



COMPTON & DULING
Attorneys At Law

**ANNUAL PRINCE WILLIAM COUNTY
NEIGHBORHOOD CONFERENCE**

March 16, 2024

**Presenter:
Christopher Chipman**

UNDERSTANDING THE
ATTORNEY/BOARD RELATIONSHIP

Overview

- **Part 1: Introduction**
- **Part 2: Attorney-Client Relationship**
- **Part 3: Fee Structures**
- **Part 4: Common Legal issues**
- **Part 5: Effective Use of Legal Counsel**
- **Part 6: Common Mistakes**
- **Part 7: Upcoming Legal Issues**
- **Part 8: Q & A**

Introduction

Why does it matter?

Community associations are amongst the most heavily scrutinized and criticized organizations in our society. It can be a daunting task for volunteer board members to keep abreast of the evolving ever-evolving legal landscape in addition to running an association's day-to-day operations – let alone maintaining some semblance of a normal personal life.

Community associations routinely face legal issues that span multiple, diverse practice areas, including but not limited to real estate, fair housing, contracts, corporate, premises liability, warranty, covenant interpretation, covenant enforcement, collections, bankruptcy, foreclosure, employment, and taxation issues. Consequently, community association law has evolved into a complex niche practice area that takes considerable time and effort to learn and a lifetime to master.

Given the myriad legal issues facing community associations and the intense scrutiny, selecting an attorney is one of the most important decisions that a board can make. It's an important decision that can have lasting ramifications, so boards should be well informed to ensure that they both select the right attorney and obtain the maximum benefit from the attorney-client relationship.

Attorney-Client Relationship

Attorney represents the Association.

1.13 Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. These persons are referred to herein as the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

Attorney-Client Relationship

Duties owed to Association.

1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

1.2 Scope of Representation

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (d) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Attorney-Client Relationship

Duties owed to Association (Continued)

1.5 Fees

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
2. the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent.

1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

- (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

Common Legal Issues

A. Corporate Governance

- I. SCC/DPOR Reporting
- II. Parliamentary Procedure
- III. Elections
- IV. Votes

B. Contracts

- I. Drafting
- II. Negotiation

C. Covenant/Bylaw Drafting

D. Covenant Interpretation/Enforcement

E. Collections

Fee Structures

A. Hourly

- I. This is by far the most-common fee structure utilized by attorneys.
- II. Typically billed in six (6) minute increments.
- III. Unavoidable for certain types of matters (e.g, litigation, adversarial matters, etc.)

B. Fixed-Fee

- I. Gaining popularity.
- II. Appropriate for certain types of routine or common issues.

C. Blanket/Retainer

- I. Not widely offered.
- II. Of limited value for most community associations.

D. Contingent

- I. Appropriate for certain types of collections cases.

Effective Use of Counsel

- A. Designate a liaison to interface with counsel**
- B. Engage with counsel**
- C. Request estimates or set NTE cost**
- D. Review invoices**
- E. Review options periodically**

Common Mistakes

- A. Not having counsel review contracts**
- B. Not consulting counsel when someone threatens litigation**
- C. Using collection agencies**
- D. Ignoring counsel's advice**
- E. Not reviewing invoices**

Upcoming Legal Issues

Sainjay Sainani, et al. v. Belmont Glen Homeowners Association 297 Va. 714 (2019)

- The general rule is that restrictive covenants are not favored and are to be construed most strictly against the grantor and persons seeking to enforce them and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions.
- For purpose of restrictive covenants, design-control powers do not include an implied power to impose design controls for aesthetic purposes.
- Design-control powers are not necessary to the effective functioning of the community.
- Express design control powers are generally enforceable, the scope of implied powers is limited to governing or protecting common property and preventing nuisance-like activities on individually owned property.
- Discretionary design-control powers that are not expressly authorized by statute or by the declaration create two kinds of risks for property owners: 1) they may not be able to develop in accordance with their expectations because they cannot predict how the controls will be applied; and 2) may be subject to arbitrary or discriminatory treatment because there are no standards against which the appropriateness of the powers exercise can be measured.

