

# **REPORT TO THE LEGISLATURE ON THE**

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## **2013 STUDY OF COMPARABLE HOA INFORMATION AND RESOURCE CENTERS**

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*Offered in compliance with C.R.S. § 12-61-406.7(1)(d)-(e) (2013)*

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## Contents

Report Highlights.....	1
Overview .....	2
Study Findings .....	3
Structure and Funding of the Other States' HOA Offices.....	3
Florida .....	3
Nevada .....	4
Virginia .....	5
Comparison of Functions and Duties.....	7
Analysis and Recommendations .....	8
Recommendation 1 - Establish a Foundation for Possible Compliance Programs for HOAs .....	8
Phase Out Exemptions for Pre-CCIOA HOAs and Large Planned Communities .....	8
Analysis on Future Compliance Possibilities for HOAs.....	8
Recommendation 2 - Establish a Binding Arbitration Program for HOA Disputes.....	10
For HOAs to Petition for Binding Arbitration .....	12
For Homeowners to Petition for Binding Arbitration.....	12
Notice Requirement .....	12
Revise Written Dispute Policy Requirement .....	13
Provide for Mediation through the Mediation Referral System .....	13
Recommendation 3 - Develop a Referral System for Mediation of HOA Disputes .....	13
Recommendation 4 - Revise Registration Requirements.....	15
Recommendation 5 - Establish a Per-Unit Fee.....	15
Recommendation 6 - Establish an Election Monitoring Program .....	16
Prohibition against Retaliation.....	17

# Report Highlights

## Statutory Mandate

Pursuant to C.R.S. § 12-61-406.7(1)(a), the Division of Real Estate has studied the functions and duties of comparable HOA Information and Resource Centers, specifically those in Florida, Nevada and Virginia. Furthermore, for each of the state centers mentioned, the division made an assessment of the structure, costs, funding, and success of the duties and functions enumerated in C.R.S. § 12-61-406.7(1)(b), including:

- The filing, investigation, verification, and resolution of complaints;
- The offering and mandating of mediation concerning complaints, as well as the referral of disputes to alternative dispute resolution services;
- Providing an expedited and inexpensive administrative hearing process for HOA –related disputes;
- The monitoring and reviewing of HOA election procedures and disputes, as well as the appointing of election monitors to conduct HOA elections;
- Determining a per unit HOA registration fee;
- Providing regulatory oversight over declarant-controlled boards for compliance concerning their fiduciary duties to the association, and the transition of control to the association owners; and
- Providing regulatory oversight to protect parties from threats or defamatory conduct with regard to HOA matters.

In accordance with C.R.S. § 12-61-406.7(1)(e), the findings and conclusions generated while conducting the study, recommendations, and a review of Colorado's experience are presented herein.

## Summary of Recommendations

### Recommendation 1 - Establish a Foundation for Possible Compliance Programs for HOAs

Phasing out exemptions for pre-CCIOA HOAs and large planned communities will make the burden of compliance uniform, with the exception of some small or limited revenue HOAs. Waiting until manager licensing is underway will give the Division an opportunity to plan for any broader enforcement of the CCIOA, as well as analyze potentially cost-reducing overlaps between manager licensing and possible HOA compliance programs.

### Recommendation 2 - Establish a Binding Arbitration Program for HOA Disputes

Implementing a binding arbitration program would be a cost-effective and expeditious means by which many of the disputes between homeowners and HOAs can be resolved. In particular, governing document issues, which are the most common type of complaint the Office receives, would be within the scope of this program, reducing the burden on Colorado's court system.

### Recommendation 3 - Develop a Referral System for Mediation of HOA Disputes

Mediation is an important component of a comprehensive dispute resolution system. Encouraging dialogue and reducing animosity within a community should be a top priority, as it has the potential to not only resolve any given dispute but also increases the chance that future disputes will be handled amicably within the HOA, thus potentially avoiding escalation of additional disputes to the Center. The expense associated with maintenance of this list will be vastly lower than that of an in-house mediation program.

### Recommendation 4 - Revise Registration Requirements

Clarifying the registration requirements will reduce the number of misleading registrations and reduce confusion on the part of HOAs by not requiring an HOA to make their mailing address representative of the physical locations of the units constituting the HOA. Other requirements pertain to the binding arbitration program or potential compliance programs.

### Recommendation 5 - Establish a Per-Unit Fee

A per-unit fee would allow the center to fund the binding arbitration program and would be fairer to small HOAs.

### Recommendation 6 - Establish an Election Monitoring Program

Trustworthy voting processes are essential to ensure that the actions taken by the board are representative of the desires of homeowners. Election monitoring can guarantee that HOAs hold proper elections and send a message that election misconduct is not acceptable.

