

BY DAVID MACK

# Why Hire a Lawyer?

## Lawyers ... You've got to love them.

This being a nation of laws, which they for the most part write, who else can you rely upon to most accurately interpret the rules they have put together for the rest of us to live by? We'd be grasping in the air without their leadership and services.

Ok, so perhaps love is too deep an emotion unless your main squeeze or a son or daughter or sibling is a member of the legal profession. But you've got to at least like them. They help keep the Country running in a somewhat orderly fashion.

I certainly do. Well except for the several on both sides who, in an unfortunately less than amicable parting, ate up a substantial

ably would be a good idea to seek competitive bids from at least three because rates are likely to vary at least somewhat between firms for the same service.

## Look Beyond the Fee

Jim Slowikowski of the law firm of Dickler, Kahn, Slowikowski and Zavell, Ltd., however, said for associations to only consider the fee would be a mistake because a dispute may arise later—say over the terms of a contract—that could have been avoided had a lawyer gone through the document before execution and a board may spend more in fees than it would have with an earlier review. As to why a board might otherwise opt to not seek an attorney's advice or opinion, "the only other reason I can think of is that in certain circumstances (a board) may think getting an attorney involved may scare off the other party and maybe kill a deal they are looking for," Slowikowski added.

share of the collective savings my ex-wife and I had accumulated over our years of togetherness. Oh, those billable hours. There almost went the college education of our kids.

But other than for that experience, my relations with attorneys have been very good. Especially with those who specialize in community association law, many of whom have served as valuable sources of information for the articles and columns I have written. I am sure they have also provided their association clients with sound advice and opinions to keep them out of trouble.

## Why Hesitate to Retain Counsel?

Why then do associations sometimes

hesitate to consult attorneys and then find themselves in water at a much higher temperature than you'll find in a hot tub? The main reason is, of course, as plain as the nose on your face or the ugliness of cauliflower.

"The biggest impediment to boards using counsel is the fear of substantial fees," said Jeff Knuckles, of the law firm of Knuckles, Keough & Moody, P.C. Which is why just about anybody with limited income hesitates to go to a lawyer for advice. Knuckles suggested asking a law firm upfront what it will charge for a specific procedure. "Associations should simply e-mail or write competent counsel for a proposal for fees before the work begins." And, just as for any service, it prob-

## An Ounce of Prevention...

Agreeing with Slowikowski and noting the old adage that an ounce of prevention is worth a pound of cure, Stuart Fullett of the law firm of Fosco, VanderVenmet & Fullett, P.C. said, "if I can address a small problem at an early state, it generally will not become a larger, more expensive problem. I encourage a high degree of communication (up front) to follow a preventive law psychology."

Throughout his experience, Lou Lutz of the management firm Legum & Norman Midwest, has not seen cost or any other reason being a significant barrier to most associations using a barrister. "I have not found boards reluctant to use attorneys," he said. In fact he has seen the opposite too often be true. "If anything, boards may try to avoid responsibilities by using attorneys and that just doesn't work." Directors cannot abdicate their ultimate responsibility for their associations. In some cases, such over reliance on legal assistance has been carried to an extreme. "I have heard stories about boards that ask for a legal opinion on every matter that comes before them."

## Going to the Well Too Often

Fullett, too, knows that some associations are too quick to go to the well of legal advice, having been contacted often when a board could have easily worked through an issue itself. "Associations should not always need to run the day to day operations past their attorney," he said, adding, however, that when a board is really in doubt it should punt. Especially, "if liability is involved, a quick phone call would not hurt."

But Lutz does have a sense based on his many years in the management business that at least a few boards or individual members purposely exclude lawyers from association business to further their own goals or objectives. They, "avoid the use of an attorney because they have personal agendas that are not in the best interest of the community and don't want professional advice that impedes carrying out those personal agendas."

Let's go over now some areas in which attorney participation is anywhere from advisable to absolutely essential.

## Contracts

"Any large agreement, dollar wise, should have counsel's input, particularly to indemnification clauses and provisions we call 'hold-back' (withholding final payment until satisfied with performance)," said Knuckles, as well as, "contracts that are new in format." However, when there is a knowledgeable management company in place, routine vendor contracts shouldn't need a lawyer's review.

As a management professional, Lutz is more emphatic than Knuckles on the point of vendor or service contracts and feels that even some that are beyond routine should not need a legal review when a management firm is overseeing the business. That's because some come in a format that has been developed and vetted over time and are standard for an industry with the language almost set in stone. "Many expensive services are provided through contracts that allow for little modification to the terms such as with elevator service agreements," he said. An experienced manager is familiar with these documents.

Slowikowski believes, however, that contracts for services should always be reviewed by counsel. At least the first in a series as long as successive contracts remain essentially unchanged in terms. "Too many times we have seen an association enter into a simple format contract only to end up in litigation because it was not well written and they were not protected," he said.

## Look for Liability

Fullett recommended that seemingly uncomplicated contracts in which an association may have liability for actions of a contractor be run by counsel. Even, "a one or two page document typically has one sided clauses in favor of the contractor," he said and, "may not provide for adequate insurance coverage protecting the association (and) does not tie the contractor in to dates of performance and the like." Problems such as these, "could be avoided with a few hours from the attorney."