Upcoming Legal Issues

Burkholder v. Palisades Park Owners Association, Inc. Court of Appeals of Virginia, Winchester, February 2023

This case addressed the use of assessments to pay for third-party inspection of lots for violations. The court found that §55.1-1805 allows associations to use assessments only for reasons related to the use of common areas, or for reasons specifically allowed by law or the association's governing documents. The association argued that it had the power, under the declaration, to use assessments for this purpose, but the court ultimately decided that while such authority may have been implied in the declaration, it was not "expressly authorized" by the declaration. A dissenting opinion on the decision found that the declaration did expressly authorize the use of the annual assessments for lot compliance inspections, but it did not explicitly do so. The dissent further noted that "[s]tretching "expressly" to mean "explicitly," raises the bar beyond what is required by the plain meaning of the applicable statute..."

Upcoming Legal Issues

Telegraph Square II, A Condominium Unit Owners Association v 7205 Telegraph Square, LLC Court of Appeals of Virginia, Winchester, April 2023, June 2023

The trial court found that the condominium association breached its contract with the appellee, and violated the Condominium Act when it assigned all common elements in Phase I to a limited number of unit owners. The Association appealed the decision. This action came about after the association re-allocated parking in a portion of the association to a limited number of owners while still assessing all owners for the cost of maintenance and repair. The Court viewed this as a failure to provide equal access to common elements by all owners. The court also awarded the Appellant monetary damages for lost rent, resulting from the changes to the use of parking, and approved the Appellant's withholding of assessments during the dispute. The Court found that the association "impermissibly converted common elements into limited common elements," "failed to comply with Fairfax County zoning ordinance minimum requirements...", "could have foreseen the lost rent damages proximately caused by the association, "improperly assessed the Appellant for the repair and maintenance..." and "the Appellant is entitled to an award of its attorney fees..." On June 6, 2023, a petition for a rehearing en banc was granted by the Court of Appeals.

Upcoming Legal Issues

Dorcon Group, LLC v. Westrick, et al. Unpublished, Court of Appeals of Virginia, Leesburg, August 2023

This is an appeal from the Circuit Court of Loudoun County where the court failed to award Appellant declarant and injunctive relief. This case pertains to a subdivision created in 1981 with a deed that imposed restrictive covenants on all but four lots. The four lots were not required to be residential and could be used for non-residential purposes approved by the county zoning and subdivision ordinances and they were also excepted from crop raising restrictions to which all other lots were subject. The Appellant purchased one of the four lots and planned to build a Bed and Breakfast. The lot owners amended the Deed to include a new restrictive covenant that prohibited commercial activities. The Appellant filed suit to challenge the amendment. The circuit court dismissed the case. The Appellant returned and argued that the language in the covenants allowing the restrictions to be excepted, modified, or vacated were improperly construed. While the circuit court found the term 'modified' to be unambiguous, the Appeals Court found otherwise. It found that a modification cannot add an entirely new restrictive covenant not previously present. The new language made the restrictive covenant more restrictive, and it did not specify what restrictive covenant was being amended.

Upcoming Legal Issues

The U.S. Corporate Transparency Act (H.R. 6395 as part of the William M. Thornberry National Defense Authorization Act for Fiscal Year 2021)

This bill was passed to reduce money laundering, tax fraud, terrorist finance, and other financial wrongdoing and was part of the Anti-Money Laundering Act of 2020. The bill became law in 2021 when the House and Senate overrode the President's veto. It will require certain types of corporations not otherwise exempted to file information with the Financial Crimes Enforcement Network (FINCEN). The initial report is required no later than December 2024. 21 Reports must contain the name of the company, any "dba" associated with the corporation, the address of the corporation, the IRS taxpayer identification number (including the employer identification number) and beneficial owner information.

Those involved in community associations are concerned about the impact of these new requirements on community associations. In addition to the general corporate information required, information on the "beneficial owners" will also be required and will have to be updated regularly. Based on the current definition of a beneficial owner, people serving on their community association board may be considered a beneficial owner and thus subject to a requirement that every beneficial owner have its full legal name, current residential address, unique identifying number, and a copy of the document that includes that number (passport or state identification) filed with FINCEN. This information will have to be updated every time a board member changes if that association falls under this legislation. A failure to comply with the law may result in civil penalties of \$500 per day up to \$10,000 as well as criminal fines or prison. Numerous community association organizations are delving into this issue since it is not thought that this bill was ever intended to impact community associations, but as written, it may indeed have a substantial impact. Associations, managers, and attorneys will need to keep their eye on this law in the coming months.

On March 1, 2024, the Act was declared unconstitutional in a lawsuit brought by the National Small Business Administration. The case is being appealed.

Q & A