

Why "More" is Rightly Demanded of You as Public Employees

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Yes- More is Expected of You

Public trust in government

U.S. Confidence in Local and State Government, 1972-2018
% Great deal/Fair amount

Legend: Local government (green line), State government (blue line)

Source: GALLUP

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Survey Says:

Do you have a higher opinion of Congress or cockroaches?

Cockroaches..... 45%

Congress 43%

Not sure 12%

COCKROACHES VS. CONGRESS

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But This is About LOCAL Government & YOU

- ▶ Things we hear about:
 - ▶ County Boards or offices/departments with an outlier who is out of control and is causing chaos
 - ▶ An elected official has hired a family member and he or she is destroying morale
 - ▶ The friend of a board member is getting a contract with some sidestep of bidding
 - ▶ Claims for unnecessary employee reimbursements paid because no one is looking (or they are looking the other way)
 - ▶ A zoning decision that seems unfair because of a perceived conflict of interest
 - ▶ Embezzlement claims

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Finding Purpose

- ▶ NIRMA is its members and it is a risk management pool, first and foremost
- ▶ A purpose of pooling is to learn from one another and share information, so we can:
 - ▶ improve;
 - ▶ become stronger; and
 - ▶ avoid costly risks
- ▶ By banding together and sharing knowledge, the members can overcome weaknesses and vulnerabilities

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Occupations Most Affected by Internal Fraud (with median losses)

- | | |
|----------------------------------|---|
| 1. Financial services, \$110,000 | 6. Education, \$68,000 |
| 2. Manufacturing, \$240,000 | 7. Insurance, \$153,000 |
| 3. GOVERNMENT, \$125,000 | 8. Energy, \$300,000 |
| 4. Health Care, \$100,000 | 9. Construction, \$227,000 |
| 5. Retail, \$50,000 | 10. Transportation/Warehousing, \$140,000 |

Source: ACFE study of 2,690 fraud cases across 125 countries between Jan., 2016 and Oct. 2017, published in NU Property Casualty 360, Dec. 26, 2019

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Is there Hope?



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All I Need to Know About Ethics I
Learned in Kindergarten



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Two Concepts of Ethics

Personal




Government



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Personal Ethics and Values

- ▶ Honesty
- ▶ Respect
- ▶ Fairness
- ▶ Integrity
- ▶ Morals
- ▶ Hardworking



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Government Ethics/Values

- ▶ No conflicts permitted— independent judgment
- ▶ No Personal Gain
- ▶ Transparency
- ▶ Accountability
- ▶ Fiduciary duties

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Personal ethics vs. Government ethics

- ▶ Personal ethics is different from government ethics!! Your instincts may not be right.
- ▶ You can be “ethical” on a personal level by, for instance, getting a job for a friend, but this could violate government ethics standards.

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One perspective: Fiduciary Duties

- ▶ A fiduciary relationship is one of trust.
- ▶ As a government official, you are trusted with government power and public funds. You are required to use those for the benefit of the public.
- ▶ As a government official, fiduciary duty concepts are useful guideposts:
 - ▶ The duty of care;
 - ▶ The duty of loyalty;
 - ▶ The duty of impartiality;
 - ▶ The duty of accountability; and
 - ▶ The duty to preserve the public's trust in government

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Concepts of Care & Loyalty



- ▶ As applied to a county official:
 - ▶ truly understand the operations, health, and finances of the county offices/departments they lead.
 - ▶ attend meetings, be active, and obtain sufficient information to make informed decisions.
 - ▶ Make sure vendors are reliable

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What is the Most Important Value for Government Ethics?

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What is the Most Important Value for Government Ethics?

FAIRNESS

And for public servants, appearance may be more important than reality.

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People Bristle at Anything they Perceive as Unfair

Academics call this:

Inequity Aversion or Rejection of Injustice

$$U_i(x_i, x_j) = x_i - \frac{\alpha_i}{n-1} \sum_{j=1}^n \max(x_j - x_i, 0) - \frac{\beta_i}{n-1} \sum_{j=1}^n \max(x_i - x_j, 0)$$

County Taxpayers call this:



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But I am always fair!

