Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

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FEATURE

When responding to inquiries of members and directors, be careful not to overstep legal bounds.

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How to Avoid Liability for 'Practice of Law' & Debt Collection

As a community association manager, a large part of your time can be taken up with questions from directors and members that require a response. While you might want to provide as much helpful information as you can, be aware that this area can be fraught with risk for you and your management company. That's because giving what you think of as a detailed and helpful response could be seen as "the practice of law" under certain circumstances, which could subject you to penalties. You also must be careful to avoid playing the role of a "debt collector," which can result in serious consequences under the Fair Debt Collection Practices Act (FDCPA). Here's how you can fulfill your duties as a manager without running afoul of the law.

Avoiding the Practice of Law

Most managers recognize that the role of the attorney is to legalize formal documents and make sure the governing documents are comprehensive and up-to-date, and minimize the association's liability. And they understand that things like reviewing a policy on what defines "noise" or what size a dog must be to comply with pet regulations is in the "management bucket," and doesn't need clarification and comment from the attorney. Aside from those extremes, advising directors and members is largely a gray area for managers, without clear guidelines as to what constitutes improper communications.

Comprehensive association management training emphasizes avoiding the practice of law with examples of what can be risky topics. *(For such examples, see "Florida's Practice of Law Advisory Helpful Nationwide," below.)* But training doesn't always cover what might come up in the normal course of business on a day-to-day basis. "A manager might need to respond to a board member or a unit owner regarding issues with the operation of the association, rules that are in place, or language in the declaration," says community association management expert Paul D. Grucza. "But interpreting passages in the bylaws could be seen as the manager practicing law, when in reality, the manager is simply providing information but doesn't want to have

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'Practice of Law'

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to check with the association's attorney for every simple thing, which is cost prohibitive," he says. He notes that it would be impossible to set a budget for unspecified professional fees to an attorney in an annual budget and that anticipating frequent legal calls would result in higher than necessary assessments.

There is a happy medium though. When a member asks a legal question, Grucza stresses that the manager should specifically tell the member that she is not the association's attorney and can't practice law when asked about items that walk the line between managerial and legal. When a director or the whole board asks the manager for legal advice, the manager should say that it needs to see the association's attorney. "Exceptions shouldn't be made just because the person asking for advice is on the board," Grucza warns.

Managers who are being peppered with requests for a legal opinion should respect that the particular issue is above their paygrade, Grucza says. Managers should preface their email responses with, "While I am not an attorney and not able to provide a legal response to your inquiry, here is what I think is happening, but please contact your attorney." Essentially, managers should take the stance with boards or members who are asking for an opinion that they will give a reasonable explanation, but they must also seek counsel.

Always Defer to Attorney for Debt Collection

One of the first things new communities do is establish a rigorous collection policy. The board and manager should create specific guidelines and policies regarding late assessments or outstanding balances that are owed by members. But Grucza cautions that before implementing the collection policy, the

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association should ask its attorney to make sure that it meets the requirements of the specific association and that it doesn't cross a line for purposes of FDCPA. "A good manager will tell the board that an attorney is necessary, but the board might not want to spend the money," says Grucza, "in which case, managers should explain the dangers of this to the board."

When an association establishes a collection policy, it presumes and expects that the manager will work to collect moneys that members owe. The policy typically includes the following steps: The manager sends the delinquent member a reminder to pay, a late notice, another late notice, and a final warning for collection. If the member still hasn't paid, copies of those notices are sent to the association's attorney for the "legal" collection process for that member.

The question is whether the manager is acting as a "collection agent" under FDCPA when she sends out the late notices and other warnings prior to the issue being handed over to the attorney. The preliminary stages of the collection process could be construed as practicing law, says Grucza, but he points out that there isn't much of a choice for managers. "If it says under a manager's contract that she will follow the association's collection policy, she may feel she has to bend the law when it comes to the preliminary stages of collections."

However, there are some things that are absolutely not appropriate even if they are in the policy. While following a policy that entails sending out first, second, and final notices is reasonable, the manager should never publicize delinquencies by, say, taping notices to a member's door or publishing a list of delinquent members on a website, newsletter, or bulletin board.

