

Effective Governance: Public Official Liability, Ethics & Conflicts of Interest

Presented by:

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Introduction

- Congratulations on your election and thank you for your commitment to public service!
- This presentation is organized as suggestions for managing risks related to the role of elected official, organizational structure and liability, and ethics & personal conduct.
- Focus is on suggested “best practices” that will enhance your effectiveness and in turn reduce risks for your city or town and for you individually.
- Presentation is a training resource only; is not intended to address or provide legal advice on any specific, pending issues.



The Role of Elected Official

- Being an elected official means your role has changed: Citizen → government official (24/7!), representative, ambassador & **fiduciary**.
- Recognize a key role and “job duty” is delivering **good governance**, which at root is based practically (and from a risk management viewpoint) on a few core concepts:
 - **Openness & Transparency** (open meetings/records laws)
 - **Fundamental Fairness** (due process)
 - **Predictability & Evenhandedness** (equal protection and certiorari claims)
- And committing always to civility, mutuality of respect and the “WE” aspect of public service on a multi-member governing body. In this context, “The ‘WE’ is more important than the ‘me.’”



Organizational Structure & Liability

- Recognition of the “WE” is also a cornerstone of risk management with respect to organizational structure and liability, particularly respecting membership on a multi-member governing body.
- Everyone within your municipal organization has a “job description” —honoring the “job description” is key to proper functioning of government at all levels, and to avoiding risks of liability, including the risk of personal liability!
- You have protection from personal liability for acts/omissions as an elected official if you are “within the scope of employment (SOE)” and not acting “willfully and wantonly.”
- Conversely, conduct that is “outside the SOE” or “willful and wanton” can result in a loss of governmental immunity and give rise to liability, including potential personal liability.



Organizational Structure & Liability

- Can also result in potential loss of insurance coverage. Public official liability (POL) policies follow “course and scope” and “willful and wanton” concepts. That is, they extend coverage to elected officials “in their capacity as such” (or similar) and have provisions excluding coverage where liability is based on willful & wanton conduct, etc.
- The CGIA provides a form of qualified immunity, but it is not an absolute shield. Similarly, a federal form of qualified immunity protects government officials from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”
- Recognize that certain liability risks—in particular civil rights claims—can be exacerbated by “bad facts” that suggest (or are perceived to be based upon) retaliatory conduct.



Organizational Structure & Liability – Tips

- Governing body members hold a fraction of the body’s power, but that power can’t be exercised individually. Rather, it is exercised by the body as a whole.
- Thus, recognition of the “WE” aspect is not only important in terms of collaboration and getting things done. It’s also critical in recognizing and managing risk around your SOE. Acting in terms of “I” rather than “we”...that’s a red flag.
- Recognize the policy-administrative distinction and commit to your chosen form of government (council-manager, board-administrator).
- Recognize the allocations of authority within your organization have legal effect and are there to “**serve and protect**” —assuming everyone is committed to them!



Supporting Organizational Structure

Where Does the Governing Body Focus its Efforts?

Legislative and Governing Body Focus/SOE:

Ownership



Governance



Management



Supervision



Front Line Employment

See, John Carver, Boards that Make a Difference

- Policy-setting (legislating), big picture, and forward-looking, rather than dealing with day-to-day operations, and rather than making reactive, case-by-case decisions as issues arise, or after-the-fact.

- Examples: General ordinances, annual budget, decisions regarding corporate assets, appointment & oversight of your few “direct reports”, deciding quasi-judicial and corporate matters reserved to the governing body.

- The governing body and its members should:

- Have longest time horizon—looking down the road.
- Have broad interests in mind.
- Work together in fiduciary role to protect city/town as an entity and governing body as an institution.

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The Governing Body as an Institution

Commit to personal conduct that strengthens the WE – the governing body as an institution. This sometimes requires personal sacrifices, such as:

- Setting aside a personal interest or agenda when there is lack of support.
- Accepting “the council/board has spoken” though one would have preferred a different outcome.
- Accepting “our work is done”; i.e., the hand-off from governing body → staff.
- Recognizing that individual efforts—e.g., liaison roles—are in service of the entity and governing body (the WE).
- Avoiding perceptions (internal or external) of “getting ahead” of or “speaking for” the voice of council/board where council/board has not yet spoken.



