

Meeting Minutes

REGULATORY COUNCIL OF COMMUNITY ASSOCIATION MANAGERS

Department of Business and Professional Regulation, Professions Board Room
1940 North Monroe Street, Tallahassee, Florida 32399

Friday, February 8, 2013

I. CALL TO ORDER

Patricia Rogers called the meeting to order at 10:03 a.m.

II. ROLL CALL

Patricia Rogers, Chair
Kelly Moran, Vice Chair
Terence Brennan
David Beswick
Dawn Warren
Terence Brennan
Margaret A. Rogers

Staff Present

Juanita Chastain, Interim Executive Director
Mary Alford, Government Analyst
Douglas Dolan, Assistant Attorney General
C. Erica White, Prosecuting Attorney
Belicha Desgraves, Assistant General Counsel
Kathleen Brown-Blake, DBPR Rules Attorney

Due to extreme echo on the conference call line the meeting was temporarily adjourned for everyone to call back into the conference line.

Patricia Rogers, Council Chair introduced Juanita Chastain as Interim Executive Director to the Council in the interim of a new Executive Director being hired.

III. APPROVAL OF MINUTES

Motion: David Beswick made a motion to approve the November 30, 2012 meeting minutes.

Second: Kelly Moran seconds the motion. Motion passes unanimously.

IV. CHAIR REPORT – Patricia Rogers

Patricia Rogers, Chair: We have a very brief agenda today and some very important discussions. Ms. White has prepared a draft for us to start on our discussion of professional standards and that might help us move forward on where we want to go with them. Welcome Mrs. Chastain and thank you staff for doing an excellent job with putting the agenda together.

V. COUNSEL REPORT – Doug Dolan and Kathleen Brown-Blake

1. SERC Proposed Rule 61E-14.5001, Citations

Kathleen Brown-Blake: I am the rules attorney for the Department. At the last meeting we discussed citation rules, mediation and notice of non-compliance rules. At that time you guys voted that there was a no SERC based on the numbers we had. Happily Mary Alford went back through the numbers and she thought there was a discrepancy so she and Jerry Wilson did some number crunching and discovered there was a problem with the numbers. They have given me new numbers to work with. There will be a new SERC on this and I have completed the SERC as well as a new checklist for you to review. There will not be legislative ratification based on the SERC information. The total impact monetary over five years is 315 thousand dollars which does not approach the one (1) million thresholds.

Motion: Kelly Moran made a motion to reconsider previous motion on the citation SERC.

Second: David Beswick seconds the motion. Motion passes unanimously.

Patricia Rogers, Chair: To explain to those listening, what this does is this allows the Department to provide citations to individual CAM's who have minor violations. Perhaps, Ms. Brown-Blake could you give us an example of what one may receive a citation for, so those listening might have a sense on what those may be?

Kathleen Brown-Blake: Yes, one of the violations listed in the citation rule would be failing to provide access to association records to those entitled to such by law. That would only be for minor violations. This rule only encompasses minor violations, so it would only be a minor violation of that statute.

Patricia Rogers: As an example we used at our meeting was that instead of providing the records in 5 days they provided it in 7 days. They would receive a citation for that rather than go through an entire legal process.

Maggie Rogers: The citation would do what?

Kathleen Brown-Blake: It would be disciplinary action that would result in a set fine amount. It is actually disciplinary action that goes to a Final Order. It is just speeding up the disciplinary process.

Motion: Maggie Rogers made a motion to vote on a SERC.

Seconds: Dawn Warren seconds the motion. Motion carries without opposition.

Motion: David Beswick made a motion to approve the SERC.

Seconds: Terence Brennan seconds the motion. Motion carries unanimously.

VI. PROSECUTING ATTORNEY REPORT - C. Erica White and Belicha Desgraves

Belicha Desgraves: If you look at the prosecuting attorney report you'll see we have fewer cases. The numbers are continuously getting lower as we continue to work diligently to address these matters. I am happy to address any questions pertaining to the report.