At Villa Management, Steven Heuberger, is also a lawyer and favors contracts reviewed for liability and other legal issues. "I review all contracts of our clients and even draft them when the amount and risk are significant," he said, adding that he would advise all associations to seek legal contract input when those same criteria are involved.

## Amendments to Governing Documents

All sources, both legal and management, are in agreement on this point. Fullett is unequivocal when answering the question should associations seek legal assistance in the modification of their declarations and by-laws. "Absolutely," he averred, "to make sure that the document is worded correctly to accomplish the intended objectives and to conform to applicable law."

## Procedural Requirements

Added Slowikowski, "if an amendment is not adopted by following all procedural requirements correctly, it is more susceptible to challenge or may not be enforceable." Owners may dispute its legitimacy and even contest it in court where a judge is likely to declare it is not worth the paper it's written on, "if the wording is ambiguous as to the meaning of the provision." And an association that embarks on a passage into such troubled waters will find that legal fees it may have saved by unilateral action in enacting an amendment more than offset by what it has to pay its counsel to try the case or negotiate an out of court settlement.

Knuckles added one more reason for involving counsel in preparing changes to covenants. An, "amended document is going to be recorded in the county and, as such, affects title."

## Establishing Rules

Fullett said that participation by counsel in preparing these behavioral restrictions is just as important as it is when a board amends the more authoritative declaration and by-laws so that it is assured that any rules do not contravene those covenants or applicable state or other law. "We have seen rules drafted by associations that would violate the Illinois Condominium Property Act, the federal Fair Housing Amending Act, FCC regulations and/or that completely contradicted the declaration and by-laws," he said.

Slowikowski agreed, suggesting that at least the board run the rules by an attorney

after it has come up with them but before officially promulgating the package to unit owners. Just as with amendments, "rules will not be enforced by a court if they are ambiguous or subject to different interpretations," he said.

## Manager's Perspective on Rules

Heuberger does not think that a legal review of rules is always essential. "If the board and/or its management agent have sufficient experience, consultation with an attorney for adopting

and/or establishing rules should not be necessary," he said.

Lutz indicated that setting up rules does not normally need attorney involvement in the process. That would appear to assume the same situation as described by Heuberger—that the board and management know what they're doing based on past actions.

## Evictions

No disagreement here amongst the legal and management sources for this article. There is really no way to avoid using an attorney in this removal procedure. "Forcible cases must always be the complete responsibility of counsel," said Knuckles.

The legal status of associations in the eyes of the law demands this collaboration between board and counsel. Most associations are not for profit corporations and, said Slowikowski, "the law requires that corporations bringing legal action be represented by an attorney." Of course, any association's legal costs in connection with turning out a resident are added to what an evictee is ordered to pay so there should be less reluctance for a board to try to go it alone, assuming it legally could do so in the first place. Charging, however, is one thing, collecting another.

## Rule Violation Hearings

In most such cases legal representation for the association is not necessary for rule violation hearings. Although, there may be exceptional circumstances. "Sometimes a substantial issue may be involved or the party

involved has threatened litigation so the board may want to have (an) attorney present," Slowikowski said.

Fullett essentially concurs with that view but goes a bit further, recommending legal back up for the board in all cases where, "the other side will be bringing an attorney."

"Heuberger believes it is a matter of how conversant associations and their managers are with the proceedings of such meetings. The more they know, the more capable they should be of working on their own. Assuming a lot of experience on the part, "of the board and/or its managing agent, attorneys should not need to be present or consulted," he said.

The best approach for an association is to evaluate each prospective hearing on a case-by-case basis in deciding on whether to call upon counsel for support.

**Turnover From Developer**

Whether or not a new association needs legal representation at this juncture will be determined by circumstances. It, "depends on the nature of the situation," said Heuberger, who advises boards that, "if there are significant problems with the developer, absolutely hire an attorney."

Fullett's position is that a new association will almost always require legal advice when taking over. There will generally be at least some issues with developers to be resolved related to construction or finances. But, he added, "even if no such developer problems are present, transition from developer control is a complex and crucial step that usually will require at least some consultation with an attorney."

Slowikowski agreed that there should at least be some early dialogue between the first elected board and an attorney so the fledgling directors know what they're entitled to receive from the developer. But he acknowledges that, "an experienced management company can also be helpful."

Lutz, too, sees the wisdom in a first owner board at least touching base with an attorney to get a heads up about their rights and responsibilities at turnover. But in his opinion the process shouldn't normally require extensive involvement of a lawyer because a board will use other resources to facilitate its assumption of control. "Boards should direct and control the transition using management companies, bankers, account-

ants, reserve advisors and other consultants."

**Other Potential Legal Needs**

Slowikowski highlighted a couple of additional areas in which legal counsel should be sought by a board. When, "terminating employees and for opinions when interpretations of governing documents is necessary."

Knuckles added insurance coverage reviews and or civil rights or fair housing issues as other areas of having potential need to retain an attorney.

