Community Association Sunshine Law Course 101

Without a doubt, the single question we are asked most frequently involves the so-called "sunshine laws" for associations. Therefore, we are pleased to offer a primer, which we have dubbed Community Association Sunshine Law, Course 101.

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Chapter 1: Definitions

First, almost all community associations fall into one of three categories, a condominium association (governed by Chapter 718 of the Florida Statutes); a cooperative association (governed by Chapter 719); or a homeowner's association (governed by Chapter 720). The law for condominiums and cooperatives is essentially identical, so when we mention the law for condos, it applies to co-ops as well. The law for HOAs is similar to the condominium counterpart, but slightly different in a few key respects, as we will see.

Like any beginners course, we must of course start with the definitions. All of the relevant laws define a "meeting" of the association's board as any "gathering" of a "quorum" of the board where association business is "conducted."

The first relevant point is that a quorum must be present. This is different than the sunshine laws for public officials, where two or more public officials cannot meet, even if they are less than a quorum. The association law is more liberal in this regard and two directors can discuss association business (except in the case of a three-member board)

One of the most frequently debated topics is what constitutes the "conduct" of business. We have seen many associations under the auspices of "executive sessions", "planning meetings", or "agenda development workshops", argue that a quorum of the board could gather out of the sunshine as long as no binding votes were being taken. In our opinion, this is not what the law says, and is certainly not what it means. Although we are not aware of any reported appellate court cases which have come out in the association context, there are a number of cases in the public arena which have held that any interaction contributing to the development of ideas constitutes a "meeting", without regard to whether or not a formal vote has been taken.

Otherwise, association boards could make all of the tough decisions in "executive session", with the "public meeting" being simply a rubber-stamp event. While many associations legitimately desire to avoid "airing dirty laundry" in open meetings, it is simply the price that is paid for the owners' right to know.

Let's now look at the definition of a "gathering" of a quorum of the board. If you have a five-member board, clearly three of them sitting in the same room

constitutes a quorum. Those three are certainly free to get together for social purposes, or other non-association reasons, but once association business is discussed, a weekly golf game could easily turn into a meeting of the board.

Likewise, if a quorum of the members of the board are assembled by telephone, the law considers them to be meeting in person.

One frequent inquiry involves the electronic transmissions which most of us refer to as e-mail. This is definitely a gray area in the law, and one which we think the Legislature needs to take a look at.

In the days of old, if Director A wrote a letter to Directors B, C, D, and E, that letter was not a "meeting" because there was no "gathering" of the board. If Director B replied to Director A and copied Directors C, D, and E, that letter was likewise not a "meeting", although the letters would probably be considered "official records" and would need to be retained in the association's file.

Now, correspondence which used to take a couple of days to be received is received in a couple of seconds. We know that many board members set up e-mail board groups, and items of association business can be debated by e-mail *ad infinitum*, to the point where not only does the development of ideas occur, decisions may actually be made.

To throw a bit more sauce into that mix, there are also situations where an agent or executive officer of the association (such as a board president or community association manager) may already have the authority to do something, but would like to "poll" the other board members for support. If the president already has the authority to take a specific action (let us say, for example, counseling an employee about perceived problems), does getting e-mail support for that action turn it into a vote?

These are all questions that will either need to be sorted out by the courts, the relevant enforcement agency, or preferably through further guidance in the governing statutes. In our view, until the law is written otherwise, e-mail interactions are not technically "meetings", although we are aware of at least one case where a condominium association received a stiff fine for conducting all of the association's business through e-mail, and never holding board meetings. Therefore, discretion is clearly the better part of valor (not to mention legal protection) when in doubt.

Chapter 2: The Do's and Don'ts of Noticing Meetings

As with meetings of governmental bodies, the right to attend and speak at meetings is of little benefit to the governed if they do not know when or where the meetings are going to be held. While governmental entities normally advertise meetings through newspapers, association advertisement is generally handled through physical posting of the notice.

Section 718.112(2)(c) of the Florida condo statute provide that notice of all board meetings, which must incorporate an identification of agenda items, shall be posted conspicuously on the condominium property at least 48 continuous hours preceding the meeting, except in an emergency. Further, written notice of any board meeting at which nonemergency special assessments, or at which amendment to rules regarding unit use, will be considered must be mailed, delivered, or electronically transmitted to the unit owners, and posted conspicuously on the condominium property not less than 14 days prior to the meeting.

