.”** In working with CIRSA members experiencing severe governing body dysfunction, I’ve begun to realize that the “values” discussion is a critical first step. By “values,” I’m talking about the philosophical underpinnings that you want as guides for behavior in your interactions with one another. If you can agree on these values, then additional steps are possible. If you can’t, you’re going to stall out. Such values might include:
 - **Courtesy and civility towards one another, staff, and citizens?**
 - **Non-partisanship?**
 - **Equality of participation?** This would include equal opportunities to be part of the discussion and decision, and equal opportunities to gain, insofar as possible, the same information at the same time as needed for good decision-making.
 - **Acknowledgement of the role of the Mayor or presiding officer in presiding over meetings?** Every meeting needs a presiding officer, and in most communities, that’s the Mayor. The role of the presiding officer must be honored if you want to have orderly, productive, and efficient meetings. And, the presiding officer must embrace that responsibility. If there’s no acknowledgement of this fundamental need, then you won’t get anywhere.
 - **Engagement?** This includes a commitment to be prepared for meetings, to arrive on time, to stay for the whole meeting, to give your undivided attention during the meeting, to participate in decision-making, and to be absent no more than necessary.
 - **Others?**
- **Norms or rules of conduct.** If you can form a consensus around values, you’re close to the point where you can discuss (and, it’s hoped, agree upon) the norms or rules of conduct that you want for the body. The content of your norms or rules won’t be discussed here, because they’ll be specific to your community and the values that serve as the jumping-off point for them. It’s worthwhile to look at

examples from other communities around the state and nation, but it's important to develop your own norms or rules from the ground up with your values as the foundation, so there's buy-in. Why rules OR norms? It's because the level of formality to be accorded really depends on your governing body's needs and desires. If you have members whose attitude is "Rules? We don't need no stinkin' rules," then perhaps a softer approach of agreeing on "norms" of conduct may be a good starting point. On the other hand, you might see reasons to elevate the adoption process by using a resolution or even an ordinance.

In Despair? You Can Still Help

You may feel your governing body will never come together to recognize the problem, much less move on towards seeking solutions. Should you give up? No! There are still things you can do as an individual. If enough individuals on the body do these things, then perhaps there will be an opening to go further! Suggestions for individuals include:

- **Assume good faith and best intentions on the part of everyone on the body.** Some smart person once said that we judge ourselves by our intentions, and others solely by their actions. This perceptual gap can lead to misunderstandings and unfounded assumptions. Let's give everyone the same benefit of the doubt we give ourselves, by assuming that they, too, are acting on the basis of honorable intentions.
- **Listen more than you talk.** Do your best to see and understand things from the perspective of others. Ask questions before reaching your own conclusions, and repeat back what you think you're hearing from others, so that you know you're on the same page. Listen for points of agreement, and emphasize and build on them.
- **Try to meet others more than halfway.** If everyone only goes so far to try to bridge the gaps, then you may never meet in the middle. Sometimes one person's generosity in going more than halfway is the catalyst for breaking down misunderstandings.
- **Use the postures, tone, and body language of respect and engagement.** Do this even if you're not "feeling it"; "acting as if" can be helpful in bringing a hoped-for harmony closer to reality. Make sure your body language and tone of voice aren't inadvertently communicating something you didn't intend. Keep your voice DOWN, even if others are starting to yell. Avoid the hair-trigger, knee-jerk, angry response.
- **Try some things to break down barriers.** Maybe switch up positions where you sit on the dais. Suggest a pre-meeting dinner; breaking bread together can be a way to get people talking (make sure you have a "no-business" rule in effect). Team-building, especially in a retreat setting, can be productive. An outside facilitator or mediator might be helpful in identifying issues that are hard to see from the "inside."

- **If you're an experienced member, mentor the newbies!** You have valuable experience from which newer members can benefit. Show them the ropes, teach them your own hard-earned lessons, and model the behaviors you want them to emulate. And if you're a new member, seek out mentors!
- **Acknowledge and appreciate** when you see others making the same effort.

Conclusion: "Until Next Election Do You Part."

A governing body might be characterized as a kind of arranged marriage—a marriage arranged by the citizens. If the conditions for civil and productive discourse are lacking from the start, it's no wonder that such a "marriage" can go bad quickly. But divorce isn't an option! So start looking at ways to improve your relationships, as individuals and as a body. And take to heart the idea that, by "acting as if," your deepest hope for a strong, high-functioning team can come closer to becoming a reality.



CHAPTER 3

GOVERNING BODIES AND THE OUTLIER SYNDROME

By: Tami A. Tanoue, CIRSA Executive Director

Those who have been working with municipalities for an extended period have observed a phenomenon that occurs at the governing body level. Let's call this phenomenon **the Outlier Syndrome**.

The Outlier is the “lone wolf” who sits on a city council or board of trustees and steadfastly refuses to act like a member of the team. Even while isolating himself or herself as the only person on the losing side of just about every vote, the Outlier manages to create havoc with the rest of the body. The Outlier may be obstreperous and obstructionist. The Outlier may refuse to recognize and respect the norms that guide the rest of the body's conduct. The Outlier may position himself or herself as the only “ethical” or “transparent” member of the body. The Outlier's every statement and action seems to be aimed at preserving that self-assumed distinction rather than making any concrete achievements. Sometimes, a governing body is unfortunate enough to have more than one Outlier.

Have you ever experienced the Outlier Syndrome in action? We call it a syndrome because of the recognizable features or symptoms that seem to fester whenever an Outlier sits on a governing body. Do you have an Outlier on your governing body? Could you possibly be an Outlier? Should the Outlier Syndrome be viewed as an affliction or malady? And if so, what can be done? We'll explore these questions in more detail below.

Power, Goals, and the Outlier

To understand the Outlier's impact on a governing body, let's start with the idea that elected officials can only act as part of a body – a collaborative decision-making body. You can search throughout the laws governing statutory municipalities, or just about any home rule charter, and you'll likely find no powers or duties that are to be exercised by a singular elected official (other than the mayor, who may have certain defined responsibilities). This means that, as elected officials, the only way you can get anything accomplished is to have a majority of the governing body on your side.

It's likely that each elected official has an individual list of goals, goals that those who voted for you want you to accomplish. But your goals can be accomplished only if they're part of the goals of the body as a whole. That means your success depends on creating a consensus

of the majority! And where does the Outlier fit in on a collaborative decision-making body? Why, nowhere! Perpetually being on the losing side of a vote means that the Outlier gets nowhere on his or her goals...unless, of course, he or she feels that being an Outlier is its own reward.

Are You an Outlier?

Perhaps you've met your share of Outliers, who tend to share one or more of these characteristics:

- There is an element of the lone crusader in them. They feel they were elected to shake up the status quo in some way. Maybe they think their predecessors were too cozy with developers, not friendly enough with the business community, too close to the municipality's staff, not close enough to the municipality's staff, etc.
- They view themselves as independent thinkers. They are often highly intelligent, but not "people persons." In kindergarten, their report cards might have reflected a poor score on "plays well with others."
- They take a perverse glee in being the "outsider," relish arguments for argument's sake, and place little value on matters like courtesy and regard for the feelings of others.
- They hate having to endure "soft" discussions such as a council or board retreat, the establishment of a mission or vision statement, the development of consensus around rules of procedure or rules of conduct, a session to discuss goals and priorities, or a CIRSA liability training session.
- They feel they are always right, and everyone else is always wrong. They feel they are always ethical, and everyone else is not. They feel they are looking out for the citizens, and everyone else is not.
- Initially, they may just have been unfamiliar with the ways of local government, and needed to build the skills to work effectively in a new environment. One or more gaffes may have caused them to be pegged as Outliers and treated accordingly, initiating an unhealthy Outlier dynamic.
- There may have been some explosive moments in private or public with the Outlier's colleagues, or indeed, the colleagues may have made some attempt at an "intervention."

These observations may or may not be totally on the mark. But one characteristic of the Outlier cannot be denied: he or she is seldom on the prevailing side of a vote, and is often at loggerheads with the rest of the body.

Do you think you may be an Outlier? If so, you might examine what your goals as an elected official really are. Do you want to have a list of concrete accomplishments at the end of your term? Or will it be accomplishment enough to have been the "loyal opposition"? If the former, then your behavior may be working at cross-purposes with your goals. If the latter, really? Will the people who voted for you be satisfied with that accomplishment? Will you?

Is the Outlier a Problem for the Rest of the Body? For the Municipality?

Most people who've had to deal with an Outlier would say that yes, the Outlier is a problem! How? Well, here are some ways:

- Anger and frustration build when a council or board has to deal with an Outlier, siphoning away energy that could be spent on more positive endeavors. This is a particular problem if tensions have built to the point that confrontations have begun to occur. No reasonable person wants to attend or view a council meeting and have a hockey game break out! It may be entertaining, but mostly, it's embarrassing to the governing body and to the community.
- Healthy teams seek to build a sense of camaraderie and cohesiveness. That's not entirely possible when there's an Outlier. It's not healthy to build a team around a shared hatred of one of its own members, and most reasonable people would prefer not to have that happen.
- The Outlier's perspective tends to be oppositional. From a liability standpoint, such a perspective is risky. If you're taking positions on an oppositional basis, are you really meeting your fiduciary duty to look out for the best interests of the entity?
- A disharmonious governing body is a dysfunctional governing body. It's been CIRSA's experience that liability claims thrive in an environment of disharmony and dysfunction.
- Your staff members are affected by the Outlier Syndrome, too. From the staff's perspective, seeing dysfunction on the governing body is a little like watching discord between one's own parents. It's unsettling, distressing, and morale-crushing.
- Most importantly, it's a shame for the governing body to lose a potentially valuable contributing member. In a worst case scenario, the Outlier becomes completely disempowered as he or she is ignored and marginalized. But this means that the body isn't running on all cylinders, and is deprived of the valuable perspectives that the Outlier might otherwise bring. Ultimately, the voters, and the community, are the losers.

