Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

AUGUST 2015

FEATURE

Follow five strategies to get legal advice at a price that won't compromise the association's ability to pay for the community's other needs.

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Contain Legal Costs Before They Spiral Out of Control

No matter how well you and the board of directors keep your community operating, you still run the risk of defending the association from a lawsuit, even if it's a frivolous one brought by a disgruntled member. And legal issues can present themselves in scenarios involving compliance with laws and regulations—including fair housing and claims under the Americans with Disabilities Act—too. At the very least, you'll want to have an attorney review board policies and governing documents when necessary.

But legal fees are expensive, no matter how small the matter is, and they can break your association's budget if you're not careful. Reducing or limiting legal fees but still getting the services you need is possible, however, if you follow five key strategies that will help you get legal advice at a price that won't compromise the association's ability to pay for the community's and members' other needs.

Hire Experienced Attorney

Many people automatically assume that attorneys who specialize in one aspect of the law or have had a long career charge high rates. There is a misconception that it will be cheaper to use a newer attorney who is not a partner, or one who doesn't have a specialty. But that's not true, says New Jersey, Pennsylvania, and New York association attorney David J. Byrne. "Clients save money with experienced attorneys because they don't have to do the research necessary to become familiar with the relevant law," he explains. Ironically, it might cost more to hire an inexperienced attorney with a low hourly rate than one with a higher rate who knows the area of law related to your case.

For example, if you call an experienced attorney with a question about relocating a member's parking space, because the member has recently been confined to a wheelchair, she won't need to spend time researching the issues involved. For the price of one telephone conversation or a short meeting, an experienced attorney should be able to

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walk you through exactly what you need to do. However, you should discuss how you ideally want your money to be allocated.

Don't pay for training. But if you hire an experienced or specialized attorney, don't fall into the trap of paying for the training of an inexperienced associate who works at the firm. While this is good training for the associate, you could end up paying more in the long run if it takes him longer to get the work done—even if his billable rate is lower. This is exactly what you were trying to avoid by hiring a more experienced attorney, so don't be bashful about finding out whether other attorneys and professionals, such as paralegals, will be working on your case. If so, ask about their level of experience and their billing rates, which should be appropriate for the level of experience or job category.

Pay less for general tasks. On the other hand, you may want some tasks handled by an attorney who bills at a lower rate, or by a paralegal, as long as this isn't really a training exercise. For example, you wouldn't want to pay a partner's high billing rate for the preparation of a simple document or letter. When you hire the attorney, ask which legal documents can be prepared by a paralegal or a less experienced attorney at a lower rate, and request that those professionals help with general tasks.

Try to Nail Down 'Cost Certainty'

Attorneys generally bill by the hour; the more time they put in, the higher the bill. The hourly rate can vary greatly, depending on the experience and position

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COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)] is published by Vendome Group, LLC, 216 East 45th St., 6th Fl., New York, NY 10017.

Volume 15, Issue 1

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of the attorney working on your case. Obviously, less experienced associates will charge less per hour than experienced partners of a law firm.

To stop the cost from skyrocketing, ask whether the attorney is willing to charge you a flat fee for a case or a specific service within a case. The flat fee should cover the cost of the case, or a specific task within the case, from beginning to end, except possibly for court or other outside fees. "The obvious benefit of a flat fee arrangement for an association is cost certainty," says Byrne.

Attorneys may be reluctant to quote a flat fee, because the party bringing the lawsuit may try to make the lawsuit expensive for you. That party may require depositions or witnesses' recorded testimonies from an unreasonable number of people. Or the party could file motions with the court frequently.

However, even if it's within a case that will mostly be billed for on an hourly basis, your attorney may be willing to charge a flat fee for particular services, such as a deposition that your attorney requests and will control. Other flat fee examples include amendments to governing documents, and certain services within collection work, such as filing liens, making foreclosure complaints, and drafting bankruptcy notices of appearance.

While flat fees are generally desirable, be wary of flat fees that seem too good to be true. An attorney getting paid a flat fee that is too low may be tempted to cut corners on your case.

Request Billing Estimates

Depending on the case, an attorney may not be able to accurately predict how much time he will spend on a case, and for this reason may be reluctant to set a fee in advance. This leaves you hard pressed to budget for attorney's fees, since you will have little idea what you will wind up paying—which creates stress for you, the board, and any members who are involved in the case. Other projects within the community might even be put on hold as a preemptive measure to cover what could end up being high bills.

There is a solution in cases where you'll be charged by the hour: Try to get your attorney to establish a fee cap and to agree to notify you when the cap is reached and get your consent before adding to the bill.

