

RISKY BUSINESS

A Publication of the
Miami Valley Risk Management Association

May 2022

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FYI – What Is Our Governance Model?

By Tom Judy

Every governing board operates pursuant to a governance model. It may have been formalized into the organization after much thought and deliberation or it may simply be a set of unwritten practices developed by trial and error.

The governance model, at a minimum, defines the roles of the board members, clarifies the oversight responsibilities of the board and their relationship to management, identifies processes for the board to receive and disseminate information, establishes a board structure (i.e., committees, etc.), and provides for a process to hire and evaluate a chief executive.

Each board has its own unique governance style, but they generally fall into one or more of the following modes of governance: 1) Fiduciary; 2) Strategic; and (3) Generative.

The **Fiduciary** mode is fundamental to good governance. Its primary objectives are to ensure financial accountability, compliance with laws and regulations, and hire/fire a chief executive. Common questions the board must answer in this mode are: Can we afford it? Are we in compliance?

The board's primary purpose within the **Strategic** mode is to be a strategic partner with senior management. The board's role is to ensure the mission is relevant, set strategic priorities, provide the necessary resources to accomplish these priorities, and monitor the organization's compliance relative to the strategic priorities. Typical questions might be: What are our opportunities? Are we meeting our strategic goals?

Articles

<u>FYI</u>	1 & 2
<u>Counselor's Comments</u>	3, 4 & 5
<u>Loss Control Lowdown</u>	6
<u>Broker's Beat</u>	7
<u>Events/From the Board</u>	8

FYI...Continued

The **Generative** mode requires a different type of board engagement and is often the most challenging to master. In this mode, the board assumes a more creative role and is more proactive than reactive. It must think outside the box, challenge the norms, and enter into a deliberative process to frame the issues facing the organization. This approach often requires taking a “deep dive” into issues. Typical questions might be: What are the emerging issues that may affect us? What are the new possibilities?

It is fair to assume that all boards spend at least some time in the Fiduciary mode. Many boards function almost totally within this mode. A more common scenario is the board that operates to some degree within both the Fiduciary and Strategic modes. Not surprisingly, the Generative mode is the least often utilized but perhaps the most fruitful.

At the May 13 Strategic Planning meeting, our facilitator will discuss these approaches in more detail and how they might be utilized by the MVRMA board. As we prepare for that meeting, it might be worthwhile to ask yourself where the MVRMA board currently fits within these three governance modes and where you would like it to be.

FYI – Strategic Planning Meeting, May 13, 2022

By Tom Judy

The triennial MVRMA Strategic Planning meeting will be held May 13, 2022. All trustees and members’ other interested personnel are encouraged to attend.

Michelle Béchamps from Sedgwick Pooling will facilitate the session. Ms. Béchamps joined Sedgwick in 2018 and brings a rich background of strategy, branding, marketing, and web experience. Prior to joining Sedgwick, Michelle developed her expertise by first working with one of the most well-respected pools in the country for 16 years before starting her own consulting business in 2008 wherein she offered her brand, organizational and strategic planning, marketing/communications, key messaging platform and web development expertise nationally. Michelle has facilitated a myriad of Strategic Planning and Branding Sessions specifically for self-insurance pools nationwide.

I have had the pleasure of working with Michelle for the last several years in her role as a strategic consultant for the Government Entities Mutual (GEM) Board. She is an exceptionally skilled facilitator and is absolutely the best choice to assist MVRMA in visioning its future needs, risks, and goals.

The MVRMA Strategic Planning meeting will be from 8:30AM to 4:00PM on May 13, 2022 in the Jefferson Room at Kohler Catering, 4572 Presidential Way, Kettering. We look forward to seeing our trustees and other interested staff then.

COUNSELOR'S COMMENTS

A Recent Supreme Case with Potentially Broad Implications for Criminal Prosecutions and Qualified Immunity

By Dinsmore and Shohl

The name Larry Thompson (“Thompson”) may not ring a bell – but the Supreme Court of the United States’ recent decision in *Thompson v. Clark* could make Thompson a household name whenever civil rights lawsuits are filed after criminal charges.

Thompson and his fiancée (now wife) cared for the couple’s newborn child and Thompson’s sister-in-law in the family home. Apparently, the sister-in-law reported to police that Thompson had sexually assaulted the newborn. Thompson physically blocked police officers from entering his home to investigate, which led to a scuffle and charges of resisting arrest and obstructing government business. An examination of the newborn discovered routine diaper rash and no signs of abuse. Thompson’s criminal charges were dismissed without explanation.

Thompson sued the officers involved for a number of alleged constitutional violations. One issue with Thompson’s suit was the “favorable termination” requirement that many Section 1983 plaintiffs face when suing government officials. When a Section 1983 suit is related to criminal charges filed against the plaintiff, a plaintiff must show that the criminal proceeding terminated “in [his] favor” before proceeding with his civil suit¹. The requirement avoids a situation whereby a person charged with a crime uses a civil rights lawsuit to attack charges rather than fight charges in criminal court. If a plaintiff’s success in the Section 1983 lawsuit would “imply the invalidity of a conviction,” the favorable termination requirement bars the lawsuit².