If there is no condominium property upon which notices can be posted, notices of all board meetings shall be mailed, delivered, or electronically transmitted at least 14 days before the meeting to the owner of each unit. In lieu of or in addition to the physical posting of notice of any meeting of the board, the association may, by reasonable rule, adopt a procedure for conspicuously posting and repeatedly broadcasting the notice and the agenda on a closed-circuit cable television system serving the condominium association. Certain rules must be followed in both condos and HOA's when television notice is used in lieu of posted notice.

Section 720.303(2)(c) of the law applicable to HOAs likewise provide that notices of all board meetings must be posted in a conspicuous place in the community at least 48 hours in advance of a meeting, except in an emergency. Unlike the law for condos, there is no requirement that an agenda be posted. As an alternative to posting, notice of board meetings can be mailed or delivered to each member at least 7 days before the meeting. For communities with more than 100 members, the bylaws may provide for a reasonable alternative to posting or mailing of notice for each board meeting, including publication of notice, provision of a schedule of board meetings, or the conspicuous posting and repeated broadcasting of the notice on a closed-circuit cable television system serving the homeowners' association.

An assessment may not be levied at a homeowner's association board meeting unless the notice of the meeting includes a statement that assessments will be considered and the nature of the assessments. Written notice of any meeting at which special assessments will be considered or at which amendments to rules regarding parcel use will be considered must be mailed, delivered, or electronically transmitted to the members and parcel owners and posted conspicuously on the property or broadcast on closed-circuit cable television not less than 14 days before the meeting.

In general, both laws require that notice of all board meetings be posted in the community at least 48 hours before the meeting. Both laws also require that if assessments are to be considered, or if rules regarding use of the units or parcels (as opposed to common element or common area rules) are to be considered, notice must actually be given to the owners by mail (or hand delivery with written receipt or electronic notice where the owner has so consented to receiving electronic notice) 14 days before the meeting. Notices in these cases must also be posted fourteen days in advance.

The location requirement for posted notices often causes some confusion and potential legal complications. The Florida condominium law requires the board to adopt a rule stating where official notice may be posted. The board may specify more than one official location, but there must at least be one location in a conspicuous place on the condominium property, where the notices must be posted. The notices can also be posted in other locations. If the association does not have a location where notices can be physically posted, notices must be mailed out fourteen days in advance, for all board meetings.

For homeowners' associations, the law simply states that the notices must be posted "in a conspicuous place" in the community. While there is no requirement that the HOA board adopt a posting location, it is a good idea to do so. Also, in lieu of posting notice of regular or special board meetings, the HOA can mail out the notices seven days in advance, which is slightly more liberal than the condominium notice requirement.

Chapter 3: Owners' Rights at Board Meetings

One common thread in our discussion of community association sunshine laws is the fact that the law for condominium associations is very similar to the law for homeowners' associations, but with subtle and occasionally significant differences between the two.

First, let us look at the condo law. Section 718.112(2)(c) of the condominium statute provides that meetings of the board shall be open to all unit owners. The law states that the right to attend such meetings includes the right to speak at such meetings with reference to all designated agenda items. A condominium association may adopt written reasonable rules governing the frequency, duration, and manner of unit owner statements.

For HOAs, if 20 percent of the total voting interests petition the board to address an item of business, the board shall at its next regular board meeting or at a special meeting of the board, but not later than 60 days after the receipt of the petition, take the petitioned item up on an agenda. Other than addressing the petitioned item at the meeting, the board is not obligated to take any other action requested by the petition.

Chapter 720 goes on to provide that members have the right to attend meetings of the board and to speak on any matter placed on the agenda by petition of the voting interests for at least 3 minutes. The HOA may also adopt written reasonable rules expanding the right of members to speak and governing the frequency, duration, and other manner of member statements, which rules must be consistent with this paragraph and may include a sign-up sheet for members wishing to speak.

The following are the highlights of members' (homeowners') rights for both types of associations:

- **Requiring The Board To Meet.** For condominium associations, unit owners do not have the right to demand that a board meeting be called. That prerogative is typically vested in either a majority of the board or the association's president, through the bylaws. Conversely, for HOAs, twenty percent of the members can petition the board to call a meeting to consider a particular item. There is no requirement in the law that the board of the homeowner's association act favorably on the requested item, only that it be appropriately considered.

