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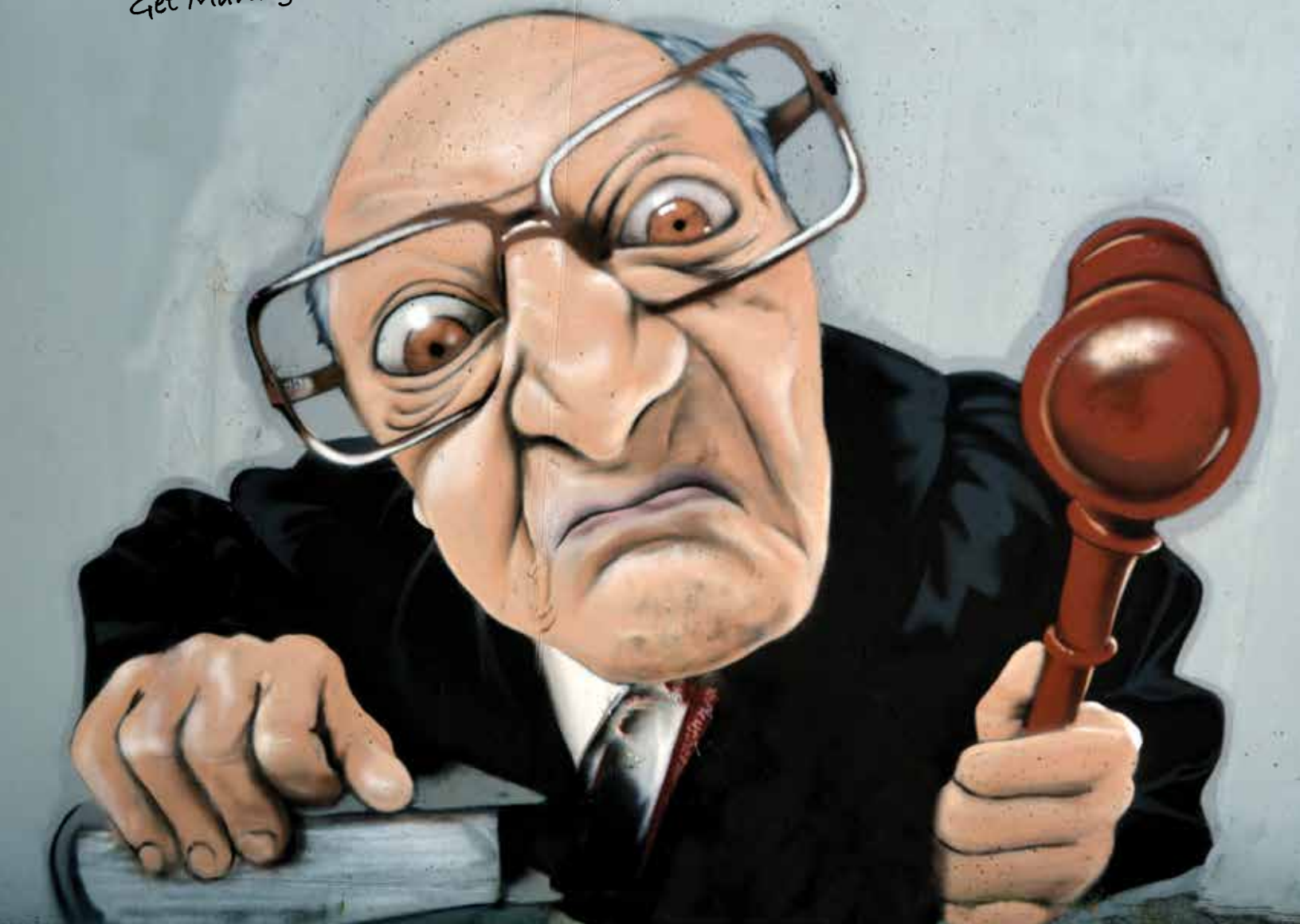
BUSTED!

Overlooked and Misinterpreted Laws that Can Get Managers and Boards in BIG Trouble



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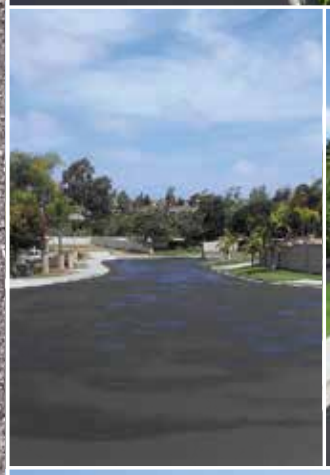

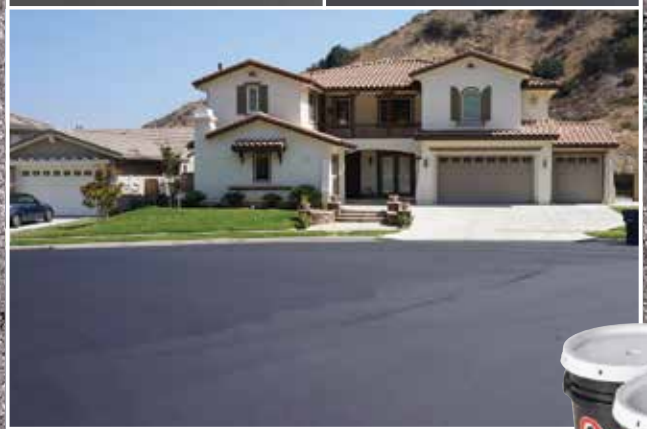

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The Channel Islands Chapter of Community Associations Institute is dedicated to empowering Homeowner Association members, managers and service providers through information and educational opportunities.

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president's message

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CHANNEL ISLANDS CHAPTER community ASSOCIATIONS INSTITUTE

Dear Members,

It is a great honor to serve as CAI-Channel Islands Chapter's President this year. And I would like to thank Tracy Neal for her excellent and tireless work as our Chapter President in 2018. Tracy led the chapter well with an astonishing accomplishment of reaching over 800 chapter members. In 2019, we will continue to build on these accomplishments, as well as the achievements in recent years. During the past ten years, we have provided our members with education, resources, networking, and advocacy on a level that earned our chapter recognition at the national level of CAI.

I would like to congratulate the newly elected board members, and thank all of our volunteers that support the chapter. I encourage you to engage with the chapter and volunteer on a chapter committee. If interested, reach out to our Executive Director Leah Ross at leah@cai-channelislands.org. We also need to thank our remarkable group of business partner members. The Chapter has deep gratitude for your efforts and contributions that our pivotal to our success.

As we plan for the ambitious goal to further extend our vibrant growth and success, we will do so on a foundation of helping our members in every opportunity that we have. Serving over 800 members in Ventura, Santa Barbara, San Luis Obispo, and Kern counties, we must always ask ourselves, "How can we help and provide even more value to our members?"

One way to help is to provide access to resources that encourage industry excellence. Along with providing this magazine, the Chapter is providing even more resources through the chapter website, www.cai-channelislands.org, while our national website, www.caionline.org offers webinars, training, articles, templates and more. Take full advantage of what is available to you as a chapter member and visit these sites often!

In addition to these resources, this year we are focusing on advancing educational efforts throughout our chapter. For our Santa Barbara and San Luis Obispo members, we are offering additional educational opportunities and resources. As we are seeing continued expansion in these areas, we are excited for the opportunities to further industry training. We are also offering a rebate program for manager members. The rebate program will help pay for up to 50% of the fee to earn the CMCA, AMS and PCAM certifications. CAI's manager certification programs allow for our manager members to better serve their communities, advance their career and encourage industry professionalism. Visit the Chapter website for more information on the rebates available.

Our Chapter is a role model and leader for the Community Associations Institute on the national level. Perhaps our most significant accomplishment is that amongst the 64 CAI chapters, we have one of the higher percentages of association homeowner members and board members. We appreciate the opportunity to provide training to so many community association members and appreciate their involvement. While we are proud of this, we cannot settle into contentment. 2019 will be a year of focusing on continued value for our members, as we continue to expand our membership and provide exceptional education and resources.

I look forward to our many adventures together in 2019, and hope to connect with you at one of our upcoming chapter events.

Your 2019 President,
Joe Smigiel
Joe Smigiel, CIRMS
CAI-Channel Islands Chapter President

BUSTED! Overlooked that Can Get

As the California Legislature continues to make significant changes to the laws governing community associations each and every year, it can be difficult for boards and managers not to overlook the ones that have been staring them in the face for years. Even the laws that have prevailed over the decades are not immune to the Legislature's changes, as the needs of community associations are persistently evolving and growing.