There has been debate around what constitutes a termination “in favor” of a criminal defendant. If a person has been convicted of a crime and later files a civil rights lawsuit, the analysis is easy: the lawsuit is barred because the charges clearly did not terminate in the accused’s favor in light of the conviction. In that situation, a plaintiff must show that the conviction was later reversed on appeal, expunged, or declared invalid before the lawsuit can proceed³. A similar analysis applies when charges are pending and a person is awaiting trial⁴.

COUNSELOR'S COMMENTS...Continued

The more difficult situation arises when criminal charges have been dismissed before trial. In that situation, there has been no determination of guilt (or innocence), and there is no judgment in any side's favor. Although there may be no conviction, many have questioned whether the charges are truly resolved in the accused's favor. The charges were dismissed – the criminal proceeding was arguably terminated in no one's favor because, simply put, the case ended without the need for such a determination.

In *Thompson*, the Supreme Court resolved any debate regarding the favorable termination requirement in this latter situation. On April 4, 2022, the Supreme Court clarified that dismissal of charges is sufficient: “[a] plaintiff need only show that his prosecution ended without a conviction.” Justice Kavanaugh (joined by Chief Justice Roberts and Associate Justices Breyer, Sotomayor, Kagan, and Barrett) explained that this decision was necessary for practical reasons, among other reasons. Any decision otherwise would allow the government to control civil rights litigation. The government could block a lawsuit by dismissing criminal charges, and if a criminal defendant wanted to sue, he would need to challenge the dismissal and demand a trial. As Justice Kavanaugh recognized, that path made “little sense” – criminal defendants should not be forced into the quagmire of demanding that they be prosecuted when faced with the opportunity for dismissal simply to preserve a civil rights lawsuit in the future.

Although Justice Kavanaugh's conclusion with respect to favorable termination is clear, two observations of how Justice Kavanaugh reached his conclusion are worth further monitoring. First, *Thompson's* case was at the Supreme Court on a claim for malicious prosecution under the Fourth Amendment. Many courts (including the Sixth Circuit⁵) have recognized a Fourth Amendment claim for malicious prosecution, but the Supreme Court had not outright held such a claim exists. After all, the Fourth Amendment protects against an unreasonable “search” and “seizure” – the Fourth Amendment says nothing about an unreasonable “prosecution.”

To the extent there was any remaining debate on the issue, the Court was clear that there was now a “Fourth Amendment claim under [Section] 1983 for malicious prosecution.” The contours of such a claim, however, are less than clear. Justice Alito, writing in dissent, opined that because the majority opinion created a claim that did not exist before (and in his opinion, the claim made little sense), the lack of clarity regarding when the claim was triggered and the elements of any such claim would create confusion and debate in the future. Indeed, there are questions about when such a claim would arise under the Court's rationale, and thus *Thompson* requires close monitoring as lower trial courts attempt to apply it to future cases.

COUNSELOR'S COMMENTS...Continued

Second, the six-justice majority recognized that there is always a fear of “unwarranted civil suits,” including after Thompson’s case – but qualified immunity was a safety measure to guard against such suits. At a time when many question the future of qualified immunity, it is noteworthy that six justices – including the Chief Justice, two recently-appointed more-conservative justices, and three of the Court’s traditionally liberal justices – all signed an opinion recognizing qualified immunity as an important safeguard. This is a good sign for law enforcement and may be a sign that a strong majority of the Court stands ready to protect qualified immunity moving forward.

Thompson is important, not only because of qualified immunity and what may be used to justify a broad malicious prosecution claim, but because many criminal prosecutions end in dismissal before trial – for any number of reasons. Some prosecutions end as the result of a diversion program, others end because a prosecutor makes a judgment call about the chances of success at trial, and others end for reasons unrelated to the criminal defendant and the charges at issue. After *Thompson*, these dismissals are sufficient to clear the favorable termination threshold, which now makes routine dismissals more significant events, especially when there is the potential for civil rights lawsuits arising out of events surrounding those charges.

¹*Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

²*LeFever v. Ferguson*, No. 2:11-CV-935, 2013 U.S. Dist. LEXIS 44704, at *29 (S.D. Ohio Mar. 28, 2013).

³*Heck*, 512 U.S. at 486–87.

⁴*See, e.g., Yoder v. Stevenson*, No. 2:20-CV-12992, 2021 U.S. Dist. LEXIS 6053, at *7 (E.D. Mich. Jan. 13, 2021) (“The United States Court of Appeals for the Sixth Circuit has ruled that *Heck* applies to civil rights actions filed by pretrial detainees.”).

⁵*See, e.g., Webb v. United States*, 789 F.3d 647, 659 (6th Cir. 2015).

Loss Control Lowdown...

