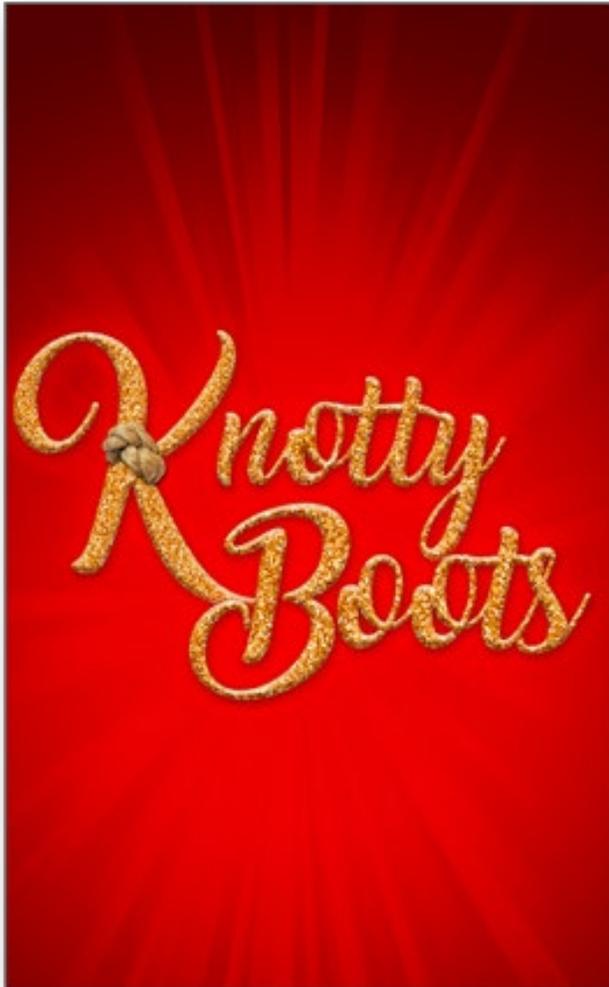




2020 CACM LAW SEMINAR & EXPO

# ENLIGHTEN

COLLABORATION. MOTIVATION. INSIGHT.



# Knotty Boots

Avoiding Legal Liability



# Southern California Panel

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- Joan Lewis-Heard, Esq., SwedelsonGottlieb
- Heather Wiltshire, CCAM, Walters Management, ACMC

# Outcomes

At the conclusion of this session, attendees will be able to:

- Explain what is meant by the unauthorized practice of law
- Evaluate what the association's manager can and cannot respond to

## Outcomes (Cont.)

- Avoid engaging in the unauthorized practice of law
- Use the management agreement to support law practice limitations
- Educate Board members about the manager's legal limitations as well as risks to the association

Community association managers regularly assist HOA boards of directors in hiring contractors, collecting assessments, adopting community rules, and many other tasks necessary to govern a community.

## MANAGERS MUST

Be knowledgeable of an association's CC&Rs, bylaws, and other governing documents, as well as a variety of local, state, and federal laws which impact association governance and operation.

However, managers must be careful not to provide legal opinions or prepare documents which constitute practicing law – *only lawyers can practice law.*

What is meant by the  
unauthorized practice of law?

# People v. Merchants Protective Corp.

(1922) 189 Cal. 531

The practice of law includes:

- legal advice and counsel
- the preparation of legal instruments and contracts by which legal rights are secured
- even if the matter is not pending in court

# Birbrower, Motalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County

(1998) 17 Cal. 4<sup>th</sup> 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304

The practice of law encompasses any:

- legal advice and legal instrument
- contract preparation
- whether or not these subjects are rendered in the course of litigation

# California Business and Professions Code

§6125 – No person shall practice law in California unless the person is an active member of the State Bar.

§6126 – A person practicing law who is not an active member of the State Bar is guilty of a misdemeanor punishable by up to one year in county jail or by a fine of \$1,000, or both.

What can and can't you say /  
respond to?

# Instructive Precedent has been set in Florida

- Florida Supreme Court – May 14, 2015 ruling
- Florida Bar re: Advisory Opinion – Activities of Community Association Managers, Case No. SC13-889
- What does and does not constitute the practice of law in Florida?