With that said, here are some commonly overlooked or misinterpreted laws and regulations, which impact your community and, if not understood, could expose boards and managers to unnecessary liability and expenses:

Making Sense of Reserve Accounts and Spending

Withdrawing funds from an association's reserve account often generates confusion for boards and managers alike. Specifically, when can funds be drawn from the reserve account, and when does the board need to obtain owners' approval for spending? The answers can be found in a few places.

Withdrawing and spending reserve account funds is subject to certain legal restrictions. Reserve funds may only be used for repair, restoration, replacement, or maintenance of, major components that the association is obligated to repair (or litigation relating to these obligations). (Civil Code Section 5510(b).) These "major components" are identified in the reserve study, which, if prepared properly and with a reserve study specialist, will clearly outline what items can be funded by withdrawals from the reserve account. In other words, if the association is simply repairing or replacing an existing component in the community (the building roof, existing irrigation systems in the common areas, remodeling the clubhouse, installing a new pump for the community pool), the board may use reserve funds for the expense, without the approval of the owners. Answering "yes" to each of the following questions will also help the board and management determine if the project can be funded by reserves:

- Is the component part of the association's common area responsibilities?
- Does the component have a predictable useful service life of less than thirty (30) years? (Civil Code Section 5550(b)(1).)
- Is the cost of repair or replacement of the component too high to be funded from the operating account or maintenance budget?
- Is the component identified and listed on the association's latest reserve study?

Determining if a repair or replacement project within the community falls within the board's reserve spending authority is not always clear-cut. What may appear to be a reserve fund expense, might actually be a capital expenditure which does require the approval of the owners if required by the association's governing documents. The board and management should consult with legal counsel to determine how a particular project can be funded, and if approval of the owners will be necessary.

The Meeting Agenda: What to Include?

Another source of strife comes from the (seemingly) benign task of setting meeting agenda items. The agenda, which is required by law, serves an important function in creating clarity by establishing the topics for discussion at the upcoming meeting and providing owners transparency as to what business will be conducted by the board. What is not defined by law, however, is how the board decides which items it should include for discussion at the open meeting or executive session.

All directors have a right to bring business before the board. The board, in gauging the pulse of its community, may decide that it is critical to address an ongoing landscaping or maintenance project before the owners. On the other hand, the board can find that certain sensitive and confidential matters set forth in Civil Code §4935 are better left for executive session. Ultimately, the decision to include or exclude items on the next agenda should be one that results from the collaborative effort and majority decision of the board.

Making Sense of the Notice Requirements

Boards and managers should square away some general terms that are defined by the law:
"General delivery" or "general notice" means inclusion in a billing statement or association newsletter, posting the document in a prominent location in the community (i.e., bulletin board, clubhouse door, etc.), which has been designated as a location for general notice in the annual policy statement, or broadcasting the contents of the document on the association's television channel. (Civil Code § 4045.)

"Individual delivery" or "individual notice" (which will satisfy general notice as well), means delivery by first-class, certified, or express mail, or overnight delivery by an express service

and Misinterpreted Laws
Managers and Boards in Big Trouble

By Lisa A. Tashjian, Esq., CCAL
Beaumont Tashjian

carrier. It also includes e-mail, fax or other electronic means, if the owner has consented to this type of delivery. (Civil Code § 4040.)

General notice is required for proposed rule changes, adoption of new rules, and upcoming board meetings.

Individual notice is required for disciplinary hearings, discipline decisions (first-class mail or personal delivery), assessment increases, pre-lien letters (certified mail), changes in association insurance coverage, notice of the association's need to temporarily relocate a resident for termite treatment, etc.

Note however, that these notice requirements may be bypassed during emergency situations. When in doubt, consult your association's legal counsel!

Conflicts of Interest

We have all heard the phrase "conflict of interest," but how do we identify one in the real world? Generally, a conflict of interest occurs when a board member's decisions on behalf of the association may be influenced by his or her personal interests. A common example is when a board member, or his or her family member, owns a construction company that the board is considering using such company for an association project. Here, the risk of a conflict is created in that awarding the contract to the board member's construction company will result in a personal benefit to him or her directly.

Each individual board member owes a fiduciary duty to the association to act in good faith, in a manner which the director believes to be 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. (Corporations Code § 7231.)

With that said, the Civil Code also gives several examples of matters which a board member must recuse him or herself from voting on, including, discipline of the board member, decisions to foreclose on the board member's separate interest, decisions to impose a reimbursement assessment for the board member's damage to common area facilities, etc. (Civil Code § 5350(b).) The common theme here is that if the matter pertains solely to the individual board member or his or her individual separate interest, said board member should be prohibited from voting.

Contracts or transactions in which a director has a financial interest (such as in the construction contract example) do give rise to a potential conflict of interest, which requires the interest of the board member to recuse him or herself.

Boards should consider adopting a conflict of interest policy, which sets forth the procedure for board members disclosing potential conflicts or financial interests, recusing themselves from decisions or discussions and otherwise addressing the issue and bringing it to fellow board members' attentions.

Association Finances and Assembly Bill 2912

In trying to further protect associations' finances, the legislature now requires that, for "transfers" which are greater than $10,000 or 5% of an association's total combined reserve and operating account deposits (whichever is lower) the prior written approval of the board is required. This means that managers who handle utility payments, reserve fund deposits, or any other transfers from the association's operating accounts, must obtain the board's written approval, each and every time, if the transfer falls within these financial parameters.

One way for the association to continue to operate efficiently in light of this new roadblock, is for the board to pass a resolution, which grants management standing authority to make these transfers, for a (renewable) one year period. This will streamline the process and alleviate concerns regarding the inefficiencies of obtaining board approval for each and every transfer, payment, etc., while ensuring that the association is in compliance with the new law.

In navigating both new and old legal obstacles confronting community associations, boards and managers alike should contact their legal counsel to obtain the direction they need!

Lisa A. Tashjian, Esq. *is a partner for the law firm of Beaumont Tashjian - a full service community association law firm. Ms. Tashjian has been practicing community association law for most of her legal career focusing on litigation, general counsel work and assessment collections. Lisa is active in many CAI Chapters and is past board president for CAI-CIC and CAI-GLAC and has a CCAL with the College of Community Association Lawyers.*

"Charged" With New Laws
Electrically and Financially Speaking

Practical Tips For Your Association

By David A. Loewenthal, Esq. and Barbara A. Higgins, Esq.
Loewenthal, Hillshafer & Carter, LLP

Although our new year started with some torrential rains, there are some ways to navigate and protect your Association from some of the new laws streaming downhill from Sacramento. Of course, no one has a crystal ball to predict just how the Courts will interpret the new laws or rule upon any case where these laws come into play, but we can use some practical insight and legal experience to help guide Associations down the path of prudent fiscal responsibility, good judgment, and financial maintenance.

Let's first talk about a subject dear to all members – money, specifically Association finances and safe money management. In comes AB 2912, a CLAC sponsored bill designed to protect against fraud, embezzlement, or other dishonest acts by Associations' managing agents, directors, officers, and employees from having too much discretionary or unilateral power to manage or transfer funds which could negatively affect an association's monetary health and the bottom-line. Unfortunately over the last decade many associations in our region have been the subject of such malfeasance by unscrupulous management companies. This bill amends *Civil Code* Sections 5380 and 5500 and adds Civil Code Sections 5501 and 5502 and 5806 to deal with this serious problem. We will discuss some of the more significant aspects of these new laws.

Existing law requires the HOA board to review financial documents and statements related to the HOA's accounts on at least a quarterly basis, unless the HOA's governing documents require more frequent review. This new law changes the frequency of review from at least once a quarter to once a month, and adds new requirements about exactly what to review.

Under Section 5500, unless the governing documents impose more stringent standards, the Board now needs to: review, on a monthly basis, a current reconciliation of the Association's: operating accounts, reserve accounts, the current year's actual operating revenues and expenses compared to the current year's budget, the latest account statements prepared by the financial institutions where the association has its operating and reserve accounts, an income and expense statement for the association's operating and reserve accounts, the check register, monthly general ledger, and delinquent assessment receivable reports.

