

THE PROPERTY LINE

Avoiding Litigation from the Litigator's Perspective



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Litigation distracts community directors and managers from doing their job. Litigation requires time commitment for trial preparation and emotional commitment at various stages of the litigation process as the level of stress, fear, and excitement fluctuates. These distractions negatively impact communities from their optimum operations. To avoid litigation, directors and managers should consider the following guidelines and alternative dispute resolution options:

1. Put It in Writing.

An agreement to do something (or not to do something) should be put in writing. The agreement must clearly set forth the respective party's obligations to each other. You run the risk of being unable to enforce the agreement if it is not put in writing, or if the agreement is drafted poorly. An agreement is drafted poorly from a legal standpoint when it contains ambiguities or contradictions subject to multiple interpretations giving grounds for contention or dispute down the road.

2. Read the Agreement.

Poorly drafted agreements are often the source of disputes. One of the ways to test if the agreement is drafted properly is to read the agreement and see if you can clearly understand the stated obligations in the agreement. If you feel uncomfortable or have doubts, hire an attorney to negotiate, draft, or review agreements involving important financial or legal implications.

3. Hire an Attorney to Avoid Litigation.

California's statutory business judgment rule embodies the reality that directors are human beings capable of making mistakes. The business judgment rule codified in Corporations Code Section 7231 protects directors from personal liability if they make decisions which may result in damage or loss to others. In order to receive the protection of this rule, directors must act in good faith and in the best interest of the association and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

In performing the duties of a director, directors are entitled to rely on information, opinion, or reports prepared or presented by competent attorneys or other professionals on the matters under consideration. (Corporations Code Section 309.) Accordingly, if directors cannot fully understand the terms of the agreement, directors should hire an attorney to review the agreement, which is what an ordinarily prudent person in a similar situation would do.

Although the cost of hiring an attorney can be a concern from a business perspective, it is not a prudent practice for directors to take the risk of getting sued for approving an agreement that they do not fully understand. The benefits of shifting the burden of reviewing and drafting the agreement to the attorney can outweigh the costs, especially if the attorney can at the onset help the parties to avoid, or reduce the costs of, litigating the case later.

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4. Mediation.

Mediation is commonly used to resolve disputes prior to litigation. A mediation is not a hearing and the mediator does not decide the merits of the case. The fact that the outcome of every case is uncertain is an inherent aspect of the mediation process and often, that is why mediation works. If the parties could be certain about their case outcome, there would be no need for mediation.

Mediation is a great tool for resolving disputes informally because it gives the opportunity for the parties to discuss their issues, clear up misunderstandings, and arrive at resolutions based on what the parties want instead of what the judge or jury might decide. Mediation is also significantly less expensive than formal litigation and usually the parties share the mediator fees equally.

Also, unlike court cases, mediation is typically conducted privately, and the information and documents are exchanged in confidence. Throughout the entire process, the parties have full control of the outcome since the mediator does not make any binding decisions and there is no admission of fault or guilt. A settlement agreement is reached only when all parties agree to settle the dispute. Mediation works and benefits the parties only when they desire to resolve the dispute in good faith. Mediation will fail if the parties approach mediation nonchalantly or merely as a matter of formality.

5. Tolling Agreement.

A statute of limitations is the deadline for filing a lawsuit. The statute of limitations is different for each type of claim. For example, a breach of written contract claim is subject to a 4-year statute of limitations pursuant to California Code of Procedure (CCP) §337. Personal injury claims following a car accident have a 2-year statute of limitations pursuant to CCP §335.1. An action for latent (or hidden) defects in construction must be brought within 10 years after substantial completion of the project pursuant to CCP §337.15. Often, research of applicable laws and factual analysis are necessary to determine the exact date a statute of limitations began to run and will expire.

Once the statute of limitations on a claim expires, the claim is no longer valid and cannot be enforced by a court. Filing a lawsuit with the court stops the applicable statutes of limitations from running, so the lawsuit must be filed before the statute of limitations expires. An agreement to mediate the dispute does not have the same effect as filing a lawsuit. A “tolling agreement,” however, stops the applicable statutes of limitations from running while the parties negotiate to resolve the dispute without filing a lawsuit.

A tolling agreement is a written agreement between the parties to a potential lawsuit to suspend the statute of limitations from running for an agreed amount of time. The tolling agreement should be drafted by an attorney with the following objectives in mind: (1) encourage settlement of the dispute by establishing certain tasks (e.g., exchange documents and information) and deadlines for the parties to negotiate and abide by before plaintiff files a lawsuit to enforce legal rights; (2) increase the claimant’s leverage by retaining the threat of an eventual lawsuit; (3) save costs for both sides through informal exchange of documents and information; (4) allow more time for the parties to consider how to best resolve the dispute; and (5) provide a sneak preview of how the litigation may eventually play out through information gathered informally in the mediation process.

If you think your community might be involved in a lawsuit and the statute of limitations will be running out soon, consider buying some time and peace through a tolling agreement to avoid litigation and save costs. Also, consider hiring an attorney to draft an enforceable and reasonable tolling agreement that both sides can agree upon. That way, community directors and managers can focus their time and energy on optimizing operations of your community!