Grucza adds that after a member's account has been sent to an attorney for collections, there's only one way to respond to phone calls from the delinquent member: "Refer the member to the attorney for any questions and decline any conversations about the debt," he says.

For more information about how to avoid violating FDCPA, as well as a Model Debt Collection Policy your board can adapt and use, see "Avoid Liability When Enforcing Debt Collection Policy," *available on our website here.*

Consider Protective Insurance

Unfortunately, if a manager either declines to respond to a member or director's question because it requires a legal opinion, or provides a legal opinion that turns out to be incorrect, the director or member could retaliate legally against the manager or management company. Whether there's substance or not to any claims, says Grucza, the manager is often the target. That's because there are so many items managers handle; any member who's upset could argue that responding to a question on a particular matter is part of the manager's duty under the management contract, he says.

Fortunately, many management companies will carry a policy that covers the acts of the manager while engaged on behalf of the company. Grucza notes that most managers carry a personal liability policy on themselves because although they think they're doing things the right way, they're afraid that a member could

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become disgruntled and sue them. There shouldn't be any stigma surrounding such a policy. It's not in place because a manager is doing something wrong; it's in place to protect a manager who's trying her best to do the right thing.

Grucza says that the best advice he can give to managers is that if they're ever unsure of how to respond to a member or director's question, they should talk to a supervisor and other managers about the situation. ♦

Insider Source

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➤ Florida's Practice of Law Advisory Helpful Nationwide

In 1996, the Florida Supreme court issued an advisory opinion explaining whether it considered certain activities by managers to be the improper practice of law without a license. More recently, after attorneys asked the court to determine whether anything had changed since 1996, it gave its updated advisory opinion in May 2015—and its answer was essentially, no.

The court's rationale was that if an activity requires a manager to interpret statutes or the law, the manager shouldn't take that on. Managers and boards should realize that an opinion from an attorney is necessary here. The court's opinion included the following examples, which can help guide managers in Florida and other states as well:

- **Preparing certificates of assessments.** Managers send to lawyers a certificate of assessments due when a delinquent account is turned over to the association's lawyer, when a foreclosure has begun, and when a member has disputed in writing an amount due. The court called these activities ministerial—and not requiring a legal sophistication or training—and thus proper for a manager to conduct. Basically, the administrative paperwork in the early stages of delinquency is not overstepping.
- **Drafting amendments or related documents.** Managers sometimes draft amendments when they're to be voted on by members and certificates of amendment to governing documents that are then recorded—which is a major liability. The court noted that these documents "determine substantial legal rights for both the association and property owners, and drafting them is essentially practicing law."
- **Determining number of days for proper notice.** Boards often need someone to determine the timing, method, and form of notice necessary for meetings. When that requires the interpretation of statutes, administrative rules, governing documents, and rules of civil procedure, those functions should be performed by an attorney, not a manager.
- **Modifying proxy forms.** Owners sometimes vote by proxy; their format is sometimes dictated by statute or governing documents. Whether managers should modify those templates depends on whether doing so requires managers to make legal interpretations. If you feel uncertain, check with an attorney.
- **Determining the number of votes.** Managers can handle the task of determining the number of votes needed to take certain actions or establish a meeting quorum—if it doesn't require them to interpret statutes or governing documents.
- **Being involved in contracts.** Managers shouldn't prepare, review, draft, or be substantially involved in the preparation or execution of contracts, which is the practice of law.
- **Searching titles.** There is sometimes a question of who should get notice of the lien that the association wants to place on a unit owner's home. If the manager is simply doing a title search and listing all record owners, that's permissible. But if the manager is searching title and making judgments about which record owners should and shouldn't receive notice, that's improper.

Other states have had fewer situations where managers have crossed over into the practice of law. As a result, there have been fewer guidelines from courts. But that doesn't mean that managers haven't hurt associations by incompetently carrying out tasks that aren't the practice of law, but still should be turned over to an attorney. For now, Florida remains the only state with an official opinion, but managers in other states can use these guidelines to evaluate their own behavior.

