Ethics, Liability & Best Practices Handbook for Elected Officials

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CIRSA

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COLORADO MUNICIPAL LEAGUE

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About the Authors

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Tami Tanoue has been the in-house General Counsel/Claims Manager for CIRSA since July, 2002. She was previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, where she served CIRSA as its contract General Counsel for 12 years, and was City or Town Attorney for several Colorado municipalities. Prior to that, she was Staff Attorney for the Colorado Municipal League, where she represented the collective interests of Colorado municipalities. Tami is a regular speaker on local government liability topics, and has written several publications on liability issues.

Robert Widner

Robert (Bob) Widner is a founding partner with the law firm of Widner Michow & Cox LLP. Bob's legal practice has consistently focused on representation of local governments with a special emphasis in land use planning law. Bob currently serves as the City Attorney for the City of Centennial. Prior to founding Widner Michow & Cox, Bob was a partner with the Denver law firm of Gorsuch Kirgis LLP where Bob served as the Park County Attorney, the City Attorney for Cherry Hills Village, and Town Attorney for Lyons.

Foreword

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 and, if done improperly, can result in liability for your entity, yourself, or both.

In this publication, Tami Tanoue, CIRSA's General Counsel/Claims Manager and former CML Staff Attorney, discusses many of the issues of greatest concern to elected officials from the standpoint of maximizing excellence and effectiveness, while minimizing the risk of liability. Her perspective is informed by decades of service to municipalities, individually and collectively. We think you'll find her writing to be engaging, on-point, and light on the legalese.

Noted municipal attorney Robert Widner of the firm of Widner, Michow & Cox, LLP contributes a chapter on ethics in local government. He provides practical suggestions for dealing with the difficult ethical issues that elected officials must face. We appreciate his contribution to this publication.

This *Ethics, Liability & Best Practices Handbook for Elected Officials* is intended to provide an overview of some of the common liability issues facing elected officials, as well as some "best practices" suggestions for maximizing effectiveness and avoiding or reducing liability.

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.

Timothy A. Greer
CIRSA Executive Director

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Chapter 1

The Oath of Office: Ethics, Liability & Best Practices

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 1
The Oath of Office: Ethics, Liability and Best Practices

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, [this Charter,] and 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 were elected, 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 staff is responsible for administrative matters.

To the extent that 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. As an individual elected official, if you are asked by an employee who's not one of your direct reports to become involved in an employment issue, or if you take the initiative to become involved, that could raise 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 your supervisors and managers 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! 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. (Executive sessions are discussed in more detail in chapter 8.)

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 Colorado 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! 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 experience, the answer to that question is yes. There are watchdogs out there scrutinizing you, and they will pounce on you with a lawsuit if your meeting 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.

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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 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: the right to a fair hearing before a neutral decision maker when individual property rights are at stake.

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 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 rancor 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. Only through collaboration and consensus-building can an individual's priority become the priority of the body.

Has the governing body been able to "gel" as a team, or are members viewing

one another with a sense of distrust? Are there "outliers" on the council or board who are creating turmoil and dissension? (See Chapter 2 on identifying and dealing with "outliers.") 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, when lawyers take their oath of office, they commit to respectful conduct towards one another and to the judiciary. It doesn't seem a far stretch to impute a similar commitment to your oath.

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 CIRSA's 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.

Conclusion

Honoring your oath of office isn't just something you do when your 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.

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Chapter 2

Governing Bodies and The Outlier Syndrome

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 2
Governing Bodies and The Outlier Syndrome

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? It could be called 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.

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.

Are you an Outlier?

Perhaps you have 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 that 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!

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Chapter 3

Nine Practices of Highly Ineffective Councils and Boards

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 3
Nine Practices of Highly Ineffective Councils and Boards

Some readers may be acquainted with John Carver's Policy Governance® model (Model) for boards of public and nonprofit bodies. In this chapter, we discuss the tough job of governing body members, and some of the ways in which a council or board can allow its effectiveness to be diminished or compromised. To understand the Model, how it works, and how it is implemented, Carver's book, *Boards That Make a Difference: A New Design for Leadership in Nonprofit and Public Organizations* (3rd ed. 2006), is highly recommended reading.

For those who've labored in local government for any length of time, *Boards That Make a Difference* will provide some laugh-out-loud moments of self-recognition. It describes a number of common practices that are a drain on the effectiveness of the governing body and a source of frustration for both the body's members and the staff who serve it.

Do Any of These Practices Ring a Bell?