There is some flexibility in this monthly review requirement. Pursuant to Section 5501, "the review requirements of Section 5500 may be met when every individual member of the board, **or** a subcommittee of the board consisting of the treasurer and at least one other board member, reviews the documents and statements described in Section 5500 independent of a board meeting, so long as the review is ratified at the board meeting subsequent to the review and that ratification is reflected in the minutes of that meeting." If a subcommittee is used, which is typically not a quorum, then the Board need not give written notice of the meeting. The Board will just need to ratify the written report or minutes of the subcommittee concerning its financial document review at the next noticed Board meeting

Since the new law *prohibits transfers* greater than *$10,000 or 5 percent* of the total combined reserve and operating accounts, whichever is lower, *without* prior written Board approval (Section 5502), it is important to con-

sider how that impacts an Association on a day-to-day basis. If an Association has an ongoing month-to-month consistent transfer of money from the operating account to the reserve account, do they still need to meet monthly to authorize in writing those regular transfers? What if the Association needs to make regular equal monthly payments to pay off, for example, a construction loan that falls within the monetary transfer requirements?

Under those scenarios, an annual Board resolution authorizing in writing the monthly payments for a specific time period within the fiscal year, should be sufficient to satisfy the requirement. This would alleviate the need (and burden) for the Board to meet monthly, just to authorize the same reserve or loan payments each month. The risk of a fraudulent transaction under those circumstances would be low as long as the Board was familiar with all of the supporting records (such as loan or reserve reports).

With the possible exception of the scenarios above, other routine or occasional payments, that fall within the monetary transfer parameters, to contractors, vendors or other third parties who may or may not work for or provide service to the Association on a regular basis will require written Board approval each time? Since the new law is designed to safeguard against fraud and embezzlement, the Board of Directors or subcommittee will need to meet monthly for reviewing these types of charges and authorizing payment. Being a fiscal watchdog can only help protect the Board and development as a whole.

Under Section 5806, unless the governing documents require greater coverage amounts, the Association shall maintain fidelity bond coverage for its directors, officers, and employees in an amount that is equal to or more than the combined amount of the reserves of the association and total assessments for three months. This section is not talking about D&O insurance. A "fidelity bond" essentially means that the Association is purchasing insurance that covers fraudulent or dishonest ("fidelity") actions of employees, plus non-employee theft.

The Association's fidelity bond shall also include computer fraud and funds transfer fraud. This part of the bond protects against illegal transfers and thefts from Association accounts typically committed by dishonest third parties who hack into the computer or bank accounts. If the Association uses a managing agent or management company, the Association's fidelity bond coverage *shall additionally include dishonest acts by that person or entity and its employees.* Associations may very well require their management companies to carry fidelity bond coverage for this very same purpose, which likely will become a cost of doing business.

The Senate Judiciary Committee comments provide insight into the statute including the following: "Notably, such a bond requirement would not, in itself, deter fraud or embezzlement. It would, however, help to ensure that if an association does become a victim of fraud or embezzlement, the homeowners will not be left holding the bag as a result. In that regard, this provision of the bill may be the most important component in terms of providing concrete protections for homeowners. As a practical matter, moreover, requiring associations to maintain bond coverage may lead to tighter controls on association finances, since a bonding company is likely to require such controls as a precondition for providing the coverage."

Another new law of interest to many is SB 1016 – Electrical Vehicle (EV) Charging Stations, codified into law as an amendment to *Civil Code* Section 4745, and which also added, *Civil Code* Section 4745.1. As everyone knows, California is a "green", very pro-environment, anti-fuel emissions state, so it should come as no surprise that "it is the policy of the state to promote, encourage, and remove obstacles to the use of electric vehicle charging stations". (In fact, the foregoing quote derives from the text of the law.) This is the third time in the past seven (7) years, the California Legislature has modified our laws controlling EV Charging Stations within HOA communities. The last time, the purpose of the amendment was regulatory in nature, to provide the Associations with the ability to impose "reasonable restrictions", while still allowing homeowners the option of installing and using EV Charging Stations. While the price of electric vehicles has been steadily decreasing, the accessibility of EV changing stations continues to be an issue, especially in HOA communities, as noted by the Senate Bill Policy Committee.

Effective January 1, 2019, the law was amended to expand the scope of homeowner rights to install EV charging stations in their "units", as well as in previously allowed areas of a designated parking space including a deeded parking space, a parking space in an owner's exclusive use common area or a parking space that is specifically designated for use by a particular owner. Realistically, this may include interior garages if considered part of the unit, or spaces within grant deeds which are considered a part of the residential unit ownership. The provisions of these Code sections apply regardless of whether the EV charging station is in the unit's garage, or a portion of the common area where the owner has an exclusive use/dedicated parking space, or in the common area subject to an authorized licensing agreement.

"For purposes of these sections, "reasonable restrictions" are restrictions based upon space, aesthetics, structural integrity, and equal access to these services for all homeowners, but an association shall attempt to find a reasonable way to accommodate the installation request, unless the Association would need to incur an expense." (Legislative Counsel's Digest for SB 1016). Fortunately for Associations, Section 4745(f)(1)(D) was amended to clearly state that a homeowner must also pay for the *costs of installation* of the station, as well as electrical usage, regardless of where the Association allows it to be placed. Under Section 4745(f)(2), as previously amended, homeowners are also responsible for any damage, repairs and maintenance

(Continued on page 11)

of the charging stations until removed, as well as any damage to any affected common areas, and this remains in effect.

It is notable that insurance requirements of homeowners installing EV charging stations were relaxed (or made more confusing) by the new amendment. The previous *$1,000,000* homeowner liability coverage policy requirement has now been replaced with no specific or minimal required amount of coverage. The requirement for the Association to be named as an *additional insured* has also been *deleted* from Section 4745 (f)(3). This is a bit of a discrepancy because it is *still referenced in Section* 4745 (f)(1)(C*)* wherein it states: 'Within fourteen (14) days of approval provide a certificate of insurance that names the association as an additional insured under the owner's insurance policy in the amount set forth in paragraph (3)." (Emphasis added). It's quite possible that "clean-up" legislation will be done in the near future to clarify the additional insured issue, and also because there is no insurance "amount set forth in paragraph 3". For now, it seems that an HOA is within its legal rights to require that it be named as an additional insured in a homeowner's insurance policy - Section 4745(f)(1)(c).

In furtherance of the above, in reviewing the legislative history and discussions regarding the modifications to the Electrical Vehicle Charging Station legislation, not surprisingly, the issue of lowering the insurance requirements was specifically discussed including the previously existing $1,000,000 requirement. The discussions centered on the fact that when the insurance requirement was enacted in 2011, this was before the time that EV charging stations became more commonplace. In the eight (8) years since the inception of the statute, the legislature has determined that the $1,000,000 insurance requirement provided very little useful purpose and rather acted as an "obstacle to installation of charging stations." The Electric Vehicle Charging Association wrote as follows: "Not only is $1,000,000 higher than normal for a homeowner liability policy, but the insurance market itself has failed to follow through in offering this kind of coverage. This has left residents without options for insurance coverage, preventing them from installing an EV charging station at their home in a multi-unit dwelling."

Overall, proponents of the changes to the EV laws believe that by eliminating the statutory minimum $1,000,000 of coverage would help remove a significant barrier to EV charging stations while still maintaining some liability coverage or protection for the Association.

Based upon the legislative history associated with the amendment, association's may wish to consider creating its Rules and Requirements for liability insurance at $500,000 since it is less than the previous $1,000,000 requirement but still affords significant insurance coverage to the Association. Of course, enforceability of the minimum insurance amount may ultimately be the subject of a challenge.

Section 4745.1 was added to the Civil Code this year in order to extend the provisions of *Civil Code* Section 4745 governing EV charging stations so that the law also covers "TOU" ("time of use") meters. An "EV-dedicated TOU meter" means an electric meter supplied and installed by an electric utility that is separate from and in addition to any other electric meter and is devoted exclusively to the charging of electric vehicles and that tracks the time of use when charging occurs. The new law clarifies that an "EV-dedicated TOU meter" includes any wiring or conduit necessary to connect the electric meter to an electric vehicle charging station. (See *Civil Code* 4745.1 (f)). The Association must process applications for EV-dedicated TOU meters in the same manner as they would for the installation and use of charging stations, except the same insurance requirements do not apply. The same type of "reasonable restrictions" apply to the TOU meter installations and usage as would apply to an EV charging station. The state of California promotes and encourages their installation and usage with reasonable restrictions allowed.

It is recommended that Associations adopt "reasonable" guidelines and requirements for implementing these laws into their application and authorization processes. This could include a written maintenance and ongoing insurance obligation agreement in the form of a covenant to run with the land so that it is recorded and is binding on the current owner and all future owners.

As always, it is advisable that Associations consult with legal counsel well-versed in HOA law when developing guidelines, procedures, and rules to comply with these new laws.

