

Community Association Guide to Legal Disputes

Every community and every HOA board will encounter conflict at some point. Communities are complicated just like the people that inhabit them. HOA boards that accept and prepare for this reality in their governing documents and through training, while remaining sensitive to resident needs and emotions, are better able to resolve disputes quickly and before they result in a lawsuit.

Conflict is unavoidable, but lawsuits can be avoided, though not in their entirety. At some point in your community association board service, you and your colleagues will face a legal challenge. Managing the community properly, open communication, facilitating disputes well and properly managing legal issues are all part of a single continuum, with all elements interconnected along the way.

Missteps in one part of the chain of HOA association management will inevitably lead to challenges later. The more missteps, the greater the number and complexity of legal issues that could follow. When examining the best way to avoid lawsuits and minimize the damage caused by actual litigation, an HOA board needs to take a holistic approach. Simply hiring expensive legal counsel and focusing on the end of the continuum is not an approach that leads to a healthy, thriving community. Managing via litigation and the courtroom will drive any community into the ground.

In other words, the first duty of the board and its partners is to ensure they're doing their jobs and upholding their fiduciary obligations to the community. That's the first step--making sure your team is doing their job to the best of their ability and its partners, whether a community management firm or maintenance crews, are doing the same.

Second, your governing documents, training, and behaviors need to properly manage conflict to reduce the number of lawsuits and maintain the community peace. And finally, should a lawsuit occur, you and your fellow board members need to be prepared to act quickly, rationally and intelligently.

Your First Line of Defense Against Lawsuits: Be Responsible

While being an HOA board member is a volunteer activity, the responsibilities you have are no joke. Mismanagement of finances, poor community management, rampant conflict and general disarray will impact your reputation, your home value and you and your neighbor's quality of life. That might sound dramatic, but it's not-running an HOA community is the same as running a business. People depend on their employers to treat them fairly and humanely; employees also depend on the health of the business to support upward mobility and a better quality of life.

Managing an HOA community is no different. A board's success, mediocrity or failure has direct impacts on the lives of the people that live there.

According to [CAM Voice](#), a website for community association managers, "The first step an HOA can take to avoid lawsuits is, of course, to make sure that they are following all laws and agreements to their fullest. They should also be sure to consult an attorney or another expert on matters of possible liability, and then follow their advice exactly; liability for some issues is reduced or eliminated if the HOA was acting on the advice of counsel."

Your board's first line of defense against legal action is being responsible for fulfilling its fiduciary duty to protect the community first and foremost. Here are some tips to bolster this first line of defense:

Maintain Your Community. Nothing gets residents riled up like the perception of negligence on the part of the homeowners association. Snow that doesn't get removed in a timely fashion, missed garbage pickup, deteriorating common areas...failure to proactively maintain the shared spaces of your community is a recipe for disputes and future lawsuits. Residents pay fees to ensure the community's quality of life and to protect their property value. Failure to do so could open the door to unrest and conflict.

Remain Fair and Follow the Governing Documents. Your CC&Rs, bylaws and rules and regulations must be followed and applied fairly. Making exceptions for certain residents while being a stickler for others is asking for trouble. The governing documents are there to ensure HOA boards act legally and that residents follow the community's policies. A breach of that trust by the HOA board creates myriad problems when it comes to legal action and the overall credibility of the board. If the board doesn't follow the rules, why should the residents?

Pick Your Battles. If a board member looks hard enough, it's very likely they'll be able to find a resident in violation of some rule or bylaw. This is not to say that you should let a violation go-as that sets a bad precedent. However, pursuing legal action at every turn creates bad will between the board and the community and could create a tit-for-tat mentality, i.e. you sue my neighbors at every turn, now we are going to return the favor. Use legal remedies as a last resort, always, and seek out and go the extra mile to resolve disputes out of the courtroom.

Second Line of Defense: Conflict Resolution

No HOA board is perfect. Conflict and unrest cannot be avoided entirely. That said, you and your fellow board members need to have the proper guidelines and processes in place to manage conflict when it arises.

Robert Frost, the revered American poet, once wrote that "Good fences make good neighbors." Well, in every HOA board's tenure, fences will fail to keep disputes from spilling over into the community.

When the time arises, and it will, here are a few tips for board members when it comes to conflict resolution that can avoid expensive legal proceedings:

Remember, It's Not Personal (Even If It Is.) Conflicts and disputes among neighbors or between a resident and the board are rarely personal. As a board member, this always needs to be

top-of-mind. And even if it does get personal, you need to avoid getting pulled into personal attacks; this will only serve to escalate the conflict and is not appropriate board member behavior.