## Overview

A unit owners' association ("HOA") is a corporation, nonprofit or otherwise, formed to preserve and enhance property values within a community.<sup>1</sup> HOAs accomplish this by a variety of means, including the maintenance of common areas, enforcement of standards, and provision of desirable services to unit owners ("homeowners"). By purchasing a unit ("home") within an HOA, homeowners exchange certain freedoms for these benefits.

While the concept of the HOA has been very successful, both within the State of Colorado and the nation as a whole, homeowners have expressed the need for assistance when problems arise. In response to growing legislative and consumer concern regarding HOAs, the Colorado Legislature ("Legislature") created the HOA Information and Resource Center ("Center") in 2010.<sup>2</sup> Throughout its three-year history, the Center has logged more than 10,444 inquiries and 2,264 complaints. At the time of writing, the Center has registered 8,838 HOAs. Based solely upon self-reporting by HOAs within these registrations,<sup>3</sup> HOAs contain 879,187 homes in Colorado, including single-family houses, townhouses, and condominiums.

From the perspective of a homebuyer, HOAs and the homes they encompass are inseparable. Thus, a homebuyer must factor into their purchasing decision the desirability of the home and the HOA. HOAs, in order to attract new homeowners, differentiate themselves through the services they offer, by the state of the community, and by maintaining rules and order. Unlike with other service providers, a dilemma for the prospective homeowner is that once they purchase a home, they cannot choose a competitor unless they sell or otherwise dispose of it and purchase another within a different HOA.

Few prospective buyers would knowingly choose to purchase a home in a dysfunctional HOA. Although state laws, such as the Colorado Common Interest Ownership Act ("CCIOA"), and the governing documents of an HOA grant homeowners certain legal rights, the multitude of complaints received by the Center<sup>4</sup> attests to the difficulty many homeowners face when an HOA is out of compliance. Unfortunately, homeowners discover the majority of problems only after completing the purchase, as the inner dynamics within an HOA are not readily apparent from outside.

The traditional avenue for resolving disputes has been through the courts, but the expense and complexity inherent in filing a suit can act as an effective deterrent. This is especially true for matters that may not have large financial implications for any particular homeowner, but are nonetheless important to the HOA as a whole, such as election misconduct,<sup>5</sup> or the withholding of records.<sup>6</sup>

Florida, Nevada, and Virginia have already implemented regulatory frameworks to address these and other issues pertaining to HOAs. The Division of Real Estate has conducted a study of the aforementioned states and, after careful review of Colorado's experience, presents this report, along with recommendations, as mandated in C.R.S. § 12-61-406.7(1)(e).

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<sup>1</sup>C.R.S. § 38-33.3-302 – Organization of unit owners' association.

<sup>2</sup>HB10-1278, as codified in C.R.S. § 12-61-406.5(1), effective January 1, 2011.

<sup>3</sup>HB13-1134 made the registration requirement more inclusive by the addition of pre-CCIOA HOAs.

<sup>4</sup>2012 Annual Report of the HOA Information and Resource Center, page 7 (Complaints).

<sup>5</sup>2012 Annual Report of the HOA Information and Resource Center, pages 10-11, 14 (Voting – proxies).

<sup>6</sup>2012 Annual Report of the HOA Information and Resource Center, pages 10-11, 14 (Association records).

# Study Findings

## Structure and Funding of the Other States' HOA Offices

### **Florida**

The Division of Florida Condominiums, Timeshares, and Mobile Homes (“Florida Division”) offers services and consumer protection for those who reside in regulated communities within Florida. The Florida Division investigates complaints, reviews and approves condominium and cooperative documents, provides educational services and information to the public, and conducts mandatory arbitration of disputes. Two bureaus are contained within the Florida Division, the Bureau of Compliance and the Bureau of Standards and Registrations. Also within the Florida Division is the Office of the Condominium Ombudsman, a resource for condominium associations, board members, and owners as well as an arbitration section, consisting of one supervisory arbitrator and six arbitrators, all of whom are attorneys, one mediator, and two administrative assistants.<sup>7</sup>

### **Homeowners' Associations in Florida**

Florida defines a homeowners' association as a community subdivision, which is separate and distinct from a condominium association.<sup>8</sup> The division does not have investigatory power over homeowners' associations. Due to increasing interest concerning homeowners' associations, the State of Florida recently established a homeowners' association registration system to find out how many exist in the state.<sup>9</sup>

### ***Bureau of Compliance***

Employing roughly 56 full-time employees, the Bureau of Compliance maintains four regional offices and handles compliance issues, including the complaints of unit owners.