David Loewenthal, Esq. *is a founding partner of Loewenthal, Hillshafer & Carter, LLP which is headquartered in Woodland Hills with offices in Westlake Village, Santa Barbara and San Luis Obispo. David has practiced in the Homeowners Association field for over 28 years. The firm specializes in representing Homeowners Associations in all of their legal needs.*

Over a span of approximately twenty-five years, ***Barbara Higgins*** *has handled a wide variety of cases with a primary emphasis on real estate related matters, HOA law, land use, contract disputes, construction defect, and complex business litigation. Ms. Higgins previously served as Vice President/ Senior Counsel for a global commercial real estate firm where she advised management and employees, conducted risk management sessions, and litigated broker liability cases.*

Discrimination & Harassment in the Work Place

What New Employment Laws Mean to Homeowner Associations and Community Managers

By Thomas M. Ware II, Esq. and Justin Nash, Esq.
Kulik Gottesman Siegel & Ware LLP

During the 2018 legislative session, the California legislature adopted and/or amended a bevy of statutes governing discrimination and harassment in the work place. While these bills do not deal specifically with homeowners associations, certainly homeowners associations and community management companies with employees are impacted by, and should be cognizant of, these changes in the law.

So what laws were enacted? How do they impact the community association industry? And, how can associations and managers go about implementing these new requirements? We are glad you asked.

SB1300

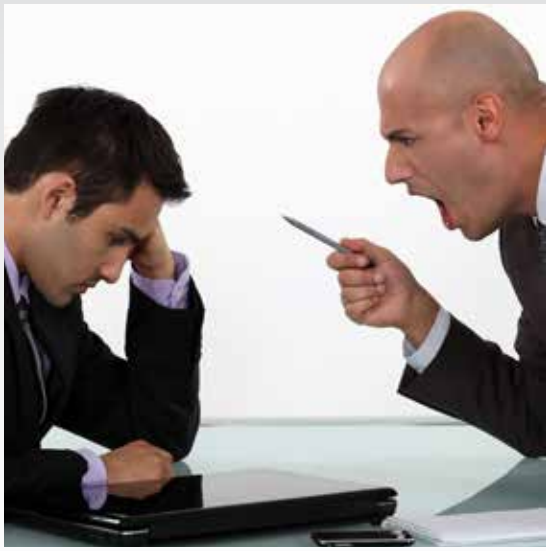
SB 1300 has three primary components: 1) it "declares the intent of the legislature and provides guidance to California Courts" regarding the standard of liability and burden of proof in employment sexual harassment cases; 2) it prohibits employers from requiring employees to sign a release of claims under the Fair Employment and Housing Act or non-disparagement agreements in exchange for a raise or as a condition of employment; and 3) permits an employer to provide "bystander intervention training to recognize problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors." (California Bill Analysis, SB 1300 Sen. 8/20/18, p. 3.)

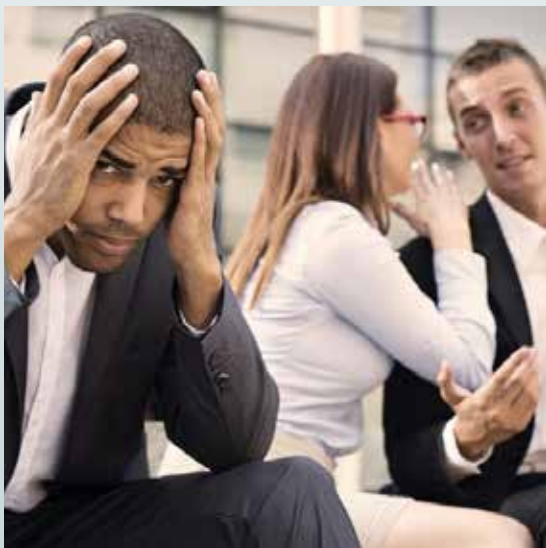
Government Code Section 12923 – Sexual Harassment Legislative Intent

SB 1300 added Government Code Section 12923. This statute does not set forth any new affirmative work place obligations but rather clarifies the legislature's intent on how courts should interpret existing work place harassment laws.

Government Code Section 12923 arguably refutes preexisting case law that requires a plaintiff to prove "that the sexual harassment that occurs in the workplace must be severe or pervasive enough to alter the conditions of employment due to the plaintiff's sex." (California Bill Analysis, SB 1300 Sen. 8/20/18, p. 3.) Rather, liability may be established by demonstrating that "a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to make it more difficult to do the job." (*Id.; citing* Justice Ginsburg's concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17.)

The Act sets forth a legislative intent that employment discrimination claims should not be resolved via summary judgment motion, i.e., by a judge without a trial. (Govt. Code § 12923(e).) "[H]ostile working environment cases involve issues 'not determinable on paper.'" (*Id.*) Section 12923(c) clarifies that the "existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decisionmaker" may be evidence of discrimination. Consistent with this intent, the legislature states that "a single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment" if the harassment interferes with work performance or creates an intimidating or offensive environment. (Govt. Code § 12923(e).) These sections do not mean that a single incident of harassing conduct nec-





essarily will result in liability. Rather, the legislature is reiterating that sexual harassment claims should be resolved by settlement or a trial on the merits. Summary judgment (dismissal of the action prior to trial) is not proper if there is a "triable issue" of any material fact in dispute.

What do these amendments mean to homeowners associations and community managers? Well, the Legislative Counsel Digest states that the bill specifies that an employer "**may be responsible for the acts of nonemployees with respect to other harassment activity**." (Emphasis added.) Employees, and arguably homeowners themselves, need to be made aware that disparaging remarks made in passing may be construed as criticizing an employee's performance in conjunction with their age, disability, sex, race, or ethnicity could be used against you as evidence in a discrimination case. For example, in *Reid v. Google* (2010) 50 Cal.4th 512, a senior manager alleged age discrimination at Google in conjunction with demotions and failure to give performance bonuses. The court held that that statements that the employee was "slow," "fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," "lack[ed] energy," his ideas were "obsolete," and he was not a "cultural fit" could support a claim for a hostile work environment based on age discrimination. (*Id. at* 536.)

Therefore, homeowners associations and managers should not permit homeowners, vendors, or guests verbally or otherwise harass employees. Rather, to avoid such claims, homeowners association and community managers must investigate and take steps to abate harassment of employees and managing agents by homeowners, vendors, and guests in order to avoid hostile work environment claims. Arguably such conduct violates nuisance provisions found in most association's governing documents. Associations, therefore, may adopt rules notifying members they can face fines, disciplinary hearings, and other enforcement remedies for harassing or mistreating association employees and agents.

The impact of the legislative intent to limit or discourage summary adjudication of harassment claims at the very least increases the cost to litigate as the ability to summarily resolve a claim short of trial is greatly reduced. This increased cost to litigate may impact insurance premiums.

Government Code Section 12964.5 – Non-Disparagement Agreements

SB 1300 added Government Code Section 12964.5 which provides that it is unlawful for an employer to require, **as a condition of employment, continued employment, or in exchange for a raise or bonus,** an employee to: 1) sign a release of claims against the employer; or 2) prevent the employee from disclosing unlawful acts in the workplace including but not limited to sexual harassment. There is an express exception for negotiated settlement agreements. (Govt. Code § 12964.5(c).) Thus, once an employee raises a potential claim of discrimination, the association/management may negotiate a non-disparagement and waiver as part of any settlement agreement. However, the employee must be given notice and opportunity to retain an attorney. Therefore, a homeowner association and/or management should advise the employee expressly of the right to obtain an attorney before attempting negotiate a settlement that includes a non-disparagement agreement and/or a release of any discrimination/harassment claims.

Government Code Section 12950.2 – Bystander Intervention Training

SB 1300 added Government Code Section 12950.2 **permits**, **but does not require**, an employer to provide **bystander training** to help ensure a workplace is free of sexual harassment. Such training may include "information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe problematic behaviors."

The Act does not include specific requirements on the scope or regulations for bystander training. Presumably, until different standards are developed, bystander training should operate under the standards outlined for sexual harassment training. (See, Cal. Code of Regulations, 2 CCR § 11024.)

Associations and its managing agents should consult with legal counsel to discuss whether and how to implement bystander training as well as the substance and scope of such training.

AB 2770 - Privileged Communications: **Communications by Former Employer: Sexual Harassment**

Assembly Bill 2770 amended Civil Code Section 47 to provide that "a complaint of sexual harassment by an employee, without malice, to an employer based upon credible evidence." In other words, the complaining employee cannot be sued for defamation based on such communication so long as the statements are made "without malice."