Spending time on the trivial. As the author describes it, "Major program issues go unresolved while boards conscientiously grapple with some small detail." How many times have you gotten mired in the tiniest detail of a purchasing decision, or the proposed budget?

Foreshortened time horizons. The board's decision-making time horizons should be the most distant of anyone in the organization. Yet, as Carver says, "we find boards dealing mainly with the near term and, even more bizarre, with the past." How many times have the pennies spent in the prior months, as reflected in the "bills for approval" portion of the agenda, received undue attention at your meeting?

Reactive rather than proactive stance. Is the idea that the board should make proactive decisions, rather than merely react to staff initiatives, completely foreign? Would, as the author says, your board "cease to function" if it were asked to create its own agenda?

Going over what the staff has already done. "Reviewing, rehashing, redoing," is what the author calls it. Some boards spend a great deal of their time going over what the staff has already done. But as the author says, "reviewing, rehashing, and redoing staff work – no matter how well – do not constitute leadership"!

Problem-based prescriptions. If you prescribe a specific solution based on the details of a specific problem that has occurred in the past, you may wind up with a "pendulum swing" that creates unintended consequences in the future. As Carver says, "Correcting insufficiencies by looking backward at what they have been simply invites the next, perhaps opposite error. It is like trying to drive down the highway with a firm grip on the rearview mirror."

Accountability being allowed to leak. Have you established a City/Town Manager or Administrator position? If so, great! But are you still continuing to encourage or allow council/board member interactions with subordinate staff, or subordinate staff members to bypass their supervisors and directly go to council/board members with

their issues or complaints? If so, you may be keeping the Manager/Administrator from being able to do his or her job, or you may be interfering in such a manner that you can no longer credibly hold him or her accountable for performance.

Diffuse authority. When the governing body's and staff's respective areas of responsibility are not clearly delineated, the staff's knee-jerk response for every issue in a gray area may be, "Let's take it to the council." If you allow this, you'll continually increase your own workload without ever clarifying the appropriate boundaries between council/board governance and staff decisions.

The "Approval Syndrome." Does your agenda call for the governing body's approval of documents containing a multitude of paralyzing details (line item budgets, detailed personnel and administrative policies, job descriptions, etc.)? How does this make you feel? The document has already been created, and you're just reacting to it. Then, to avoid feeling like "rubber stamps," board members may start nitpicking. But as the author says, "no matter how much intelligence goes into playing this reactive role, it is clearly not leadership." Moreover, by its approval, the board has been co-opted into assuming ownership of the document, and staff is let off the hook in terms of accountability for the results expected from the document!

The "seductive intrigue of organizational activity." You know how, when you're faced with a huge project, sometimes the easiest way to procrastinate is to divert your attention to desk-cleaning or some other trivial task? That's the "seductive intrigue" that can pull you into involvement in the organization's internal minutiae. It can be a heck of a lot easier to divert your attention to those details than to grapple with the big issues involved in governing your entity. But governance shouldn't be about bringing the council/board more knowledgeably into the process of administration. A governing body need not and should not tag along behind management, or try to become "superstaff" in a "conscientious attempt to tag along more professionally." You've got grander things to do as the governing body!

So What's the Answer?

Well, no doubt John Carver would say, "Adopt and implement my Model!" Of course, that will require time and effort, an unswerving commitment, and probably the help of a Policy Governance® consultant. In the meantime, here are a few suggestions from *Boards That Make a Difference* to ponder.

- **View yourselves as an extension downward from ownership, rather than an extension upward from management.** As mentioned, your job is not to be "superstaff," much less "supermanagement." As the representative body for the citizens – the true "owners" of the community – your job is to exercise ethical and trusteeship responsibilities on behalf of the ownership. Viewed in that light, it becomes apparent that neither the championing of management decisions, nor substituting your judgment for that of staff, are part of those responsibilities. To be true leaders, you need to "develop a taste for the grand expanse of the larger context," as Carver says.

- **You determine the "ends." Leave the "means" to the staff.** It's important to read *Boards That Make a Difference* in order to understand fully what Carver means by "ends." Briefly, "ends" are the results or outcome to be obtained or the impact to be made, for whom, and at what cost or relative worth. You could call the "ends" the "what and the why." Everything else falls into "means," or the "how." Once you determine the "ends," give staff the latitude to determine the "means." After all, they were hired for their skill and expertise in means, weren't they? Aren't they in the best position to determine the means? If the governing body becomes involved in means, you may be simultaneously impairing your staff's ability to exercise their best judgment, and crippling your ability to hold them accountable for the achievement of the ends. Who's to blame if you dictated the "how" and the result was a shortfall in achieving the "what"?