Q&A

Preserving Right to Enforce Restrictions

Q A homeowner in the planned community I manage has installed a shed in his backyard. Under the association's declaration of restrictions, the homeowner is required to get written permission to install this type of structure, but didn't. He refuses to remove it, saying that multiple other similar sheds are visible in his neighbors' yards. If the association sues him, what's the likelihood that other owners' unapproved structures will affect the outcome?

A The fact that the association hasn't cracked down on unapproved structures being built by other homeowners could negatively affect the outcome of any litigation over the current situation. Selectively enforcing rules is always problematic for boards of community associations. Issues can run the gamut from being unable to force an owner to remove a structure, to a discrimination claim that can seriously affect the community's reputation and bottom line. But in some cases, it means that a court will allow a homeowner who fails to get approval for some item to keep it.

Recent Case on Point

A recent Kentucky association learned this the hard way. In that case, a married couple who were homeowners in the community built a wooden storage shed in their backyard. The homeowners asked their neighbors for permission and got a building permit from the city. But they failed to ask the association in writing, which was a requirement under the governing documents. When the association learned about the shed, it demanded that the homeowners remove it for being in violation of the restrictions and for not seeking permission to build it. The homeowners refused, so the association sued them. The homeowners asked a trial court to rule in their favor without a trial. The trial court determined that the homeowners could keep the shed. The association appealed the decision.

Enforcement Seen as Arbitrary

A Kentucky appeals court upheld the decision of the lower court. The appeals court stated that it was "extremely sympathetic to both positions in the case" but held that "because of the numerous other structures visible from the common area, the Homeowners Association's issues with this individual structure seem arbitrary."

The appeals court concluded that given there were numerous structures visible from the common area on other subdivision lots, the shed was not "so out of place in material or color such as to change the tone of the neighborhood that the subdivision restrictions were intended to protect."

The association later filed a motion to alter the decision, to add language to the court's order that would limit it to this particular case only to protect the association's future authority to exercise its building approval rights under the

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Q&A

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subdivision restrictions. The appeals court granted the request and that "the shed which is the subject of this lawsuit…shall not be used in the future by any homeowner of the association as the basis for failing to seek approval prior to the building of a structure for which approval is required by the Declaration of Restrictions."

Although, ultimately, the association was able to prevent future homeowners from violating the restrictions by building an unapproved structure, it could've avoided litigation altogether if it had enforced the restrictions uniformly for all homeowners [English Station Community Assn. v. Gaddie, March 2018]. ♦

IN THE NEWS

➤ Homeowners Concerned After $20M Jury Verdict for Playground Tragedy

A homeowners association in Las Vegas is facing not just a staggering jury verdict in favor of the family of a teenager who was injured by playground equipment in the community, but also questions from confused members, some of whom feel misled.

In 2015, a swing set crossbar in the community's common area fell on the 15-year-old boy's head, causing permanent brain damage that will worsen over time. Court records show the association did not have a maintenance and inspection plan on their playground equipment.

The association and its insurance company were given multiple chances to settle the case for the policy maximum of $2 million, but they refused and lost at trial, so homeowners may be left holding the bag to the tune of as much as $90,000 each. Some are worried they may lose their homes or go through foreclosure.

Questions remain as to whether the association intentionally lied to homeowners, who were not informed of the lawsuit by the association. Some first saw the news of the lawsuit on social media. Now, homeowners have hired their own lawyers. The attorneys are looking at whether there was any negligence or intentional misconduct by the insurance company, or by the community management company that led to this worst-case-scenario.

On the bright side, homeowners have been informed as to how to protect themselves, through adding lien assessment coverage to their individual insurance policies and filing homestead declarations. A Declaration of Homestead could protect the homeowners from a lien execution on a judgment that's been entered against the association. Homesteading is a smart move for anyone who lives in an association.