Section 47 also was amended to state that "communications between the employer and interested persons, without malice, regarding a complaint of sexual harassment." Accordingly, a homeowners association, and/or its managing agent, is permitted to answer questions by a prospective employer regarding sexual harassment complaints against a current or former employee. The association and/or managing agent's response to an inquiry as to whether or not the association would rehire that person based upon the association's determination that the former employee engaged in sexual harassment is privileged and not actionable so long as the statements are made "without malice."

"Malice" in this section means a communication either motivated by hatred or ill will, or is made without reasonable grounds for believing the matter to be true. (*Schep v. Capitol One N.A* (2017) 12 Cal.App.5th 1331.) Thus, an association employee is free to make complaints, and association and its management agents may respond to prospective employer inquiries, without fear of liability so long as the statements are made in good faith. False spiteful accusations or statements are not protected. Although

(Continued on page 14)

associations and management agents have defenses for good faith statements outlined above, associations and management agents should respond to inquiries about sexual harassment judiciously. It would be prudent to run any such statements by legal counsel before conveying them to prospective employers.

SB 1343

Employers: Sexual Harassment Training: Requirements

SB 1343 requires an employer who employs **5 or more employees (whether full time or part time), including temporary or seasonal employees,** to provide at least 2 hours of sexual harassment training to all supervisory employees and at least one hour of sexual harassment training to all nonsupervisory employees. (Gov't Code § 12950.1(a).) Previously, this requirement only applied to employers with 50 or more employees. By reducing the threshold for harassment training from 50 to 5, the Act now governs a vast number of management companies and homeowners associations who directly employ 5 or more employees, including on-site managers, on-site maintenance workers, security guards, and other staff. Initial employee training must be provided by January 2020. Thereafter, it is required once every 2 years. (Gov't Code § 12950.1(a).)

Beginning January 1, 2020, any seasonal or temporary employee, i.e., hired by a homeowners association or management company to work less than six months, must be provided with training within 30 days of hiring or within 100 hours worked, whichever occurs first. If the temporary worker is provided, i.e., employed, by a temporary worker service, then the temp service, as opposed to the association or management, must provide the training. (Gov't Code § 12950.1(h)(1).)

The employer "may develop his or her own training module." However, the training must be "classroom or other effective interactive training and education." (Gov't Code § 12950.1(a).) Such training may be provided: a) in person; b) computer based training that is individualized and interactive; c) via an internet based seminar or webinar provided it includes "interactive content, discussion questions, hypothetical scenarios, polls, quizzes, or tests." "[T]he instruction shall include questions that assess learning, skill building activities that asses the [participant's] application and understanding of the content learned. . . ." (Cal. Code of Regulations, 2 CCR § 11024(a)(2).)

The training must explain:

(1) The definition of sexual harassment under Federal and State law;
(2) "Statutes and case law prohibiting and preventing sexual harassment;"
(3) "The types of conduct that can be sexual harassment;"
(4) "Strategies to prevent sexual harassment;"
(5) Supervisors' obligation to report harassment;
(6) "Practical examples of harassment;"
(7) "The limited confidentiality of the complaint process;"
(8) "Resources for victims of sexual harassment, including to whom they should report;"
(9) "What to do if a supervisor is personally accused of harassment;"
(10) "The elements of effective anti-harassment policy and how to use it;"
(11) What constitutes "abusive conduct" under the law; and
(12) Harassment "based on gender identity, gender expression, and sexual orientation."

(California Dept. of Fair Employment and Housing, "Sexual Harassment FAQs;" *see also*, Gov't Code § 12950.1 and 2 CCR § 11024.)

Training may be taught by: 1) attorneys admitted to the bar for two or more years whose practice includes employment law; 2) human resource professionals or harassment prevention consultants with two or more years of experience designing discrimination training, responding to discrimination and harassment complaints, and 3) law school, college, or university professors or instructors with 20 instruction hours or two or more years' experience in employment law. (*Id.* at § 11024(a)(9)(A).)

In addition, the Department of Fair Employment and Housing ("DFEH") is required to develop two online training courses, one for supervisory and one for non-supervisory employees. These courses are required to be posted on the DFEH's website. (Gov't Code § 12950.1(k)-(l).) In lieu of providing training, an employer "may direct employees to view the online training course" provided by the DFEH. (Gov't Code § 12950.1(j)-(l).)

It is important that associations and management agents be cognizant of these new requirements. Failure to comply with these requirements may result in the DFEH filing a lawsuit to compel a homeowners association and/or management company's compliance. (Gov't Code § 12950.1(f).) Associations and managers must endeavor to proactively avoid such claims to avoid the uncertainty and cost of litigation.

Thomas M. Ware II *is a partner in the law firm of Kulik Gottesman Siegel & Ware LLP. For the past twenty-nine years, his practice has focused on the representation of homeowners associations and their volunteer directors and officers. He currently serves as one of CAI-CLAC's Legislative Co-Chairs.*

Justin Nash *is an associate in the law firm of Kulik Gottesman Siegel & Ware LLP. His practice is focused on the representation of homeowners associations and their volunteer directors and officers.*

By William S. Dunlevy, Esq
Law Offices of William S. Dunlevy

Board members are frustrated with owners not responding to violation notices and the amount of time correction can take with violation and fine polices. In addition to mailing notices, boards are requesting that management call the residents and/or email them, as well to notify them to correct violations. These violations are not life threatening and usually involve common issues such as don't work on your vehicle, etc.

QUESTION: *As long as a letter is sent by first class mail, what is the legal opinion about the boards' request to call or email the violator? Does calling members about violations present a problem to managers?*

ANSWER: I am sure that these requests are based on a sincere desire to gain compliance through informal means. Nonetheless, board requests for the managers to call or email alleged violators, in addition to mailing the official notice, present certain significant legal and practical issues that the board and manager should carefully address before implementing such a plan.

On the legal side, please bear in mind that per Civil Code section 5855, the only authorized legal avenue for the alleged violator to discuss the alleged violation is in a hearing before the board. The board is the only body that has the authority to decide whether or not to impose the potential discipline on the alleged violators. Therefore, the manager would be in a very difficult legal position if the alleged violators want to discuss or dispute the alleged violation.

I imagine that many managers reading this article will say that alleged violators often call or email them after receiving the official notice of the alleged violation. I also imagine that such conversations and emails can be rather unpleasant, to say the least. Does the board really want to place the manager in the position of initiating communications with the alleged violators that will likely create more of these unpleasant conversations and emails?

The manager is the agent of the association and works under the direction of the board of directors. The manager is correctly viewed by the owners as an official representative of the association. If the alleged violator wants to discuss the alleged violation, what does the manager say to the alleged violator? At most, the manager should tell the alleged violator that they will have to appear at the hearing before the board if they want to discuss or dispute the alleged violation. What if the alleged violator interprets something the manager says as the board's official word and the board later makes a decision that is contrary to what the manager said or was interpreted as saying?

On the practical side, communications are often subject to different interpretations. This is particularly true in verbal communications. How many times have you said something to someone else only to have them completely misinterpret what you were trying to communicate the them? Even written communications are subject to different interpretations. In reality, miscommunications often result in legal disputes and, in the worse case scenarios, they result in lawsuits. The board should be extremely cautious before putting the manager in the position that something said in a telephone conversation or written in an email results in the association facing legal difficulties.

There are also potential legal and practical issues regarding the association's contract with its manger or management company. Most management contracts carefully define the manager's duties. While I have not reviewed any sample manager contracts for this article, I suspect that the contracts do not provide for the manager to be making phone calls or sending emails to alleged violators in addition to sending the official notices. Therefore, asking the manager to take on these additional responsibilities could result in additional charges to the association. If that were to happen, the board should consider whether or not the cost/benefit ratio makes this idea worthwhile.

In advising my association clients, I always try to keep in mind the "Rule of Unintended Consequences." This Rule states that even the best and well intentioned ides may result in unintended problems. I recommend that having managers call or email alleged violators should be carefully evaluated under this Rule before any implementation.

