Legal Focus: Playing by the Rules in 2013

by Kathy Danforth

Though challenging, rule of law is superior to fist-fighting and other physical methods of resolving differences of opinion. As long as people have opposing interests and new situations are arising, however, the lines of legality will continue to move. "Between current laws, proposed legislation, and new court decisions, the rules of engagement keep changing," according to Donna DiMaggio Berger, Esq., with Katzman Garfinkel & Berger. "It's tougher and tougher to be a board member."

A number of organizations are involved in representing the interests of community associations in the legislative arena, playing both offense and defense. "The Community Advocacy Network (CAN) has been involved in shaping community association legislation since 2007," reports Berger.

"We have a pretty comprehensive and ambitious agenda each year and the last couple of years the Florida Legislature has given a lot of deference to the CAN agenda. We were instrumental in crafting the demand for rent language so that the associations can collect rent directly from tenants when a delinquent owner is not paying the association, as well as giving associations the authority to suspend the right to use the common areas by delinquent owners. We also saw a long-standing goal become a reality with owners in older high-rises finally getting the right to opt-out of installing sprinklers if they choose to do so."

Another organization, the Community Association Leadership Lobby, also had a busy legislative year. "During the 2012 Legislative Session, CALL focused most of its attention and efforts on bills that would have improved the financial situation of associations and their ability to collect unpaid assessments," says Yeline Goin, Executive Director for CALL. "For instance, HB 319/SB 680 would have discouraged litigation and excessive collection fees and helped to prevent the unnecessary delay of foreclosed unit re-sales. Also, HB 213/SB 1890 would have given associations the right to move stalled mortgage foreclosure cases by using an expedited order to show cause procedure. Although these bills passed by overwhelming margins in the House of Representatives, they stalled in the Senate and did not pass." CALL expects that modified versions of these bills will be introduced during the 2013 Legislative Session and, according to Goin, "CALL will continue to work with the sponsors to ensure the passage of the bills." CALL will also be lobbying for additional changes to the statutes including clarifying HOA election procedures, fixing certain insurance glitches, and exempting small HOA pools from regulation.

The 2012 legislative session did not pass major legislation affecting community associations, but the one that got away—HB 319—is worth noting as it may reappear. "Last year," Berger explains, "everything ground to a halt for a couple of reasons. It was a redistricting year, so legislators were distracted by what their districts would be. We knew that not a lot of policy was going to happen, and true to form, HB 319 passed out of the House and died in the Senate."

Berger describes several aspects of the bill. "We wanted to require that homeowner associations and cooperative directors also be certified like condominium directors to create parity. I don't know that there's a compelling argument that condominium directors should be certified to serve on their boards and not their HOA and Cooperative counterparts," she remarks. "We want directors to be fully aware of the significance of their service. The bill had language that would remove the 2015 deadline to upgrade elevators to Phase Two firefighter standards so costly upgrades could be held at bay until a major repair or replacement is necessary."

"The main aspect that killed the bill was a Safe Harbor clarification," Berger explains. "In Florida, there's a cap for banks on their liability for back assessments when a bank takes title, which is the lesser of 12 months assessments or one percent of the original mortgage. This was an incentive for banks to make loans in these communities, knowing their liability would be capped."

"The ambiguity," according to Dan Wasserstein, attorney with Weissman Nowack Curry and Wilco, "is that it doesn't list other pre-occurring items such as late fees, attorney fees, or interest. A lot of advocates for associations have said, 'These items are not specifically reduced, so I'm going to get that back in addition to the small assessment collection.' House Bill 319 was going to add those terms in so the one percent or 12-month cap would be all-encompassing. The associations would be potentially losing out on those late charges, interest, and attorneys' fees that they expended and are sometimes collecting."

"I've heard some attorneys say it would give clarity if those items were listed because there would be no dispute and short sales may be executed faster. I believe it would be beneficial to clarify the statute, but the other way to state that the lender has to pay the one percent or 12 months plus the other prior line items," Wasserstein states.