Dealing with the Outlier Syndrome

You can't cure an affliction until you recognize it. And you can't recognize what you haven't named and defined. If your municipality is afflicted with Outlier Syndrome, you've taken the first steps towards a cure by naming, defining, and recognizing it! Here are some other steps you might consider.

- Confront the issue forthrightly and compassionately in a neutral environment. A council or board meeting is likely not a neutral environment! Perhaps the matter could be discussed as one item on a retreat agenda. Be prepared with specific examples of how the Outlier has negatively impacted the body.

- Consider addressing the issue in the context of a larger discussion about governing body rules of procedure or rules of conduct. The “norms” that guide members’ interactions with one another may be obvious to some but not all, especially to newer members. Those norms could be part of the discussion, and the process of articulating them can facilitate a consensus to honor them.
- Consider bringing in an outside facilitator to assist you. A governing body is a bit like a marriage that’s been arranged for you by the citizens! There’s nothing wrong with getting some outside help for perspective and to find solutions.

If you think you might have the Outlier label pinned on you, consider these suggestions:

- First, get a reality check. Find out how you’re being perceived by your peers. It may be very different from your own perception of yourself. Ask each of your colleagues to give you a frank assessment.
- Check your motivations. If you have concrete goals you want to accomplish as an elected official, you must accept that success in your position can’t happen without collaboration and consensus building. There is nothing that you can accomplish alone. So set a goal to be on the “prevailing” side...indeed to bring others over to establish a “prevailing” side.
- If you’ve already burned some bridges, understand consensus-building can’t happen without mutual trust, respect, and a sense of cohesion. These will take time to build. Look for a retreat or other opportunities to clear the air and start fresh.
- Use staff as a resource! Your manager or administrator wants nothing more than to assist newly elected officials in learning the ropes, and understanding the best time, place, and approach to raising issues. Don’t get off on the wrong foot with blunders that might peg you as an Outlier.

What if all efforts to deal with the Outlier Syndrome fail? Well, it might be time for the rest of the governing body to cut its losses and move on. Don’t continue to agonize over the Outlier and his or her impact on the body’s functioning. Continue to accord the Outlier the same opportunities to participate in discussion and decision-making as any other member, but don’t allow the Outlier to keep pushing your buttons. Remember, arguments and confrontations require more than one participant. You may need to simply say “thank you” or move on to the next point of discussion. Ultimately, the responsibility for putting an Outlier into office rests with the citizens, so there’s only so much you can do. Try to go about your business without having the Outlier become the dysfunctional center around which the rest of you swirl.

Conclusion

Governing body members don’t all have to be in lockstep, or think and behave in the same way. On the contrary, diversity of thinking, styles, opinions, experiences, and approaches are healthy and necessary for a collaborative decision-making body. There is truly a collective wisdom that comes forth when many diverse minds work together on common goals. But the Outlier Syndrome is detrimental to a high-functioning governing body, and therefore, to the community. If your governing body is afflicted with the Outlier Syndrome, it’s time to do something about it!



CHAPTER 4

LIABILITY PROTECTIONS AND YOU

By: Tami A. Tanoue, CIRSA Executive Director &
Sam Light, CIRSA General Counsel

Are you acquainted with the protections you have through your entity's membership in the CIRSA property/casualty pool? In this chapter, we provide you with a brief introduction to the two key coverage parts of the liability policy that apply to you as elected officials of CIRSA member entities.¹

What Liability Coverages do We Have?

General Liability and Auto Liability Coverage applies to claims for bodily injury, property damage, and auto liability, among others. This is the coverage part that pertains to most allegations of “hard” injuries, such as an allegation of physical injury to a person or to tangible property. Thus, for instance, this coverage part would respond for an auto accident while you're driving your entity's vehicle on public entity business. This coverage part also includes law enforcement liability coverage.

Public Officials Liability Coverage applies to “wrongful acts” you are alleged to have committed. This coverage part applies to allegations of civil rights violations, improper activities concerning employment practices, and violations of federal and state law. Thus, for instance, this coverage part would respond when someone claims that he or she has suffered employment-related discrimination, harassment, or a violation of constitutional rights.

Who's Covered?

“Covered Parties” under the policy include, of course, your entity as a member of CIRSA. Any elected or appointed official, trustee, director, officer, employee, volunteer, or judge of a CIRSA member is also considered a covered party. So is each governing body, board, commission, authority, or similar unit operated “by or under the jurisdiction of” a member entity. Thus, elected officials, board and commission members, appointed officials, employees, and even authorized volunteers of your entity are all considered covered parties.

What Limits of Coverage do We Have?²

- For general liability and law enforcement liability, the coverage limit is \$10,000,000 per claim/occurrence.
- For auto liability, the coverage limit is \$5,000,000 million per claim/occurrence.
- For public officials' liability, the coverage limit is \$10,000,000 per claim/occurrence, subject to an annual per-member aggregate of \$10,000,000.

Defense costs are included in these limits. There is also a member-selected deductible that applies to each claim/occurrence. Members have chosen deductibles that vary from \$500 to as much as \$250,000 per claim/occurrence, so you should check with your own CIRSA contact to find out what your entity's deductibles are.

What Key Exclusions do We Need to be Concerned About?

There are several exclusions of concern, and a few are highlighted here. These exclusions are universal in most liability policies.

The “willful and wanton” exclusion is probably the exclusion of greatest concern to elected and other public officials. This exclusion applies to both coverage parts of the liability policy, and states that coverage does not apply to any loss arising out of the actions of any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a member entity when such acts or omissions are deemed to be willful and wanton. And remember, you are a “Covered Party” only while in the performance of your duties for the member entity, and acting within the scope of your authorized duties for the member entity.

As you probably know, the Colorado Governmental Immunity Act's protections are lost when you are determined to have been acting outside the “scope of employment,” that is, outside the course and scope of your authorized duties as an elected official. But such conduct has a double consequence: the loss of your liability coverages through CIRSA. This is the reason that our public officials' liability training places a heavy emphasis on the need to understand your “job description” as an elected official, and the need to stay within the parameters of that “job description.”

Staying within the “scope of employment” is also important to lessening your risks of liability where federal civil rights claims are concerned. You probably know that, under 42 U.S.C. Section 1983, you can be sued for a civil rights violation in your individual or official capacity. An individual capacity suit is one that alleges that you violated someone's constitutional or other federally protected right while acting under the auspices of your public office. (An official capacity suit, on the other hand, is a suit against the entity, rather than you individually.) A finding of individual liability in a Section 1983 suit essentially means that you've violated a clearly established constitutional or statutory right of which a reasonable person should have been aware, and that your conduct was unreasonable. Such conduct can fall within the “outside the scope” exclusion; violating someone's civil rights is likely not within the “job description.” Thus, elected officials need to be especially cautious about conduct that could be actionable as an intentional civil rights violation.

The sexual harassment exclusion is another exclusion that has impacts on claims based on an individual official's conduct. This exclusion to the Public Officials Liability coverage part applies to sexual harassment claims. Let's say that a sexual harassment claim is made both against the entity, for failure to deal effectively with sexual harassment in the workplace, and against the harassing employee or volunteer. Under this exclusion, the entity will probably be covered. However, with respect to the individual official, employee, or volunteer, the entity will have the option to direct CIRSA to defend or not defend the individual. Thus, if the entity so directs, the individual will be left out in the cold as to any defense of a sexual harassment claim against him or her! And in any event, even if the entity directs CIRSA to provide a defense, any liability imposed on the individual based upon a finding that harassment occurred would not be covered through CIRSA. **The sexual abuse exclusion** operates in a similar fashion.

The punitive or exemplary damages exclusion is also pertinent in the context of an individual official's conduct. Punitive or exemplary damages can be awarded in circumstances where an individual's conduct is willful and wanton in the disregard of someone's rights, or callously indifferent or motivated by evil intent. The purpose of punitive damages is, as the term suggests, to punish a wrongdoer for such egregious conduct. Because the punitive effect would be considerably blunted if an insurer were available to cover a punitive damages award, punitive damages are deemed uninsurable by the appellate courts of many jurisdictions, including Colorado. Consistently with this judicial position, the CIRSA liability policy contains an express exclusion for punitive or exemplary damages.

The breach of contract exclusion can be pertinent to the activities of governing bodies. Governing bodies approve a wide variety of contracts, and sometimes are alleged to have dishonored them. It is not the intent of a liability policy to cover the kinds of liability that can arise when someone alleges a breach of contract, so there is an exclusion for the breach of an express or implied contract. This exclusion does not apply when a claim is based upon an allegation by an official or employee of wrongful termination of employment.

The condemnation/inverse condemnation exclusion can be relevant to a land use action taken by a governing body. A landowner may claim that all or a portion of his or her property was "taken" by governmental action, or that vested property rights were impaired by governmental action. These types of claims, involving the value of private property, are not covered. As you can imagine, liability policies aren't suited to cover these types of claims, because they would require insurers to try to underwrite the risk of having to pay for the property values of privately owned real estate throughout the state!