William S. Dunlevy *is a veteran community association attorney serving association clients in Los Angeles, Ventura, Kern, and Santa Barbara counties and providing service in all areas of community association law with an emphasis on governing document interpretation and enforcement, Alternative Dispute Resolution (ADR - mediation and arbitration), governing document revision, business advice, corporate affairs, contract review, and common area/separate interest repair planning.*

By Sandra Gottlieb, Esq., CCAL
managing partner with SwedelsonGottlieb
and
Joseph L. Gillman, Esq.
associate attorney with SwedelsonGottlieb

QUESTION: *The members requested a recall; Now what do we do?*

ANSWER: There are three (3) statutory grounds for removing directors, and none of the reasons have to do with whether you like how they speak, are against their politics or whether their house is better landscaped than yours. First, under Corporations Code section 7221, a director can be removed for cause. This means a felony conviction, a court determination of unsound mind, a failure to attend board meetings as required by the by-laws or a failure to meet the qualifications of directors. Second, under Corporations Code section 7223, a director can be removed through court action in the case of fraudulent or dishonest acts or gross abuse of discretion. Finally, under Corporations Code section 7222, one or more of the directors may be removed without cause by vote of the members – this is by far the most common method for removal and the subject of this article.

The procedure for scheduling the recall of one or more of the directors is fairly simple. A petition must be presented to one of the association's corporate officers (e.g., president, vice president or secretary) with the signatures of members who represent at least five percent (5%) of the members of the association. The petition must call for (demand) the recall of the directors, and it must contain the printed and signed names of the petitioners along with their respective addresses.

Importantly, for a removal without cause, which is what we are discussing, there is no requirement that the petition specify the reason for the removal of the directors. In other words, the petition does not need to state that the directors are not maintaining the common area, enforcing the governing documents, or provide any other reason for removal.

A recall petition should request both a recall and, if that recall is successful, an election of replacement directors at the same meeting. Once a recall petition is duly submitted, the board is legally obligated to do two things:

(1) within twenty (20) days the petition's submittal, the board must notice the requested recall meeting, which must occur within thirty-five (35) to ninety (90) days after the petition's submittal; and

(3) at least thirty (30) days before the scheduled recall meeting, the board must distribute secret ballots to the members.

If the board fails to act by selecting the date for the recall election, the petitioners may call a meeting of the members without board action, or alternatively, the petitioners may seek a court order to force the matter to a vote.

Even after a recall petition is duly submitted, the recalled directors will remain in office and continue making decisions for the community, unless they are ultimately removed by a vote of the members at the requested recall meeting.

At the recall meeting, any director whose removal is sought is entitled to have an opportunity to respond to the petition. After the director(s) are heard, the vote required to remove any director depends upon the number of members within the association. If the association consists of less than fifty (50) members, the vote requires the approval of a straight majority of all the members. For an association with fifty (50) or more members, the vote requirement is a majority of the members present at a meeting where quorum is present.

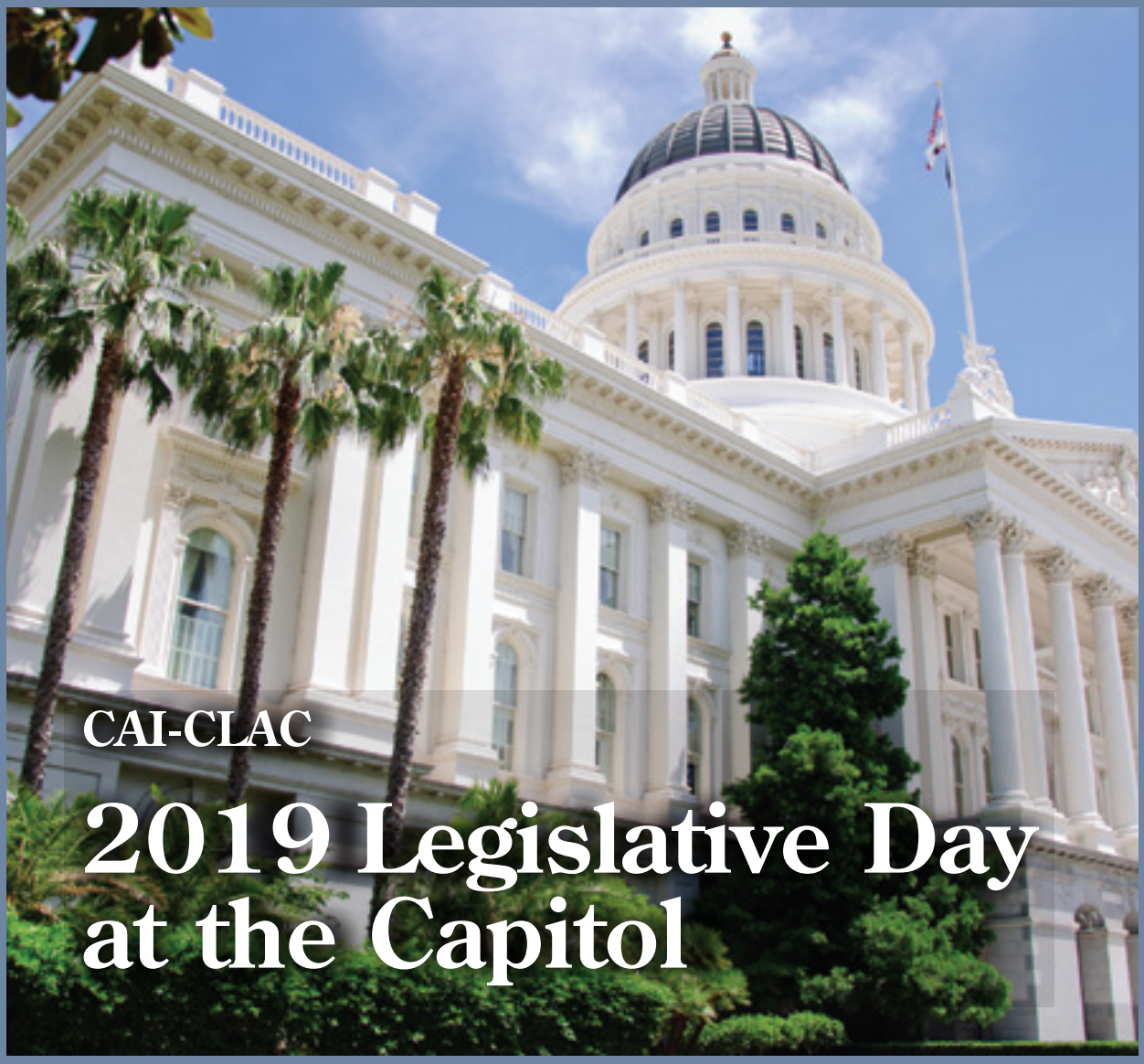
Removal without cause becomes more complicated where the governing documents permit cumulative voting in the election of directors and less than all of the directors are on the recall ballot. Cumulative voting allows a member to cast more than one (1) vote for any single candidate. Where cumulative voting is allowed, no director may be removed (unless the entire board is removed) where the votes cast against removal, if cumulated, would be enough to elect the director. This provision makes it extremely difficult to remove a single director if there is significant member opposition to the removal of the director. This provision does not apply, however, where the entire board is on the recall ballot, in which case the voting requirements described above would apply.

If a board of directors is not fulfilling its fiduciary duties to the association and its members, the members should notify the board of its obligations and any corrective action requested. If this approach is unsuccessful, the members should consider a recall of the board as a last resort inasmuch as a recall election is almost always divisive in the community that is going through that process.

This article is intended to provide the members with the general requirements for a recall. Competent counsel should be consulted for assistance with the technical aspects of a recall.

Sandra L. Gottlieb, Esq. *is the managing partner and head of the transactional division of SwedelsonGottlieb, a law firm that exclusively represents community associations throughout California.*

Joseph L. Gillman, Esq. *is an associate attorney with SwedelsonGottlieb, who community associations throughout California with both transactional and litigation matters.*



CAI-CLAC

2019 Legislative Day at the Capitol

Each year, members of CAI gather in Sacramento to educate legislators on current issues affecting California's 55,000 Community Associations. During this two-day event, you will attend briefing sessions with CAI's lobbyist, learn what new changes are on the horizon, and go straight to the Capitol to make our voices heard.

SAVE THE DATE!

APRIL 8-9, 2019
HYATT REGENCY
SACRAMENTO

These visits serve multiple purposes, educating legislators, seeking support for specific bills, and showing appreciation for past support. In addition, get to know the CAI-CLAC Committee members who represent your chapter's voice at the "Meet the Delegates" Reception. Come to Sacramento and be part of the change!

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www.caiclac.com

CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

CLAC Preview for 2019

By Sean D. Allen, Esq., *Roseman Law, APC*

The California Legislative Action Committee (CLAC) is a volunteer committee of your CAI chapter, consisting of homeowners and professionals serving community associations. We are the largest organization in the country dedicated to monitoring legislation, educating homeowners and elected state lawmakers, and protecting the interests of those living in homeowner associations. The 2019 legislative session has just begun, but we have provided a few things to keep in mind as we kick off the new year.