- **Right To Speak At Board Meetings.** For HOAs, the statute does not confer a general right to speak at meetings of the board, although some governing documents for homeowners' associations do so. Members of homeowners' associations do have the right to speak at board meetings which have been called by petition of the association membership. Conversely, condominium unit owners have the right to speak at all meetings of the board of directors with respect to items which have been placed on the agenda for the meeting. This does not mean that every unit owner serves as a member of the board and is entitled to debate motions, but it does mean that they are entitled to be heard regarding matters the board intends to consider at the meeting. Therefore, we believe that unit owner statements should be taken either at the beginning of the meeting, or at a set time in connection with a specific agenda item. Allowing owners to speak after the board has voted does not, in our opinion, fulfil the requirement allowing participation by members.

- **The Board's Right To Establish Meeting Rules.** Both laws permit a board to establish reasonable regulations regarding the procedures for speaking at meetings of the board. For example, we think it is reasonable to require those who wish to speak to turn in a form at the beginning of the meeting, indicating which agenda item or items they would like to address. We also believe that an association may impose reasonable time limits. Three minutes per topic, per speaker, is typically considered a reasonable time limit.

Chapter 4: Keeping Minutes of Board Meetings

Corporate minutes are often referred to as the line between organization and disaster. We have also seen "minutes" that are so lengthy, perhaps they should have been called "hours."

The purpose of minutes is to record what was done, not what was said. Where detailed findings of facts are appropriate for inclusion with minutes, they should be recited in a separate resolution of the board.

A typical set of board minutes should be one to three pages in length. The minutes should reflect:

- The date, time, and place at which the meeting was called to order.
- The presiding officer.

- The establishment of a quorum, with attendees listed by name.
- Proof of proper notice for the meeting.
- Disposal of unapproved minutes from previous board meetings.
- A summary of reports given to the board and a statement by whom the reports were given (a one or two sentence summary is typically sufficient).
- Unfinished business.
- New business.
- Adjournment.

Whenever an item of board business is put to a vote, the person making the motion for approval of the item should be identified in the minutes, as should the name of the person who seconds the motion. The exact wording of the motion should also be included in the minutes. The points raised in debate are typically not included in the minutes.

The condominium law requires the vote of every director to be recorded in the minutes. Accordingly, if five directors vote in favor of a motion and two are opposed, the minutes should reflect the names of the five who voted for the item, as well as the names of the two who voted against. There is a similar requirement in the statute for homeowners' associations.

Most boards operate under *Robert's Rules of Order*, either through mandate from the bylaws, or simply because most people are familiar with *Robert's* as a standard reference for parliamentary procedure.

Under *Robert's Rules of Order*, the chair of a meeting typically does not vote, except to break ties. This is not the case for associations. Typically, the chair of board meetings is the association's president, who is also a member of the board. As a member of the board, the president is entitled (and probably legally obligated) to vote on issues before the board.

One area where there is some significant difference between the condominium and homeowners' association law involves abstentions. Directors may desire to abstain from voting because they may not know enough about the topic (for example, if they just joined the board), or if they do not wish to take sides on a politically sensitive issue.

Directors are obliged by law and concepts of fiduciary duty to abstain from voting when the subject matter of the vote presents a conflict of interest. For

example, if a board member owned two units and approval of a lease application for one of those units was on the agenda, that director should abstain from voting on that item due to a conflict of interest.

In condominiums, directors may only abstain from voting in the event of a conflict of interest. Otherwise, the director is deemed to have voted with the majority of the board. For HOAs, the law is a bit looser. The statute provides that a director's abstention must be noted in the minutes, but does not limit abstentions to conflict of interest situations. As in condos, unless there is a conflict, it is preferred practice for all HOA directors to vote on items that have been brought to a vote by motion.

Both the laws for condominiums and homeowners' associations require minutes of board meetings to be kept for seven years, as part of the official records of the association. In our opinion, minutes should be kept perpetually (from the beginning of the association) and are one of the few documents that an association should keep in its files for so long as the association is in existence.

Chapter 5: Sunshine Laws for Committees

As we have learned by now, the sunshine laws for condominium associations and homeowners' associations contain many similarities, but also some important differences.

For both condos and HOAs, there are certain committees which must always operate in the sunshine, which means they must post notice of meetings, permit all association members to attend committee meetings, keep minutes, and permit the meetings to be videotaped or recorded with audio equipment. For condominiums, operating in the sunshine also means the committee must permit other unit owners to speak to designated agenda items.

The sunshine laws for homeowners' associations apply to committees which can make final decisions regarding the expenditure of association funds, or committees which are vested with the power to approve or disapprove architectural decisions with respect to parcels in the community. We call these HOA Statutory Committees.