Kelly Moran: I applaud you in reducing the number of cases in legal.

VII. EXECUTIVE DIRECTOR – Juanita Chastain, Interim Executive Director

1. Financial Statements; Period Ending December 30, 2012

Operating Account balance = \$9,223

Unlicensed Activity balance = \$148,124

2. Division of Regulation Quarterly Complaint Report

Handout reviewed by Council Members.

VIII. Council Discussion Topics

1. Rule 61E14-2.001, F.A.C; Standards of Professional Conduct

Patricia Rogers, Chair: The Council has been discussing ways of enhancing these to bring up the standards within our profession. We recognize there isn't an entirely positive image of the profession and we would like to see if there are ways with the current laws to enhance the standards thereby raise awareness with managers and within our own rules of the importance of professional conduct.

Maggie Rogers: Would drug testing fall under this category?

C. Erica White: No.

Maggie Rogers: That is the root of your problem.

Kathleen Brown-Blake: I am the one who will be taking care of publications of this stuff. At this point we have yet published a notice of development so you do not have to have the language nailed down today. The language was provided to help you work on it, but this is not what we believe the final language will look like 100%. You can review it, if you like. Today what we need is a notice of development to be voted on and approved by the Council so we can get that published. Then we can work on the language for the next meeting

Patricia Rogers, Chair: I think this is a work in progress, does that mean we can work on this language for a while?

Kathleen Brown-Blake: Absolutely. The issue we have with changing language is that we have to match it or it will have to be language that is appropriate with the statutory authority that is granted. Any language you do want to change you can try and make it, if there is an issue with it I can let you guys know.

Motion: David Beswick made a motion to publish a notice of rule development of Rule 61E14-2.001, F.A.C.

Seconds: Kelly Moran seconds the motion. Discussion:

Maggie Rogers: When you say you are going to make a motion to publish that means that you are making a motion to publish the workings of this?

Kathleen Brown-Blake: No Ma'am, for rule making to be legal in this state we have to notice the public in the Florida Administrative Register that a rule is open for development. That is what we are going to publish. The language will not be included in this notice, it will be included in the following notice once the language is voted on by the Council.

Maggie Rogers: Okay. Thank you for that explanation

Patricia Rogers, Chair: Can we invite comment on the current rule?

Kathleen Brown-Blake: Yes, it would be great if we could do it now. It could save time, money and effort and get it down faster if we could get the comment now.

Patricia Rogers, Chair: I would appreciate it if we could invite comment on where managers believe there should be change in the current rule? Does the Council agree with that?

Kelly Moran: How will we go about inviting comment?

Kathleen Brown-Blake: The notice of development is a publication online in the Florida Administrative Register. It provides information for comments to be provided directly to me and I will then forward that comment to Mrs. Chastain to send to you guys for discussion at the next meeting.

Patricia Rogers, Chair: Can we also have it published on the DBPR website?

Kathleen Brown-Blake: We can put the notice of rule development, but not any proposed language.

Patricia Rogers, Chair: No, not the language. Just a notice we are seeking comment on this rule.

Juanita Chastain: I think that will be acceptable. We will look into that for you.

Kelly Moran: I am just concerned most people will not look to where the notice of rule is published and won't be aware that this is something we are considering.

Jim McMurry: I am with Florida Community Association Journal Magazine. We would be happy to publish the notice in our magazine to get the word out.

Kathleen Brown-Blake: We appreciate that. The notice itself is something that can only be provided for by a state document. The FAR and our website would qualify as a state document. I don't think there would be an issue with your magazine making comment or referencing to our website. The notice itself should not be published in anything that is not a state document.

Patricia Rogers, Chair: I think we can work something out were they can publish something.

Maggie Rogers: Can we ask questions or make comment on the changes, can we do it at that time?

