



LAW ENFORCEMENT LIABILITY TRENDS: What Managers Can Do

Tami A. Tanoue, CIRSA Executive Director
June 24, 2021

SAFER TOGETHER

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Where We've Been

- Over the years, we've talked about – and you've heard about -- the Governmental Immunity Act, federal civil rights laws, and other sources of liability
 - We were privileged, for many years, to live in a state with great liability protections for public officials and public entities, including law enforcement
 - We were fortunate that we didn't have "runaway juries" – Colorado juries were known for a common-sense approach to seeing the real issues in a claim involving police, and for an appreciation of law enforcement
 - We've had legal principles in place that didn't hold law enforcement officers and other public officials to the standard of being "supreme court justices" – "qualified immunity"
 - And we've been fortunate to have federal judges who generally take a common-sense approach to deciding qualified immunity issues, dismissing cases when warranted

CIRSA SAFER
TOGETHER

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Where we are: Toto, I have a feeling we're not in CO anymore!

- Massive changes are impacting the provision of law enforcement services in CO and elsewhere
 - Public sentiment (and therefore jury sentiment) is changing
 - Social forces (e.g., social media + body-worn cameras) mean “social inflation” factor for claims – not just local community sentiment, but national and even international perceptions, can influence the course of a claim
 - Much riskier to take law enforcement liability claims to trial
 - Much harder to settle law enforcement liability claims, especially for a reasonable amount
 - Until a few years ago, CIRSA never had a settlement of a member police liability claim of more than \$1 million. That has changed dramatically – and the upward trend is unsustainable.



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What are some of these trends?

- \$1.3 million settlement in 2014 was our biggest ever at the time
- A \$4 million settlement in 2017 was our biggest ever at the time
- An \$8.75 million settlement in 2020 is now our biggest ever...at this time
- 2021 has already seen more than one highly publicized case alleging excessive force by CIRSA member PDs
- **As settlements and judgments increase, the cost of coverage increases, too**
 - Obviously, the upward trend in coverage costs is also unsustainable
- And local governments are finding that the cost of providing LE services is also increasing independently of the above – **mandates are increasing but the funding isn't**



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What are some of these trends?

- The change in the federal administration means that “pattern and practice” liability via the US Department of Justice is back in the picture (and S.B. 217 brought it into the state picture via the Attorney General)
 - This power essentially gives the DOJ the ability to impose structural changes on police departments to address problematic practices
 - DOJ settlement agreements and consent decrees were once available online and were instructive to peruse – appear to have been taken down during previous administration but will likely become relevant again
 - This guide: <https://www.justice.gov/crt/page/file/922456/download> has links to various DOJ consent decrees



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What are some of these trends?

- Law enforcement liability insurance will likely become even less affordable and less available, with more exclusions and lower limits of coverage
 - At CIRSA, we currently provide \$10 million per claim/occurrence in law enforcement liability coverage
 - We will fight to hold on to these limits – it remains to be seen whether such high limits of coverage will continue to be available on the market
 - We’ll also fight against per-member or pool aggregates that apply to those limits
 - Preliminary indications for those facing July reinsurance renewals: expect 40-50 percent increase in law enforcement liability coverage costs
 - Law enforcement liability reinsurance cost already makes up about 80 percent of the total cost of your liability coverage through CIRSA
 - We are also providing coverage for the up-to-\$25k personal liability that police officers face as a result of S.B. 217



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What are some of these trends?

- We haven't seen the last of the legislative changes, either
 - Discussion of abolishing "qualified immunity" at the federal level (already abolished in law enforcement claims under state law in CO)
 - Single party control of legislature means it's easier to pass legislation, with or without the input of stakeholders such as municipalities and counties
 - You saw how S.B. 20-217 was introduced and passed within a 10-day period in the CO legislature last year, with little ability of local governments to provide input
 - This year's changes were less dramatic, but the opportunities for input were just as limited



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What are some of these trends?

POLITICS • News

At Colorado's Capitol, prosecutors no longer rule the roost

The seas used to part for law enforcement, but the power is shifting

"I went to the General Assembly intentionally looking to dismantle the criminal justice system that has been unjust," said Leslie Herod, a Denver Democrat and a prolific legislator on this topic. "Efforts made previously were substantially weakened and didn't have the support of even the Democrats. ... We have seen a huge shift."

Denver Post, June 20, 2021



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What are some of these trends?

- Meanwhile, “it’s hard to be a police officer” (heard at the CML newly elected officials workshop 6-18-21) – always true but even more so today than ever
 - So far this year, two Colorado LEOs have been killed responding to active shooter incidents
 - At least 3 others have been injured responding to incidents
 - Social and legal environment are causing career changes, retirements, recruitment challenges, demoralization
 - PERF survey: Retirements up 45%, resignations up 18%, from April 2020-April 2021 - <https://www.nytimes.com/2021/06/24/us/police-resignations-protests-asheville.html>
 - “We did not get into this to become the bad guys.”
 - The sense of support for police, and their mission to serve and protect, is not as strong as it once was in some communities
- And the job of managing and overseeing police departments – for managers and governing bodies both – is also becoming commensurately more challenging



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What do these changes mean for governing bodies and managers?