The bonds or taxes exclusion applies to any liability based upon or arising out of the issuance of bonds, securities, or other financial obligations, or taxes, fees, or assessments, or the collection, retention, or expenditure of funds. Thus, when a claim is made of an improperly levied tax, or retention of funds in violation of the Taxpayer's Bill of Rights, or impropriety in the issuance of bonds or other financial obligations, this exclusion would apply.

What Else Should You Know About Coverage Issues?

A lawsuit against you may involve one of several responses from CIRSA. We may determine, based on the allegations, that we owe you an unconditional duty of defense (i.e., the assignment of a defense attorney) and indemnity (i.e., covering any judgment or settlement). Or we may determine that none of the allegations invoke any duty of defense or indemnity, and send you a denial letter. Sometimes, though, a suit will contain a mixture of covered claims and uncovered/potentially uncovered claims and, in this case, we will defend you under a “reservation of rights.” A “reservation of rights” letter will be sent telling you of the areas where there may be no coverage, and reserving our right not to indemnify you, and our right to terminate your defense (and potentially seek reimbursement of legal fees paid on your behalf) should circumstances warrant.

One or more CIRSA defense counsel will be assigned in circumstances where we find that there is a duty to defend. In some cases, a single attorney can represent multiple defendants; however, in cases where defenses may be inconsistent between or among the covered parties, or other circumstances for a conflict of interest may exist in representation, we will assign multiple counsel. CIRSA-assigned defense attorneys, although paid by CIRSA, owe their duty of loyalty to you, their client.

We hope that you never have to delve into the details of these coverages in the context of an actual claim against you, but it’s a good idea to be familiar with the broad outlines of those coverages. As always, if you have questions, please contact CIRSA.

Footnotes:

1. This is only a summary of certain provisions of the CIRSA liability coverage documents. The language of the applicable coverage document must be reviewed for a complete and accurate understanding of the applicable coverages, and the application of the coverage document to any specific situation will require the advice of your entity’s attorney.
2. Please refer to the Declarations pages of the Liability Coverage form for more specific information on the limits and sublimits for all coverages.



CHAPTER 5

OPEN MEETINGS AND EXECUTIVE SESSIONS

By: Tami A. Tanoue, CIRSA Executive Director &
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At CIRSA, we've seen a steady stream of claims against our members for alleged violations of the open meetings law in the conduct of meetings and executive sessions. These types of claims are usually excluded from most commercial insurance coverages. However, CIRSA provides some defense cost coverage for claims alleging executive session violations by governing bodies. In this chapter, we'll go over the basics of the open meetings law and summarize CIRSA's coverage for allegations of open meetings violations.

The Open Meetings Law

Under the Colorado open meetings law, C.R.S. Section 24-6-401 *et seq.* (COML), it is “the policy of this state that *the formation of public policy* is public business and may not be conducted in secret.” Note this statement's focus on the formation of public policy. Thus, the law intends openness in the policymaking process, and councils and boards are well-served by honoring not only the letter of the COML but the spirit of this purpose statement.

The core requirement of this law is that all meetings of a local public body (a term which includes the governing body and other formally constituted bodies of a public entity), at which public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times. “Full and timely notice” must be given of all meetings. The COML deems this requirement to have been met if notice of the meeting is posted at least 24 hours prior to the holding of the meeting; however, your charter or local ordinances may require posting further in advance. The notice shall include specific agenda information where possible. No action taken at a meeting is valid unless it meets the requirements of the open meetings law. A “meeting” under the open meetings law includes “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.”

There are a few exceptions to this core requirement of public openness, and a properly convened executive session may be held to discuss matters that fall into those exceptions.

Some of the more commonly arising subjects that are proper matters for an executive session include:

- The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest;
- Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions;
- Certain personnel matters; and
- Determining positions on matters that may be subject to negotiations, developing strategy for negotiations, and instructing negotiators.

The open meetings law should be reviewed in its entirety for all of the applicable legal requirements, and legal advice should be obtained on its meaning. Home rule municipalities may have their own meeting and executive session procedures established pursuant to their home rule powers; this discussion is not intended to cover the variances in local practice in home rule municipalities.

The “courts of record” of the state have jurisdiction to issue injunctions to enforce the purposes of the open meetings law. Any citizen of the state may apply for such an injunction. The open meetings law states that, in any case in which the court finds a violation of the law, the court shall award the citizen prevailing in such action his or her costs and reasonable attorney fees. In addition, a citizen may apply to the court for access to the record of an executive session; if the court determines, after listening to the record, that the local public body engaged in substantial discussion of any matters that were not proper subjects for an executive session, or took formal action while in executive session, then the record may be made accessible to the public.

Executive Session Coverage Through CIRSA

Defense costs coverage for executive session claims is provided to CIRSA property/casualty members by way of an amendment to the “non-monetary damages, fines or penalties” exclusion in the public officials liability section of the coverage document. This coverage is subject to the following terms:

- It applies only to reasonable attorney’s fees and reasonable and necessary costs included in the defense of an action brought solely under C.R.S. Section 24-6-402(9) of the open meetings law.
- It applies only to such an action brought against the member’s governing body; subordinate boards and commissions holding executive sessions do not have this coverage.
- It does not apply to any plaintiff’s attorney fees or costs that are assessed against the member as a result of losing such an action. Such fees and costs must be borne by the member.
- There is a sublimit for this coverage that is shared with certain other non-monetary defense coverages. The sublimit is \$10,000 any one action, subject to a \$30,000 annual aggregate per member. The member deductible does not apply to this coverage.

- Submitting an executive session claim to CIRSA is optional with the member; the member may choose to defend such a claim itself. If a member wants to avail itself of this coverage, the claim must be submitted to CIRSA, for handling by CIRSA-assigned defense counsel, at the time of commencement of the action.

A Few Suggestions

The risks of open meetings violations can be greatly reduced by favoring transparency and using caution in cases of uncertainty. After all, the courts interpret the rules and will resolve doubts in favor of openness. Toward that end, elected and appointed officials should be cognizant of when their discussions will trigger open meetings requirements, so that violations can be avoided. To avoid claims of improper notice, a full meeting agenda should be timely posted, and the body and staff alike should avoid adding substantive items to the agenda at the meeting (as claims and distrust can result from such surprises).

Of course, claims of executive session violations could be avoided entirely by never having an executive session! However, this may be an unrealistic goal because, as discussed above, there is a legitimate need for confidentiality in some matters. But consider the following:

- Hold executive sessions to the absolute minimum necessary to protect legitimately confidential matters.
- Confirm with your city or town attorney that the proposed subject of the executive session is authorized under the law. The statutory bases for having an executive session are specific and narrowly construed, and bodies should resist efforts to pound a square peg in a round hole in searching for authority where it does not exist.
- Utilize an executive session “script” to help guide you in the proper procedures for convening an executive session. CIRSA members may obtain a CIRSA sample by contacting saml@cirsa.org.
- When participating in an executive session, be vigilant of yourself and others to make sure that the discussion doesn’t stray from the specific subject that was announced in the motion to go into executive session. Participants in the executive session must commit to “stay on topic” and not stray from the specific subject.
- Make sure you keep an electronic record of each executive session as required by the open meetings law. The only exception to the recording rule is an executive session for an attorney-client conference; these sessions should not be recorded.
- Stay out of the loop on personnel matters when feasible. One of the more common reasons for holding an executive session is the discussion of a personnel matter. However, if the employee who is the subject of the executive session so demands, the discussion must be done in public. Moreover, personnel matters that are not personal to a particular employee are not proper subjects for an executive session (unless some other lawful basis for holding an executive session applies). These and other complexities of the “personnel matters” basis for holding an executive session can be avoided if your personnel policies have been set up in a manner that delegates most personnel matters to your staff.

- If you have to take one of your own governing body members to the “woodshed,” don’t do it in an executive session. Some years ago, the “personnel matters” basis for holding an executive session was amended to state that executive sessions are not permitted for discussions concerning any member of the local public body or appointment of a person to fill a vacancy on the local public body. Thus, the idea that the governing body can convene in executive session to discuss one of its own members as a governing body “personnel matter,” is no longer viable.
- If the confidentiality of a matter is such that it warrants an executive session, then be sure to honor that confidentiality once the executive session is over, until and unless public discussion of the matter becomes legally permissible. Don’t act outside the scope of your legal authority as an individual member of the governing body to waive confidentiality on your own. If the executive session concerns negotiations or other matters where some information will be shared with third parties in follow up to the session, ask “Who are our spokespersons?” and “What information will we share at this time?” and honor the answers arrived at in the session.

Conclusion

Open meetings missteps are hard to overcome in terms of maintaining your constituents’ trust in you. Further, each and every executive session your entity holds exacts a price in terms of expectations of open government and, if done improperly, can subject your entity to claims. By complying with the strict requirements of the open meetings law, keeping executive sessions to the minimum necessary, and observing all of the formalities for holding meetings and executive sessions, you can keep that price low and public confidence high.