# What is ministerial work?

- An act or function that does not involve the judgment of the person performing the act or duty.
- Can generally be performed by non-lawyer community managers.

# Examples of non-ministerial work

- Negotiating and approving the formal terms and conditions of a contract
- Drafting proxies
- Drafting amendments to CC&Rs or bylaws

# Examples of non-ministerial work (Cont.)

- Interpreting statutes or governing documents
- Determining voting rights
- Providing advisement on insurance coverage

# How to avoid engaging in unauthorized law practice

- The point at which a manager is straying into the realm of practicing law is not always clear.
- There are two simple rules for determining when a manager is crossing that line.

# Scenario #1: Contract Review

- An association receives a contract proposal for the epoxy coating of common area pipes at a cost of \$35,000.
- In an effort to avoid legal costs, the Board asks you, the Manager, to review the contract.

# Scenario #1: Contract Review (Cont.)

- You review the contract to ensure that certain business terms are included, but you do not realize that some key protections relating to insurance, indemnity, and warranty (which a lawyer would insist on and check for) are missing.

# Scenario #1: Contract Review (Cont.)

- During the performance of the work, one of the workers causes a fire with a blowtorch; six units and portions of the common area are damaged, with an estimated repair cost of \$285,000.

# Scenario #1: Contract Review (Cont.)

- The contract limits the contractor's liability to the contract price (\$35,000), the contractor's insurance does not cover work performed on condominium buildings, and the indemnity provisions in the contract are one-sided in the contractor's favor.

# Scenario #1: Contract Review (Cont.)

- The ultimate costs incurred by the association to repair the damage are far more than what the legal fees would have been to have the contract reviewed by an attorney.

## Scenario #2: Leasing and Insurance Amendments

- An association's Board of Directors wants to amend the leasing and insurance provisions contained in the association's CC&Rs.
- The Board asks you, the Manager, to prepare the amendment language and the voting materials for the owners' vote on the proposed amendments.

## Scenario #2: Leasing and Insurance Amendments (Cont.)

- Association legal counsel is not asked to help draft or review the documents.
- The proposed amendments are submitted for vote, and are approved by a majority of the owners.
- An owner challenges the validity and enforceability of the amendments.

# Scenario #2 – Leasing and Insurance Amendments (Cont.)

- It is determined that a super-majority of the owners as well as first mortgagees were required to approve the proposed amendments.
- It is also determined that the insurance amendment language conflicts with the damage and destruction provisions in the CC&Rs.

# Questions to Ask

- Is it reasonable for an association's Board of Directors to rely on the legal advice of the managers as a non-lawyer?
- Is it in the best interest of the association to avoid legal advice to save money?
- Will you be violating the law if you address a "legal" issue for the association?

# Use the Management Agreement to Support Your Limitations

## ➤ Insurance

- The unauthorized practice of law may be considered a willful act (rather than a negligent act).
- There is generally no coverage available under an insurance policy for damage or injury resulting from willful acts.

# Use the Management Agreement (Cont.)

## ➤ Indemnification

- Any indemnification clause in an association's management contract may not (and likely will not) protect a manager from criminal prosecution, or civil liability, for the unauthorized practice of law.

# Queen Villas Homeowners Association v TCB Property Management

(2007) 56 Cal. Rptr. 3d 528, 149 Cal.App4th 1

- Association management agreement terms
- Manager actions
- Association action
- Court decision

# Specific Manager Duties

- These are typically limited to specified areas of management and expertise.
- Acting outside of your contracted duties can expose you and/or your management company to liability for damage or injury resulting from “extra” acts.

# Educating the Board

- The manager providing legal advice is a serious concern.
- It is not the cost of a contract or action that the Board should consider, but rather the potential liability to the association if something goes wrong.

# Educating the Board (Cont.)

- There is personal legal and financial exposure for individual board members if they do not properly solicit and rely on the advice of qualified experts and consultants.

# Use Common Sense

- It is not worth the risk when there is the potential for substantial liability to the manager and the association.
- If there is a concern over the proper course of action, it is always prudent to ask the association's legal counsel.
- An association's annual budget should include a reasonable line item for engaging legal services.

Questions?





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