

Your HOA Got Served: Now What?

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The unfortunate reality for many community associations and their boards of directors is that at some point in their existence they will be sued.

When that happens, there are a number of basic but important "to-do's" and "to-don'ts" that warrant the association's consideration, and where appropriate, action.

This article highlights some of those. But first, the disclaimer. After all, what would an article authored by lawyers be without a disclaimer?

DISCLAIMER: Developing an appropriate and prudent response strategy to any lawsuit necessarily depends on the facts and circumstances surrounding the particular suit, its allegations and claims, and the association's objectives in relation to the suit. One-size-fits-all packages do not exist in litigation.

The To-Do's:

Preserve records. Associations, like all other litigants, are obligated to maintain and preserve records and information that may be pertinent to the lawsuit. Failure to do so could harm the association's case. If an association's records are maintained by a third-party property management company, steps should be taken to ensure the management company is maintaining those records. Consult with legal counsel upon receiving notice of the suit to ensure proper steps to preserve records are implemented and followed.

Insurance. If the association and/or its board members have been sued, the association may have liability insurance that will cover defense costs and may also afford indemnity coverage. The association's carrier should be notified about the suit as soon as possible, and the association should take care to follow any requirements in its policy concerning giving notice of the claim. If there are any excess carriers, the association should ensure they are likewise notified of the lawsuit. The association should also review its policies, or work with legal counsel to review them, to become generally familiar with their content. Doing so will help the association identify any pertinent obligations it has under the policies as well as any policy language that may limit coverage for the lawsuit. It is also helpful to understand at the outset of litigation, that as a general rule, insurance carriers are not in the business of funding counterclaims and often decline to cover the costs associated with those claims. As such, any counterclaims the association or its board may wish to pursue may fall outside of the association's policy and require payment directly from the association's coffers.

The To-Don'ts:

Sharing information. When an association or its board is sued, board members often face mounting pressure to keep the membership informed of every detail of the litigation process, and understandably they tend to desire to share as much information as possible. But this is a context in which oversharing or sharing the wrong information can come at a steep cost. Safeguarding confidential and privileged information during a lawsuit is crucial to maintaining any privileges attached to that information. To that end, it is important that board members not disseminate confidential and privileged information to third-parties, which includes the association's membership. Examples of confidential and privileged information include discussions with the association's legal counsel concerning the case and draft work product provided by counsel. That said, it is appropriate for the board to keep the association's membership generally informed of the suit and its progress. To the extent there is any question as to what information can be shared by the association and its board in the context of litigation, seeking the input of counsel can prove invaluable in preserving privileges while keeping the community generally informed of the litigation process.

Don't hold back. It is crucial that the association empower its legal counsel to defend the case by sharing at the outset all known facts and documents that are or may be pertinent to the lawsuit. While there may be a temptation to save on legal costs and fees by self-editing or otherwise limiting the information shared with counsel to what the board deems relevant, proceeding in that fashion can cause significant problems in a case. In this context, it is crucial that the association's board be as transparent as possible with counsel and err on the side of oversharing. The old adage "forewarned is forearmed" applies well here.

Trying to navigate the litigation process while also balancing the challenges inherent in running a community association can be a daunting task. But with a little foresight, foreknowledge, and an experienced and responsive legal team, a task that can be managed.

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