CHAPTER 6

ETHICAL CONDUCT IN LOCAL GOVERNMENT

By: Robert Widner, Widner Juran LLP

Introduction

Citizens have a right to expect ethical behavior from local government officials. In the municipal context, “ethical behavior” generally means the conduct of public business in a manner that will preserve or restore the public’s trust in government. In many instances, local government officials are unaware of the rules and guidelines governing their official behavior. This chapter outlines a basic regulatory framework for ethical behavior for local government officials and advocates on the premise that limited but enforceable local regulation is necessary to protect the public trust. The first part of this chapter focuses upon “*what*” ethical activity should be regulated at the local level. The second part focuses upon “*how*” local ethical standards should be enforced.

Why Regulate Local Ethics?

Both media stories and national studies of local government decision-making highlight the need for regulation of ethical behavior by local government officials. Unfortunately, ethical violations do occur at all levels of government and may range from the use of a public office to help a friend secure special treatment from the government to corruption, self-dealing, or just plain poor decision-making. Although the vast majority of public officials ably conduct official business without ethical missteps, a single publicized violation can cast a cloud upon the entire government organization and raise suspicion that other public officials are engaged in similar misconduct. Simply put, ethical violations erode public trust.

Colorado state law attempts to describe appropriate standards of conduct for local government officials in Title 18, Article 24 of the Colorado Revised Statutes. The state law fails in many respects to articulate clearly the standards for ethical behavior or to define key statutory phrases, such as what constitutes “personal or private interest.” State law further fails to serve the needs of local government by delegating the enforcement of alleged local ethical violations to the local district attorney’s office. This delegation often proves ineffective as it requires district attorneys to divert their limited resources from the enforcement of criminal conduct to the investigation and enforcement of

state misdemeanor ethical misconduct. Moreover, enforcement of statutory standards of conduct against elected public officials by elected district attorneys can—fairly or unfairly—lead observers to assume that politics, rather than justice, will dictate the outcome.

In addition to state statutory law, in 2006 the Colorado voters enacted Amendment 41, a constitutional citizen initiative. Amendment 41 was codified into Article XXIX of the Colorado Constitution. The purpose of Article XXIX was to establish new statewide rules governing the receipt of gifts and other considerations by government officials. It also allows a state independent ethics commission to hear complaints, issue findings, and assess penalties in connection with ethics issues arising under Article XXIX and under any other state standards of conduct and reporting requirements. The state's independent ethics commission has proven a less than effective means of addressing ethics at the local level due to lengthy hearing timelines and the need for local officials to defend conduct in a state tribunal located in Denver using state, and not locally, created and imposed ethics regulations. Of significant importance to the creation of local ethics regulation, Article XXIX includes an explicit exemption which limits the state's independent ethics commission's jurisdiction: Home rule municipalities that have enacted local ethics codes which address the topics of Article XXIX are not subject to the jurisdiction of the independent ethics commission.

Municipalities may overcome these state statutory and constitutional shortcomings through local regulation and local enforcement of ethical behavior. Effective local regulation of public officials' ethics necessarily involves two distinct elements. The first is a set of clearly written directives identifying what constitutes unacceptable or unethical behavior. The second is a process for enforcing the written directives in a reasonable, fair, and efficient manner.¹

What Should be Regulated?

The most common problems with local rules of ethical conduct are vagueness and overbreadth. Sweeping general statements such as “city officials should comport themselves at all times in a professional manner” are too vague to help either the officials or their constituents understand what is and is not acceptable. Likewise, regulations that attempt to set standards for the officials' personal life may seem admirable, but are really beyond the scope of good ethical regulation. Consequently, any set of ethical regulations should focus on the conduct of public officials while performing their public duties and should be specific enough to clearly define what constitutes an ethical violation.

Engaging in criminal conduct while in the course of one's public responsibilities should always be an ethical violation. However, criminal acts committed by public officials outside of their official role and in their private capacity are best left to local law enforcement or, as discussed below, the public's right of recall. It may be true that a public official's criminal activity unrelated to public office can still undermine public trust, but if your ethical code provides that “any felony or misdemeanor criminal activity” committed by a public official constitutes an ethical violation, are you prepared to sanction a board or council member who receives a jaywalking ticket?

A criminal act committed by a public official in his private life will typically only call into question the qualifications of that particular public official to serve the public. To that end,

state law provides a remedy in the right of recall, a process by which the voters can decide whether that individual should continue to serve. Local ethical regulations, however, should avoid putting members of the municipal governing body in the role of overseeing and enforcing the private activities of one of their own.

It is also customary, and a good idea, for local ethics regulations to incorporate as an ethical violation any failure of the public official to adhere to important provisions of the municipal charter or ordinances, such as provisions that prohibit elected officials' interference with the city manager's supervisory role over city employees. In addition, ethics regulations should prohibit:

- the intentional disclosure of confidential governmental information;
- the acceptance of gifts of substantial value;
- the misuse of public resources or public equipment; and
- engaging in contractual relationships for the personal benefit of the public official and/or the official's relatives or any business in which the official has an interest.

In summary, local ethical regulations should prohibit the conduct that will most directly impair the public's trust in the local government organization as a whole. If drafted with appropriate attention to specificity, effective local regulation will put public officials on notice of precisely what constitutes inappropriate behavior related to their public service, and will clearly inform constituents of what is expected of their local representatives. Accompanying the regulations should be well-defined steps for disclosure and recusal in circumstances giving rise to conflicts of interest. Finally, local codes should include terms and phrases designed to avoid vagueness and ambiguity.

How Should Ethics Codes be Enforced?

Ethics regulations effectively inform officials what conduct is permitted and prohibited in public service. However, without a means to enforce the ethical requirements, the regulations become largely meaningless.

Creating a process to enforce ethical regulations requires careful thought. Ensuring that the regulations are enforced fairly is a paramount concern. Fair enforcement is fostered when regulations clearly articulate the requirements and expectations of every step of the enforcement action. Where a step is optional, such as whether an investigation of the ethics complaint will be performed, the criteria and procedures for determining whether the step will be employed should be clearly identified and followed. The regulations should contemplate the need for issuing subpoenas for documents and compelling witness testimony and attendance.

The typical process will include a complaint, the identification of the hearing body or hearing officer, an initial review, investigation, a hearing, a decision and, if appropriate, a penalty.

Complaint

The initiation of the process to enforce an ethical standard should require a written complaint or allegation of unethical conduct. The form of the written complaint is

important. The person charged with unethical conduct has a right to know what conduct is alleged to have violated the ethical rules.

At a minimum, the complaint should include a detailed description of the action alleged to have violated the rules and citation to the ethical rules alleged to be violated by such conduct. Requiring the complaining party to verify or certify under penalty of perjury or other sanction that the allegations are truthful may aid in preventing complaints that are merely intended to harass or which might be politically motivated. Once received, the complaint must be formally delivered or served upon the person alleged to have violated the rules.

Hearing Body or Officer

A critical decision for any ethical enforcement action is the selection of the appropriate hearing body or officer to hear the allegations, render a decision, and impose a penalty, if appropriate. The enforcement regulations should identify the process for selection, composition, and qualifications of the hearing body or hearing officer. The options are numerous. The hearing body might, for example, be composed of the entire governing body of the local government, a governing body subcommittee, a citizen ethics board, or an independent hearing officer. Moreover, the decision of the hearing body or officer can be considered advisory and made subject to final review and ratification by the governing body.

Each option presents advantages and disadvantages. The elected governing body is a logical selection when judging the conduct of its fellow members or public servants due to its role as representing the citizens who demand ethical action by government. However, selecting the governing body or individual members of the governing body risks injecting elements of political favoritism into the ethics process, and raises complications where other members are necessary witnesses to facts alleged in the complaint. Similarly, while citizen members have a direct interest in ethical governmental action, citizens can oftentimes be politically aligned with elected officials or lack the experience to understand the allegations in the context of public service. Individual hearing officers, while perhaps free of any political motivations, may lack accountability to the citizens.

Initial Review

A preliminary or initial review of the complaint may be a beneficial step. A complaint may fail to assert any actions by the public servant that constitute an ethical misstep or may assert actions that are unrelated to the servant's public duties. In addition, a complaint may, on its face, be submitted for the sole purpose of harassing the public servant. At a preliminary review, the hearing body or officer can elect to dismiss the complaint, thereby saving the local government time and money in processing spurious or specious allegations. Any decision to dismiss the complaint should be made in writing and provided to the complaining party and the person against whom the allegations were raised.

Investigation

For some but not all complaints, an investigation might be warranted. If warranted and approved by the hearing body or officer, the investigation should be undertaken by an independent and neutral party. This investigation might involve the interview of witnesses and review of the evidence, and may culminate in a written summary of disputed and undisputed facts relevant to the issues to be decided by the hearing body or officer.

Hearing

For complaints that warrant prosecution, a hearing should be held to consider the complaint. In some circumstances, the hearing may include a preliminary stage whereby the hearing body or officer reviews the investigative report and, if appropriate, may elect to dismiss the allegations if the investigation established that the evidence does not support a finding of wrongdoing. Conducted in a manner similar to a judicial proceeding, the hearing should permit the presentation of evidence to support the allegations of unethical conduct and an opportunity to provide a defense against the allegations. The local government may employ a prosecutor to present the allegations and evidence. Any decision by the hearing body or officer should be made in writing to ensure an adequate record and formally conclude the proceeding.

Decision and Penalty

In the event that the hearing body or officer finds a violation of the ethical standards, a penalty may be in order. Obviously, the severity of the penalty can vary depending upon the seriousness of the violation. Penalties may range from a simple letter of admonition or censure, to removal of the public servant from certain duties or responsibilities, to more drastic action including removal from elective office.