- #1 In many areas, there is a disconnect between the community’s perception of law enforcement, and the entity’s own perception of law enforcement. Ignore this disconnect at your peril!
- Is the governing body potentially a **bridge** between the two?
 - Many communities are seeing a call for greater “civilian oversight” of police departments. City Councils, Boards of Trustees, and Managers/Administrators can be part of that “civilian oversight.”
 - If you choose not to embrace that role, then other forms of “civilian oversight” may be thrust upon you (or you may decide that those other forms are appropriate) – police oversight bodies, “independent monitors,” etc.
 - “Pattern and practice” investigations can end up in a settlement agreement or “consent decree” that’s an imposed form of oversight
- If you can take – and encourage your elected officials to take -- a leading role as this “bridge,” perhaps that oversight can be done more collaboratively than it might otherwise



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What do these changes mean for governing bodies and managers?

What steps might help to create a “bridge”?

- More community meetings focusing on mutual, joint, and differing concerns about LE issues?
- Other community input opportunities?
- Citizen Police Academies?
- Greater transparency? E.g. putting key policies online?
- Using “department head reports” during meetings for more than “this month’s stats” – community education, interaction?
- Advisory bodies, or bodies with actual oversight powers?
- Ensuring key policies are congruent with community expectations – and helping the community to better understand the why and how of high-risk policies such as use of force?
- Others? What are you doing?



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What do these changes mean for governing bodies and managers?

- #2: What else can the manager and governing body do?
 - If you see law enforcement as a critically important community service, it **MUST** be treated that way with the selection of the people who perform that service, and with the prioritization of resources for training, supervision, equipment, staffing, policy development, compensation & benefits, etc.!
 - Some communities are discussing “defunding” their police departments...meanwhile, many other communities have never adequately FUNDED their departments.
 - You “can’t afford” to adequately fund your police department? You can’t afford NOT TO!!
 - Underfunding and/or understaffing your police department disserves EVERYONE: your officers, your municipality, and your citizens.
 - In short, if you want your community to provide law enforcement services, you **MUST** make a commitment to funding properly.



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What do these changes mean for governing bodies and managers?

- #3: Another phenomenon holding back police departments: “piling on” of service after service, expectation after expectation, without seeing what you’re doing to their workload and their ability to fulfill their fundamental mission
 - Police are expected to solve all of the ills of the world in addition to crime-fighting. Homelessness? Opioid abuse? The pandemic? Oh, and let’s throw animal control, code enforcement, and traffic enforcement on top of everything else!
 - You cannot ask “too much” of law enforcement without that pressure causing cracks somewhere...officer burnout and attrition, mistakes leading to injury to themselves or to others, erosion of community trust, etc.
 - Is your PD adequately staffed? Example: can a three-member department really be adequately staffed”?
 - It’s critical to prioritize what the community wants your PD to do. The police can’t do everything.



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What do these changes mean for governing bodies and managers?

- #4: Considering a “startup” police department? Please consider all of the above and more!!
 - We’ve seen several “startup” PDs in recent years. The motivations are understandable.
 - But make sure that you hire the best you can to lead your department, and make sure that they know their priorities!
 - Example: Does it really make sense to hire officers and put them on the street BEFORE you have policies and procedures in place?
 - And make sure that you know the true cost of operating a police department. The insurance costs themselves are daunting.
 - As noted, for CIRSA members, the cost of law enforcement liability coverage makes up about 80 percent of the total cost of liability coverage!
 - We don’t yet have an indication of how much law enforcement liability coverage will cost for 2022, but entities facing a July 1 renewal are reporting a 40-50 percent cost increase
 - Are there other approaches to providing law enforcement services that offer “economies of scale”? Joint PD between two or more communities? Throwing in with the Sheriff’s Department with an IGA that will give you at least some of what your own PD would offer?



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What do these changes mean for governing bodies and managers?

- #5: Managers are part of the “civilian oversight” of your police departments! Exercise that responsibility by:
 - Making sure your entity’s organizational structure is set up to give you an appropriate role/relationship with the PD – not all organizations are!
 - Being actively involved in management/oversight without micro-managing
 - Ensuring excellent lines of communication between you and the Chief – being a sounding board and providing mentorship
 - Ensuring that sound and consistent human resources policies are established and are being followed
 - Providing support on dealing with high-risk HR issues – harassment, discrimination, disciplinary/corrective actions, internal recourse processes
 - Ensuring that internal recourse processes (e.g. internal complaints, discipline, etc.) are generally congruent with those of the rest of the entity (or have justifiable variations)?