Another possibility is to ask the attorney to give you an estimate or fee range. An experienced attorney can give a general range of how much a case may cost, assuming the case takes a predictable course. If the attorney is reluctant, you can ask what the cost was for similar cases the attorney handled. This should give you a ballpark idea of what your costs will be, barring unforeseen issues that make the case more complex or drawn out.

Asking for an estimate or about previous costs drops the hint to the attorney that you are cost conscious, but you should also not be embarrassed to discuss the association's concerns about legal issues affecting its finances. In addition to calling you first before doing extra work that runs up the bill, the attorney might have other suggestions for how to keep costs low.

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Limit Administrative Costs

If you are paying hourly rates, you may also be billed for certain administrative costs. These small or incidental costs, for things such as photocopies, faxes, and postage, can add substantially to your bill before your know it. You might not question these extra costs; compared to the overall bill you are facing, they may seem trivial. But they can become a sizable expense as a case moves along.

Instead of being blindsided later, find out beforehand what items you will be charged extra for and how much. Ask about administrative costs for these items:

- Copies;
- Faxes;
- Postage (including express mailings);
- Hand deliveries;
- Meals; and
- Transportation to and from court and meetings.

If a charge seems unreasonable, ask whether it is totally necessary or there is a less expensive alternative.

Keep Phone Conversations to the Point

If you are being billed at an hourly rate, the attorney is probably charging you this rate for your phone conversations with him. Managers who don't realize this may unwittingly and unnecessarily increase their bills by starting or ending their telephone conversations with their attorney by making small talk having nothing to do with the case. Or they may call the attorney and ramble on about aspects of the case that aren't needed by the attorney to handle it. Unless you are willing to pay for social conversation, keep it to the point. As with many types of conversations and meetings regarding the association—legal or not—it always helps to be prepared with a list of questions and concise explanations, so that you don't waste time. ♦

Insider Source

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RECENT COURT RULINGS

➤ State Statute Didn't Apply Unless Adopted by Condo Declaration

FACTS: An association told the buyer of two foreclosed properties that he was responsible for unpaid association assessments incurred on the properties prior to the sale. The association claimed that a recently passed state statute gave it the right to demand payment from the buyer. The statute provided that a property owner is "jointly and severally liable with the previous parcel owner for all unpaid assessments that came due up to the time of transfer of title." The buyer argued that he was exempt because the association's declaration provides that a subsequent owner of a property within the association won't be liable for payment of any assessments owed by the prior owner. The buyer sued the association. A trial court ruled in favor of the association. The buyer appealed.

DECISION: A Florida appeals court reversed the lower court's ruling.

REASONING: The appeals court noted that the state statute conflicts with the declaration of the association. The issue in the case was whether the trial court's reliance on the statute, rather than the provisions of the declaration "unconstitutionally impairs" the buyer's right to contract. The appeals court concluded that it did. That was because the association did not amend its declaration to specifically adopt the statute; therefore, the statute could not be applied to supersede the express terms of the declaration, which absolved the buyer from responsibility for any unpaid assessments incurred prior to the purchase of the properties.

- Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Association, Inc., May 2015

➤ Association's Resolution Doesn't Defeat Member's Statutory Right

FACTS: A state statute requires a Kansas condominium association to keep detailed records of receipts and expenditures affecting the operation and administration of the association and other accounting records for five years and to make those records available for examination and copying by a unit owner—subject to some exceptions. The statute allows certain records retained by an association, such as "individual unit files," to be withheld from inspection and copying by members.

After the statute was passed, the association's board of directors approved a rule redacting the names and addresses of delinquent residents on records subject to disclosure, declaring such information to be part of "individual unit files." Following adoption of the rule, the association made available to any member requesting a list of delinquent accounts: (1) the amount delinquent; (2) the length of the delinquency; (3) whether or not late charges were being imposed; and (4) the collection efforts undertaken to resolve the delinquency. However, the names and addresses of the delinquent owners were redacted from the requested forms.

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Recent Court Rulings

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After making multiple requests for the names and addresses of delinquent owners, a unit owner sued the association, arguing the statute entitled him to unredacted versions of the delinquency records. The association asserted that the names and addresses of delinquent accounts were classified as "individual unit files" under the statute and, therefore, immune from disclosure. The owner asked a district court for a judgment in his favor without a trial. The district court denied the request. It ruled in favor of the association. The owner appealed.

DECISION: A Kansas appeals court reversed the lower court's decision.