It is exceedingly rare for ethical violations to result in a monetary fine. A monetary fine or action to void a contract resulting from unethical conduct is most appropriate where the ethical violation caused probable financial harm to the community. These types of violations are best prosecuted by the district attorney under the public trust provisions of state law.

Importantly, removal from office is a power best reserved for the governing body which holds the power of removal pursuant to the charter (for home rule municipalities) or state statutes (for statutory cities and towns). Moreover, it is important to acknowledge that elected officials remain accountable to the citizens and are subject to recall from office should their constituents feel the ethical standards of their official are lacking. For that reason, removal from office should be considered only in the most egregious cases.

Footnote:

1. Many home rule and statutory municipalities in Colorado have adopted local ethics regulations, ranging from comprehensive charter provisions and ordinances to a few local supplements to state law. CIRSA members can obtain examples of local ethics ordinances by contacting saml@cirsa.org.



CHAPTER 7

HARASSMENT ISSUES: WHAT ELECTED OFFICIALS NEED TO KNOW

By: Tami A. Tanoue, CIRSA Executive Director

Introduction

Harassment allegations have been a media fixture for the past few years, as the “me too” movement spreads across the world of entertainment, media, the corporate sector, and even into federal, state, and local government.

In municipal government, many of us feel like seasoned veterans in dealing with harassment issues. At least in the employment arena, we know how to deal with harassment. We have the policies in place, and we take them seriously. We do regular training on the issues. We know how to undertake a fair and credible investigation when allegations surface, and we understand the need to impose appropriate consequences for well-founded allegations.

But now, harassment issues are surfacing at the level of governing bodies and elected officials. Like an unexpected virus variant, this permutation has left some municipalities unprepared to deal with the consequences. The results have included ineffective responses, public embarrassment, and loss of public confidence.

Why Should You Care About Harassment Issues at Your Level?

You might be thinking that the governing body working environment is not the same as the employee workplace. You’re all co-equals, elected by and accountable only to the voters. The people “hired” you, and the people are the only ones who should be able to “fire” you. You each got into this voluntarily for the love of your municipality, and not as your livelihood, and those who can’t stand the heat should get out of the kitchen. Right?

Well, wrong! Let’s start by looking at your place in the municipal organization. You’re at the very top of the organizational chart and the chain of command. As such, you are a key influencer of the organizational climate. A recent study concludes that the organizational climate is the most potent predictor of harassment in the workplace!¹ You’re setting the tone for how people throughout the organization interact with one another. If the tone you set is disrespectful, inhumane, or dysfunctional, then that behavior will be modeled and replicated throughout the organization! Do you want that?

Another reason you should care: the higher up in the organization a harassment issue surfaces, the more difficult it is to deal with. Because of legal requirements and public expectations for transparency, you must necessarily conduct most of your work in public. If you think that a harassment allegation at your level can be dealt with behind closed doors, you may be disappointed.

Also, the consequence for a well-founded allegation of harassment isn't straightforward when it comes to an elected official. How is an elected official to be "disciplined" by his or her peers? Concepts such as "corrective action up to and including termination" don't necessarily translate well when applied to elected officials.

And assuming you've laid out a process for dealing such allegations, who gets involved in that process? Those in the administrative team who normally provide you with support, advice, and assistance may well say, "sorry, this is above my pay grade," requiring you to go outside your organization, at great expense, for help.

Policies, Legal Definitions, Civil Liability Laws, and Their Limitations

The definition of "harassment" differs from policy to policy. One common factor, though, is that harassment generally must be "severe or pervasive" in order to constitute a policy violation. The "severe or pervasive" standard is consistent with the U.S. Equal Employment Opportunity Commission's (EEOC) view of offensive conduct that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990: the conduct must be severe enough that enduring the offensive conduct "becomes a condition of continued employment"; or must be "severe or pervasive" enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.²

Thus, policies, as well as civil rights laws affording protection from harassment, set a high bar for liability. A common question, then, becomes: "well, if my conduct is short of 'severe or pervasive,' there's no problem, right?" Stated differently, if someone's behaving badly, but the behavior doesn't quite hit the high bar for a policy violation or for civil liability, does that make the conduct acceptable?

Another form of liability is criminal culpability. How often have you heard someone justifying their bad behavior in this way: "Well, I haven't committed any conduct that could be described as criminal." Does that make the conduct OK?

Let's think about this! In any other aspect of your work as a public official, is the standard for acceptable conduct this low? When it comes to ethical or conflict of interest issues, for example, would we be able to get by with a low bar like "well, just don't commit a crime," or "just don't expose yourself or our municipality to civil liability"? No! Municipal officials pride themselves in meeting the highest standards of conduct when it comes to ethical issues or conflicts of interest. So why should we set such a low bar for the way we behave towards one another?

And here's another critical issue. Harassment laws are generally aimed at employment matters: employee-employee issues, supervisor-employee relationships, employer-employee responsibilities, and the like. These laws aren't designed for issues between elected officials, who aren't employees, aren't accountable to an employer, and are beyond

the reach of common workplace remedies like termination, suspension, demotion, etc. Thus, you'll run across investigations of elected officials' conduct that might reach a conclusion along these lines: "The allegation of a hostile work environment based on sexual harassment was unfounded. This conclusion is reached because the Civil Rights Act of 1964 does not apply to elected officials." But, does that make the conduct acceptable? Should exposure to civil liability be the standard by which conduct is gauged?

Most reasonable people would not live their lives by the guideline, "I'm OK as long as I avoid civil or criminal liability." We would want to hold ourselves to a much higher standard! And, as leaders, we certainly wouldn't want to model such a low bar for the rest of the organization. So let's ditch the legal parsing. Let's focus away from the "h" word, harassment. Let's not spend too much time arguing over definitions. What we need to do is to confront and articulate the expectations we should have for ourselves, and for our colleagues, in the environment in which we operate.

Risk Factors for Harassment

The EEOC has been doing some interesting work around harassment issues in recent years. Risk factors have been identified that, if present, increase the likelihood that there will be harassment issues in the workplace. You can view the complete list on the EEOC's website,³ but some of the risk factors include:

- Homogeneity – lack of diversity, "currently only one minority among us."
- Workplaces where some employees don't conform to workplace norms – "rough and tumble" or single-sex dominated workplace culture.
- Cultural and language differences – arrival of new personnel with different cultures or nationalities; segregation of personnel with different cultures or nationalities.
- Workplaces with "high value" personnel.
- Workplaces that rely on customer service or client satisfaction.

Could any of these factors apply to your governing body? For example, if diversity in terms of gender, race, ethnicity, age, and other factors is a new phenomenon on your governing body, then one might expect misunderstandings and gaffes to occur. Certainly, elected officials are "high value" personnel within the organization; there's no one higher in the org chart than you! And most municipalities pride themselves on a high degree of customer service and customer satisfaction. These are all things to be proud of—but they are also factors for the presence of harassment issues.

So, What Can We Do?

If you've read this far, congratulations! You're more than halfway towards dealing with these complex issues in a positive and successful way. The recent work of the EEOC includes a recognition that a "committed and engaged leadership" is one of the most important factors in preventing and addressing harassment.⁴ So the fact that you, as an organizational leader, care about this issue is a great thing in itself.

First, take a look at the prevailing culture on the governing body. Are old ways of interacting with one another no longer working well? Or making some members feel like less than equal participants on the governing body? Have you had complaints or concerns raised about the behavior of one or some members? If so, it may be time to discuss the prevailing dynamics openly and honestly to start identifying the concerns.

Once you know what the concerns are, then you can begin discussing how to deal with them. You can identify what types of conduct are not acceptable. You can identify the values that are important to the group. You can work towards commitments about how you will communicate and interact with one another. Those commitments can form the basis for norms or standards of conduct. Not everyone may end up on the same page, but the “peer pressure” brought about by the consensus of a majority is powerful!

If you can get on the same page on norms or standards of conduct, it may be desirable to put them into a written document, perhaps a set of governing body rules of conduct. The rules can articulate the standards explicitly, so that everyone understands what is expected. A process for bringing forward concerns or complaints can be identified, as well as the manner in which such concerns or complaints will be investigated. CIRSA members can obtain an example of such rules by contacting tami@cirsa.org.

And very importantly, the rules can provide consequences for violations of the standards. Those consequences may be limited by your home rule charter (for home rule municipalities) or the state statutes (for statutory cities and towns). But even if the consequences don’t necessarily include a severe consequence like expulsion from the governing body, they are still powerful! Even a “public censure” is a powerful consequence; your wayward colleague, as well as the citizens, will understand that you take your conduct standards seriously and that violations are unacceptable.

Bystanders and Peers

It’s important to stress that we are all leaders, and we all have a role to play. Each of us is likely a supervisor, role model, or mentor to someone else. We may be part of a peer’s support system, sounding board, or confidant. We may even just be a witness. And that’s where the concept of “bystander” empowerment or intervention—another concept recently embraced by the EEOC⁵ — comes in. Perhaps “peer” would be a better term than “bystander,” but the idea is this: that someone who doesn’t directly experience concerning behavior, but who observes it happening, can step in and make a difference.

This doesn’t necessarily mean that you, as a bystander or peer, should intervene superhero-style, to swoop in and “rescue” someone that you think may be in a problematic situation. Indeed, you don’t need to expose yourself to a situation that could escalate. But what you can do is to talk to that person away from the situation: let him or her know that you saw what was happening. Say something like, “Hey, I happened to hear what Kyle said (or did) to you, and I didn’t think it was OK. Were you OK with that?” If the person responds in the affirmative, fine; you can all move on.