Patricia Rogers, Chair: No, all we are voting on right now is the motion to develop the rule. Once we vote on that then we will discuss the changes.

William: I have a suggestion; there is a book out called Neighbors at War! The Creepy Case Against Your Homeowners Association by Ward Lucas. I think it is worth looking into it. Thank you.

Council Members voted. Motion passes unanimously.

C. Erica White: You will notice in paragraph 1(a) I struck the language regarding "control." We have already had a ruling in the Division of Administrative Hearings that we can not discipline a CAM or CAM Firm for failing to properly "control" someone they work for, so I struck that language. The court found that it is not constitutional for the Department to discipline on that.

Patricia Rogers, Chair: What is the role of a management company then?

C. Erica White: What we do is discipline licensee's for failure to follow what is in the statute or rule. What I am saying is this rule we have on control of others. The court has ruled that it is unconstitutional for the Department to discipline a CAM licensee for failure or actions of another licensee. In civil court it is called vicarious liability, we can't do that in administrative context. The language needs to be stricken because I can not charge under it.

Maggie Rogers: Are you saying the manager has no responsibility over someone they hire?

C. Erica White; No, I am not saying that. I am saying as the Department if the manager fails to properly supervise that licensee. We need to charge the licensee they failed to properly supervise. We can't charge a CAM Firm because of the actions of the employee that was a violation of our rules, we have to actually charge that employee.

Maggie Rogers: Does that apply to licensed employees and unlicensed employees?

C. Erica White: Unlicensed person would not be under the purview of the Council. This would only apply to people that are licensed.

Maggie Rogers: I'm not talking about charging the unlicensed person. I am asking is the manager responsible for hiring unlicensed people.

C. Erica White: That would depend on the employment contract between the manager and the people they are employing. The only way we get involved is if the manager fails to execute the duties under statute. If an employee embezzles money under a CAM firm, that is a criminal matter or civil matter. It depends on the circumstances on how the money got embezzled. If the manager embezzled the money we can discipline the manager. If the employee embezzled the money we need to look at that employee. We can not hold the manager responsible for the employee embezzling the money under the control of others. Now maybe under professional misconduct we can do that, but not under subsection 5, the control of others.

Terence Brennan: Does this mean a management firm directs an employee to do an illegal action that the management company can't be responsible for that. Is it because the employee has a license and operating autonomously under the license? Either they have control or they don't. How does that work into the courts decision?

C. Erica White: The issue is how you charge it, we can charge it as unprofessional conduct, you can charge it as gross misconduct, you can not charge it under control of others. That particular subsection 5 is unconstitutional. We have not even been charging it since the case came out, so we are not using it. There are other ways to charge them, just not under that.

Patricia Rogers, Chair: You all may recall that the Council voted over a year ago on a settlement for a case were an individual manager was charged under control of others, the management firm was charged with control of others. They appealed it and we lost a case specifically on this. It was made very clear in the decision that we could not charge under this decision. I remember quite clearly.

Maggie Rogers: What if the manager directed the employee to do something wrong?

C. Erica White: What I am saying is that you charge the manager maybe under professional conduct or gross misconduct or negligence. You would not charge them as control of others.

Maggie Rogers: Let me be more specific. What if a manager directed his workers to be harassing towards certain people in the condominium. How would that play out?

C. Erica White: You have standards for professional conduct. And if the standards are remunerated as we make changes to this rule layout that a CAM manager conducting themselves inappropriately or directed something like that to occur, and that is in your rule we would charge that as professional misconduct. You would not charge them under control of others in subsection 5, which is what I am talking about.

Terence Brennan: Does this mean a management company does not have control over a CAM and that is why you can not charge in that way. The concept doesn't exist that they have control in the first place?