REASONING: The issue on appeal was whether records showing which unit owners are delinquent in paying their dues are subject to disclosure. The statute's record-keeping provisions allowed an association to exempt some records from disclosure. Significantly, the exceptions are not mandatory but discretionary, noted the appeals court. And the association exercised its discretion when it adopted a rule that defined *individual unit files* to include the names and addresses of individual unit owners who were delinquent in their dues payments, making them exempt from disclosure.

But one of the stated purposes of the statute is to "address current and potential areas of conflict and tension between unit owners and associations." The collection of association dues is fundamental to the operation of common interest communities, and significant arrearages or delinquencies, particularly among key unit owners such as board members, could greatly undermine an association's operations. Disclosure furthers the effective operation of common interest communities by providing accountability to the board and to individual unit owners, noted the appeals court.

The appeals court pointed out that the fact that a unit owner is delinquent on his or her obligations wasn't necessarily a matter of privacy that should be protected in the same manner that the statute protected other sensitive information. That's because any unit owner whose dues are delinquent can be sued for payment—and such a lawsuit would be a *public* record, accessible by anyone, including other unit owners. The appeals court said there wasn't an expectation of privacy in such information. Also, the statute makes the disclosure of that type of information optional, meaning that "disclosure is preferred over secrecy," said the appeals court.

The appeals court determined that the individual unit file disclosure exception does not permit an association to redact the names and addresses of unit owners who are delinquent in their dues payments. Importantly, an administrative resolution adopted by the association cannot defeat a statutory right created by the legislature, the appeals court stressed. ♦

- Frobish v. Cedar Lakes Village Condo. Assn., June 2015

RISK MANAGEMENT

Encourage Employees to Report Sexual Harassment

Unfortunately, sexual harassment can happen in any workplace, including among members of your staff. In addition to wanting to make sure that your employees feel comfortable and not threatened at work, you also need to be concerned about sexual harassment because an employer can be held responsible if one of its supervising employees violates federal or state laws that prohibit sexual harassment—even if the employer was unaware of the violation. It's crucial to set a sexual harassment complaint procedure to protect your community from liability and to encourage employees to report sexual harassment if they become aware of it.

Draft Complaint Procedure

If you're sued for a supervisor's misconduct, you could end up owing the victim back pay, emotional distress damages, and a staggering penalty, which is assessed on a state-specific basis.

So what can you do to protect yourself from being held liable if one of your supervisors sexually harasses an employee? You should already have a policy prohibiting sexual harassment and explaining what sexual harassment is. But you also need to make sure you have an effective sexual harassment complaint procedure drafted. It should make it easy for employees to come forward and report harassment so that you can stop the harassment before it becomes severe or pervasive, and hopefully before the employee sues.

Another reason to have a well-written and effectively enforced complaint procedure is that it may convince a court that you took reasonable steps to prevent and correct the behavior in the event that the victim does sue.

Understand the Law

The Supreme Court has ruled that an employer is always liable for a supervisor's harassment if the harassment "significantly affects" the victim's employment status—for example, by causing the employee to lose a promotion or be demoted or terminated. If the sexual harassment doesn't significantly affect the victim's employment status but creates a hostile or offensive environment, the employer may be able to avoid liability or limit damages. You can do this by showing that: (1) you exercised reasonable care to prevent and promptly correct any harassment; and (2) the harassed employee unreasonably failed to take advantage of any preventive or corrective opportunities you provided (for example, the employee did not use your complaint procedure to report the harassment) or failed otherwise to avoid harm.

The Equal Employment Opportunity Commission (EEOC) published enforcement guidance on an employer's liability for unlawful harassment by supervi-

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sors, which set out what an employer should do to prevent unlawful harassment. It stresses the importance of having a policy and complaint procedure on sexual harassment, and distributing *both* to all employees.

Complaint Procedure Goals

Your complaint procedure should emphasize that employees should report sexual harassment as soon as possible. In part, this means making sure a harassed employee won't encounter any unreasonable obstacles to making a complaint. For example, requiring harassed employees to write out complaints might discourage them and open the door to lawsuits.

Like our Model Policy: Set Sexual Harassment Complaint Procedure, your procedure should:

Encourage victims to make complaints. Encourage your employees to come forward as soon as possible. If the victim doesn't complain before the harassment becomes a pattern, you can defend yourself by showing that the employee didn't take advantage of your company's established procedure before the harassment became severe. This makes it difficult for an employee to get a court to award damages.

But if you fail to encourage employees to complain before harassment becomes severe or pervasive, it will be difficult to establish this defense [Policy, par. 1].

Encourage all employees to report observations. Don't just encourage victims to report harassment; also encourage anyone who witnesses sexual harassment to report it. That way, you'll have an easier time uncovering harassment and getting rid of it from your workplace. By asking witnesses of harassment to report it, you also make clear to all your employees that you're trying to prevent and promptly correct sexual harassment [Policy, par. 2].