Berger advises, "The Safe Harbor aspect was not our language, but to the extent that associations might be duped into being aggressive,

not knowing they could be sued later, we were led to ultimately support the clarification. It's too easy for someone to tell an association that you can bill for the additional costs, but later it is the association who will be sued. In the past, banks were busy and conceded to demands, but their eyes are wide open since last session and they may come after you. Depending on the cause of action they bring, a bank can go back a couple of years, so it may be easy in-easy out with that money."

"It would be wonderful if we could bill banks for 12 months of assessments plus late fees, interest, and attorneys' fees," Berger agrees. "Twelve months of assessments don't come close to making an association

whole. But you have to understand political realities—those proposals don't survive the first day of session. The Florida Banking Association is an incredibly strong lobby. It doesn't mean you don't fight, but in legislation, incremental change is the best way to accomplish what you ultimately want. Take tiny bites at the apple over the years and soon enough you've eaten it all. Swing for the fences and often you strike out."

Michael Ungerbuehler, attorney with The Association Law Firm, adds, "In my opinion, the statutes are sufficiently clear that associations can collect interest, late fees, costs, and attorneys' fees from the bank. The argument that 'courts are giving different opinions' is not a reason to argue that going from what it is now to collecting assessments only is beneficial to associations. Different rulings result from preparation by different attorneys and the specific facts in each case. I am shocked that anybody would say that having a law specifically state that a community cannot now collect additional costs from the bank would be a 'win' for associations and will somehow give them more money."

Regardless of your view, the substance of HB 319 will probably not vanish. Roberto Blanch, attorney with Siegfried, Rivera, Lerner, De La Torre, & Sobel, states, "HB 319 did include various topics that are sure to make a comeback upon the commencement of the next legislative session. The proposed revisions that may be included among new bills expected to be presented in upcoming legislative sessions may include these topics: 1) proposed limitations to time periods for filing election disputes; 2) proposed expansion of safe harbor protections afforded to lenders acquiring title to units in foreclosure or by deed in lieu of foreclosure; and 3) increasing perceived protections to personal information that may be revealed during inspection of association records by other owners or their representatives."

Ben Solomon, attorney with Association Law Group, reports, "Now there is talk that although a similar version of HB 319 will be reintroduced during the next legislative session, this time it will not include the bank bailout language. If that happens, I believe associations and their attorneys are very likely to support the bill."

Berger shares proposals that CAN hopes to introduce in the next session. "We want to bring back board certification and our elevator retrofit language. Another idea we think is reasonable is to reduce the foreclosure notice required to lien and foreclose on banks that have taken title to property and are now the deadbeat owners in an association. They're in the industry and certainly aren't the 'least sophisticated consumer' deserving of lengthy statutory notice. Frankly, associations should not have to give banks 60 days notice in a condominium or 90 days notice in a HOA prior to enforcing their rights. We want to go straight to lien if banks are not paying their fair share."

Though no legislation with a widespread effect passed in 2012, some bills will affect specific situations, and associations are still flexing their muscles with the measures passed in 2011. Solomon says, "In particular, associations are taking good advantage of the new rent demand law pursuant to 720.3085(8) where they can now demand rent from occupants living in units where the owners have stopped paying their maintenance fees. Our association clients have already collected hundreds of thousands of dollars in rent receipts from tenants pursuant to such new statutory right, which in some cases has become an important lifeline."

Wasserstein concurs, recalling, "I've seen my clients avail themselves of the tenant rent demand letter to directly demand that a tenant pay rent. It's been very successful as an additional way to combat delinquencies. There have been some issues with that, however, as the association is allowed to evict under the statute if the tenant does not pay, but the association cannot then take possession and put a new paying tenant in the property because the association really isn't the owner of the property. The eviction in and of itself can still be a benefit in the circumstance where the tenant is detrimental to the community. However, if the tenant just disregarded the rent demand letter, possibly because they were afraid of not paying the owner, but they're good and quiet tenants, it's probably better to have someone in the unit running the air conditioner and taking care of the place rather than to remove them and have a unit sit vacant."