Always Have a One-on-one Conversation. If an ongoing issue arises between residents or the board and a community member, make the effort to engage the parties in a face-to-face discussion. We all know email and texts are terrible when it comes to tone and intent. The written word, particularly in these mediums, is ripe for misinterpretation. Schedule an informal meeting with the aggrieved party, or, if you can get all parties together, that can work, too (you'll need to judge this on a case-by-case basis). When you meet, remember to follow these guidelines:

- Be open, patient, and pleasant during discussion. Make sure everyone knows you don't have a preconceived agenda and that you are there to listen.
- Employ problem-solving language and avoid editorializing or expressing your own opinion. Phrases like, "How do you think we can solve this problem", "How do you suggest we approach this?" or "I think I have a solution", open the door to dialog and make the community member feel in control and that they have a say.
- Try to solve the complaint efficiently to avoid debate and over complication.
- Keep this dialog among the parties that are in conflict; gossiping and talking about the issue is a no-no and could damage the trust you've built.

Read the HOA Complaint Letter. If your one-on-one or small group meeting doesn't resolve the issue, a homeowner may put their complaint in writing. It's your responsibility to read this letter carefully and examine it objectively. In many disputes, both sides have some legitimate claims. That said, it's critical for you to understand the letter and then put the complaint in the context of your community's rules and regulations, bylaws and CC&Rs. Once you understand how the complaint falls with the governing documents of the community, put a response in writing explaining the board's reasoning and how you believe the dispute can be amicably settled.

Third Line of Defense: Get Outside Help

Sometimes, despite your best efforts, conflicts can't be stamped out and they continue to move along a path toward legal action. It's unrealistic for a board to think they will never be sued; the goal should always be to limit legal action as much as possible.

Notify Your Legal Team. At this point in the process, the board needs to have notified its lawyer or legal team, giving them a heads up about the situation. The level of advice and assistance provided should be determined on a case-by-case basis and the severity of the situation. In some cases, it might make sense to incur legal fees even before you get sued to prepare for a possible major legal event. The point being: start coordinating with your legal counsel. And by all means, if you don't have legal counsel, get some and do so quickly.

Engage in Mediation. If the face-to-face meeting and the response to the complaint letter fail to resolve the issue, it's a wise idea to propose mediation. Many HOAs have a mediation committee that steps in to facilitate and hopefully resolve disputes. Where there is no subcommittee, hiring a mediation professional is an option. In either case, mediation is an important step to take prior to becoming embroiled in a lawsuit. This is a less expensive option compared to legal action.

Consider Small Claims Court. Depending on the nature of the complaint, small claims court is a good option should mediation fail to resolve the dispute. Most disputes will be resolved before reaching this point, but small claims is often a viable and less expensive legal option.

The Actual Defense: How to Manage a Lawsuit

Okay, so you've made your best effort to resolve conflict and you've attempted mediation but your HOA board is now a party in a lawsuit. Now what?

Don't Panic When the Summons Arrives. The summons is in hand. Things just got real. The worst thing a board or board member can do is panic, or do nothing. Remain calm. Think logically and emotionally. Get together and discuss next steps with your fellow board members and

then take quick, thoughtful, rational action. Don't wait or hesitate. Remain calm but understand that time is of the essence to mount your defense.

Formally Engage Your Legal Team. Now is the time to fully engage your legal counsel. Whereas early on you were giving legal a heads up about an ongoing issue, with a lawsuit now active it's time to lean on the experts.

Notify All Insurers of the Legal Claim. Again, how to proceed with notifications of your insurers varies by case and by insurance type. However, it's a universal best practice to notify your insurers of active claims as soon as is humanly possible. Swift, appropriate action in this area will help you ensure coverage; delays or hesitation can open the door to your insurers denying coverage due to timeliness clauses in their respective policies.

Make Sure Your D&O Insurance is Active or Get It. Directors and Officers insurance is critical for your board. General liability insurance does not protect individual board members from legal action, D&O insurance does, to a degree. According to HOA Leader, D&O insurance "protects directors and officers from claims that they failed to act or acted wrongfully in their individual or group capacity on behalf of the association." The scope of D&O insurance can be complex and varies policy-to-policy. However, D&O insurance typically protects individual board members against perceived breaches of fiduciary duty but not against fraud. Having D&O insurance not only protects board members, but it also helps in recruiting volunteers and giving board members the confidence to handle community disputes without fear of personal repercussions.

Be a Great "Discovery" Partner. Once your legal counsel or legal team is engaged, and the lawsuit moves through the litigation process, you need to be a great partner to your lawyer or lawyers. One of the first and most important steps in your HOA board's defense is the discovery process. Isaacs & Isaacs, a law firm out of Kentucky, defines discovery as "...the exchange of legal information and known facts of a case. Think of discovery as obtaining and disclosing the evidence and position of each side of a case so that all parties involved can decide what their best options are – move

forward toward trial or negotiate an early settlement. Parties in a case are required to participate in the discovery process, meaning they must hand over information and evidence about a claim so all participants can know what they are facing at trial.”