Give employees easy ways to complain. For your complaint procedure to be effective, you need to make it as easy as possible for employees to report sexual harassment. That means you need to give employees a *choice* of accessible individuals to complain to. A complaint procedure that requires employees to complain first to their supervisors isn't always effective against sexual harassment because the supervisor may be the harasser. So tell employees that they can complain not only to their supervisors but also to any management-level employee.

Also, designate at least one official outside the employee's chain of command to take harassment complaints. For example, if you have a director of human resources, designate him or her. The key is to pick an individual who is outside the so-called "chain of command." By allowing an employee to bypass the chain of command, you make it easier for the complaint to be handled impartially. An employee who reports harassment by his or her supervisor may feel that an official within the chain of command will more readily believe the supervisor's version of events [Policy, par. 3].

Additionally, require all managers and supervisors to report sexual harassment complaints to appropriate officials right away. Even if the victim wants to keep a complaint confidential, managers and supervisors should understand that they

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have a duty to report harassment complaints. Otherwise, you could be liable for failing to act on the complaint.

Assure confidentiality of complaints. In your complaint procedure, assure your employees that you'll protect the confidentiality of their complaints to the greatest extent possible. That way, they'll be more willing to come forward [Policy, par. 4]. On the other hand, never promise complete confidentiality—you won't be able to conduct an effective investigation without revealing certain information to the accused harasser and potential witnesses.

But make sure that you share information about harassment accusations only with people who need to know it. Tell people who receive and investigate complaints that they must keep the information confidential. You need to protect the privacy of both the victim and the harasser. If you don't, either of them may try to file a defamation or invasion of privacy claim against you.

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MODEL POLICY

Set Sexual Harassment Complaint Procedure

You can give this sexual harassment complaint procedure, based on the U.S. Equal Employment Opportunity Commission's guidelines, to your employees. The procedure encourages employees who are victims of harassment to complain, asks employees who observe harassment to report it, gives harassed employees a choice of accessible individuals to whom they can complain, says that any complaints or reports will be kept confidential to the greatest extent possible, and takes a stand against retaliation. Check with your attorney about adapting this procedure for use at your community.

SEXUAL HARASSMENT COMPLAINT PROCEDURE

If you are the victim of sexual harassment, ABC Community strongly encourages you to tell us about the problem by making a complaint.

1. **Do not wait to complain.** You should not wait until harassment becomes severe or persistent to bring a complaint. If you complain right away, we can stop the harassment before it gets worse.
2. **Report sexual harassment of fellow employees.** If you see another employee being sexually harassed, please report this to the director of human resources or to any other management-level employee, including the president.
3. **Where to complain.** You may complain directly to your supervisor, the director of human resources, or any other management-level employee, including the president. You do not have to complain first to the person who is harassing you.
4. **Confidentiality of complaints and reports.** If you make a complaint or report the harassment of another employee, we will protect the confidentiality of your complaint or report to the greatest extent possible.
5. **No retaliation for good-faith complaints or reports.** No reprisal, retaliation, or other adverse actions will be taken against any employee for making in good faith a complaint or report of sexual harassment, or for assisting in good faith in the investigation of any such complaint or report. If you suspect someone is engaging in retaliation or intimidation, report it immediately to human resources or a manager.

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Assure protection against retaliation. To be effective, your complaint procedure should assure employees that there will be no retaliation against employees for reporting sexual harassment or giving information about harassment in good faith [Policy, par. 5]. That means you should take measures to prevent retaliation. For example, when investigating a complaint, remind the harasser and the witnesses about the prohibition against retaliation. You should also scrutinize employment decisions affecting the complaining employee during and after the investigation to ensure that no one retaliates against the employee.

PRACTICAL POINTER: Although you're trying to encourage your employees to make complaints or report violations, it's okay to include the term "good faith" when talking about exercising their right to make a complaint. These words send a signal to your employees that they should consider their motivation when they make a complaint and that the complaint procedure isn't a tool to use inappropriately—for example, to get even with a supervisor who gave them a poor job evaluation.

Require Acknowledgement of Procedure

Distribute the new complaint procedure to all your employees—including temporary employees, day laborers, and anyone who gets a paycheck from you. Also, have employees sign an acknowledgment saying that they've read and that they understand the policy and complaint procedure. That way, you'll have a record showing that an employee was aware of your community's policy to encourage victims and other employees to report sexual harassment. And remember to post the complaint procedure in central locations and to include it in your employee handbook. ♦