Starr Markworth

New federal rules affect cities' ability to train in-house for entry level CDL testing

Federal law recently began requiring drivers seeking a commercial driver's license to meet new training standards. Beginning February 7, 2022, CDL applicants will be required to complete entry-level driver training from a provider listed on the new Training Provider Registry approved by the Federal Motor Carrier Safety Administration (FMCSA). FMCSA's Entry Level Driver Training (ELDT) regulations set the baseline for training requirements for entry-level drivers.

This includes those applying to:

- Obtain a Class A or Class B CDL for the first time.;
- Upgrade an existing Class B CDL to a Class A CDL; or
- Obtain a school bus (S), passenger (P), or hazardous materials (H) endorsement for the first time.

The ELDT regulations are not retroactive; the entry-level driver training requirements do not apply to individuals holding a valid CDL or an S, P, or H endorsement issued prior to February 7, 2022.

The following FMCSA links are provided for additional information.

- [CDL Overview webpage.](#)
- [Entry-Level Driver Training \(ELDT\) webpage.](#)
- [Training Provider Registry webpage.](#)
- [Frequently Asked Questions webpage.](#)

The positive news is that in response to these foreseeable financial and logistical challenges to our member cities, MVRMA staff applied to the Federal Motor Carrier Safety Administration to be considered as a certified training provider in their registry. The application was approved and MVRMA received notice that we are now considered an approved provider under the new requirements.

MVRMA staff and driving instructors are currently creating the new driver training curriculum and will be offering this training multiples times throughout the year, in addition to our ongoing driver training programs.

We are so very excited to be able to offer this value-added service to the MVRMA membership. Staff will continue to monitor any updates or changes as the implementation of this regulation moves forward and will adjust as needed. The average training program can range from \$2,500 to \$8,500, depending on the trainer, and can take from 3 days to 20 days depending on the individual's experience. Under the MVRMA certified program, we will be able to offer this training for a fraction of the cost and streamline the instruction to effective and efficient.



Broker's Beat

Cybersecurity

In recent years, cybersecurity has become a focal consideration among public entities, gaining significant attention from all classes of public entity, ranging from small municipalities all the way up to the federal government. As cyber infrastructure has become increasingly intertwined with all aspects of government operation, cyber attacks can prove devastating to an organization's basic ability to operate. In response to the constantly evolving cyber landscape and the emergence of new cyber threats, the federal government has begun to invest significant resources in new agencies to meet this growing demand for security assistance on all things cyber.

Established in 2018, the Cybersecurity & Infrastructure Security Agency (CISA) is a United States federal agency, created with the mission of leading the national effort to understand, manage, and reduce risk to American cyber and physical infrastructure. CISA produces original cybersecurity content as well as partnering with commercial service providers. Many of the Agency's cyber services are available at no cost to eligible entities. We encourage you to access CISA's site and its resources to help strengthen your organization's cyber posture.

Among the many cyber services offered:

- **Vulnerability Scanning:** Evaluates external network presence by executing continuous scans of public, static IPs for accessible services and vulnerabilities. This service provides weekly vulnerability reports and ad-hoc alerts.
- **Web Application Scanning:** Evaluates known and discovered publicly accessible websites for potential bugs and weak configuration to provide rec-

ommendations for mitigating web application security risks.

- **Phishing Campaign Assessment:** Provides an opportunity for determining the potential susceptibility of personnel to phishing attacks. This is a practical exercise intended to support and measure the effectiveness of security awareness training.
- **Remote Penetration Test:** Simulates the tactics and techniques of real-world adversaries to identify and validate exploitable pathways. This service is ideal for testing perimeter defenses, the security of externally available applications, and the potential for exploitation of open-source information.

• **Additional Services Visit:**

<https://www.cisa.gov/publication/cisa-services-catalog> to download CISA's complete catalogue of services for eligible entities.

<https://www.cisa.gov/free-cybersecurity-services-and-tools> to review cybersecurity services provided by CISA, widely used open source tools, and free tools and services offered by private and public sector organizations across the cybersecurity community.

<https://www.cisa.gov/shields-up> to review information on adopting a heightened security posture.

In addition to the services and information described above, you can use CISA's website to access critical cyber resources such as incident response planning, readiness guidelines, and publications from leading cybersecurity organizations. As the ability to place cyber coverage becomes increasingly dependent on having strong security controls in place, these resources will be helpful for not only strengthening your organization's cyber posture but will also serve to make your organization more competitive in the cyber insurance marketplace.

Calendar of Events

Upcoming Training Events

Spring Driver Certification/Recertification

ADA & FMLA Update & Workplace Investigation - May 23rd, Location To Be Determined

Upcoming Board Events

Strategic Planning - May 13th - 8:30 AM to 4:00 PM, Kohler Catering, Kettering

Committee Meetings - Via Zoom

Risk Management - May 26th - 10:00 AM

Finance - May 26th - 1:30 PM

Personnel & Compensation - May 31st -10:00 AM

Board Meeting

June 20th - Home2Suites, Centerville

From The Board Room

March 20, 2022

- Approved Revised Bond Coverage Policy
- Approved Revised Subrogation Policy
- Approved Revised Risk Management Performance Awards Policy