But if the person indicates that the behavior to which he or she was subjected was a problem, then think of the impacts of your intervention! First, that person knows that he or she is not alone: you are a witness. Second, you are affirming that the behavior is not

acceptable. And third, you can be of help in identifying resources for further follow-up. Bystander intervention is about empowering yourself to be part of the solution.

If you're comfortable doing so, you can talk to the person engaging in the problem behavior: "That joke wasn't funny." Or, maybe the situation calls for some kind of interruption...maybe standing in proximity will extinguish the behavior. Or, perhaps, drop something on the floor and create a small diversion!

There are other ways in which a bystander or peer can positively affect a problem situation. Training on this topic is available and can provide a powerful peer-to-peer tool for communicating and reinforcing workplace values.⁶ Although a formal complaint/follow-up process should always be available, an effective bystander or peer intervention may help resolve issues without the need to escalate them into a formal process.

Conclusion: It's All About Respect

In the final analysis, this discussion shouldn't be about the "h" word, harassment. It should be about the "r" word, respect. A working environment where everyone's scrutinizing whether the harassment line has or hasn't been crossed in any given interaction is not a good working environment. A working environment where everyone's striving for a sense of mutual respect, trust, collegiality, and inclusion, is an environment where things are going to get done, and done well.

Footnotes:

1. National Academies of Sciences, Engineering, and Medicine, 2018: *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/24994>.
2. <https://www1.eeoc.gov/laws/types/harassment.cfm?renderforprint=1>.
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4. <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.
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CHAPTER 8

ELECTED OFFICIALS' INVOLVEMENT IN PERSONNEL MATTERS

By Tami A. Tanoue, CIRSA Executive Director and
Sam Light, CIRSA General Counsel

Introduction

CIRSA doesn't take many member cases all the way through trial. When we do, it's usually because we expect a jury verdict in our member's favor. But one area where we've sometimes been disappointed by a jury has been in the area of employment liability.

CIRSA members' experience with employment claims in the judicial system reflects certain realities. Every juror has probably had to deal with a "bad boss" at some time in his or her working life. It's much harder to find a juror who's had to deal with "bad employees" as a manager or supervisor. So juries are naturally tilted in the employee's favor rather than the employer's.

Another reality is that employment litigation is extremely stressful. Careers and reputations are at stake. The supervisor's and manager's (and sometimes elected official's) every move is subjected to scrutiny, and the documents they've generated are nit-picked by attorneys and blown up into super-sized exhibits. One's fate is entrusted to the decision of a group of complete strangers. Sometimes, that fate is a dire one, indeed. One mayor in New Mexico (which is in the same federal circuit that encompasses Colorado) was handed a verdict in which a jury determined that his retaliatory and discriminatory conduct in an employment matter warranted a punitive damages award of \$2,250,000 against him.¹

Even when the stakes aren't that high, no one who's ever been through employment litigation relishes the thought of ever going through it again. The suggestions in this chapter are intended to help you, as an elected official, to minimize the chances that you'll be caught up in employment-related litigation and, if you are, to maximize the chances of a better outcome than that faced by the New Mexico mayor.

Establish a Structure That Allows Delegation of Personnel Functions

In a word, the single most important suggestion is: delegate! The chances that you'll be pulled into an employment claim, much less sued successfully, go way down if you've appropriately delegated the responsibility to hire, train, evaluate, supervise, manage, and discipline all but your key employee or employees. To do this, you need to have an administrative structure in place that will permit delegation, such as a manager or administrator form of government.

If your entity is fortunate enough to have a manager/administrator, the governing body should take full advantage of the organizational structure this position allows. The manager/administrator should be the **only** position (except for city/town attorney, municipal judge, and similar positions) that reports directly to the governing body. All other personnel should be accountable to the organization solely through the manager/administrator. Every organization that has more than a few employees should strive to put such a structure into place.

Honor the Structure

Once you've achieved a manager/administrator form of government, you must honor it. These types of actions, if allowed, would violate your commitment to that form and waste the resources that you've allocated to it, and encourage dysfunction and disorder:

- Elected officials reaching down below the level of the manager/administrator to influence what goes on with personnel administration below that level.
- Elected officials reaching down below the level of manager/administrator to give orders to employees below that level on how to do their job, particularly if the orders are contrary to the established policies and/or the direction of their supervisors.
- Elected officials permitting an employee below the level of manager/administrator to bypass his/her own supervisor and take personnel issues directly to them.

Thus, for instance, if your entity has committed to a manager/administrator form, there's no call for elected officials, individually or collectively, to demand the hiring or firing of a specific employee below the level of manager/administrator. Such an action raises questions of propriety from several perspectives:

- **Do your personnel enactments reserve any such authority to the elected officials?** If you have a manager/administrator, your charter, ordinances and/or personnel handbook probably don't (and shouldn't) call for you to be involved in decisions involving subordinate employees. If you get involved in such decisions, you may be outside the scope of your authority and could get in trouble (see "Be aware of the scope of your authority" below).
- **What's the reason for doing an "end run" around the manager/administrator?** Do you have a "favorite" candidate for employment, or an employee who's on your "hit list"? Why are you championing or condemning someone rather than trusting your manager/administrator to make the right decision? Do you question his or her judgment or ability to make the right choice? If so, confront that concern;

don't skirt it with an "end run." And, if the governing body does not share your concern about the manager/administrator, don't "end run" your governing body's collective decisions on oversight of its direct reports.

- **Could what you're doing be perceived as retaliatory?** Along with all the other reasons why involvement in personnel matters can be very risky, consider the retaliation claim. Everyone is potentially in the category of persons who are legally protected from acts of retaliation. Retaliation claims are among the most difficult to defend. And, these kinds of claims can lead to massive liability.

But often, it's not the elected official who seeks, in the first instance, to become inappropriately involved in a personnel matter. Rather, there's pressure put on the official from outside. For instance, a department head may have curried disfavor with a segment of the citizenry because of the perceived manner in which a service or program is being carried out. Either way, though, such involvement is the wrong thing to do. Don't be pressured by a member of the public, for instance, to interfere in a personnel issue that's been delegated to the manager/administrator. That citizen's not going to be around to help you if you get into trouble at his or her urging!

Similarly, don't give in when a subordinate employee is trying to use you to get around his or her supervisor, or when an applicant is trying to get a leg up on employment through you. Let the process unfold the way it's meant to unfold. If you have a concern about the way the manager/administrator is handling things, address that concern directly. If you cave in to pressure to involve yourself inappropriately, though, you may be enabling someone who wants to "game the system," or unfairly disempowering a manager or supervisor.

Be Aware of the Scope of Your Authority, and Stay Within That Scope

From a liability standpoint, one of the worst things you can do is to act outside the scope of your legal authority. An area where authority issues often arise, particularly in smaller communities, is in the "committee," "commissioner" or "liaison" format for personnel administration. In this format, an individual councilmember or trustee is in a supervisory or oversight relationship with respect to a department, department head, or employee. Thus, a town might designate a trustee as "water commissioner," "police commissioner," etc.

What's troubling about this format is that it's often not described anywhere in the community's enactments, nor is the authority of each commissioner set forth in writing. Rather, this format seems to be a relic of oral history and tradition. But the lack of written guidelines means that there are significant personal risks to the commissioner. What if the commissioner takes an adverse job action, such as seeking to terminate an employee? Under what authority is the commissioner acting?

If the commissioner can't prove that the action was within the scope of his or her authority, there may be consequences from a liability and insurance coverage standpoint. The Governmental Immunity Act, for instance, provides protections for public officials only when in the performance of their *authorized duties*. Likewise, liability coverage

protections through CIRSA only apply when a public official is acting *within* the scope and performance of official duties. Finally, even if there is authority on the books, this format in particular can lend itself to uncertainty over who does what—“Is this a decision for the board, commissioner or department head?”

Similar questions arise when an individual elected official chooses to become involved in a personnel matter in a way that isn't authorized by the entity's personnel enactments. Where is the authority for such involvement? If you can't find a firm source of authority, you may be heading for trouble. An individual elected official's inappropriate action can not only create liability exposure for the official, but put him or her crosswise with the other members of the governing body.

Respect the Principle That Each Employee Should Have Only One Boss

This seems like an obvious principle that every organization should follow. You don't want an employee confused by multiple directions from multiple supervisors. You also don't want an employee playing one supervisor off against another. When elected officials become inappropriately involved in personnel matters, this basic principle is violated, and the result is chaos.

If you allow yourself to become embroiled in a personnel matter involving a subordinate employee, the employee may then feel that the word of his or her supervisor can be disregarded. You may have forever undermined that supervisor's authority, or allowed the subordinate to do so. Likewise, if you were involved in lobbying for the hiring of a favorite applicant (even if it was for good reasons), that person may always feel that you, not his or her supervisor, are the go-to person on personnel issues.

Similar principles apply with respect to your governing body's oversight of its manager/administrator and other direct reports. Elected officials should recognize the council/board is not a group of seven or other multiple number of bosses, but one boss. Therefore, members of the body should commit themselves to speaking with one voice to their direct reports and to exercising their oversight role—e.g. performance reviews, goal setting, etc.—as a group. Even when there are differences of opinion as to how to address an issue with the manager/administrator, the body should arrive at its position. If the governing body does not work to speak with one voice to its direct reports, it's undermining its credibility as a board and its ability to gain accountability at the highest levels in the organization.