Changes Enacted

Changes this year included extension of the Distressed Condominium Relief Act in addition to revisions affecting continuing education requirements, scope of warranties for residential construction, and dock fees.

Blanch reports that HB 517 included an extension to the expiration date of the Distressed Condominium Relief Act from July 1, 2012, to July 1, 2015. "This bill will enable bulk buyers and bulk assignees to continue purchasing condominium units in bulk without the exposure that historically plagued 'successor developers' prior to the enactment of the Debt Relief Act," Blanch explains.

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Michael Hyman, Esq. and Shari Wald Garrett, Esq., attorneys with Hyman and Mars, note revisions with regard to Chapter 468. "Changes provide that the continuing education requirements for reactivating a license may not exceed one renewal cycle of continuing activation. This will ensure that managers have been educated and remain current with the law as it changes from year to year," they relate.

Hyman and Garrett also note, "With regard to Chapter 553, there is no longer a common law implied warranty of fitness and merchantability on 'off-site improvements,' which includes an association's community amenities such as roadways, drainage systems, play areas, swimming pools, and clubhouses. As a result of this statutory change, if problems arise that are caused by the general contractor due to faulty construction, the developer may no longer be held responsible. Please note that this does not, however, limit the association's ability to file other legal actions such as negligence, violations of the minimum building code, and breach of contract."

As background, Ungerbuehler explains, "A case was decided by the fifth appellate court where an association sued a developer and the appellate court expanded the implied warranty to all infrastructure. In light of that appellate court decision, the developers had a knee-jerk reaction and lobbied to get legislation passed, using the argument that it must be done to protect the economy. The flip side is that it's going to hurt associations. I don't think there should be legislation to further remove warranty rights—their contracts are their opportunity to defend themselves. With the economy as it is, human nature says that people are cutting corners. It can take six to eight years for construction defects to become evident, and this bill accrues to all construction before the effective date of July 2012 as well. Board members aren't construction experts; this will require more inspections and costs will rise."

Lisa Magill, attorney with Becker & Poliakoff, believes that CS/HB 1013 is the most crucial change for associations, and states, "This law reverts to the strict doctrine of *caveat emptor* (let the buyer beware), even when the buyer essentially cannot become aware of the risks associated with buying a home in a homeowners association. It is anti-consumer legislation. In a typical real estate transaction, the buyer pays for a home inspection before they complete the purchase of a house… to learn whether there are conditions that impact the value of the house. If the inspection reveals costly problems, the buyer generally has the ability to cancel the contract. But a buyer doesn't know whether retention ponds in an HOA have the proper slope, whether the storm drains and pipes are big enough to carry a sufficient amount of water, or whether the sidewalks were poured properly. Typically, the association only learns about these types of defective conditions as a result of an engineering study performed after transition. Moreover, an HOA doesn't have a choice when it comes to ownership or responsibility for neighborhood improvements. Its responsibilities are dictated long before any shovel hits the ground."

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Magill observes, "It is curious that the legislature chose to enact consumer-oriented safeguards protecting timeshare buyers (who may or may not be Florida citizens) while at the same time leaving Florida owners or prospective Florida homeowners without adequate remedies."

Blanch concurs, saying, "This bill [HB 1013] was proposed and adopted under the guise of protecting public policy and results in limiting claims by homeowners and homeowner associations based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for a new home."

Berger states that HB 13 will be significant to associations.

She explains, "This legislation relates to dock space in multi-family communities, and removes some of the monetary inequities and overregulation that the state has historically imposed on dock owners in multi-family communities."

Magill specifies benefits: "The changes on submerged land lease set renewal terms at 10 years, exempts private residential multi-family docks from sales tax, and exempts 10 square feet of dock space from fees for every linear foot of shoreline in which the lessee has a sufficient upland interest."