The sunshine laws for condos apply to committees which are empowered to take final action on behalf of the board, or committees which make recommendations to the board regarding the association budget. We call these Condo Statutory Committees.

Regardless of what the bylaws say, the sunshine requirements always apply to Condo Statutory Committees and HOA Statutory Committees. All other committees might be called "nonstatutory committees." Here, there is a big difference between the condo law and the law for HOAs.

For homeowners' associations, nonstatutory committees are not subject to sunshine requirements.

Conversely, the condominium statute provides that nonstatutory committees are subject to sunshine requirements unless the bylaws for the association specifically exempt those committees from the sunshine laws. In our experience, very few bylaws for condominium associations exempt nonstatutory committees, and in such cases the sunshine rules apply to all condominium association committees.

Confused yet? If so, you are not alone. There is no compelling reason why the law treats these two types of associations differently, but it does.

In short-hand, the architectural review board (sometimes called architectural control committee) for a homeowners' association, and any HOA committee which is authorized to spend money must operate in the sunshine. Other HOA committee need not do so.

For condos, the budget committee, and any committee empowered to take final action on behalf of the association, must always operate in the sunshine. All other committees are exempt from sunshine laws, but only if the bylaws contain a direct exemption, otherwise the sunshine laws apply to those committees as well.

Chapter 6: Exceptions to the Sunshine Law

Every rule has its exceptions. In this chapter, we will look at the exceptions to the sunshine rules for condominium and homeowners' associations.

As noted previously, there are no exceptions to the sunshine rules for "executive sessions", "planning sessions", "fact finding missions", "personnel meetings", or for any other gathering of a quorum of the board (or, where applicable, committees) for the purpose of conducting association business. Remember, votes need not be taken for association business to be conducted.

As we have learned by now, there are subtle differences between the law for condominium associations and the requirements for a homeowners' association. Generally speaking, the HOA law tends to be a bit more liberal, and is indeed a bit more flexible (although only slightly so) regarding closed meetings.

First, let's take a look at the law for condominiums. Section 718.112(2)(c) of the Florida Condominium Act provides the requirement that board meetings and committee meetings be open to the unit owners is inapplicable to meetings between the board or a committee and the association's attorney, with respect to "proposed or pending litigation, when the meeting is held for the purpose of seeking or rendering legal advice."

Therefore, condominium association boards (or committees) may hold closed meetings when they are meeting with legal counsel to discuss pending litigation. The rationale for the exemption is obvious. For example, if an association is involved in litigation with a member, it would be unfair to the association to permit the member to attend meetings with the association's attorney to discuss the strengths and weaknesses of the case, strategic issues, and the like.

The statute also permits closed meetings with legal counsel regarding "proposed" litigation. Here, the law is open to greater interpretation. Theoretically speaking, any legal matter in which an association is involved presents the specter of "potential" litigation, but by whom must it be "proposed"?

The law for HOAs contains a nearly identical exclusion for meetings with legal counsel regarding pending or "proposed" litigation. This exclusion is found in Section 720.303(2)(a) of the statute applicable to homeowners' associations. However, the HOA law also contains a second exemption, which is found at

Section 720.303(2)(b) of the statute. This law provides that meetings between a quorum of the board (or a committee) and legal counsel may be closed when "personnel matters" are under discussion, there is no requirement that pending or proposed litigation be involved. There is no similar provision in the condominium law, although there probably should be, and many "personnel matters" also involve "proposed litigation."

A question often posed is whether notice of closed meetings needs to be posted in the community. Public governmental entities are also entitled to have closed meetings with attorneys, and they are obligated by law to post notices of those meetings. Neither the condominium law nor the law for homeowners' associations specifically address this point, and we have heard both sides of the coin argued.

As a practical matter, the purpose of posting notice is to let owners know that the board is meeting and to permit them to attend, observe, and address the topic when permitted by law. Posting notice for a closed meeting often throws fuel on a community's political fires, particularly when the litigation involves a high profile or contentious issue in the neighborhood.

Nonetheless, we are of the belief that associations are wise to post notice of these meetings, and quite likely legally obligated to do so, since the posting requirements in both statutes refer to "all" meetings, while the exemptions only specifically apply to unit owner or parcel owner attendance rights.

Boards should also keep minutes of attorney-client privileged meetings, particularly if a vote is taken at the meeting. The minutes should never reflect attorney-client privileged information, but only who attended the meeting and proper documentation of any vote which was taken.

The Final Exam

Question #1: Your association's board consists of five directors. Which of the following events constitutes a "meeting" of the board?