- **Set appropriate boundaries on the "means."** Leaving the means to staff doesn't mean unbridled discretion. We all know that there's a limit to the idea that "the ends justify the means." Carver maintains that the governing body's legitimate involvement in means is to prohibit any means that are imprudent or unethical. But the way to do that is not with a set of *prescriptions* – what must be done. Rather, the right way to do that is with *proscriptions* – what must not be done. Why? Well, there aren't enough hours in the day or enough specialized knowledge on the board to define all the things that must be done. But the board certainly has a legal, moral, and ethical compass. That's why defining what's prohibited as imprudent or unethical is a more effective and efficient means of putting a boundary past which means cannot go.

- **Govern yourself before governing others.** Carver recommends that the governing body take the time to design and codify its own processes, including a board member code of conduct. One of the many helpful examples in *Boards That Make a Difference* is a sample code of conduct. Anyone who's experienced dysfunctional behavior within a governing body knows that negative interpersonal dynamics can destroy the governing body's effectiveness as well as its credibility with its constituents. But how can a board deal with inappropriate behavior among its own if it hasn't first determined what constitutes appropriate behavior? With a sound and mutually agreed process, personality need not become the dominant force in shaping issues and dealing with disagreements and confrontations.

What's This Have to do With Liability Anyway?

The problems identified by Carver as obstacles to good governance are also problems that can lead to increased liability for elected officials. For instance, if your role in relation to staff's is unclear, how are you or staff going to know what is within the scope of your authority and what is within the scope of theirs? Falling outside the scope of your lawful authority is one of the sure ways to lose your liability protections. And it follows that Carver's approach to good governance also provides

excellent risk management suggestions. Both board and staff can flourish within their respective spheres of authority without stepping on one another, maintain appropriate accountability, and ensure that the work of the public entity will be carried out within the boundaries of prudence and ethics.

Conclusion

This chapter has pulled out bits, albeit helpful bits, of *Boards That Make a Difference* for you to consider. Reading the book is highly recommended, because the Model really makes the most sense when viewed in its entirety.

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Chapter 4

Removal of Elected Officials in Statutory Towns: Pitfalls to Avoid

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 4

Removal of Elected Officials in Statutory Towns: Pitfalls to Avoid

The purpose of this chapter is to identify 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.

A recent case involving a CIRSA member municipality highlights the importance of these judicial decisions. While these decisions are more than a century old, they came into play in the recommendation of a United States Magistrate Judge in *Russell v. Buena Vista,* 2011 WL 288453 (D. Colo. 2011). This recommendation is unpublished and does not serve as precedent; however, it was recently cited with approval by the Colorado Supreme Court in *Churchill v. University of Colorado,* 2012 WL 3900750 (Colo. 2012). Thus, the recommendation 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 old 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 municipality "of a character directly affecting its rights and interests." *Board of Trustees v. People ex rel. Keith,* 59 P. 72, 74 (Colo. 1899). Political or personal disagreements, or a stalemate resulting from failure to obtain a requisite number of votes on matters coming before the governing body, 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. *Board of Alderman v. Darrow,* 22.P. 784, 787 (Colo. 1889). 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. *Darrow,* 22 P. at 787.

The charges must in the first instance be proven by testimony and evidence, with the opportunity given to the officer sought to be recalled to rebut such testimony and evidence, and offer his or her own.

This highlights one of the most difficult procedural aspects of a removal proceeding: who will present the evidence and testimony? The governing body serves as the decision-maker. It would likely be problematic, from a fairness standpoint, if the decision-makers also served as witnesses.

- The hearing must be held under the same limitations, precautions, and sanctions as in other judicial proceedings, and subject to judicial review. *Keith,* 59 P. at 75.

Questions to consider in holding the proposed 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, cross-examination of witnesses?
- Are rules of procedure in place, has a standard of proof been established, and will rules of evidence be followed?
- Who will be the witnesses presenting the evidence and testimony?
- Do the officers 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 officers sought to be removed to prepare their cases 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?
- **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. In removal proceedings, the adjudicatory body (the governing body) 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, as noted above, would further diminish the separation of these functions. The lack of separation may compromise the appearance or reality of a neutral and impartial decision-maker. The governing body

must be cognizant that this lack of separation, while difficult to avoid in some removal proceedings, may increase the liability of the decision-makers.

