

The background of the slide features a close-up, slightly blurred image of a document with handwritten text in cursive. A purple pencil is positioned diagonally across the lower-left portion of the document. The overall color palette is warm, with shades of brown and orange.

Save Time & Money- Mediate, Don't Litigate™

Scott Eriksen, Esq.
Kat Marquis, Esq.
Jeanne Kempthorne

Condominiums and Conflict

- Where to begin?!?
- Are community associations and conflict inextricably linked?
- Is there a guiding principle that board members, managers, and other professionals may utilize to frame their approach to conflict review and resolution?

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

– Thomas Jefferson, the Declaration of Independence.

Condominiums are Communities

- A lofty quote, but consider that condominiums are a microcosm of federal, state and local government structures.
- Life at the community is governed by “laws” – covenants, restrictions, rules, etc. – enforced by the elected or appointed board.
- In many ways, the administration of these “laws” is more important to condominium residents than higher levels of governance (municipal, state, federal) in terms of their immediate financial and personal impacts.
- The real-life implications of condominium governance are not something that should be minimized, particularly not by those who sit as fiduciaries of their neighbors’ trust on association boards.

Condominiums are Communities, cont.

- By viewing association functions as “mini” governmental interactions, association board members, agents and advisors may gain a greater perspective of the potential impacts of their decisions.
- To be sure, living at a condominium necessarily means that one will have to abide by certain rules and regulations. It is also inevitable that some of these restrictions will curb individual freedom and autonomy.
- However, simply because there are rules and regulations in place does not mean that residents should feel uncomfortable in their own homes. (Back to Jefferson – Pursuit of Happiness)
- So, what does that mean for us? How do we reconcile rules and individual freedom/choice?

Mitigate, Don't Litigate

- An alternative title for this program may have been: “Mitigate, Don't Litigate.”
- Oftentimes, community association conflict arises from misconceptions or ignorance of the interplay of community restrictions and individual freedoms.
- “I didn't know” is not an excuse, but it may be a reason. The first step in conflict mitigation is educating residents and prospective residents of what community association life is all about.
- *An ounce of prevention*: Handbooks, closing packages, welcome meetings, newsletters, web-postings, etc.

Mitigate, Don't Litigate, cont.

- These efforts may cut down on unnecessary (and costly) disputes between owners and associations.
- However, if we could mitigate all association conflict, we wouldn't be sitting here today.
- There will always be incidents where an individual's personal choices conflict with community regulations/harmony.

Rules are made to be...

- Broken? (Hopefully, not at your association.)
- However, the first step to good governance and conflict mitigation is ensuring that your rules, restrictions and covenants are:
 - **Lawful** – Some provisions, particularly in older governing documents may not be consistent with or enforceable under applicable federal or state law.
 - **Reasonable** – Draconian mandates that drastically exceed customary restrictions may be subject to challenge; however, there will be a time and a place for absolute prohibitions, etc.
 - **Consistently and Evenly Enforced** – It is important to be sure that your associations consistently and evenly enforce rules and restrictions to the best of their ability.

Rules are made to be... cont.

- Know your rules. All board members should be familiar with the covenants, restrictions and policies of their associations.
- Revisit and revise periodically. (But not all the time)
- Consider a due process / enforcement policy:
 - Verifying complaints and threshold enforcement inquiries;
 - Notice and opportunity to be heard;
 - Measured schedule of fines, fees, etc.
- You've done it all! Yet despite your efforts, you still face difficult/disruptive individuals, so what now?

Don't Use a Cannon to Kill a Fly

- Responses to unit owner violations should be measured/tailored.
- This may require a case-by-case review of the issue, and will certainly require some degree of fact finding.
- Resist the urge to “throw the book” at the first sign of a violation:
 - What is the nature of the violation, who has been disturbed?
 - How many residents has the violation impacted, what are the consequences?
 - Are there any extenuating circumstances that may require leniency or careful consideration? (Reasonable accommodations, etc.)
 - Can we verify/prove the violations?

Don't Use a Cannon to Kill a Fly, cont.

- Once a complaint has been verified, and the Board has decided to proceed with enforcement action:
 - Notice/warning from the Board or Agent
 - First time offenses, minor offenses, etc.
 - Fines and outline of potential next steps.
 - Legal Enforcement Letter – Cease and Desist – Demand Notice
 - Review facts with counsel and provide supporting evidence.
 - Demand notice – cease and desist ongoing violations, notice of past violations.
 - Impose fines and fees (note on attorneys' fees and costs).
 - Consider a bond if documents allow.

Now What?

If violations or disputes persist after notices, fines and fees (or after such other due process mechanisms the association may have in place), what is the next step?

- **Litigation** – “The Nuclear Option.” Sometimes, it will be necessary to enforce covenants by legal action, but a board should carefully consider the costs, time, and other issues associated with litigation.
- **Arbitration** – “Diet litigation.” Arbitration is a binding process which may be required under some condominium documents. It can be nearly as expensive and time consuming as litigation.
- **Mediation** – The subject of our discussion today. For reasons you will hear, often the most expedient, economical and equitable way of resolving disputes and maintaining community harmony.