



# Community Association Management Insider®

Helping You Run Your Condo or Homeowners Association Legally and Efficiently

**FEBRUARY 2019**

**FEATURE**

*Restrictions in the fine print can make it hard for you to end a vendor's contract.*

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## Use Four-Step Strategy to Preserve Contract Termination Rights

Unfortunately, as community association managers know all too well, sometimes the contractors your association hires for such jobs as snow plowing, painting, or providing security don't perform up to the standards you expect. If you don't terminate the contract and you let the company continue to provide poor service to your community, members could get frustrated and the management office could be fielding an increased number of complaints. Even worse, the association could get hit with a lawsuit by a member or guest hurt because of bad service. For example, during the winter season in cold weather climates, if a snow removal company does a bad job of snow plowing and a member falls, your association could be sued.

Your association doesn't want to be in a position in which it's unable to terminate the contract of an underperforming service contractor when it wants. But if you just sign the boilerplate contract that a service contractor submits without making changes, the association is likely to end up in precisely this fix. Even reputable contractors include restrictions in the fine print that make it hard for customers to end their contract.

### Beat Boilerplate Contract Defect

To safeguard your association's right to get rid of inefficient contractors, you must be wise to the tricks and negotiate to get rid of the unfair restrictions. The best way to work around a boilerplate contract is to write up your own termination clause and insist on including it in every service contract you or your association signs.

Here's a four-step negotiating strategy to use when contractors ask you to sign contracts that limit your termination rights. Ask the association's attorney about adapting our *Model Clause: Draft Association-Favorable Termination Clause*, which you can insert into service contracts you negotiate for the association.

### Step #1: Check for Restrictions on Termination

When entering into a new service contract, the last thing you may think about is how to get out of it. But that could prove short-sighted

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## Contract Termination Rights

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if the deal goes bad. So, before signing any service contract, check it carefully for restrictions on the right to terminate. Look in the section describing how long the contract will last—it usually appears under the heading “Term,” “Duration,” or “Termination.” You’re likely to find restrictions on your right to terminate, especially in agreements for elevator maintenance, trash and snow removal, parking lot sweeping, HVAC service, and floor cleaning.

There are generally two kinds of restrictions to look out for:

**1. Multiyear term.** The contract may be for a term of three, four, or even five years. Be cautious about agreeing to a multiyear contract. Keep in mind, though, that some contractors who have invested money, such as a company that installs laundry facilities, will insist on a multiyear term. Otherwise, there’s no reason to agree to a contract longer than a year.

**2. Automatic renewal.** Because it’s more subtle than a multiyear term, contractors often use automatic renewal clauses to entrench themselves. This clause, after an initial term of, say, a year, allows either side to terminate the contract upon 30 days’ written notice. The catch is that you cannot just give 30 days’ notice whenever you want. Typically, the contract says notice can be given “no earlier than” a certain number of days—usually 45 to 90—before the anniversary date (that is, the date on which the contract was signed). Unless notice is given within the time period set in the contract, the contract is automatically renewed, and you’re stuck for another year.

For example, an association manager signs a one-year, automatically renewing contract on Jan. 1. The contract gives either side the right to terminate the

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## Contract Termination Rights

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agreement upon 30 days' advance written notice, "provided that such notification must not be given earlier than 45 days before the anniversary date."

On June 29, the association decides that it wants out of the deal and gives 30 days' notice. The manager thinks this notice will end the contract at the end of July. But he's wrong. The contract says that notice can't be given any earlier than 45 days before Jan. 1. The earliest date the association can give notice and avoid automatic renewal for another year is Nov. 17.

What's more, the association has only 15 days—from Nov. 17 to Dec. 2—to give notice that's late enough to meet the 45-day restriction and early enough to meet the 30 days' notice requirement.

There's no problem if the manager remembers to send out the notice in the two busy weeks at the end of November. But this is not a sure thing. Managers have enough on their minds running the community without being subject to such a restrictive termination clause in a service contract. Even if you know the rules in the contract, you may still forget to send the notification on time. You won't realize how restrictive the clause is until you try unsuccessfully to get out of the deal.