C. Erica White: No, I am not saying that. I am talking about the disciplinary action that the Department takes against a licensee. As it relates to the control of others, we can not charge a CAM Firm for the actions of its employees. Specifically saying we are charging the CAM Firm for the action of an employee. We have to charge the employee, who is a licensee. I am not talking about employees like a secretary. I am talking about an employee that is a licensee. Now, let me also say, if a CAM firms fails to manage its records properly or fails to provide appropriate oversight, we can charge for professional misconduct we can't charge them for control of others.

Terence Brennan: I just want to understand the control aspect of this. It would seem like the basic reason you can't charge them under that way is because the management company does not have control over their employees. The licensee has control of his own actions. They have no authority to direct the licensee to do something because that is the licensee promise.

C. Erica White: That is beyond the scope of what we would be doing. Whatever is in the contract between the CAM firm and the employee is what governs their control. As it relates to discipline, we are not able to discipline a CAM firm for the action of it's employees. We have not been charging for that in at least the last 2 years since I have been handling this profession. It is not something we are currently doing now.

Terence Brennan: Maybe what I should do is read the case. Do you have the case number?

C. Erica White: I will be happy to forward the case to you.

Patricia Rogers, Chair: I think if there is concern with that particular ability then we need to think about it and come back at our next meeting, clearly this is not the only discussion we are going to have on these standards. We can not charge under "control" subsection (a) it was ruled illegal by the courts. I agree there is no point in having it in the rule if we can not follow it.

Terence Brennan: It is good to understand what the courts reasoning of that.

Patricia Rogers, Chair: If you are still concerned about that issue, and I certainly understand that concern. You can put this and some others ideas of where she can fit some other language into the rule.

Maggie Rogers: Are you going to send that to everyone?

C. Erica White: Yes, I will send it to Mary Alford and she can send it to all Council Members.

Maggie Rogers: Thank you.

C. Erica White: The next thing you will see the word “licensee” which is sub-paragraph (b) all I did was change the subsections in 468, they were incorrect. It was a technical change. You will see under subsection (1) new paragraph (b) I actually added in from the statute what community association managers duties are because the rule did not have it and I think we were defining what services we are expecting the licensees to perform we need to have that in the rule. That comes directly from Chapter 468. You can also see where I have “due professional care” it is defined. In the current rule it was not defined. I know there were some discussions from previous meetings, this is just a definition I came up with, it can be changed. I attempted to show what due professional care is so when I am charging for discipline I can actually charge for a violation of due professional care, which I have difficulty doing now. Again, the same thing with professional competence those are definitions I have added so I can charge someone for a violation of on a level of “professional competence,” which I can not do now because there is no definition.

Maggie Rogers: Can you just slip into this definition on ethical duties to follow legal rules, all legal rules?

C. Erica white: The definition of community association management is actually in statute. You do have an obligation to perform those services with a certain amount of skill. What I was attempting to do here is to indicate you have to follow the law as it relates to performing only those services that are designated in statute, you don’t want to go outside of those services that are indicated in statute. You also don’t want to hold yourself out as being able to perform those services if you don’t have the qualifications to do so. That language can be changed if the Council is not comfortable with it. I am trying to establish there is an ethical duty for CAM’s to perform services that they are allowed to do.

Maggie Rogers: I agree, I am saying can you say there is a legal or ethical duty.

C. Erica White: that is up to the Council. I will defer to Board Counsel as well.

Patricia Rogers, Chair: Maggie, I would prefer that we go over it today and allow everyone to mull over it and make their suggestions for changes over the next month and then reconsider it.

Maggie Rogers: Okay, that is fine with me. I just want you to know the reason I am adding that is because it makes it very clear. It should be a given, but it is not a given that they must follow the law. Ethical and legal duties just encompasses it, it just makes it a little clearer. If you don’t mind checking it out to see if it is okay, I would appreciate it.