- ▶ Do you think you are more fair than most other people?
- ▶ Picture your children (or grandchildren) - do you think they are smarter than average?
- ▶ Think of your closest friend or family member - do you feel that person is more ethical than most people?

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Ethical Blind Spots?



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Unconscious Psychological Biases



Conformity bias - acting as others do, not wanting to be "that person"



Organizational bias - helping "the County" or a particular supervisor or co-worker over the larger citizenship base that the government is meant to serve



Overconfidence bias - inflating the unlikelihood that bad behavior will be discovered



Minimization bias - the feeling that speaking up won't make a difference or change

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How to Identify Ethical Blind Spots



- ▶ We make excuses.
 - ▶ I'm busy.
 - ▶ It's always been this way. It must be okay. People don't want to change.
 - ▶ It's not me, so it's not my problem.
 - ▶ What am I supposed to do about it anyway?
 - ▶ Well, no one else seems to mind or care.

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Creating an Ethical Culture


Supervisors can consider:

- ▶ Mission Statements & Codes of Ethics - point them out, train on them, live them, enforce them (see NIRMA's model personnel handbook)
- ▶ Personnel - Hiring/firing decisions (Ask "Integrity-based" interview questions, identify integrity as an important expectation of the job, address the issue in annual performance evaluations)
- ▶ Implement policies and leadership that protect whistleblowers, anti-retaliation
 - ▶ Strengthen and publicize objective reporting channels
 - ▶ Consider appointing an ethics officer

Every non-management employee can consider:

- ▶ Suggest any of the above
- ▶ See something, say something: self-examine your reason for reporting, find the right reporting avenue

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Creating an Ethical Culture

- ✓ Start a dialogue among staff.
 - ✓ Eliminate any "gray areas" about what may constitute unethical behavior as relates to your particular work functions.
 - ✓ Solicit suggestions/public input
- ✓ Be truthful - always.
 - ✓ Managers should take the lead in setting a tone of honesty in the workplace.
- ✓ Own up if you've done wrong or discover wrongdoing.

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Creating an Ethical Culture

- ✓ Imagine explaining yourself to the news, or in a deposition, or on the witness stand.
- ✓ Avoid not just impropriety, but the appearance of it as well.
- ✓ Examine your relationships for any extreme loyalties to particular people or causes.
- ✓ Ask for help from a trusted & knowledgeable source (county attorney, NIRMA employment law help line, etc.)

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Credits - Resources to Learn More on Local Government Ethics

- ▶ CityEthics.org - Carla Miller, fellow for Edmund J. Safra for Center for Ethics at Harvard University - links to tools and resources curated to those interested in local government ethics
- ▶ Ethicsunwrapped.utexas.edu
- ▶ www.scu.edu/government-ethics/resources - Santa Clara University - Markkula Center for Applied Ethics

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Transparency in open meetings - and beyond

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Transparency Benefits Both the County and the Public



- ▶ Transparency inspires confidence and trust of the public
- ▶ County business = public funds.
- ▶ Efforts to increase transparency often also reduce liability risks

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The Public's Right to Know....


What Exactly???

- ▶ What the government may keep confidential is extremely limited
- ▶ Some county business is confidential, such as:
 - ▶ Human resources issues can be confidential, in order to protect the reputation of individual employees (but they have a right to choose a public forum)
 - ▶ Issues involving litigation are confidential, in order to protect the legal rights of the county
 - ▶ What about proactive or reactive risk management efforts?