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What do these changes mean for governing bodies and managers?

- Ensuring that the Police Department’s internal and operating values, philosophies, and approaches are congruent with those of the rest of the entity (or have justifiable variations)
- Setting the tone and expectations for issues such as transparency, ethics, community relationships, etc.
- Ensuring a credible external complaint/resolution process exists and is followed
- Supporting proper funding and resource allocation for excellence in personnel selection, supervision, training, equipment needs, etc.
- What else?



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What else is on the horizon

- We can certainly expect to see more legislation in coming years – “reform,” “dismantling,” whatever you want to call it, it’s not going away
- We do not want to go back to a time when local governments were actually closing down operations because insurers were cancelling policies (was anyone here in the early ‘80s?) -- but if it happens, you’re better prepared this time
 - Public entity pools like CIRSA and CTSI formed in response to the “insurance crisis” of the late 70s/early 80s, and we’ll be here if it happens again
- We hope that the current wave of anti-police sentiment can be overcome – but it will require work by police departments, managers, governing bodies, and the communities they serve – the efforts of all are essential if the divided is to be bridged
- Oh, and here’s a thing that we hope *isn’t* coming....



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What else is on the horizon



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How Insurance Companies Can Force Bad Cops Off the Job

In exchange for coverage, insurers can demand that police departments implement new policies and training, and dismiss problem officers.

RACHEL B. DOYLE JUNE 10, 2017

BROOKINGS

[How We Rise](#)

Why police department insurances are the key to progress on police reform

Rashawn Ray, Friday, June 26, 2020

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HARVARD LAW REVIEW

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ARTICLE

HOW PRIVATE INSURERS REGULATE PUBLIC POLICE

John Rappaport

U.S. NEWS

The hidden hand that uses money to reform troubled police departments

Across the nation, insurers have had surprising success “policing the police,” ending risky behavior, ousting chiefs, even closing troubled departments.



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Wait, what?

- As you can see from these headlines, there are some calls for insurers to take an active role in “police reform”
 - One of these articles proposes “shifting civilian payouts for police misconduct away from taxpayer money to police department liability insurance policies”
 - Some people have even proposed that large self-insured PDs be required to purchase insurance instead of being self-insured
 - Wait, what? Isn't INSURANCE paid for by TAXPAYER MONEY? How would this help??
 - Some of these articles describe situations where insurance coverage was threatened absent changes such as the removal of certain personnel, the imposition of a department-wide “performance improvement plan,” a change in top leadership, or implementation of specific training, supervision, and policy recommendations



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Wait, what?

- How do you think this would sit with your Chief? To quote one Chief: “I’ll be damned if I let an insurance company run my police department.”
- CIRSA views itself as a RESOURCE to its members. That’s why our Board has funded initiatives like:
 - SIGMA wellness initiative
 - The CORDICO mental wellness app
 - Individual time with Dr. Jamie Brower, a noted police psychologist for those facing stresses
 - Training opportunities through the Loss Control Department’s regional seminars, law enforcement roundtables, etc.
 - \$25k individual liability coverage for officers
 - In the past (and we’re reviewing again for the future), funding a portion of your cost of Lexipol police policy manual and training service; and we are happy to allocate time with CIRSA defense attorneys to assist you in writing/revising your PD policies
- Our approach is to make RECOMMENDATIONS, provide RESOURCES, and seek ways to REWARD members for following best practices and offer SUGGESTIONS



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Summing Up

- At CIRSA, we want to be the “carrot” and not the “stick”
 - But this is in part dependent on being able to show our reinsurers that the “carrot” approach works
 - We could face a day when reinsurers begin shaking a stick at us
- We are always looking for more and better ways to help elevate our members’ practices
 - What else do you think we can or should be doing with regard to the challenges facing law enforcement?
 - We always welcome your thoughts on how we can better serve you
- THANK YOU for undertaking all of the challenges of local government, and most especially those around law enforcement



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About CIRSA

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers’ compensation coverages
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
- Not an insurance company, but an entity created by intergovernmental agreement of our members
- Total membership today stands at over 280 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities



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Speaker Bio

- Tami A. Tanoue, CIRSA Executive Director
- Previously in-house General Counsel/Deputy Executive Director for CIRSA
- Previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, serving CIRSA as its contract General Counsel for 12 years, and serving as City or Town Attorney for several Colorado municipalities.
- Previously Staff Attorney for the Colorado Municipal League, representing the collective interests of Colorado municipalities.
- Regular speaker on local government liability topics; author of several publications on liability issues.
- Suggestions today are based on my years as a municipal attorney and observing the ways in which governing bodies can get into or stay out of trouble from a liability standpoint
- Suggestions are those of the author, who takes full responsibility for them...any resemblance strictly coincidental, etc. 😊
- Here as a training resource; in the event of any conflict between my training tips and the advice of your entity's attorney, the advice of your attorney prevails!