Changes to Civil Code § 4040 Regarding Email Notices

Last year CLAC was instrumental in making a small, but very meaningful change to the Civil Code regarding electronic notices to homeowners. Under prior law, associations were authorized to deliver documents to homeowners by email, facsimile, or other electronic means, *only if* the recipient had previously consented *in writing* to receive those notices electronically. The new change to Civil Code § 4040 now authorizes the homeowner to send and revoke that consent by email, instead of on physical paper. This simple, but common-sense change to the Civil Code should help make the managing of community associations easier and more cost efficient.

Changes to Civil Code § 4360 Regarding Rule Changes

CLAC had another common-sense victory last year with an important change to Civil Code § 4360. Under prior law, a proposed change to an association's operating rules would need to be sent out to the membership for a 30-day question and comment period prior to being enacted. The new change to Civil Code § 4360 reduced that comment period to 28 days, thereby allowing boards of directors who meet monthly to have new rules voted in place at the very next board meeting, instead of potentially extending the comment period beyond the next monthly meeting and adding additional delays to the effective management of the community.

Legislative Day at the Capitol

As many of you know, each year members of our California CAI chapters gather in Sacramento to educate our legislators on current issues facing California's 55,000 community associations. During this two-day event, we attend briefing sessions with our lobbyist, learn what new changes are on the horizon for this year, and head to the Capitol to make our voices heard. Save the date! This year's Legislative Day at the Capitol will be held on Monday, April 8th and Tuesday April 9th. Please join us and help to educate our legislators, seek support for favorable bills, and discuss the problems with potentially detrimental bills. This is also a great chance to get to know the CLAC committee members who represent our chapter's voice at the "Meet the Delegates" Reception. We welcome you to come to Sacramento and be part of the change!

The Hyatt Regency in Sacramento has provided us a group discounted rate so make sure to include our group code "G-CLA5" when making your reservation.

Join Our Buck-A-Door Campaign

As mentioned above, CLAC is a volunteer committee of your CAI chapter, and we operate entirely on the voluntary contributions of the members and homeowner associations we serve. You can support our efforts and ensure your voice is heard by contributing to our "Buck a Door or More" campaign from your association. We make it as easy as possible for you and your association to get involved. Simply navigate to our website at *caiclac.com/donate/buck-a-door* and sign up. Every donation helps!

Sean D. Allen, Esq., *is a partner with the law firm of Roseman Law, APC, and is the head of the firm's HOA department. Having exclusively represented common interest developments for several years, he has broad experience with issues and disputes that impact community associations. Sean serves on the California Legislative Action Committee (CLAC) for our chapter.*

2019 Chapter Calendar of Events

Mar 26	**Chapter Luncheon "Decoding the Claim Game",** 11:30 am, Los Robles Greens, Thousand Oaks
Apr 8-9	**CA Day at the Capitol,** Sacramento
Apr 11	**Central Coast Dinner Program "Rules Enforcement Without Remorse",** 5:45 pm, Ventana Grill, Pismo Beach
Apr 12	**CMCA Review Session,** 8:00 am, Chatsworth
Apr 18	**SB Luncheon "Rules Enforcement Without Remorse",** 11:30 am, Hyatt Centric Santa Barbara
Apr 23	**Chapter Luncheon,** 11:30 am, Los Robles Greens, Thousand Oaks
May 7	**Managers' Program,** 11:30 am, The Courtyard Marriott, Oxnard
May 9	**Dinner Program,** 5:45 pm, The Courtyard Marriott, Oxnard
May 29	**Community Faire,** 4:15 pm, The Embassy Suites, Oxnard
June 20	**Central Coast Dinner Program "The Great Debate: The Neighbor-to-Neighbor Dispute",** 5:45 pm, Ventana Grill, Pismo Beach
June 25	**Chapter Luncheon,** 11:30 am, The Courtyard Marriott, Oxnard
June 27	**SB Luncheon: "The Great Debate: The Neighbor-to-Neighbor Dispute",** 11:30 am, Hyatt Centric Santa Barbara

Note: Event dates, times and locations are subject to change. Please check the chapter website: cai-channelislands.org for the most current information

Chapter Announcements

Congratulations to Lisa A. Tashjian, Esq., CCAL of Beaumont Tashjian

Lisa was accepted into The College of Community Association Lawyers (CCAL) by the National Organization of CAI. The College includes lawyers who have demonstrated skill, experience and high standards of professional and ethical conduct in the practice of community association law, and who are dedicated to excellence in the specialized practice of community association law.

Colleen Scott, CMCA, AMS

We are excited to announce that Colleen Scott has accepted the position of administrative assistant for CAI-Channel Islands Chapter. Colleen recently retired from association management and we are grateful to have her as part of the CAI team as she brings a wealth of experience and knowledge to the chapter.

Thank you

to the following members for renewing your membership with CAI!

Individual Homeowner Leader Members

Carol Stamey, Carefree Living Association
Ursula Norby, Puerta Del Mar
Gail Ryff

Community Association Boards

Anacapa Walk Corporation
Foxenwood Garden Villas II HOA
Kjaergarrd Owners Association
Lynn Meadows Homeowners Association
North Oaks Homeowners Association
Pepper Farms Homeowners Association
Persimmon Hill Homeowners Association
Ventana Neighborhood Association
Waypointe Neighborhood Association

Management Companies

Concord Consulting & Association Services
PMP Management, AAMC
Tandem Property Management
The Emmons Company

Community Manager Members

Carolyn Abul-Haj, EKAM Inc.
Michelle Armstrong, PCAM, Good Management
Tamera Gresiak, Sherwood Valley Homeowners Association
Carol Henderson, Leisure Village Association
Matthew Howard, AMS, PMP Management, AAMC
Frank Jauregui, CCAM, PMP Management, AAMC
McKenna Keays, Good Management
Roxane Key
Gayle Pinero, Community Property Management
Sally Reagan, CMCA, AMS, Encina Royale
Wesley Shryock

Business Partners

All American Roofing • Animal & Insect Pest Management
A Plus Tree, Inc. • Behr Paint • Belfor Property Restoration
Ben's Asphalt • California Premier Restoration
City National Bank • Design Build Associates
Kasdan, Lippsmith, Weber, Turner LLP
McDonnell Roofing Inc. • MD&D Pools
Mission Paving & Sealing • Pacific Utility Audit, Inc.
Porter & Lasiewicz, CPAs • Precision Painting
Riley Pasek Canty LLP • Specialized Pipe Technologies
Steve G. Segal Insurance Agency, Inc. • SwedelsonGottlieb
The Centurion Group • The Cleaning Lady Company

Welcome

to our new members!

Homeowner Volunteer Leader Members

Cobblestone Creek / Jensen's Crossing
Las Jollas de Rancho Grande
Shoshone Sycamore Owners Association

Managers

Michelle Atkinson, Ross Morgan & Company
Carla Campos, Farrell Smyth, Inc.
Diana Castillo, CCAM, AMS Realty
Colby Bloom, Community Property Management
Debra Edwards, Coro Community Management & Consulting
Ashley Holloway, Farrell Smyth, Inc.
Berta Recio, Ross Morgan & Company
Crystal Rost, Farrell Smyth, Inc.
John Shade, AMS Realty
Kristin St. John, CCAM, St. John & Associates
Jessica Stewart, Farrell Smyth, Inc.

