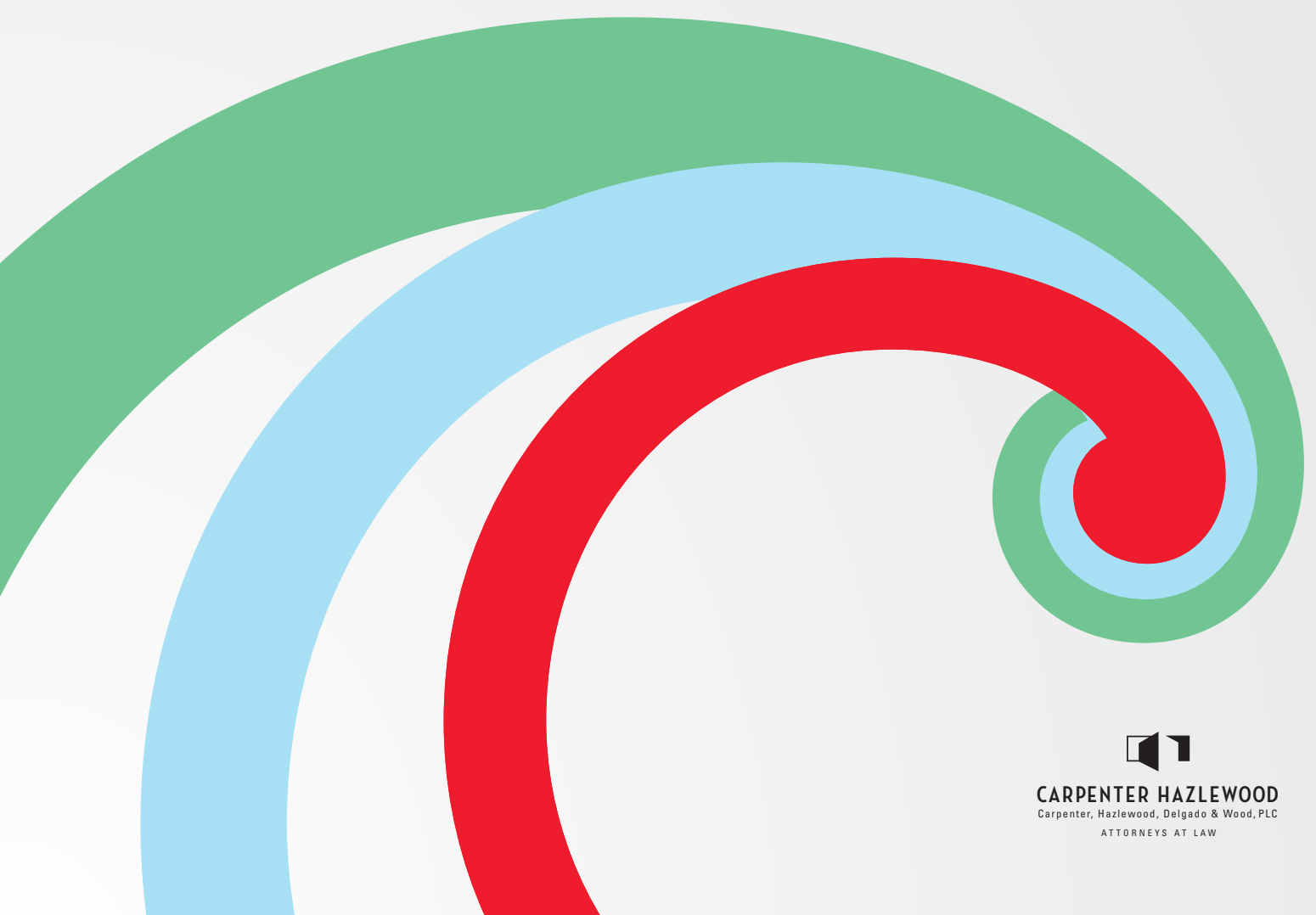


The Three “C”s of Getting the Best Results Out of Your Association’s Collections Provider in Any Economy

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In recent months, we all have had challenging discussions about how to best help associations collect their delinquent assessments. There are some methods seeming to be magic elixirs that promise higher collection rates and astounding results. This article is not about those methods or results. Instead, this article explores some simple, foundational principles that should undergird any association collections provider agreement. Whether your association hires a lawyer, relies heavily on the community manager or engages a grey-bearded guru with a collections divining rod, these are three essentials of that relationship. Awareness and insistence on these Three “Cs” of collection services will give associations a firm foundation and ultimately translate into fewer write-offs, lower collection costs and attorney fees and more money collected for the association. Boards of Directors should demand these behaviors from their collections providers.