How can a board help with discovery? Well, this starts well before the lawsuit. A highly organized board with clear processes and organized documentation is your legal counsel’s best friend. Being able to furnish documents-emails, letters, phone calls, faxes, financial statements, etc.-is critical to mounting a strong defense or pushing the suing party to settle.

It’s really pretty simple: HOA’s that are poorly run, are not organized and have weak process will be sued more frequently and be less able to defend themselves even against spurious claims.

The lesson, here? Be organized. Document everything. Follow the governance documents. In reality, the everyday actions of the board and its strict adherence to established processes means a board is always preparing to support the discovery process in a legal dispute.

Maintain Confidentiality. You and your fellow board members need to keep quiet about the lawsuit. Emails, letters, conversations outside of the board and other communications about the nature of the lawsuit can be used against the HOA board and damage its defense. Mum’s the word.

Educate the Board on Basic Legal Matters. It’s possible that you might have a lawyer or lawyers on your board. Regardless, every board member should have some basic knowledge of the law as it pertains to HOA community management. Every board member shouldn’t be ready to pass the BAR exam, but knowing the fundamentals can’t hurt.

Here are some basic legal terms-in addition to those already shared-that every board member should be familiar with:

Fiduciary Duty

The highest ethical and moral obligations and duty of good faith a person is charged with for fulfilling their responsibilities. The board of directors of a community association has a fiduciary responsibility to act in the best interests of the association. (Associa)

Governing Documents

The governing documents of an association include the Declaration (CC&Rs), Bylaws, Articles of Incorporation and any Rules and Regulations. A condominium's survey map and plans are sometimes considered part of the governing documents as well. (Barker Martin)

Assessment

Generally used to mean the regular amount chargeable by the association against a unit or lot for the owner's share common expenses including regular and special assessments. Commonly includes charges and fines imposed by an association depending on jurisdiction or definition in governing documents. (Barker Martin)

Special Assessment

Special assessments are made for capital improvements or for other purposes, such as replenishing a reserve fund that was spent on unexpected maintenance projects. (Halpern-Rodriguez)

Quorum

Quorum is the presence of a required number of members in a meeting for the proceedings to be valid. (Homeowner Protection Bureau)

Lien

A monetary claim made against a property for unpaid mortgage, taxes, contractor work, or other charges. A lien attaches to the property, not the owner, but must be recorded in the property records of the resident county. (Association Ready)

General Liability Insurance

General liability insurance protects a homeowners association from personal injury and property damage claims. Importantly, a general liability insurance policy doesn't protect board members from claims that their actions have damaged the association or its members. This kind of protection is offered by directors and officers insurance. (HOA Leader)

Reserve Accounts

Reserve accounts (also referred to as "reserve funds" or simply "reserves") are funds set aside by the homeowners association to pay for the replacement or repair of community property. Reserves are intended to prevent the need for special assessments. A good definition of the purpose of reserve funds can be found in a Washington state law (SB 6215). It describes reserves as funding "major maintenance, repair and replacement of common elements, including limited common elements that will require major maintenance, repair, or replacement in more than one and fewer than thirty years." (HOA Leader)

Maryland Homeowners Association Act

Laws governing HOA operation in the state of Maryland. You can review the act [here](#).

Open Meeting

Open Meeting refers to the portion of a Board Meeting that permits any member of an association to attend, except when the board adjourns to executive session to consider litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments. (AtHomeNet)

Delinquent Assessment Collection Policy (DACP)



A Homeowner Association (HOA or Association) or Owner Association (OA) document that specifies the guidelines on collecting assessment dues from property owners. (United Trustee Services)

HOA communities are complicated just like the people that live in them.

Avoiding every lawsuit is impossible, but HOA boards can reduce their frequency by fulfilling their fiduciary duties to the best of their abilities. Remember, community management is a continuum of interrelated parts; successes and failures reverberate across the chain. The better your board manages the continuum, the less negative impact occurs at the end of the line.

HOA boards that make good faith efforts to do their very best, be transparent and remain fair will significantly reduce the number of lawsuits by building trust among community residents. Trust increases the chance of conflict resolution and mediation well before legal action is taken.

Fair and consistent application of your governing documents and a reasonable, fair and transparent conflict resolution process will help most HOA communities keep the peace and avoid costly, disruptive time spent in the courtroom.

Comsorce has helped many communities just like yours stay on top of key issues, including conflict mitigation. Reach out to us today-we'd love to hear more about your community and its challenges.