### Step #2: Demand Removal of Restrictions

Contractors will do their best to make you believe that the contract is a take-it or leave-it proposition, but you don't have to accept a contract without negotiating it. Everything is negotiable, even if you don't have a lot of leverage. If it isn't negotiable, look for another contractor. If you must accept an automatic renewal, be sure you mark in your diary when you must give notice that you want to end the contract.

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#### MODEL CLAUSE

### Draft Association-Favorable Termination Clause

If you can't write your own service contracts, your association should at least write its own termination clause to insert into the contractor's form contract. Ask the association's attorney about adapting this type of termination right to include in every signed service contract. This clause lets you get out of the contract on seven days' advance notice. It lets the contractor end the contract, effective as of the last day of a calendar month, with at least 30 days' notice.

#### TERMINATION RIGHTS

**Term.** This Agreement shall commence on \_\_\_\_\_, 20\_\_\_\_, and shall terminate on \_\_\_\_\_, 20\_\_\_\_ (which period is referred to herein as the "Term"); provided that this Agreement may be terminated at any time during the Term hereof by Association upon not less than seven (7) days' prior written notice to Contractor, or by Contractor as of the last day of any calendar month during the Term hereof upon giving not less than thirty (30) days' prior written notice to the Association. In the event of such termination, all payments due hereunder shall be prorated to the date of termination.

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## **Contract Termination Rights**

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### **Step #3: Negotiate for Termination on Seven Days' Notice**

Once the boilerplate restrictions are cleared away, the question becomes how many days' advance notice you give to end the contract. Contractors have an interest in a long notice period. Ninety days is a standard demand. Associations, on the other hand, prefer to keep the notice period to a minimum. Seven days' notice is probably the minimum notice period contractors will accept.

You'll want to keep the "lame duck" period to a minimum. Some standard clauses enable the association to terminate the contract immediately, without any advance notice. But this isn't typical. Although it might seem "fair" and "logical," don't let the contractor have a reciprocal right to terminate on seven days' notice. That's not enough time to bid out the work and hire a replacement. To avoid potentially serious service disruptions, require contractors to notify you at least 30 days in advance.

### **Step #4: Get Right to Terminate Contract at Any Time**

You need to worry not only about the length of the notice period but also about restrictions that make you wait for anniversaries, ends of months, etc., before you can terminate the contract. Whatever notice period you agree to, make sure that you can terminate the contract "at any time during the term" as long as you give the required notice.

But don't let contractors terminate the contract at any time they want to. Instead, require the contract to end on the last day of a calendar month. In other words, if a contractor gives you 30 days' notice on Nov. 15, the contract would end not on Dec. 15 but on Dec. 31. Besides buying more time to line up a replacement, this enables you to start the next contract on the first of the month. ♦

## **RECENT COURT RULINGS**

### **➤ Governing Documents Determined Lot Assessments**

**FACTS:** Lot owners in a planned residential community owned two adjacent lots. After several years, they combined both lots into a single lot. They followed state law to do so and properly recorded the change. When the association charged them for assessments for each of the two lots, which now were combined, the owners objected. They asserted that they should be charged assessments for one lot.

The association sued the homeowners. A trial court ruled in their favor and established that only one assessment could be charged. The association appealed.

**DECISION:** An Alabama appeals court reversed the trial court's decision.

**REASONING:** The appeals court noted that, while the homeowners had complied with state law to legally combine the two properties, this didn't affect

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## Recent Court Rulings

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the association's agreement with the homeowners. The original governing documents stated that assessments could be charged for each *original* plat. It didn't say or contemplate that new, single plats that were the result of a combination of properties could then be consider one plat for purposes of assessments. The governing documents trumped the fact that the new property was legally a single property. ♦

- Great Bend Yacht Club, Inc. v. Macleod, January 2019

## PREMISES LIABILITY

### Avoid Injury Liability by Documenting Common Area Inspections

You and your staff should have a risk management strategy set up that covers all of the issues that could lead to liability for the association you manage. One of the big ticket items in terms of liability that your strategy should address is safety hazards in the community. That's because safety hazards can result in, at best, minor accidents and, at worst, personal injury lawsuits. Here's how to take reasonable care in a high-risk area.