C. Erica White: We can make a note of that. As for paragraph 2 as it relates to “honesty”, I actually took a case to the Division of Administrative Hearings (DOAH) and I lost because the administrative law judge found that I could not prove anything under paragraph 2, it is just not detailed enough. I added two things regarding honesty, again I took the language from the Department’s statute, both of them talk about misleading, deceptive or fraudulent representation related to community association management. A and B are basically saying the same thing; one deals with fraudulent representation and the other deals with employ a trick or scheme, but that again is designed to allow us to prosecute embezzlement under the honesty subsection of this rule. I think this will give us more teeth to be able to do that.

Maggie Rogers: This is perfect, I don’t’ think anything should be taken out. Just add making misleading, deceptive or illegal statements. Just to make it a little bit clearer. All that does is just make it a little clearer.

Patricia Rogers, Chair: I have a problem with putting in “illegal”. I am not always certain what an illegal statement is. I don’t know if that is appropriate. We know what misleading, deceptive or fraudulent is.

Maggie Rogers: Legal are things written down, that we can check. That is why I would like to add that word. Other things can be ambiguous, legal is not.

Doug Dolan: We will check all of this out, but as far as broadly here we can not just impose any legal obligations to the licensee which is not permitted in the statute. We can not over broaden the statute.

Maggie Rogers: I want to repeat what you said; you can't impose any rules about legality, is that what you are saying.

Doug Dolan: No, we can not enlarge the statute with the rules.

Kathleen Brown-Blake: We have to work within statutory authority.

Maggie Rogers: You don't think there is a statute stating you have to be legal?

Terence Brennan: I have a suggestion. Instead do the following as required by such and such statute. That would bring the law into it, it points to the statute itself that makes it illegal. It doesn't broaden anything.

Kathleen Brown-Blake: We can encompass all of that without having to go into the honesty definition. Under the due professional care definition we can state they are required to follow Chapter 468, Part VIII which is the CAM section and the rules promulgated there too. This will encompass everything the licensees are held to. That should cover all the legal and non-legal issues. Honestly, enforcing an illegal statement is going to be near impossible. It is unnecessary language in the rule. Not to mention if I send a rule with the term "illegal statement" to JAPC, JAPC will kick it back to me and say what does this mean.

Patricia Rogers, Chair: That is the same question I would have, what does it mean. Going back to Due Professional Care, you are going to put Chapter 468, Part VIII. Aren't there also parts of Chapter 455 that CAM's should follow as well?

Kathleen Brown-Blake: Yes, I can do that absolutely.

C. Erica White: On paragraph 3 relating to "Professional Competence", I really kept that language the same as it currently is. I just removed "he or it" and just word-smith it a little bit so it is really the same language. We have already defined professional competence so I think it makes the rule a little tighter.

Under Due Professional Care I added a subsection regarding the complying with the associations governing documents. That is because the number one complaint we get is that the CAM or CAM firms do not comply with the governing document. By putting it under Due Professional Care I can charge the violation by a CAM for failing to show due professional care by not following the associations governing documents. This would be a very clean violation that I can charge and win if it is laid out in the rule this way.

Paragraph 5 I told you I struck that language. When you get down to records, I actually re-titled it "gross misconduct." I am trying to decide what gross misconduct is, which would be with holding possession of records. Right now it just says records and talks about what a licensee shall not do. I am rewording it to say it is misconduct if you do the following; withhold possession of records, deny access to records. It is cleaner that way. Or create false records. It is just to make it very clear that it is gross misconduct. Also, using funds for any purpose that has not been authorized, all of that will be designated as gross misconduct.

Terence Brennan: Going back to the governing documents. I had the impression, many years ago, in

talking to the Department that they didn't get involved in the governing documents, that they do not enforce the governing documents. What obligation does a CAM have?

Patricia Rogers, Chair: That maybe on the side of Division of Condominiums, Timeshares and Mobile Homes. If it is a violation by the CAM that would be different.

Terence Brennan: I was just curious if there is any enforcement power or policy regarding the governing documents.