Fullett pointed to some of the less common business matters with which boards deal such as common element repair loan transactions, reciprocal easement issues and construction and common element license transactions.

Heuberger noted that when new laws or statutes are enacted at the local, state or federal level an association might want an opinion as to how it might be affected. "The board would need to be advised as to how to respond to such legislation," he said.

Lutz offered a general observation regarding any summons to appear in court, which legal counsel should be the second to know about. "Anytime boards have been served with a complaint advising of a lawsuit, they should contact their attorney as quickly as possible," he said.

**Management vs. Legal Advice**

As we have seen in the foregoing, when knowledgeable managers are in the employ of associations, they can advise and assist boards in matters that the latter might otherwise feel compelled to elevate for a legal evaluation. "The experienced manager is the community association's best resource," said Lutz. "Many have experienced most situations and can explain how other associations have successfully handled a challenge. "But can they encroach on the legal realm in even the slightest way?"

Clearly no, warned Slowikowski emphatically. They should stay out of the province of attorneys. "Managers should never offer legal advice unless they are lawyers, he said, although conceding that this absolute prohibition might be modified under certain circumstances short of providing an actual original legal opinion. Management may have had prior experience dealing with problems or issues that normally should be referred to

counsel and may even have a prior legal opinion on a specific concern of a board. In that situation, management, "can give input to the board which may be sufficient for the board to make an initial decision, "without consulting counsel. If such a matter can't be resolved with that level of assistance, then an attorney should be brought in to settle it completely.

Fullett identified some areas in which competent management could offer guidance that falls short of legal advice so that a board would not need to consult counsel. "Many managers are capable of informing a board how a meeting should be run, the appropriate action a board should take for documenting subjects and when it is clear in the documents who is responsible for what maintenance."

**Retainer vs. Fee for Service**

There is mixed opinion regarding the basis on which an association should employ legal counsel. Fullett doesn't look favorably on retainers. "I believe that it is in an association's best interest to pay for services only when needed and not pay when such are not needed," he said. "It has been my experience in reviewing matters from other firms that represent community associations that associations seem to receive a 'one size fits all' approach to their legal issues under a retainer."

Heuberger said that it depends on the knowledge and expertise of the board and/or its management company. When they are experienced and would need little attorney assistance, a fee for service would seem to be most prudent.

Lutz, on the other hand, holds a contrary view when it comes to paying for legal assistance at least with respect to a couple of associations that Legum & Norman Mid-West manages. "I deal with two associations that have a well qualified law firm on a retainer basis," he said. "In those instances these associations are receiving excellent legal advice for a nominal fee."

**D & O Insurer Problems?**

The question arises as to whether a D&O insurer would ever reject or be resistant to a claim arising from board action that should have been preceded by consultation with an attorney but was not and a lawsuit was initiated against the association?

"I have not seen this with any D&O insurer," said Slowikowski. "They may not be

happy that a board got into 'hot water' because they did not consult an attorney but I have not seen an insurer reject a claim for that reason."

Heuberger has not found this to be a problem either. "As far as the director and officer liability policies that I have reviewed, I did not find any exclusion of coverage because the insured did not retain an attorney for consultation."

Lutz doesn't believe that insurers have the authority to reject claims because of the lack of a lawyer's involvement. "An insurance carrier has an agreement to provide a service under contracted situations," he said. "It is not their role to advise the boards to use or not use an attorney."

#### **When Associations do not use Attorneys**

Pat Costello of the law firm of Keay & Costello, P.C. has had many experiences with associations that failed to use attorneys when they should have, especially in the area of terminating various kinds of vendors. Usually that has involved ignoring contract provisions regarding adequate notice, the need to provide

an opportunity to cure defects or terminating without cause when a cause was required.

"The board is then being threatened with litigation and, after the fact, tries to develop the cause to fire the vendor," he said. Usually a board has, "to pay something to terminate the relationship with the contractor/vendor or get involved in defending litigation." In many of these cases, the associations signed contracts without attorney consultation beforehand, jeopardizing their interests from the outset.

Costello recalled a specific situation in which a board denied a disabled unit owner's request for a special parking space on the basis that no one in the association was provided with a special parking space. The directors failed to contact their attorney before making this bad decision. The unit owner retained counsel who threatened federal litigation on the basis of not making reasonable accommodation for a disabled/handicapped person under fair housing law. After being advised that this would be a losing case for the association, "the board not only acquiesced to the owner but had to pay some costs and attorney's

fees for the owner's counsel," said Costello.

Sometimes boards believe they can get along without an attorney's assistance only to realize too late that they were mistaken in judgment. In a case that Knuckle's firm had been involved in, an association delayed too long in bringing in an attorney to pursue construction defects. The board, "waited beyond the warranty claim period to ask our advice, greatly impeding any relief possible," he said. "Their efforts at negotiating were quite lengthy and the developer cut off all conversation the day after the warranties expired."

In the final analysis, boards must strike a balance between making decisions on their own or with management and requesting legal input beforehand. It may take some time before a new board will feel comfortable in asserting its independence in action, but with time and experience as well as through a growing knowledge of its rights and responsibilities under the law and governing documents, it and its successors should arrive at that desired state of self assurance. ■