Ethics and Personal Conduct

Become familiar with the ethics laws that govern your conduct as an elected official. Make them your “best friend” in resolving ethics issues. Some key areas:

- **Conflicts of Interest:** Disclose, recuse, don’t vote, and don’t influence others.
- **Confidential Information:** Don’t disclose or use any confidential information for personal benefit.
- **Gifts:** Decline any gifts seemingly connected to your service and abide by gift rules.
- **Contracts:** Do not have a financial interest in a contract with your municipal organization (or if allowed, ensure all rules are followed).

Avoid situations that may create appearances of impropriety. Beyond compliance with the “letter of the law” recognize that in matters of ethics, fair or not, sometimes perception = reality and reality = perception.



Ethics and Personal Conduct

And beyond compliance with the rules, commit to high levels of personal conduct.

Recognize that inappropriate personal conduct can be destructive to a public body, its agenda, and its reputation. Some problem areas we've seen:

- “Outsider syndrome” and elected officials “going it alone.”
- Accusations of lack of respect, lack of good faith, hidden agendas, preconceptions, undue partisanship, “proxy talk,” incivility, or other concerns creating a sense of distrust.
- Individual elected or appointed officials ignoring rules or norms of conduct around use of staff time, interactions with outside agencies, etc.



Ethics and Personal Conduct

More problem areas we seen:

- Officials taking an individual and unhealthy interest in personnel issues or administrative issues that are assigned to staff under state or local law.
- Failures to recognize the “24/7” nature of being a public official and the impacts that problematic behaviors can have on reputation, community trust, and others in the organization—irrespective of whether the conduct is in an “official,” “individual,” or “personal” capacity.
- Personal conduct is another area where, fair or not, sometimes perception = reality and reality = perception. Thus, commit to high standards of personal conduct and to avoiding personal conduct that can debilitate public officials and public bodies.



Some Scenarios

- “Our liquor ordinances say the Town Clerk issues special events permits but one member of our Town Board has visited the Clerk’s office repeatedly telling the Clerk she must turn down a special event permit application for an event near his house.” What to do?
- “We’ve heard a few Board members have taken to social media to combat some critics of a new Board ordinance, but unfortunately one of them has gotten in a pickle by alleging that one of these critics has failed to get building permits and has failed to report and pay payroll taxes. The animosity spilled over at a recent Board meeting where the elected official repeated the accusations. Now the critic is threatening a defamation lawsuit.” Problems?
- “Recently the Council voted to approve a purchase of water rights. As the closing on the purchase approached, we learned a commission was due to a brokerage firm. The rub is that one of the elected officials who voted for the purchase is a partner in the brokerage firm. Now citizens are claiming an ethics violation.” Concerns?



Elected Official – Governing Body Liability Risks

Where do liability risks lie for elected officials and elected governing bodies?

- Civil rights claims (e.g., First Amendment, Due Process, Equal Protection)
- Employment practices – e.g. harassment, discrimination, retaliation
- Alleged “willful & wanton” conduct (state law intentional torts)
- Breach of ethics and/or fiduciary duty
- Open meetings/open records laws
- “On the record” challenges to a “quasi-judicial” action of the governing body
- Declaratory or injunctive relief claims arising from governing body action; e.g., challenging an ordinance or some other action
- Contract and quasi-contract claims
- Takings and regulatory takings claims

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Concluding Thoughts

- As elected officials, commit to good governance that builds faith and trust in government and strengthens the governing body as an institution. Have a good “risk radar” and seek support from your attorney and staff to effectively manage risk.
- Use your power wisely and humanely. Remember, you set the tone for the whole organization in terms of the treatment of employees, citizens, and the business community.
- Engage in active collaboration, be willing to “agree to disagree” and move on.
- Embrace process irrespective of outcome and always consider issues on their merits alone.
- Always put public interest first and embrace the fiduciary, stewardship, and “WE” responsibilities of governing body membership.

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CIRSA Resources

- CIRSA *Elected Officials Liability Handbook*: <https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>
- The elected officials' page on CIRSA website has some resources relevant to both elected and appointed officials: <https://www.cirsa.org/safety-training/elected-officials/>
- For CIRSA training on quasi-judicial best practices and due process, see these CIRSA videos: https://www.youtube.com/watch?v=mPz-P7A_qlc and <https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4>
- And our newest video (<https://www.youtube.com/watch?v=bfhxvn1c1lA&t=10s>), which is 17 minutes long, or select and watch sections by topic here: <https://www.youtube.com/@CIRSASafety>



About the Colorado Intergovernmental Risk Sharing Agency (CIRSA)

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created pursuant to Colorado statutes and intergovernmental agreement of our members
- Total membership today stands at 290 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities

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Thank You!

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