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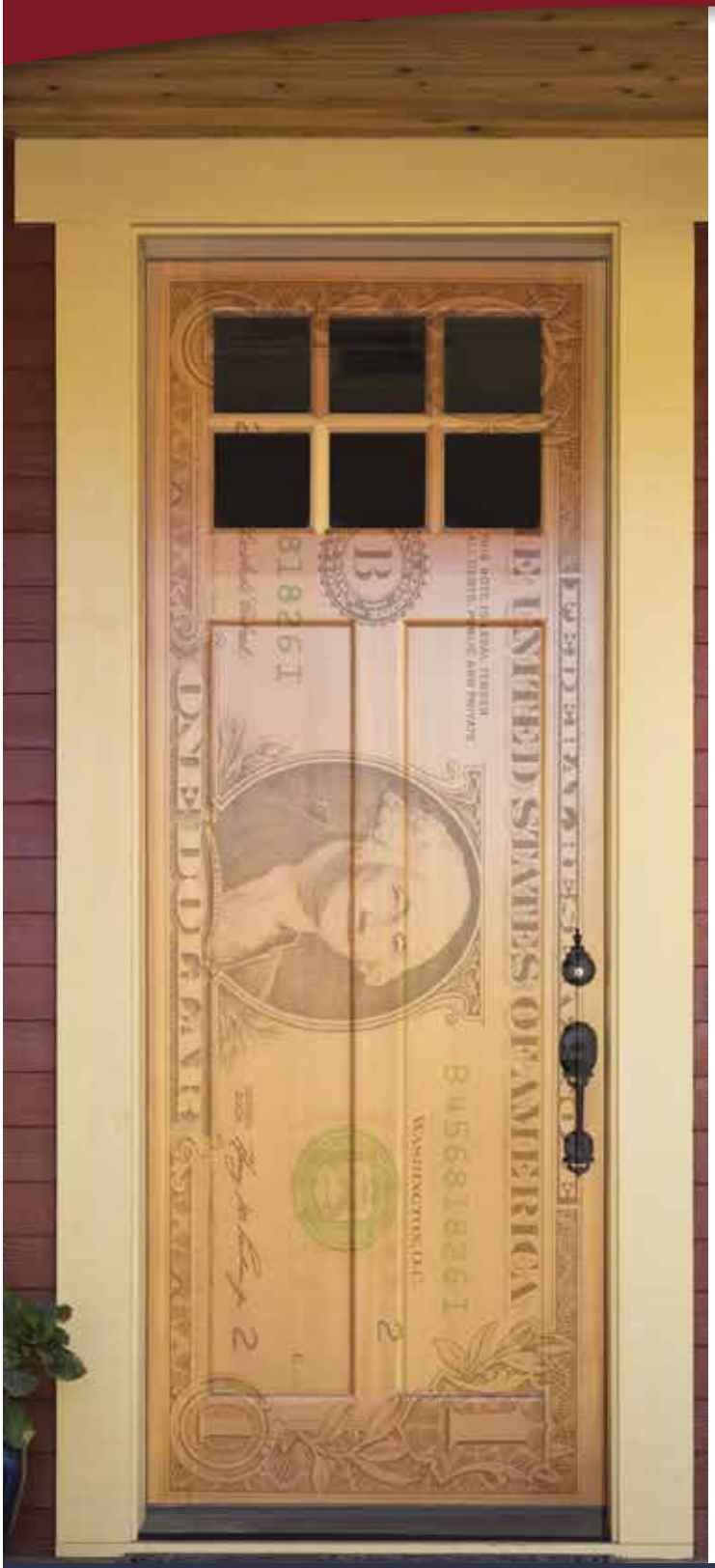
WORKING TOGETHER:
CAI Calfornia Legislative Action Committee and 50,000 Community Associations



A Buck a Door or More Makes Sense!

The California Legislative Action Committee (CLAC) is a volunteer committee of Community Associations Institute (CAI), consisting of homeowners and professionals serving homeowner associations (HOAs).

CAI is the largest organization in America dedicated to the monitoring of legislation, educating elected state lawmakers and protecting the interests of those living in community associations.

CAI-CLAC is working toward legislative solutions that are right for California homeowner associations with the ongoing and generous support of HOA communities across the state. Join CAI's 2013 Legislative Action Committee of the Year and do your part by contributing a "Buck a Door or More" from your association.

To receive CLAC updates and for more information on the Buck-A-Door, visit www.caiclac.com.

CALIFORNIA LEGISLATIVE ACTION COMMITTEE
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888.909.7403 | 916.550.9488 fax | www.caiclac.com

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CHANNEL ISLANDS CHAPTER
community
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Central Coast & Santa Barbara PROGRAMS

"Rule Enforcement Without Remorse"

This program will cover:

- Understanding the Boards' duty to enforce association documents, including CC&R's, Rules & Regulations & Architectural Guidelines.
- Enforcing documents in good faith – gaining compliance via violation notices, fines, hearing, IDR & ADR & suspension of privileges.
- How your association can lose the right to enforce – exploring various non-enforcement scenarios.
- Addressing tricky issues such as surveillance cameras, access rules, no smoking rules, political signs and time for questions on your enforcement challenges.

–TWO PROGRAM DATES–

Central Coast Dinner Program
Thursday, April 11, 5:45 pm
Ventana Grill, Pismo Beach

Santa Barbara Luncheon
Thursday, April 18, 11:30 am
Hyatt Centric Santa Barbara

Program Speakers:

Tracy Neal, Esq.
Beaumont Tashjian

David Loewenthal, Esq.
Loewenthal, Hillshafer & Carter LLP

Thank You!

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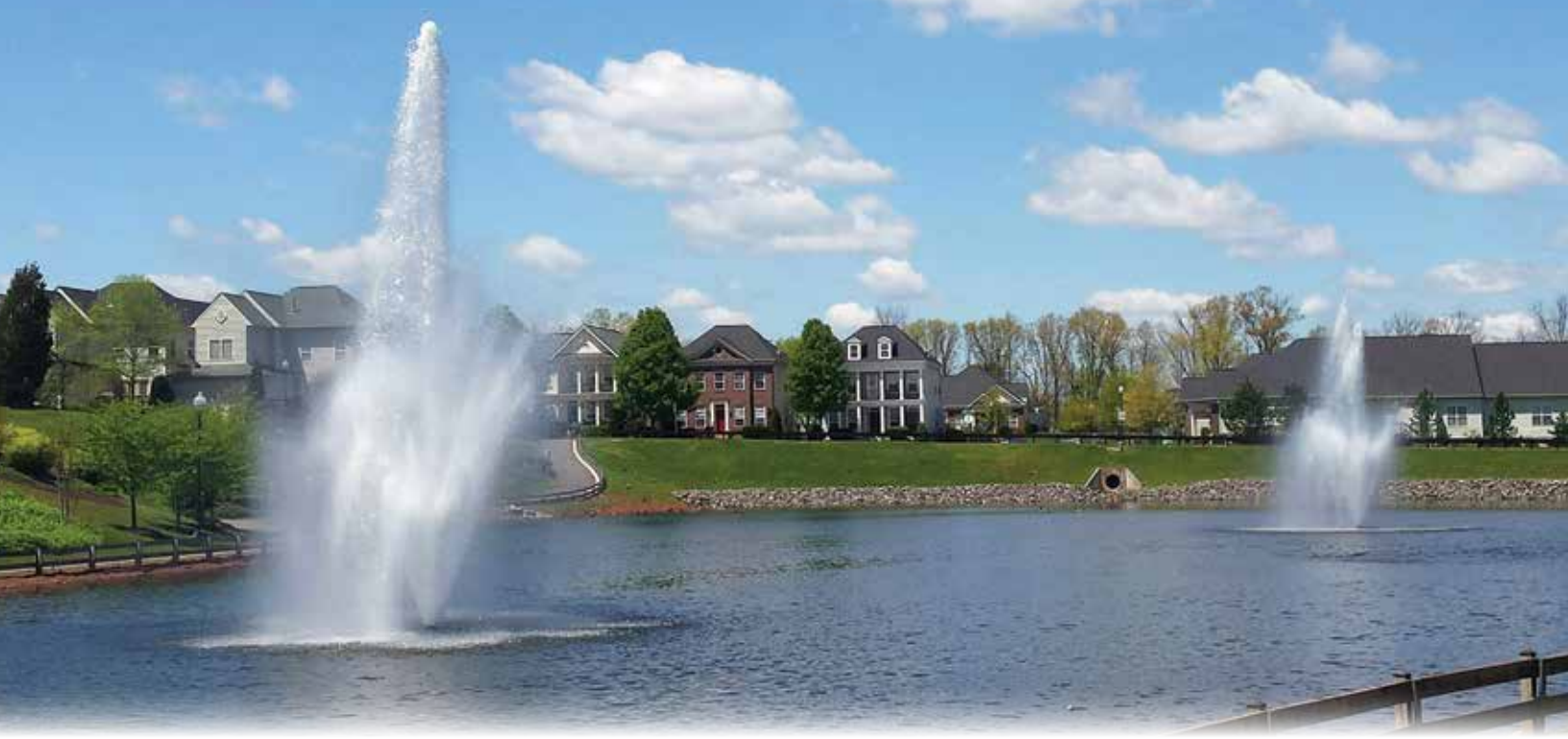

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Schedule of Events

April 8-9
CA Day at the Capitol
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April 11
Central Coast Program
"Rules Enforcement Without Remorse"
Pismo Beach, CA

April 12
CMCA Review Session
Chatsworth, CA

April 18
Santa Barbara Luncheon
"Rules Enforcement Without Remorse"
Santa Barbara, CA

April 23
Chapter Luncheon
Thousand Oaks, CA

For more information or to register,
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