PILLAR #1 – COMMUNICATION

A collections provider should always communicate clearly and regularly with the association and its board of directors.

Communication between the Board and its collections provider must be swift, accurate and occur often. Accepting any less means the loss of valuable time and the possibility that the association is further separated from its prize: its money.

COMMUNICATION ABOUT THE STATUS OF MATTERS

There should be a free routine information exchange about open collections matters between the Board and its provider.

As attorneys who collect delinquent assessment debt for community associations, we are required by lawyer ethics to “keep the client reasonably informed about the status of the matter.”¹ For attorneys, this communication is not optional, and we risk our licenses and livelihoods should we fail to communicate well and often with our clients.

Good communication is required of managing agents as well. The law of agency applies to agents of an association such as managers and their non-attorney collection agents. The

restatement of agency, a collection of the laws regarding agency, establishes a duty of communication for the agent:²

*An agent owes the principal a duty to provide information to the principal that the agent knows or has reason to know the principal would wish to have. An agent also owes the principal a duty... to provide information to the principal that is material to the agent’s duties to the principal.*³

In other words, management companies, collection agencies and any other association agents have a duty to keep the Board of Directors informed. This includes good and regular communication about pending collections matters.

COMMUNICATION ABOUT DECISIONS REQUIRED OF THE BOARD (ESPECIALLY ABOUT A PROPOSED SETTLEMENT OF THE DEBT)

Be wary of collections providers that keep the Board of Directors in the dark regarding attempts by owners to settle their accounts or the terms of their settlement offers. Boards should jealously guard their right to settle a matter. The collections provider may be the intermediary, and may exercise express limited authority (for instance waiver of ‘soft costs’) but the ultimate decision maker should be the Board of Directors.

COMMUNICATION ABOUT FEES

In this economy, fees often drive Boards to new collections tools and providers. Boards of Directors and their agents have a duty to familiarize themselves with the fees being charged the association and/or the homeowner. This should be known before a Board ever enters into a collections services agreement.

Lawyer ethics require lawyers and law firms to communicate about fees and expenses “before or within a reasonable time after commencing the representation.”⁴ That rule also applies to the fees the lawyer charges during the attorney-client relationship.⁵

² It is important to note that the restatement is not a statute in Arizona, but Common Law made by the Courts. Where Arizona statutes are silent and where specific Arizona cases are not instructive, Arizona Courts will follow the restatement.

³ Restatement of Agency (Third), § 8.11, Comment b (2006-2009, American Law Institute)

⁴ E.R. 1.5, Ariz.R.Prof.Resp

⁵ Communication about attorney fees is so important to Arizona’s Attorney Bar that there is a special arbitration service for clients and

¹ E.R. 1.4, Arizona Rules of Professional Responsibility

But the rules for lawyers are not unique. Other collections providers are required to disclose fee information to the client. Arizona’s laws and administrative rules that regulate collection agencies require regular accounting and communication about fees, fairness and client funds⁶. The restatement of agency also has similar language and requires a managing agent to “deal fairly in arranging the terms of the relationship.”⁷ Agents must disclose material information (such as collections fees and costs) before the association makes its decision whether or not to engage the agent.

In addition to knowing the fees “upfront” a Board should always know where they stand on what fees have been charged to date, both collectively (for all of the collections matters) and individually (for each matter). The object of the Association’s collections action is to collect money, not to become terminally enslaved to collections expenses.

COMMUNICATION ABOUT RESULTS

A Board of Directors should not have to guess what is going on with the association’s collections accounts. If results matter to the association, then the provider’s communication about results is critical. If the delinquent accounts go into some black hole when turned over to the collections provider, a Board cannot be expected to make good decisions on those matters or on what to do with new delinquencies. Perfect results are unrealistic, but perfect communication about results, whether good or bad, should be expected in the association’s relationship with collections professionals.