#### High-Traffic Portions of Community Pose Risk

The common areas in your community or condominium building are rife with risk—especially high-traffic common areas, which are used by not just members, but also visitors, and can get wear and tear or damage that could cause slips, trips, and falls. That's why it's important to inspect them at regular intervals for safety hazards that can be eliminated.

Your maintenance staff members are perfect for this job. After all, they spend a lot of time in the common areas anyway, cleaning or making repairs, so they are the most likely to notice things that are amiss, such as a broken step or slippery surface that could lead to a fall.

#### Make Inspections a Breeze

An effective way to make inspections a no-hassle task is to conduct them in 10-minute sessions and to have a variety of people—to get the benefit of different perspectives—help.

Use our *Model Checklist: Keep Record of Common Area Maintenance & Repair*, to focus the inspector's attention on important items, make sure that none are missed, provide a record of repairs that were made, and document when those repairs were made.

The checklist can also be used to show a court that you took reasonable care by inspecting your common areas regularly for hazards, and correcting any you found. Make sure to keep the completed checklists on file. ♦

**MODEL CHECKLIST**

**Keep Record of Common Area Maintenance & Repair**

Showing that you took reasonable care to avoid injuries in the community’s common areas can prove to be crucial when liability issues crop up after an injury takes place in one of those areas. Every community’s common areas will vary, though, so use our checklist below as a guide and add particular aspects that you also would need to address.

**COMMON AREA INSPECTION CHECKLIST**

DATE \_\_\_\_\_ INSPECTED BY \_\_\_\_\_

**ENTRANCE AREAS & HALLWAYS**

◆ Carpets tacked down/floor tiles in good condition?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Lights working?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

**STAIRWAYS**

◆ Steps free from wear and in good repair?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Free from trip hazards (e.g., slippery, uneven)?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Clear of obstructions (e.g., bicycles)?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Railings in good repair?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Lights working?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

**EMERGENCY EXITS**

◆ Unlocked from the inside and free of obstructions?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Well marked?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Emergency lights working?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

**FIRE PROTECTION EQUIPMENT**

◆ Smoke detectors working?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Fire extinguishers inspected and accessible?  Yes  No

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

**OTHER**

◆ Item \_\_\_\_\_

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

◆ Item \_\_\_\_\_

DATE REPAIRED \_\_\_\_\_

COMMENTS \_\_\_\_\_

## DEALING WITH MEMBERS

### Minimize Liability for Increased Use of High-Risk Areas in Community

Although in many parts of the country, planned community and condominium residents are battling snow and freezing temperatures, spring and summer—with warm weather and opportunities to get active—will be here soon enough. And some communities experience soaring heat year round, like those in association-prevalent states such as Florida. Many members invite guests into the community and host seasonal parties or activities in warm weather. You may even provide association-sponsored summer fun.

But it's important during this time to keep the community operating smoothly by avoiding accidents and liability for the association during the months where there is extra usage of amenities. Here's how you can avoid risks and association liability by making sure that summer safety rules adequately address risks, and members comply with them.

#### Keep Three Areas Under Control

Setting objective rules about the way members and their guests must act while in the community helps to avoid a gray area where they can argue that things like throwing parties in dangerous areas, roughhousing in the pool or sports courts, or not cleaning up after entertaining in common areas aren't specifically prohibited. Set expectations by passing and enforcing rules barring dangerous behavior in the following areas.