In the Courts

As communities go down the path of foreclosing on homes in their communities, questions have moved into the courts regarding the associations' relationship to the debt owed or incurred after taking title. Wasserstein reports, "They're trying to work out in the appellate courts right now what it means for an association to foreclose with regard to the prior debt and what it means going forward for new assessments. If an association takes title and owns a property, what happens to the money owed? By doctrine of merger, did that merge into their ownership so they lose the right to collect? If they hold the property for a year, can they add on assessment charges for the next owner, if it's not rented, or is it an expense they have as the owner that must be spread over the existing paying owners?"

Associations take title to a property with the purpose of recovering losses, not dismissing them. Berger comments, "When an association takes title via their own foreclosure subject to the outstanding loan, the concept of joint and several liability says that both the current and the past owner are jointly and severally liable. A pending lawsuit will decide whether an association should be treated as the previous owner for joint and several liability purposes." The outcome of that case and similar cases could affect the balance sheet decision as to whether the potential rental income gained by the association taking title would offset losing rights to collect debts against third party purchasers at a lender's foreclosure sale. "If the ruling is beneficial to associations, we will propose a statutory amendment to clarify that associations are not to be considered the previous owner for joint and several liability purposes," Berger adds.

The main concern and legal activity for most associations continues to be financial recovery. Jonathan Mofsky, attorney with Siegfried, Rivera, Lerner, De La Torre, & Sobel, observes, "Associations are using

their lien rights in order to avoid the issues that arise with bank delays in foreclosure cases, as delays have become the norm in the aftermath of the recent robo-signing scandal, foreclosure moratoriums, and related mortgage crisis. The strategies… involve working closely with their attorneys and managers to properly evaluate lender foreclosure cases, assess the condition of subject properties and ownership interests, and develop a cost-effective streamlined course of action to maximize the association's recovery."

"After title transfers, associations can either list the property for rent or sale, subject to the association's governing documents, but the process is different from a typical lease or sale. For leases, associations, as owners, should work with their counsel to ensure that the lease terms comply with the leasing restrictions and requirements set forth in the community's declaration and bylaws; as leases for association-owned properties are not exempt from tenant screening procedures, minimum lease terms, and other provisions contained in the association's governing documents. In addition, appropriate disclosures should be included in the lease agreement regarding the superior mortgagee, unpaid real estate taxes, and other issues, which may affect the tenant's interests in the leased property. Such disclosures will protect the association against potential claims by the lessee if the property is subsequently sold through a foreclosure auction or tax sale," Mofsky states.

Solomon warns, "Associations need to be as aggressive as ever in collecting their past due assessments, especially from banks that become new owners through their own foreclosures. What we have seen is that many banks do not pay their assessments even after they take title to units through foreclosure until the association files a new lien and potentially even a foreclosure against them. The general rule is that associations still need to apply the maximum legal pressure against defaulted parties to collect as much as possible as quickly as possible."

Tending the Homefront

To keep progressing economically, Magill notes, "Community association leaders need to pay attention to financing requirements or guidelines. While much of the momentum is now fueled

by foreign investors (spending cash for purchases), long term viability of these communities depends upon the ability of new purchasers to obtain purchase financing. Communities that do not qualify for FHA/VA financing or financing backed by secondary markets (for example, Fannie Mae, Freddie Mac, and the like) are sure to suffer, while properties that do qualify for financing are likely to increase in value.

With boards routinely having to pursue legal recourse for delinquent fees, Berger cautions, "There are boards who will shop for what they want to hear, but they're not doing themselves a favor. You need to get the right advice and follow it."

Though finances are the focus, associations do need to tend to other details of life. Ungerbuehler reports, "I see some associations going back and reassessing their rights with regard to cable providers using their properties."

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DAVID B. HABER, P.A.

Emily Newell, attorney with the Law Office of David B. Haber, PA, points out an ongoing issue, "Associations and property managers need to be aware that different statutes apply to condominium associations versus homeowner associations. For example, the statutes vary with regard to lien and assessment rights, enforcement/governing rights, and notice requirements."