In the meantime, a closed homeowners meeting was held by the board. The association banned one local news station from its Facebook page. A court hearing on a possible appeal of the verdict is scheduled for this spring. ♦

REPAIRS & MAINTENANCE

Gear Up for Summer with Air Conditioning System Inspections

Depending upon where the community you manage is located, hot weather is a year-round issue you must manage or summer is around the corner faster than you think. One sure way you can beat the heat, no matter where your association is, is to be certain that your community's central air conditioning system or members' individual units are ready to go for peak temperatures. Malfunctioning systems are likely to waste energy and money—and they'll certainly lead to member complaints. What's more, some health conditions can be aggravated by excessive heat, and you could put the association in a position of liability if failure to maintain the air conditioning system compromises a member's health.

Hit Key Points on Central Inspections

The number-one tip for air conditioning maintenance is regular inspections. You can spot common problems and deal with them before they become bigger problems. You should conduct both visual and physical inspections of your central air conditioning system, and use a checklist, like our *Model Forms: Be Thorough with Air Conditioning System Inspection,* to document your findings. Spring is a good time to do your inspections for associations in areas where the weather gets warm in May; set a convenient date each year for year-round hot-weather communities. Be sure your staff is well trained and follows safety procedures. But hire an outside service company to do the yearly maintenance on a cooling tower system if no one on your staff has advanced training in servicing this type of equipment.

Here are tips for inspecting central air conditioning systems with cooling towers:

- Grease the motor bearings, the parts that make the pumps and motors turn, and check them for wear and tear. A good rule of thumb is to check the bearings at least twice a year.
- Tighten electrical connections. Loose connections will cause a voltage drop, which will make the motors and relays run at a hotter temperature and reduce the life expectancy of your equipment.
- Grease pump bearings and check that they're operating smoothly.
- Drain and clean the cooling tower. Clean the inside and outside of the cooling tower using a pressurized hose.
- Check the fan belt in the cooling tower. Make any necessary adjustments and replace the fan belt if it shows wear and tear.
- Check and replace filters. Checking filters monthly is a good practice.
- Clean evaporator coils. Make sure the coils are free of algae, dirt, bird droppings, and any other substances that may have accumulated over the winter months.
- Clean drain pans. Clear out any debris and standing water that may have accumulated.

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Repairs & Maintenance

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- Check thermostat calibrations. If controls are out of calibration, your air conditioning system could run inefficiently, remaining on too long and overcooling.

Two Steps to Evaluating Individual Units

If you're responsible for maintaining members' individual condensing units, you should inspect the outdoor and indoor portions of them. Here's what you should focus on:

Outdoor Inspection:

- Visually inspect the outdoor portion of the individual unit. You can discover the majority of common air conditioning unit problems with a simple visual inspection. Check for leaves, bugs, bird nests, and any other accumulation from winter.
- Test the electrical connections to the condenser compressor and evaporator to be sure they aren't loose. Also check supply and return ducts for damage.
- Clean debris from the condensers.
- Clear condensate drains. Over the winter, moisture that remained in the drains may have dried up and formed clogs. Clogs would prevent condensate water from flowing into the drain, creating the potential for water to back up out of the drain pan and flood the member's unit.
- Clean outside condensing coils. Use a coil cleaner and rinse thoroughly.

Indoor Inspection:

- Change filters. Do this every spring, even if the filter doesn't look dirty.
- Clean each unit's coils. A self-rinsing coil cleaner should take care of minor dirt buildup. For heavy buildup, conduct a more thorough cleaning.
- Insert sludge tabs in condensate pans. Sludge tabs help melt the sludge and buildup that can accumulate in condensate pans over the winter.
- Test the unit. If you discover a problem, repair or replace the unit as quickly as possible to avoid cooling problems and high electric bills.

Consider Common Problems

Over the course of many air conditioning system inspections, you'll probably see the same few problems. Clogged condensate lines are a prime example. This problem can result in emergency calls not only because the member came home to a hot condo, but also because the condensation couldn't drain properly and spilled out on the carpet. Look for furniture blocking return air ducts. This will reduce efficiency considerably.

Pay careful attention to coils. Outside coils should be cleaned at least every spring or once a year. In regions where trees, particularly cottonwoods, shed cotton-like fibers, you may need to do so more often. Anything that can restrict the air flow through the coil can overheat the compressor, thereby reducing efficiency and life span. Filters should be replaced a minimum of four times per year. ♦

➤ ➤ ➤ *Model Forms follow* ➤ ➤ ➤

MODEL FORMS

Be Thorough with Air Conditioning System Inspection

Here are checklists that your maintenance staff can use to inspect and record the condition of your community's air conditioning system before summer temperatures peak or any time of year for hot-weather located associations.