- **A.** Three members of the board holding a planning session in order to set the agenda for the next board meeting.
- **B.** Two members of the board meeting with an employee to discuss performance problems.
- **C.** Four members of the board attending an educational seminar regarding association law.
- **D.** All of the above.
- **E.** None of the above.

Question #2: Notice of board meetings is to be posted in a conspicuous location:

- **A.** 48 hours in advance of the meeting.
- **B.** 14 days in advance of the meeting.
- **C.** 72 hours in advance of the meeting.
- **D.** Both A and B.
- **E.** All of the above.

Question #3: A board meeting may be closed to unit or parcel owners when:

- **A.** The board is going to be discussing controversial topics.
- **B.** The board is going to discuss an opinion letter it received from the association's attorney.
- **C.** The board is going to meet with legal counsel to discuss pending or proposed litigation.
- **D.** In an emergency.
- **E.** All of the above.

Question #4: Members of the association can audiotape (tape record) or videotape which of the following meetings:

- **A.** Board meetings for homeowners' associations.
- **B.** Board meetings for condominium associations.
- **C.** Only meetings where the owner's direct interests are involved.
- **D.** A and B.
- **E.** None of the above.

Question #5: The sunshine laws for associations applies to which of the following committees:

- **A.** Any committee of a homeowners' association that can approve architectural requests or authorize the expenditure of association funds.
- **B.** A condominium association's budget committee and any committee of the condominium association that is empowered to take final action on behalf of the board.
- **C.** Every committee of a condominium association unless the association has exempted "nonstatutory committees" from the sunshine requirements through its bylaws.
- **D.** All of the above.
- **E.** None of the above.

Question #6: Owners have the right to address the board in regard to any designated agenda item at which of the following meetings:

- **A.** Any meeting of a condominium association board.
- **B.** Any meeting of a homeowner's association board.
- **C.** A meeting of a homeowner's association board called by petition of twenty percent of the voting interests.
- **D.** A and C only.
- **E.** All of the above.

Question #7: In addition to notice of the date, time, and place of the meeting, postings must also include an agenda for which of the following meetings:

- **A.** Condominium association boards.
- **B.** Homeowners' association boards.
- **C.** The board members' weekly poker game.
- **D.** All of the above.
- **E.** None of the above.

The Answers

Answer #1: The correct answer is A. The setting of the agenda for a future board meeting is "conducting" association business. Attendance by a quorum of the board at a seminar does not involve the conduct of business for the association. Although a meeting with an employee involves the conduct of association business, this is not a "meeting" in our example since a quorum of the board is not in attendance.

Answer #2: The correct answer is D, both A and B. Notice of all board meetings must be posted at least 48 hours in advance. For both condominium and homeowners' associations, notice of meetings where assessments will be considered, or notice of meetings where rules concerning the use of the units or parcels will be considered, must also be posted 14 days in advance, and also mailed or delivered to the owners 14 days in advance.

Answer #3: The correct answer is C, only meetings between the board and legal counsel are exempt from the sunshine requirements. The meeting must be for the purpose of discussing pending or proposed litigation, and for homeowners' associations, may also include discussion of personnel matters, but legal counsel must still be present. Although notice provisions can be suspended in the event of an emergency, this does not suspend unit owners' or parcel owners' right of attendance.

Answer #4: The correct answer is D, both A and B. Both the condominium and HOA laws permit unit owners or parcel owners to record meetings of the board. The board may adopt reasonable rules regarding how such recording is done, but may not otherwise limit that right, nor require demonstration of any particular reason why the owner wishes to record the meeting.

Answer #5: The correct answer is D, all of the above. Certain enumerated committees of both condominium and homeowners' associations are always open to owners. For condominiums, all committee meetings are likewise open to owner attendance unless the bylaws have exempted them.

Answer #6: The correct answer is D, both A and C. This is one area where the condominium law and the law for homeowners' associations differs substantially. Condominium unit owners have the right to address the board with respect to any designated agenda item. Conversely, there is no similar right in HOA's. HOA parcel owners are only granted the right to address the board if the board's meeting is called by petition of the members. The bylaws of a homeowners' association may also confer participation rights greater than the statute, and of course the board can (and should) permit input from owners in an appropriate fashion.

Answer #7: The correct answer is A. Only the condominium law requires the posting of an agenda with notice of a board meeting. However, for homeowners' associations, if an assessment is to be considered at the board meeting, notice that an assessment will be considered and the nature of the proposed assessment must also be included with the notice.