Barbara Billiot Stage, attorney with the Law Offices of Stage and Associates, feels, "A lot of litigation would be saved if the state would create an oversight agency to address some of the problems within communities. There also need to be term limits for board members. While I know that many of the associations cannot get people to agree to be on the board, there is a real problem that is ruining many communities when you have long-time board members who become too comfortable with their positions and start using the power to create 'HOA drama.' HOA drama is the biggest problem in this state regarding associations, and while

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the boards are quick to say it's the homeowners, a lot of times it's the result of the approach the association has that puts the owners on the defense and they react. There has to be a better way. I refuse to represent associations that want to use my services to bully and abuse owners."

Magill observes, "Community association leaders are unfortunately between a rock and a hard place in terms of aging infrastructure, especially in the Housing for Older Persons (over 55) communities. Fixed incomes prevent many seniors from investing in infrastructure or building enhancements that may vastly improve quality of life. It breaks your heart to hear about elderly and infirm residents 'trapped' in their apartments when the elevator breaks or there is a loss of power. Failing to attend to the critical structural needs of the buildings only jeopardizes the safety and health of the residents even more, but community leaders cannot be effective without the funds necessary to engage in pro-active maintenance and repair."

A positive trend for saving money, which Magill notes, is water and energy conservation. "We hear of more and more community associations employing Florida-Friendly landscaping, engaging in water conservation methods, and taking other actions to reduce their energy costs," she advises. Those measures frequently include installation of LED and energy-efficient lighting, electric charging stations for vehicles, and geothermal pool heating.

"Everything ties back to enforcing regulations of communities," Ungerbuehler remarks. "I see associations put that on the back burner because they're all hurting for money."

Unlicensed Practice of Law: Revisiting the Boundaries

In line with the consequences of stepping outside the law, The Florida Bar's advisory committee on Unlicensed Practice of Law (UPL) is currently reviewing the guidelines for CAMs. Due to and despite the regular dealings that managers have with legal matters, both boards and management need to recognize and strictly adhere to restricting manager actions to ministerial duties rather than interpreting and practicing law.

Stage points out one of the difficulties—"The law needs to be very clear, though, because the Court is asking a non-lawyer not to practice unlicensed law, and the method they are using takes a lawyer to figure it out because of the legalese."

Hyman and Garrett recount the test developed by the Supreme Court in *The Florida Bar versus Sperry* to define UPL: "If the giving of [the] legal advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services constitute the practice of law."

They note, "Accordingly, it is generally understood that the practice of law is the giving of advice, the drafting of legal documents, and the representation of clients in legal negotiations and court proceedings."

In 1996, the Supreme Court provided further clarification. Laura M. Manning-Hudson, attorney with Siegfried, Rivera, Lerner, De La Torre, & Sobel, explains, "In 1996, the Supreme Court of Florida reviewed an advisory opinion issued by The Florida Bar on cases involving the activities of community association managers that constituted the unlicensed practice of law. The court's review of the advisory opinion held that property managers can take on ministerial actions that do not require legal expertise and interpretation, including the completion of forms for the state's office of corporations and annual reports; preparation of first and second notices for elections and ballots; written notices of annual meetings; board meeting and annual meeting agendas, and affidavits of mailings.

"However, the advisory opinion adopted by the court also found that managers would be engaging in unauthorized legal practice if they should prepare claims of lien and satisfactions of claims of lien documents, as these documents require legal descriptions of the property and establish the lien rights of community associations. The opinion also held that the drafting of a Notice of Commencement form also constitutes the practice of law, as does determining the timing, method, and form of giving notices of meetings, and determining the votes necessary to take certain actions—because such determinations necessitate an interpretation of Florida law and the association's governing documents. In addition, responding to the association's questions regarding the application of the law to specific matters being considered and

advising the association that a specific course of action may or may not be authorized under the law also constitute the practice of law by a CAM.

"In the latest meeting of The Florida Bar's advisory committee, many of the committee's prior opinions remained consistent; however, there were four matters that the committee determined required clarification. Specifically, the committee determined that the term "modification" needs to be defined in terms of what "modifications" a property manager may make to a limited proxy form and whether those modifications are material or ministerial. The committee also requested an opinion as to whether a property manager may prepare documents concerning the rights of the association to approve prospective owners; draft the pre-arbitration demand letters required by Section 718.1255, Florida Statute; and identify, through review of title instruments, the owners who are required to receive pre-lien letters."