The first checklist is for communities that use systems that work off central chillers with cooling towers; the other is for communities that use individual condensing units and are responsible for maintaining them. Your maintenance workers should check off each box after they've completed each task and record what corrective measures were taken or still need to be taken to correct any problems. Completed checklists should be filed in the management office.

AIR-CONDITIONING INSPECTION CHECKLIST CENTRAL CHILLERS WITH COOLING TOWERS

Community Name _____ Date _____

Address _____

Staff Member Conducting Inspection _____

INSTRUCTIONS: Check appropriate box for each air-conditioning component. In the section marked "COMMENTS," record whether a problem was found, and if so, its location, a brief description of the problem, and what corrective measures were or need to be taken to correct it.

OUTDOOR MAINTENANCE

A/C COMPONENT	COMMENTS
❑ GREASE MOTOR BEARINGS	
❑ TIGHTEN ELECTRICAL CONNECTIONS	
❑ GREASE PUMP BEARINGS	
❑ DRAIN & CLEAN COOLING TOWER	
❑ CHECK COOLING TOWER FAN BELT & REPLACE IF NECESSARY	
❑ REPLACE ALL FILTERS	
❑ CLEAN EVAPORATOR COILS	
❑ CLEAN DRAIN PANS	
❑ CHECK THERMOSTAT CALIBRATION	
❑ OTHER	

➤ ➤ ➤ *A/C Checklist for Individual Units follows* ➤ ➤ ➤

AIR-CONDITIONING INSPECTION CHECKLIST
INDIVIDUAL CONDENSING UNITS

Community Name _____ Date _____

Address & Unit # _____

Staff Member Conducting Inspection _____

INSTRUCTIONS: Check appropriate box for each air-conditioning component. In the section marked "COMMENTS," record whether a problem was found, and if so, its location, a brief description of the problem, and what corrective measures were or need to be taken to correct it.

OUTDOOR MAINTENANCE

A/C COMPONENT	COMMENTS
❑ CONDUCT VISUAL INSPECTION	
❑ CLEAN DEBRIS FROM CONDENSERS	
❑ CLEAN CONDENSATE DRAINS	
❑ CLEAN OUTSIDE CONDENSING COILS	

INDOOR MAINTENANCE

A/C COMPONENT	COMMENTS
❑ CHANGE FILTERS	
❑ CLEAN COILS IN EACH UNIT	
❑ INSERT SLUDGE TABS IN CONDENSATE PANS	
❑ ASK EACH MEMBER TO TEST OPERATION OF INPUT	
❑ OTHER	

RECENT COURT RULINGS

➤ Unit Owner Had No 'Actual Controversy' with Condominium Association

FACTS: A condominium unit owner alleged that a board of directors election for the community had been improperly conducted. He claimed that there were statutory violations. He asked a trial court for declaratory relief—that is, a judgment of a court that determines the rights of the parties without ordering anything be done or awarding damages—but the court denied it. The unit owner appealed.

DECISION: A California appeals court affirmed.

REASONING: The appeals court agreed with the trial court, holding that the unit owner's allegations did not present an "actual controversy" warranting declaratory relief because the owner did not allege "continuing or habitual violations, nor was there any evidence indicating that the association would continue to operate under any allegedly unlawful rule or practice."

The unit owner had also asked for attorney fees to be awarded. But the appeals court noted that, although the unit owner had initially been successful in obtaining preliminary injunctive relief prior to the trial court's decision, that did not entitle the unit owner to interim attorney fees and costs because there was nothing in either the statutory language or the legislative history suggesting any intent to abandon the general rule that "fees and costs could be awarded only at the conclusion of the litigation." So because the unit owner had ultimately failed, he wasn't entitled to fees despite early success. What was relevant for fees was the final outcome. ♦

- Artus v. Gramercy Towers Condominium Assn., January 2018