**High-risk area #1: Sports courts, swimming pool.** Sports courts, such as basketball, volleyball, and tennis courts, and a swimming pool, are great amenities for a community. But they can also lead to problems—for example, members arguing over how much time should be allotted on a court—or serious injuries or drownings. Creating a set of rules that govern the use of sports courts and the pool is a smart way to avoid liability for injuries and to head off member disputes. Cover the following items in your rules, which you can tailor to your association, and post them at the entrance to amenities:

- Use by children, such as a minimum age to use the amenities;
- Use by members, residents, and guests only;
- Proper attire, such as shirts on sports courts and bathing suits in the pool;
- Hours;
- No food or drinks, except for water in plastic bottles that may be consumed courtside or poolside;
- Aggressive or rowdy behavior or foul language;
- Banned sports equipment, such as skateboards; and
- No pets (if this is applicable to your community)

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## Dealing with Members

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Remember to say in the rules that all members, residents, and their guests using sports courts or the pool do so “at their own risk,” and that “neither the association nor its manager shall be responsible for injuries or accidents.”

Specify that if a member violates any of these rules, the association and/or manager reserves the right to bar her from using these amenities.

**High-risk area #2: Common areas.** Generally, as long as members and their guests aren’t disturbing other members, it’s all right to allow them to do some limited entertaining in common areas. You may even have equipment in a common area that’s actually likely to draw parties, such as barbeque grills or kids’ playground equipment.

But parties, no matter how small, can still leave a mess that your maintenance staff will have to pick up, and that can prevent other members from using the areas later. A rule that members must clean up after themselves after using a common area can head off this type of nuisance.

**High-risk area #3: Rooftops.** A common problem is entertaining on condo roofs—and because a fall from a roof can be deadly it’s of utmost importance to address this. As summer begins and temperatures rise, members and their guests may be tempted to go up on the roof and sunbathe, barbecue, or just cool off from their hot units. Unfortunately, allowing people on the roof of your building can create problems for you and the association. For example, if a member or guest gets seriously injured or causes costly property damage, a court may rule that you’re liable for the injuries or damage because you let members and guests use the roof.

Letting members and guests use their roof also adds unnecessary wear and tear to the roof, which could shorten its life and create defects. As a result, your insurance premiums could increase. And if, say, a roof defect leads to a leak that damages members’ property in the units below the roof, the association could be held liable for that damage.

So how can you avoid this risk? Encourage the board to pass a rule barring members and their guests from using your building’s roof. The rule you set should bar members and their guests from using the roof for any reason except an emergency. Adapt and use the following Model Language after talking with your association’s attorney.

### **Model Language**

Members and their guests are strictly prohibited from accessing, storing personal belongings on, or using the roof for any purpose, except in an emergency.

## **Enforce Rules Fairly, Effectively**

Setting rules is fruitless if members don’t follow them. Here are the two steps you should take to enforce summer safety rules when a member doesn’t take them seriously.

**Speak with member first.** As soon as you find out about a member’s infraction—for example, leaving a mess in a common area after entertaining—talk to the

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## ***Dealing with Members***

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member about her actions. Remind the member about the rule that specifically requires members to leave a common area the way they found it. And point out that violating this rule could lead to serious consequences.

**Send “get-tough” letter for continued violations.** If, after speaking with the member, you learn that she has continued to use the common area without cleaning up messes afterwards, send her a get-tough action letter. This letter should be stern and:

- Remind the member about your prior conversation with her about her unauthorized use of the roof in which you reminded her that your bylaws specifically bar such activity;
- Note that despite this conversation, it has come to your attention that the member has continued to use the common area without cleaning it afterwards, citing examples of when she did so; and
- Warn the member that her continued use of the area is both a serious disregard for other members’ enjoyment of the community and an extra maintenance issue, and also a material violation of the association’s governing documents.

Also, cite the specific portion the member is violating, refer to the specific rule she’s violating, and attach a copy of that rule to the letter. And say that if the member continues to use the common areas without cleaning up afterwards, you’ll pursue whatever legal remedies are available to the association. ♦