- **The decision will be subject to judicial review 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.

Conclusion

The types of internal conflicts often experienced by governing bodies may be an adequate basis for the exercise of recall powers by the people. However, removal is different from recall. When removal powers are exercised pursuant to Section 31-4-307, the governing body is essentially overriding the will of the people. For this reason, the removal power should only be exercised in situations where serious misconduct or malfeasance in office can be proven, only if the procedural safeguards summarized above are in place, and only with the assistance of legal counsel. Otherwise, the governing body may be taking on an unacceptable risk of liability.

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Chapter 5

Liability Protections and You

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 5
Liability Protections and You

Are you aquainted with the protections you have through your entity's membership in the CIRSA property/casualty pool? In this chapter, we provide 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 or 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]

As of this writing, coverage limits are as follows:

- For general liability and law enforcement liability, the coverage limit is $5,000,000 per claim/occurrence.
- For auto liability, the coverage limit is $1.5 million per claim/occurrence.
- For public officials' liability, the coverage limit is $5,000,000 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 potential 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."

> The "willful and wanton" exclusion is probably the exclusion of greatest concern to elected and other public officials.

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 official, employee, or volunteer. Under this exclusion, the entity will likely be covered. However, with respect to the individual 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. Consistent 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 elicit one of several responses from CIRSA. It may be determined, based on the allegations, that you are owed an unconditional duty of defense (i.e., the assignment of a defense attorney) and indemnity (i.e., covering any judgment or settlement). Or it may be determined that none of the allegations invoke any duty of defense or indemnity, and you will receive 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 in which 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, CIRSA will assign multiple counsel. CIRSA-assigned defense attorneys, although paid by CIRSA, owe their duty of loyalty to you, their client.

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.

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Chapter 6

Ethical Conduct in Local Government

By: Robert Widner, Widner Michow & Cox LLP

Chapter 6
Ethical Conduct in Local Government

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.

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.

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. Unfortunately, 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.

Municipalities may overcome these state statutory shortcomings through local regulation and 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.

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 or her 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.

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 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 or not 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. 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 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 state law. 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.[1]

Footnotes:

[1] Please see Chapter 4 for a discussion of the removal power in a statutory town.

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Chapter 7

Elected Officials' Involvement in Personnel Matters

By Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 7
Elected Officials' Involvement in Personnel Matters

CIRSA doesn't take many member cases all the way through trial. But 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.

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.

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 (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).

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 elected officials minimize the chances that they'll be caught up in employment-related litigation and, if they 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 (with the exception of city/town attorney, municipal judge, and similar professional positions) that reports directly to the governing body. All other personnel should be accountable to the organization solely through the manager. 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, 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 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 personnel handbook probably doesn'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 issue; don't skirt it with an "end run."
- *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, as can be seen from the situation in which the New Mexico mayor found himself, 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. 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's 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" 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 committee 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 state 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.

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.

Respect the principle that each employee should have only one boss. This seems like a pretty 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, the way children sometimes play one parent off against the other. 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 always 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.

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 selection, evaluation, and discipline standards and procedures for the entity; could include 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, it's time to delegate them to your manager/administrator.

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Chapter 8

Executive Sessions

By Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 8
Executive Sessions

At CIRSA, there has been an upswing in claims against members for alleged violations of the Open Meetings Law in the conduct of 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 all allegations of open meetings violations.

> Under the open meetings law, C.R.S. Section 24-6-401 *et seq*., it is the public policy of the state that the formation of public policy is public business and may not be conducted in secret.

The Open Meetings Law

Under the open meetings law, C.R.S. Section 24-6-401 *et seq.,* it is the public policy of the state that the formation of public policy is public business and may not be conducted in secret. 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; this requirement is deemed to have been met if notice of the meeting is posted at least 24 hours prior to the holding of the meeting. No action taken at a meeting is valid unless it meets the requirements of the open meetings law.

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 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 (Exclusion 10) 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. As of this writing, 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

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.
- 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 tami@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 in the motion to go into executive session.
- 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.

Each and every executive session your entity holds exacts a price in terms of loss of public confidence in open government and, if done improperly, can subject your entity to claims.

- 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. Until this amendment was made, it was not uncommon to hold such a discussion in executive session under the theory that it was a governing body "personnel matter," but this theory 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.

Conclusion

Each and every executive session your entity holds exacts a price in terms of loss of public confidence in 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 executive sessions, you can keep that price low and public confidence high.

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