Manning-Hudson believes, "While stricter definitions make the determination of what is the unlicensed practice of law easier to resolve since the line is brighter, associations may argue that they will have to incur more expenses in legal fees. However, there are a plethora of legal decisions that evidence the complications surrounding the issues created by managers who take on legal responsibilities… which ultimately result in the association incurring more in legal fees to correct the mistake than it would have spent had it originally used the attorney."

Stage's opinion is, "I agree with the Florida Supreme Court regarding this topic. While I am all for my associations operating without my services as much as possible to save money, I have witnessed some horrible statements by CAMs that would have gotten the associations in trouble had they followed the CAM's advice… One issue that has given my associations a lot of problems is CAMs preparing and filing liens. Mistakes encumber the wrong property and are not easy to fix sometimes—like the CAM in South Florida who filed one lien against 109 properties owned by 109 individuals."

David B. Haber, of the Law Office of David B. Haber, P.A., comments, "Our firm has experienced numerous situations where the involvement of legal counsel is necessary to avoid the property managers expanding their role to include matters that they should not handle on their own. To avoid managers and associations

becoming implicated in the unlicensed practice of law, we have worked proactively and cooperatively with the managers of associations to educate and inform them in advance of the types of matters, which can involve legal issues and/or have legal ramifications, so that they do not have to guess. The best possible outcome for the association is achieved through this cooperation of management and legal counsel.

"We believe that a broad spectrum of issues should have the involvement of the association's counsel to avoid the association's manager being afoul of the UPL guidelines. Some examples of those issues are: requests for ADA handicapped spaces and how to interpret the law regarding the number of spaces and where they must be provided; illegal short-term rentals and what enforcement actions can be taken legally to prevent same; what actions the board may or may not take against owners who are delinquent on their assessments; what is or is not a material alteration to the common elements; changes to the rules and regulations and whether those new rules are enforceable in light of the specific terms of the declaration and the Florida Statutes; how to avoid claims of selective enforcement of the declaration and the rules and regulations; tenant or owner screening and background checks; what constitutes adequate insurance coverage and how the coverage affects pending claims when you change insurance companies; how and when to notify the insurance carrier of a claim or potential claim; what constitutes a claim or potential claim; negotiating vendor contracts; pet restrictions and the enforcement of same; how to address the responsible party or parties to pay for leaks, water damage to units, and drywall repairs; what is maintenance versus capital expenditures; what is a common element versus a limited common element and who is responsible for the repairs to same; how to propose and carry out a special assessment; and what to do when a unit owner wants to expand the unit to include common elements or limited common elements."

Haber also states, "It is important that property managers are aware that so many actions of the manager and the association are controlled by the specific language contained in each association's Condominium Documents, the Florida Statutes, and the Florida Administrative Code and opinions and decisions of the Division of Condominiums.

Oftentimes, the issues, which are raised in your association, have been addressed in prior court rulings or administrative opinions/rulings by the Division, so checking with the association's counsel on these matters can avoid future litigation and/or administrative complaints to the Division by unit owners against the association."

Ken Direktor, who leads Becker & Poliakoff's team of 30-plus attorneys focused exclusively on community representation, recognizes, "An awareness of legal issues is part of a manager's job… That said, an awareness of the issues and the training to provide legal advice are two different things. While a manager can certainly reproduce a form authorized by the statute, the contents may require legal analysis. For example, an estoppels letter includes an account balance. That seems fairly straightforward. However, who determines what interest rate is authorized by the governing documents? Whether late charges are authorized by the governing documents? Whether the assessments owed were properly adopted, whether as periodic payments due pursuant to a budget or a special assessment?"