This is not to suggest that a militaristic chain of command is required in every workplace. In fact, flexibility in reporting relationships is desirable in some situations. For instance, you wouldn't want to lock your employee into reporting a harassment claim only to an immediate supervisor, if the immediate supervisor is the one alleged to be engaging in the harassment. But you can maintain the needed flexibility without collapsing into the chaos that your inappropriate involvement in personnel matters will beget.

Conclusion

There's certainly a place for elected official-level decision-making in personnel matters, but those decisions should be reserved for the high-level issues that involve the entire organization. Examples of such high-level issues could include establishing overall policies for the entity; selection, evaluation, and discipline for the council/board's few "direct reports"; salary and benefits plan for the workforce; and overall goals and priorities for departments. But when these issues begin devolving into the details of hiring, training, evaluating, supervising, managing, or disciplining particular employees below the level of your direct reports, it's time to delegate them to your manager/administrator.

Footnote:

1. The award was later reduced to \$1,500,000 but affirmed by the 10th Circuit Court of Appeals. *Hardeman v. City of Albuquerque*, 377 F.3d 1106 (10th Cir. 2004).



CHAPTER 9

SOCIAL MEDIA USE BY ELECTED OFFICIALS

By: Tami A. Tanoue, CIRSA Executive Director &
Sam Light, CIRSA General Counsel

Social media engagement has become a regular part of life. Daily, we check our emails and texts, and then probably go on to check our favorite social media sites, such as Facebook, Instagram, Twitter, and others. Local governments and their constituents are also mutually interested in connecting via social media, whether to conveniently transact business or provide timely information about everything from street closures to street festivals. So it's no wonder that elected officials, too, have integrated social media into their public lives. But if you're an elected official, you should know that, because of the powers and responsibilities conferred on you by virtue of your position, your social media use has some legal dimensions that may not apply to the rest of us. This chapter explores a few of them.

Open Meetings Law

While Chapter 5 outlines the basics of the Colorado open meetings law (COML), it's worth examining more specifically how its requirements can extend to your social media use. Consider this scenario: You have a Facebook page for yourself under the category of "Politician." 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 be tackling at its next meeting, and two of your fellow councilmembers get wind. All three of you go back and forth posting about your respective views and how you intend to vote on the topic.

Is this a "meeting" within the meaning of the open meetings law? Well, it seems at least arguable that it is! Remember, a "meeting" under the law includes a gathering convened electronically to discuss public business. When there are three or more members of the local public body (or a quorum, whichever is less) participating in such a gathering, that can trigger the notice and "open to the public" requirements of the law. If triggered in this type of social media discussion, how do you comply with the 24-hour "timely" posting requirement in the COML when you're posting on Facebook? How do you meet the "open to the public" requirement? These are questions for which there are not clear answers, but you see the point...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.

Constitutional Concerns

A scenario: You post about the upcoming agenda item on your 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, including some hateful attacks from the citizen you defeated in the last election, and some uncalled-for memes and photos. You decide the hateful attacks aren't helpful to the discussion—keep it positive, people!—and so you “block” your prior campaign rival from posting and you start deleting some of the particularly disagreeable comments. A few days later you ultimately decide that the better part of valor is to just delete the whole darn post.

Did your act of “blocking” your rival raise free speech concerns? It may well have! Remember, the constitution provides strong protections for free speech and generally prohibits the government from censoring speech that occurs within those venues established for the open exchange of ideas on matters of public concern. These principles have raised the question of whether a public official's Facebook page or Twitter account is a public forum such that commenters cannot be blocked, or their comments removed, based on their content.

While the law in this area is still developing, a few courts have concluded that if a public official has a social media page or feed that essentially “walks and talks” like a governmental forum, then the medium is a public forum subject to the principles regulating free speech. So, for example, where an elected official designates the page as their official page as a member of an elected body, uses the page to communicate with constituents as an elected official about government events, and invites followers to use that page for discussion of any topics relating to the government, the official cannot block persons who post critical content. The takeaway? A social media site can be a great way to communicate with constituents but if that's how you use your accounts, don't block people from posting.

Also in the above scenario, if you've decided to delete the whole darn post: Are the post, and the comments, considered “public records” within the meaning of the Colorado Open Records Act (CORA)? Again, it seems at least arguable that they are! The term “public records” is defined to include “the correspondence of elected officials,” subject to certain exceptions. And public records are open for public inspection and copying. 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? More of those infernal questions for which there isn't a clear answer...but you see the point! If there's a chance that the posts are subject to CORA, then it might be smart to tolerate the replies you get on your post. Alternatively, make sure you have some reasonable and defensible posting rules in place so that everyone knows up front your expectations for your page.

Quasi-Judicial Rules of Engagement

A further word of caution on social media concerns your duties as a decision-maker in quasi-judicial matters. Consider this 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? You've certainly stated that you're "taking no position" at this time, right? 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?

"But, but, all I'm doing is making sure the public knows about this proposal," you protest. Well, 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. With a post like this you can see how, even if your intentions may have been honorable, doubts can be cast on your impartiality and neutrality. Those doubts increase if your involvement goes beyond this scenario—say, for example, that you are also posting or responding to comments about the merits of the application.

When it comes to social media buzz around quasi-judicial matters, remember that due process requires you to be impartial and base your decision upon evidence presented at your public hearing. Remember also that defensible quasi-judicial decisions are about good process. As part of that process you will ultimately hear the case and have the power to make the decision—at the time that it's ripe for your body's decision! Avoid the temptation to leap into the social media fray, as that will protect your ability to serve as a quasi-judge, and protect your governing body's decision.

Some Suggestions

Social media use by elected officials implicates new and evolving legal issues, and this chapter only touches upon a few of them. The uncertainty is real! But you can avoid uncertainty and stay on solid ground if you follow these suggestions:

- Consider whether you really need to be on social media in your elected official capacity. If only 23 people “like” your page, it may not be worth the hassle. And keep in mind that only a fraction of those 23 people may even be seeing your posts.
- If you feel that the use of social media is a net plus and/or a service to your constituents, be extremely careful about what is posted! Stay away from discussions of items that will be or could be on your governing body’s agenda. There’s a time and place for discussion of those items, and it’s most likely not social media. Stick to public service announcements, photos and posts about things you did (“It was great to meet so many of you when I volunteered at City Cleanup Day last week”), upcoming events like “Town Halls,” re-posts of City newsletters, links to articles that tout your great city, and the like. If you’re careful about what you post, you’re not going to have to confront the uncertainties of COML, CORA, and other laws. If you stick with helpful but non-controversial posts, then there won’t be much of a need to delete posts.
- Be particularly careful to stay away from commenting on a pending quasi-judicial matter. This is where the stakes are highest! In a worst case scenario, an imprudent post could require your recusal from participating in the matter on the basis that you’ve revealed your non-neutrality, buttress someone’s constitutional claim, serve as a basis to attack the body’s decision, or all of the above.
- Check to make sure you created your page under the right category. “Politician” is more accurate than “Governmental Organization.” And don’t use the official city/town logo, to avoid any implication that yours is an “official” city/town page.



CHAPTER 10

APPOINTMENT AND REMOVAL OF OFFICIALS IN STATUTORY TOWNS

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Introduction

Colorado law grants elected officials in statutory towns the power to appoint and remove certain municipal officials, including members of the governing body and officers such as the clerk or treasurer. If you're an elected official in a statutory town, it's important for you to have a working understanding of the rules and potential pitfalls in this area. An improper appointment or removal can not only result in disputes or claims, but also create uncertainty within the organization and a cloud over the governing body. This chapter provides information on appointment and removal of officials in statutory towns, including the filling of vacancies and guidance regarding best practices. In general, statutory cities operate under different statutes, and home rule municipalities operate under charter provisions that are likely different than the statutory requirements outlined in this chapter, and so neither are addressed here.¹

Filling Vacancies on the Town Board

A vacancy on the town board can occur under a variety of circumstances, including: resignation; inability to fulfill the duties of office; failure or refusal to take the oath of office; failure to meet residency requirements (including moving out of the ward or municipality); removal from office; a seat left unfilled after an election, or an official passing away during the term of office. Once a vacancy arises, the town board is faced with several considerations.

- **Sixty-day time frame.** First, state law provides that a vacancy on the town board may be filled either by appointment or by election. However, this option only lasts for 60 days. If the town board does not fill the vacancy by appointment or order an election within 60 days, then the board is required to order an election to fill the vacancy.
- **Resolution declaring vacancy.** The board should consider adopting a resolution that declares the vacancy, sets forth the vacancy effective date, and states whether the board chooses to fill the vacancy by appointment or by election. While such a resolution is not required for a statutory town, the board should consider this

approach, as passing a resolution declaring a vacancy provides a written record of when the statutory 60-day clock begins and makes known the intent of the town board regarding its choice on how to fill the position.

- **Special considerations for vacancy in mayor’s office.** Generally, a vacancy in the office of mayor is filled in the same manner as vacancies of other members of the town board. However, if the town board will appoint someone, it may wish to consider qualifications or circumstances unique to the position, including the mayor’s voting rights and role as presiding officer.