PILLAR #2 – COMPLIANCE WITH ALL LAWS AND ASSOCIATION GOVERNING DOCUMENTS

A collections provider should comply with all laws and with the association’s governing documents when dealing with homeowners, the association and third parties encountered along the way

A collections provider should comply with...

attorneys that cannot agree about the fee the attorney has charged. Community associations that have disputes with association counsel can always avail themselves of the State Bar’s fee arbitration service. In any fee dispute over \$500, the State Bar will assign a hearing officer to listen and help resolve the dispute. There is no fee for this service. The website with information and links to the proper forms for fee arbitration is as follows: <http://www.azbar.org/WorkingWithLawyers/feearb.cfm>

6 Arizona Revised Statutes §32-1001, et.seq.

7 Restatement Agency 3rd, §8.11(c) and comments.

- Federal Debt Collections Laws
- Federal Fair Housing Laws
- Laws or Rules regulating attorneys
- State Statutes Regarding Payment and Application of Homeowner Payments of Assessments
- Unauthorized Practice of Law Statutes/Rules
- State Debt Collection Licensing Regulations
- Terms of Vender Contracts, specifically Insurance
- Court Rules
- CC&R Collection Provisions
- The Association’s Written Collections Policy

Boards must require that any association vendor or agent operate and provide service to the association lawfully and in compliance with the governing documents. Turning a blind eye to illegal or unethical collection practices is a recipe for association liability and totally disruptive to the collections process.

These actions are problematic for several reasons:

- Illegal acts or violations of the governing documents and Board policies give delinquent owners a legal defense. Do not misunderstand, illegal or unethical behavior by a collections provider does not somehow cure the homeowner’s delinquency, but these defenses can muddy a judge’s thinking about the debt itself and cause an association to lose a good, viable claim.
- Illegal acts give birth to counterclaims for the delinquent owner. Nothing defeats a collections action better than a counterclaim that alleges an offset in favor of the delinquent owner.
- Violations of the law often have statutory damage provisions. This means that aggrieved owners can claim a damage figure, not because these damages were actually suffered, but because the statute itself calls for the amount of money. Here are a couple federal and state laws that mandate a measure of damages:

- Federal Fair Debt Collections Practices Act
\$1,000 damages per violation
- Arizona’s Wrongful Lien Statutes
\$5,000 damages per violation or actual damages (whichever is higher)

- Violations of the law may not be covered by the association’s insurance policy. Many directors’ and officers’ (“D&O”) insurance policies contain language that excludes coverage for a Board’s dishonesty, fraud

or willful violation of laws or statutes. Obviously, D&O insurance protection coverage is helpful to cover an association and its Board from allegations of poor decisions and other accusations of wrongdoing. But when a Board hires a collections agent that intentionally ignores the law and the documents, the carrier may not step up to cover and defend against the delinquent owner's counterclaim. This is very costly for the association in two ways: the wasted insurance premiums; and the damages and defense attorneys' fees are the association's full responsibility.

These situations can be avoided with a bit of due diligence. The authority that regulates lawyers, the State Bar, keeps meticulous records of lawyer discipline. The internet has some public information, but calling the State Bar and asking about an attorney's disciplinary history and whether or not the lawyer is insured for malpractice is a practical tool to guard against this problem. (You can also ask the attorney herself about malpractice insurance.) Likewise, the state banking department keeps records of past wrongdoing related to licensed debt collectors and that information is a phone call away.

PILLAR #3 – CREATE A WAY OUT

Not every collections method works for all communities. Change is inevitable and Boards are always looking for a better way to collect money. Therefore, associations need a way out. Beware of any collections service provider agreement that does not allow the association to terminate the relationship. Any such agreement should contain these key termination provisions:

1. a 30 day termination provision for any reason (with or without cause);
2. upon termination, the association decides what matters stay and what matters transfer to a new provider;
3. if the provider provides other services in addition to collections, there should be a severability clause that allows the association to terminate collections services but leave the relationship for other services intact;
4. clear language about how the final billing will be handled; and
5. language requiring the provider to return association records and files immediately upon termination.

Talking termination with a new or potential provider may seem pessimistic to some Boards, but thoughtful drafting of

a termination provision should be one of the foundations of any contractual relationship.

THE THREE “C”S – GETTING ASSOCIATIONS CLOSER TO THEIR MONEY

If only collecting assessments in general were as simple as three “Cs”! However, the Three “Cs” above can help the collections process tremendously. If Boards and management demand good Communication, expect nothing less than full and faithful Compliance with all laws and the governing documents, and Create and execute agreements that provide for a “way out” of the contract when things do not work out, then associations will have better relationships, avoid costly mistakes and ultimately collect more of their monies.

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