However, Ungerbuehler reports, "I'm not seeing the substantial harm to the public that is being claimed. I believe the Florida Supreme Court was sufficiently clear in 1996 about what it considered to be UPL, and I don't believe the committee that has brought up the issue has proven that it's necessary to go back and change it. There are rogue people everywhere in every profession, but I believe there's enough direction in the 1996 opinion to allow the CAMs to function properly. Trying to practice law without a license is a third-degree felony—I think that's a significant deterrent."

Ungerbuehler comments, "Some of the biggest issues that were supposedly a problem were how much is owed on a delinquent property or how many days notice must be given before a meeting. Those are pretty clear. I think much greater harm will come from pulling a lot of work from CAMs and sticking it to attorneys and having attorneys do ministerial tasks doesn't seem appropriate."

Berger also questions whether there is a clarification

issue that even needs to be addressed. "We submitted a letter to the standing UPL committee and urged common sense and a clear distinction between following the law and practicing it. What's putting pressure on the situation is current economic conditions. Boards may pressure CAMs to do things they're not authorized to do, and to the extent a manager is able to say 'I can't do that,' further clarification may be a good thing. But you don't need to pick up your phone and call your lawyer to know how many days of notice to give or what constitutes a quorum."

Berger volunteers, "In my experience, I don't see managers wanting to play lawyer. I do see some volunteer board members or retired lawyers who aren't admitted in Florida who don't always give the best legal advice."

Wasserstein states, "The managers I work with are very mindful and make sure they don't engage in UPL, but it's an interesting, fine line. An association is already paying for a manager, and there's an expectation that they can give some advice since they're obligated to be familiar with the statutes, laws, and documents. If it's a fact—how many days notice to give or the terms of directors—that's not UPL. We do need more clarity as to what are the realms of questions and answers they can give."

Wasserstein recalls an instance when a manager called in the evening because they had a tie election vote and were going to re-vote. "There's a specific procedure outlined in Florida administrative code for the case of a tie," Wasserstein explains, "and I had to tell him you have to re-notice and have the runoff 21–30 days after the tie. Someone could raise questions later if it's not done properly."

"Part of the problem is it's a legal opinion to know if you need a legal opinion," Wasserstein adds, "so that's why you need clarity. Clarity protects everyone—the board, who has a fiduciary duty; and managers, so they will know what they can't say. Management is not charging more for taking risks; they want to be protected."

"A better approach to cutting costs," Wasserstein suggests, "is to do research first. Many managers are very good and can potentially cut down on attorney time when they do some of their own research and then check with the lawyer to obtain confirmation that what they

have uncovered is the state of the law. I'll also know if there's anything to add; where they may just know the governing documents, I may know an important case or subsection of a statute. An attorney adds value there."

"Clarity in the law is certainly desirable, but clear and regular communication between the association's board, manager, and counsel are the best way to increase operating efficiency, control cost, and protect the association's legal interests," Magill states. Your lawyer will be the best judge as to when a legal opinion is involved.

Regardless of whether one favors more clarification or considers it an encumbrance, the Florida Bar is expected to submit their advisory opinion to the Florida Supreme Court in the next few months. Until and after that time, it is prudent to err on the side of seeking legal counsel for any areas of doubt. Manning-Hudson reminds associations, "Association boards should bear in mind that the preparation of claims of lien, Notices of Commencement, and other legal documents do not typically incur significant attorney fees, but the ramifications of problems with these documents and forms can prove to be very costly. It is simply not worth the risk for associations or their managers to prepare these documents in order to avoid the relatively nominal legal fees, and thereby also risk exposing the managers to potential fines and license issues."

Hyman and Garrett state, "The bottom line for all managers is to draw a bright line with the association that they manage as to those functions that must be referred to association counsel." While job descriptions are usually rather inactive files pulled out for performance evaluation purposes, they may include important boundaries for CAMs that are not to be trifled with. Regardless of the Supreme Court's decision, all parties should make sure that tight finances, inattention, or other factors do not divert a community from making sure their legal actions are directed by competent, licensed counsel. The rules are constantly changing, the stakes are high, you're responsible for other people's money, and it's against the law… practicing law without a license should be a road not taken. ■