C. Erica White: If the CAM violates the governing documents, we can discipline the CAM for violating the governing documents. The problem is that when we get complaints it is not clear exactly what portion of the by-laws or governing documents the CAM violated. By the time we get into the complaint, there is not a whole lot there. This is giving us the teeth to go after a clear violation of the governing documents. It is also making it very clear to licensee that it would be due professional care and if they don't exercise it then they would be disciplined. We are just trying to make it as clear as possible.

Patricia Rogers, Chair: I would ask that you send any questions or additional comments to Ms. White.

Kathleen Brown-Blake: If we could have them sent to Mary Alford that way they get to both Ms. White and I. We are going to be working on getting the language set up together.

Patricia Rogers, Chair: What is a good date?

Kathleen Brown-Blake: April 1st.

Patricia Rogers, Chair: Mary can send out a reminder email reminding everyone that they must have them submitted by April 1st by next week.

Mary Alford: Yes, Ma'am I will.

Patricia Rogers, Chair: I think this is important and I think it would be good if we all reviewed, thought about other changes we might want, thought about what is missing that we can change and whatever questions we want to ask about what should be in there that isn't in there.

2. Training Requirements for Investigators

Jerry Wilson: I am the Division Director for the Division of Regulation. Mary Alford came to me and said the Council was interested in the investigators and what kind of requirements we have for hiring and what kind of training they get. I was able to put together for Mary and hopefully you guys have, it is essentially the basic requirements to be an investigators, what an investigator does, what we expect them to do and what training they get. As you can see we had a training last year with Ms. White, Ms. Brown-Blake and the Division of Condominiums, Timeshares and Mobile Homes. Hopefully the information you have will answer any questions you may have or I will be happy to answer any questions.

Terence Brennan: Starting at the beginning, needing 1 – 3 years of experience conducting investigations. What sort of investigations would that be, what does it mean in that context?

Jerry Wilson: There are other state agencies that employ investigators. We have county and city government that conduct investigations locally. We also have inspectors that do inspections but do conduct investigations as well. It could come from a variety of places.

Terence Brennan: That 1 – 3 years is not a hard fast rule, you may take someone in and promote them into an investigator position with time.

Jerry Wilson: Yes, they would have had to demonstrate experiencing with conducting investigations. Certainly we would give them training. We have manuals and training manuals. We work with the Office of General Counsel through the years to develop basic elements to each of the violations contained in your laws and rules. What documents are necessary to prove these violations, a very extensive list. We certainly conduct investigations for about 15 other boards and professions. It is a large task to know all of these things. We do have several investigators that formally worked with the Division of Condominiums, Timeshares and Mobile Homes, especially in South Florida. They come to us with a wealth of knowledge and investigative experience. Certainly, a lot of coordination with our Office of General Counsel and Division of Condominiums to do this.

Terence Brennan: Thank you.

Patricia Rogers, Chair: Is the Council satisfied with the experiencing and training of the investigators?

Multiple Council members indicated “yes” in the background.

3. Unlicensed Practice of Law relating to CAM’s

Patricia Rogers, Chair: There has been no action legislatively. In January I sent you a re-cap of that. CAI has put together a committee to keep track of what was going on. FCAP has also put together a petition that ask no action be taken on it. Right now, the only thing we need to do is keep a low key and make sure no legislation comes up. I have talked to multiple legislators and none of them have heard anything coming up this Session, they think there are more important issues that need to be addressed.

IX. FUTURE MEETING DATES

May 31 – Conference Call

X. OLD BUSINESS

None.

XI. SUGGESTED TOPICS FOR THE NEXT MEETING

1. Public Information Brochure
2. Standards of Professional Conduct
3. UPL Follow-up
4. Legislative Update

XII. ADJOURNMENT

Motion: David Beswick made a motion to adjourn the meeting.

Second: Kelly Moran seconds the motion.

Meeting adjourned at 11:03 a.m.