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Conflict Between the Right to Know and Confidentiality/Privacy


- ▶ Both the Open Records statutes and the Open Meeting Act are construed by the courts in favor of openness.
- ▶ Recent laws affecting the State focus on transparency:
 - ▶ Transparency in Government Procurement Act
 - ▶ Taxpayer Transparency Act
 - ▶ Legislative efforts abound in this area



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Open Meetings - Special Issues

- ▶ Agendas and minutes
- ▶ Recording meetings
- ▶ Building a record
- ▶ Executive session
- ▶ Open microphone
- ▶ Error correction




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Agenda/Minutes - level of detail
Neb. Rev. Stat. §84-1413:

- ▶ Agenda must be "sufficiently descriptive" -be extra cautious about controversial topics
 - ▶ Example: Agenda item of "Work order reports" - didn't suffice for vote to approve work order approving spending of \$47 million to construct a power line across private property. *Hansmeyer v. NPPD*, 256 Neb. 1 (1999)
- ▶ Minutes must contain "substance of all items discussed."
 - ▶ Often the best or only evidence of what occurred at your meeting
 - ▶ Neb. Rev. Stat. §84-1413(5) - "Written and available for inspection" within 10 days
 - ▶ Neb. Rev. Stat. §23-122 - "Publish" within 10 days
 - ▶ *Wolf v. Grubbs*, 17 Neb. App. 292 (2009) - consequence for failure to timely make "written and available" is voiding of entire meeting, consequence for failure to publish is unclear (maybe negligence?)


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Open meeting blunders



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Recording Meetings



- ▶ Practices to Consider:
 - ▶ Video and/or record your meetings
 - ▶ Remember, someone else may do so
 - ▶ Why? Minutes may omit important details and make it more difficult to determine what happened and why.
 - ▶ Utilize websites to publish recordings, if you are dedicated and have the resources to do it right

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Building a Record

- ▶ At least one copy of all reproducible written materials to be discussed must be available for examination and copying. §84-1412(8)
 - ▶ Best practice - index or label documents when Board must make a quasi-judicial decision (especially zoning matters)
 - ▶ Recent LB garnered NSBA opposition because "counties don't do a good enough job" on making a record for quasi-judicial functions
- ▶ Resist the rush- consider all available and relevant information before making a decision - speak up to table an issue if needed
- ▶ Err on the side of giving leeway for public comment
- ▶ DISCUSSION - explain how you are voting and why
- ▶ Consider a court reporter

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Executive Session

- ▶ Consider using a SCRIPT - it builds a habit and ensures uniformity
- ▶ THERE ARE ONLY TWO STATUTORY JUSTIFICATIONS:
 - ▶ "Protection of the public interest"
 - ▶ "Prevention of needless injury to an individual, if the individual has not requested a public meeting"
- ▶ STATUTORY EXAMPLES (not exhaustive):
 - ▶ Strategy sessions on collective bargaining, real estate purchase, pending litigation or litigation which is imminent as evidenced by claim/threat
 - ▶ Discussion on deployment of security personnel/devices
 - ▶ Investigations of possible criminal conduct
 - ▶ Evaluation of job performance of a person when necessary to prevent reputation injury and no public meeting requested
- ▶ Good faith motivation for closed session does not cure non-compliance
- ▶ Discussion has no absolute protection from discovery in litigation

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Open Microphone Policies

- ▶ Reasonable Rules & Regulations permitted by Neb. Rev. Stat. §84-1412
- ▶ Suggested policies/procedures:
 - ▶ Speakers on agenda items should identify themselves before speaking
 - ▶ Limit speakers to a time limit per agenda item
- ▶ Avoid the Q&A trap and arguments
- ▶ Recognize the need to hold over to give notice on agenda when applicable

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D'oh!

Meeting Error Correction

- ▶ *Pokorny v. City of Schuyler*, 202 Neb. 334 (1979): “It is a general principle of law that where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred.”
- ▶ Don't fear it:
 - ▶ Suspend the meeting right away, if possible
 - ▶ Assess what happened with county attorney
 - ▶ Arrange a complete do-over - can't consider anything from prior meeting on that issue.

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The Watchdogs are Out There...