Term of Office for an Appointee Filling a Vacancy

The term of office of a vacated seat filled by appointment or election only runs until the next regular election. This is true even if the original term would not be expiring at such election. There is no authority in state law for a statutory town to extend the term of office of an appointee filling a vacancy. If terms of office are four years, this rule can sometimes create confusion at the next regular election, where some seats are up for a full four-year term while another seat is on the ballot solely for purpose of electing a person to fill a vacant seat for the remainder of the term. Proper parlance can reduce the confusion—candidates running for that vacant seat aren’t running for an office having a new two- or four-year term but for a shortened, two-year term to fill the vacancy.

Qualifications of an Appointee Filling a Vacancy

Colorado statutes do not separately mandate qualifications for an appointee who is to serve in the event of a vacancy. However, the Colorado Constitution and related statutes require that persons holding any elective office shall be qualified. To be qualified, an appointee must be: at least 18 years old as of the date of the election [or appointment]; a U.S. citizen; a resident of Colorado for at least 22 days prior to the election [or appointment]; a resident of the municipality (and ward, if applicable) for at least 12 consecutive months prior to the date of the election [or appointment]; not serving a sentence in any public prison; and registered to vote.

An appointment is void if the person appointed is not qualified. Therefore, it is important to ensure that a person appointed to fill a vacancy in an elective office has the qualifications set forth in state law, as summarized above.

Although state law does not dictate the process for selecting a qualified person to fill a vacancy, governing bodies should be mindful that appointments to elective positions, to some extent, remove the people’s opportunity to choose their own representative. Therefore, it is prudent to implement a formal process with sufficient advertisement of the vacancy to provide transparency and ample opportunity for participation. Other considerations and pitfalls to avoid include:

- Making an appointment that benefits or appears to benefit any member of the governing body personally (see chapter 6);
- Appointing someone who will create turmoil or dysfunction within the governing body or other areas of municipal government (see chapters 1 - 3); or

- Failing to provide the appointee with proper training once appointed. Like any other person serving in an elective position, an appointee should receive proper training.

Appointment of Officers in Statutory Towns

State law requires the town board appoint or provide for the election of certain officers, including a clerk, treasurer and town attorney. The applicable statute, C.R.S. Section 31-4-304, states in pertinent part:

The board of trustees shall appoint a clerk, treasurer, and town attorney, or shall provide by ordinance for the election of such officers, and may appoint such other officers, including a town administrator, as it deems necessary for the good government of the corporation.... **[N]o appointment of any officer shall continue beyond thirty days after compliance with section 31-4-401 by the members of the succeeding board of trustees.**

In some cases, the town board fails to act within 30 days to appoint or re-appoint officers of the town. Further, in many cases, these positions are staffed with municipal employees, which can lead to uncertainty in employment when the town board fails to re-appoint an employee to one of these appointed positions. These and other circumstances raise the question: What is the impact of not making appointments within the 30-day period after the new board members are seated? In short, if the 30-day period set forth in this section passes, the term of the officer expires.

However, it is important to note that the expiration of the term does not necessarily or automatically oust the individual holding the office from that position and create a vacancy. Rather, absent provisions to the contrary in state law or local ordinance, the public interest requires that public offices should be filled at all times without interruption. The Colorado Constitution adheres to this principle, stating in Article XII, Section 1 that “[e]very person holding any civil office under the state or any municipality therein, shall, unless removed according to law, exercise the duties of such office until his successor is duly qualified....”

Therefore, an individual holding an appointive office in a statutory town remains in that position after his or her term has expired (i.e. holds over) until a successor properly appointed by the town board takes office. Moreover, if the incumbent is an employee, he or she would remain in their appointive position and on the town’s payroll as a holdover.

To avoid confusion and conflict regarding holdovers, when the term of an appointive office expires, the town board should timely act to either re-appoint the incumbent or appoint a new person to the office. The board should also seek advice of legal counsel before deciding to not re-appoint an incumbent appointive officer who is also an employee of the town.

Removal from Office in Statutory Towns

The following identifies some of the key requirements pertaining to the removal of an elected official in a statutory town pursuant to a proceeding under C.R.S. Section 31-4-307. Many of these requirements are not present in the statute itself; rather, they are found in some old judicial decisions concerning the statute. Removal of an elected official by

the governing body essentially overrides the will of the people who elected the official. For this reason, it is critical that any removal proceedings take place in accordance with the guidance provided by these decisions. The advice of counsel is also critical given the potential for missteps.

While these decisions are more than a century old, they came into play more recently in the recommendation of a United States Magistrate Judge in a case involving a CIRSA member municipality.² While the Magistrate Judge's recommendation is unpublished and does not serve as precedent, it was cited with approval by the Colorado Supreme Court.³ Thus, the Magistrate Judge's recommendation highlights the importance of these older decisions and may offer some good guidance to a statutory town contemplating a removal proceeding.

Given this recent resurrection of old case law, the way in which a town may have applied Section 31-4-307 in past proceedings may not serve as a sound guide to the conduct of such proceedings today. Thus, past practice should not be used as a basis to avoid compliance with the following requirements gleaned from the old but resurrected case law:

- **The basis for removal (unless the elected official has moved out of town) must be “misconduct or malfeasance in office,” as those terms are used in Article XIII, Section 3 of the Colorado Constitution.** These constitutional provisions contemplate official misconduct of such a magnitude that it affects the performance of the officer's duties, and offenses against the town “of a character directly affecting its rights and interests.”⁴ Political or personal disagreements, or a stalemate resulting from failure to obtain a requisite number of votes on matters coming before the town board, may not be sufficient grounds to effect a removal.
- **The removal proceeding is quasi-judicial in nature, subject to the safeguards commonly found in judicial proceedings.** This means:
 - There must be a charge or charges against the official sought to be removed. The charges must be specific and stated with substantial certainty.⁵ Vague or general charges likely will not meet this requirement.
 - There must be a hearing in support of the charges, and an opportunity to make a defense.⁶ The charges must in the first instance be proven by testimony and evidence, with the opportunity given to the officer sought to be removed to rebut such testimony and evidence, and offer his or her own.
 - The hearing must be held under the same limitations, precautions, and sanctions as in other judicial proceedings.⁷

A basic requirement of judicial proceedings is that decision-makers must be neutral and impartial. This is why in most judicial proceedings, investigative, prosecutorial, and adjudicatory functions are separated. However, in removal proceedings, the adjudicatory body (the town board) may also have carried out an investigative function by establishing the charges that are the basis for the proceeding. Involvement in presenting

testimony and evidence would further diminish the separation of these functions, and the lack of separation may compromise the appearance or reality of a neutral and impartial decision-maker.

These requirements highlight one of the most difficult procedural aspects of a removal proceeding: who will present the evidence and testimony? The town board serves as the decision-maker. It would likely be problematic, from a fairness standpoint, if the decision-makers also served as witnesses. One option to address this issue is use of a hearing officer whose decision is made subject to final review and action by the town board. Another option is to limit involvement in non-adjudicatory functions to one (or at most two) members of the governing body who understand their need to then recuse themselves from the board's decision-making.

- **The decision will be subject to judicial review.**⁸ This means that under Rule 106(a)(4) of the Colorado Rules of Civil Procedure, a transcript of the proceedings as well as the evidentiary record, will be produced to the district court for review. The standard of review will be whether the governing body's decision was "arbitrary or capricious." Constitutional due process violations may be raised, and considerations of bias may be raised to set aside a decision as well.

Other questions and issues to consider in holding the proposed removal hearing include:

- Have provisions been made for the issuance of subpoenas to compel the attendance of witnesses, the administration of oaths, the right of discovery, and the cross-examination of witnesses?
- Are rules of procedure in place, has a standard of proof been established, and will rules of evidence be followed?
- Does the officer sought to be removed have the right to be represented by counsel? Is the governing body working with the advice of counsel?
- Have adequate time and opportunity been given to the officer sought to be removed to prepare his or her case in answer to the charges? Have provisions been made for the granting of reasonable continuances?
- Has some means of recording the hearing been arranged, preferably by a stenographer who can prepare a verbatim transcript?
- Who will prepare written findings of facts, conclusions of law, and a final decision and order?

Conclusion

A town board's powers of appointment are effective tools. They can be used to timely fill a board vacancy and appoint key staff who will help drive the town's vision and success. But, if not handled appropriately, appointments can become the source of intractable disputes and potential liability. Thus, board members should work together to understand their options, duties and obligations when it comes to making appointments, and make wise use of their appointment powers.

Likewise, a town board's power of removal is undoubtedly an important one; but, an imprudent or improper removal proceeding can be the source of significant liability. As noted, recently resurrected case law suggests the bar for exercising the removal power is high, for situations where serious misconduct or malfeasance in office can be proven. Further, the removal power should be exercised only with the procedural safeguards summarized above in place, and only with the assistance of legal counsel. Otherwise, the governing body may be taking on an unacceptable risk of liability.

Footnotes:

1. Officials in statutory cities and home rule municipalities should obtain from their counsel and staff information on the appointment and removal requirements specific to their organization.
2. *Russell v. Buena Vista*, 2011 WL 288453 (D. Colo. 2011).
3. *Churchill v. University of Colorado*, 2012 WL 3900750 (Colo. 2012).
4. *Board of Trustees v. People ex rel. Keith*, 59 P. 72, 74 (Colo.App. 1899).
5. *Board of Alderman v. Darrow*, 22 P. 784, 787 (Colo. 1889).
6. *Darrow*, 22 P. at 787.
7. *Keith*, 59 P. at 75.
8. *Id.*



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