- ▶ They seem to start from a place of mistrust, look for what government is “hiding” and “warn” others
 - ▶ ACLU
 - ▶ Facebook groups
 - ▶ Blogs
 - ▶ Other online forums
 - ▶ Smartphones

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The News Media

- ▶ The First Amendment “Freedom of the Press” was intended, in part, to ensure governmental accountability
- ▶ But sometimes accountability through news backfires – rather than prompting more ethical decisions
 - ▶ It can cause officials to defend more stridently what they have already done or intend to do
 - ▶ It can cause officials to discard good judgment to conform to the demands of the loudest subset of citizens

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News Media Tips

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- ▶ Be ready. When a potentially newsworthy issue arises, designate a small team with a single point person to develop and carry out a strategy for how to address the news media.
- ▶ Get a message out to your employees.
- ▶ Get the facts. Don't blow it by assuming facts prior to fully analyzing what has happened.
- ▶ Develop a media plan. Is legal counsel needed? Try to anticipate media questions and simple responses. Decide whether to proactively address the media to get ahead of the issue.

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News Media Tips

- ▶ Recognize that knee-jerk responses to critical incidents can adversely impact later litigation
- ▶ Consider replacing "no comment" with other options:
 - ▶ "I'm not in a position to answer that question at the moment."
 - ▶ "We haven't fully reviewed the lawsuit yet, so it is premature to talk about it."
 - ▶ "We are in the process of internally reviewing the situation."
 - ▶ "We are fully cooperating with law enforcement's (or other authorities) investigation of the situation."
- ▶ Stay on message. Try not to get distracted by side issues.
- ▶ Never lie, or behave deceptively or evasively. Sooner or later it will catch up to you, and there is no better way to lose credibility with the media and the public (and your employees).
- ▶ Avoid laying blame. Just deal with your County and your situation - if there are others to blame, public processes will expose them.

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County Websites

- ▶ Make sure it is operated by you!
- ▶ Many options: MIPS, Nebraska Interactive, others
- ▶ Designated person(s) to update and monitor for continued accuracy, usefulness
- ▶ ADA compliant - accessible to those with disabilities
- ▶ Consider organizing by frequent topics rather than departmental structure
- ▶ Disclaimers and Terms and Conditions

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What to Post on a County Website

- ▶ Consider your means and what you can keep up with
- ▶ Suggestions:
 - ▶ Meeting agendas/minutes, documents considered
 - ▶ Budgets/Audits, Interlocal Agreements
 - ▶ Board Resolutions
 - ▶ Contracts
 - ▶ Neb. Rev. Stat. §23-122 notices (Allowed claims & employee job titles/duties/salaries)

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Sheriff's Office Websites

- ▶ Law enforcement agencies are often subject to special scrutiny for accountability.
- ▶ In 2016, the ACLU surveyed a group of NE law enforcement agencies regarding their civilian complaint procedures, including 9 NIRMA member agencies.
- ▶ These DOJ guidelines were the benchmarks for civilian complaint procedures:
 - ▶ Is the procedure "welcoming" ?
 - ▶ Is the procedure "accessible" ?
 - ▶ Is the procedure "not intimidating" ?

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Social Media

- ▶ County-run social media account (Twitter, Facebook, etc.)
 - ▶ can be good to promote transparency
 - ▶ triggers open record laws
 - ▶ triggers retention schedules
 - ▶ Requires designated moderator(s)
 - ▶ Posts may considered policy or official positions of the county in litigation
 - ▶ Requires development/adoption of concrete guidelines
- ▶ Personal posts by elected officials may trigger open meeting laws



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County Social Media Page

Sample Guidelines

- ▶ Expressly state that persons participate at their own risk
- ▶ Expressly state that comments of public do not reflect the opinions or position of the County or its personnel
- ▶ Expressly state that comments will only be monitored during working hours
- ▶ Reserve right to block persons from site and delete their content/posts that are: obscene, abusive, defamatory, promote illegal activity, or that promote particular products/services or political organizations, that compromise safety/security, or which perpetuate discrimination on the basis of any legally protected status

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Individual Social Media/Emails

- ▶ Personal vs. Public email addresses
- ▶ Open records/Meetings
- ▶ Get IT help for retention
- ▶ If exchanges by quorum of officials turn into “polling” or decision-making, Open Meetings Act is triggered

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DO WHAT IS RIGHT, NOT WHAT IS EASY

www.wordsonimages.com

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