### ***Bureau of Standards and Registration***

The Bureau of Standards and Registration reviews and approves public disclosure documents by entities offering units covered by the division to the public.<sup>10</sup> The bureau has roughly 25 full-time employees.<sup>11</sup>

### ***Office of the Condominium Ombudsman***

The Office of the Condominium Ombudsman (“Florida Office”) is a neutral resource for unit owners, boards of directors and associations, assisting them in understanding their rights and responsibilities.

The Florida Office:

- Prepares and issues reports and recommendations for the division;
- Acts as a liaison between the division, unit owners, board members, and managers;
- Provides education and resources to unit owners, board members, and managers;
- Monitors and reviews procedures and disputes concerning condominium elections or meetings;

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<sup>7</sup>Legislative Budget Request for the Department of Business and Professional Regulation for 2014-15 Fiscal Year (10/15/2013), page 111.

<sup>8</sup>Fla. Stat. § 720.301(9).

<sup>9</sup>Fla. Stat. § 720.303(13), Chapter 2013-218.

<sup>10</sup><http://www.myfloridalicense.com/dbpr/lsc/LSCMHOrganization.html>.

<sup>11</sup>Kevin Stanfield (Florida Deputy Director), interviewed by Gary Kujawski (CO HOA Officer), on 10/28/13.

- Assists with the resolution of disputes between unit owners and associations;
- Assists with the resolution of disputes between unit owners;
- Encourages and facilitates voluntary meetings with and between unit owners while maintaining neutrality; and
- Recommends action for misconduct.<sup>12</sup>

The Florida Office is limited to matters involving condominium associations with regard to the above-referenced duties, as the ombudsman does not have the authority to investigate subdivision association complaints. The ombudsman's office does not investigate or enforce complaints, or provide mediation or arbitration, which are the roles of the Bureau of Compliance, arbitration section, or private mediation services. The Florida Office has seven employees<sup>13</sup> and a budget of \$437,986.00.<sup>14</sup>

### **Fees and Funding**

The division collects the following fees:

- A \$4 annual fee for each residential unit in a condominium or cooperative association;
- A \$2 fee for each timeshare week;
- A \$4 annual fee for each mobile home lot;<sup>15</sup> and
- An assortment of other yacht and ship fees.<sup>16</sup>

Although Florida is implementing a registration system for HOAs, no per unit fee has been established for HOAs at the time of writing.<sup>17</sup>

The Florida Condominiums, Timeshares, and Mobile Homes division's fiscal year budget for 2013-2014 was \$7,221,790, with 111 positions.<sup>18</sup>

### **Nevada**

The Nevada Division of Real Estate ("Nevada Division"), which is a division of the Department of Business and Industry, contains the Office of the Ombudsman for Common-Interest Communities and Condominium Hotels ("Nevada CIC Office") and a seven-member Commission for Common-Interest Communities and Condominium Hotels ("Nevada Commission") that adopts regulations, advises the division, and handles disciplinary matters. Nevada's Uniform Common-Interest Ownership Act and CCIOA share a similar heritage; both are adaptations of the Common Interest Ownership Act, as promulgated by the National Conference of Commissioners on Uniform State Laws.

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<sup>12</sup>Fla. Stat. § 718.5012.

<sup>13</sup>Legislative Budget Request for the Department of Business and Professional Regulation for 2014-15 Fiscal Year (10/15/2013), page 112.

<sup>14</sup>Legislative Budget Request for the Department of Business and Professional Regulation for 2014-15 Fiscal Year (10/15/2013); Based on the existing expenditures for fiscal year 2012-13 (page 116).

<sup>15</sup>F.A.C. Chapter 61B-30.001 Fees.

<sup>16</sup>F.A.C. Chapter 61B-60.002 General Provisions; Forms and Fees.

<sup>17</sup>Fla. Stat. § 720, Chapter 2013-218.

<sup>18</sup>2013-2014 Operating Budget, Agency Format, <http://transparencyflorida.gov>.

### ***Office of the Ombudsman for Common-Interest Communities and Condominium Hotels***

The Nevada CIC Office was created to assist common-interest community unit owners and association board members in understanding their rights and obligations under state law and the governance of their associations.

The duties of the Nevada CIC Office include:

- Assisting in the processing of claims submitted to alternative dispute resolution;
- Providing education to owners, associations, board members and community managers;
- Investigating disputes involving violations of CIC law or an HOA's governing documents; and
- Registering associations organized within the state.<sup>19</sup>

The Nevada CIC Office does not arbitrate or act as a referee for disputes; nor does it make determinations on compliance matters, as the Nevada Division's compliance section, or hearings before the Nevada Commission handle these functions.

### ***Commission for Common-Interest Communities and Condominium Hotels***

The Nevada Commission, a seven-member panel appointed by the governor, acts as an advisory board to the division, approves and adopts regulations, handles disciplinary matters, and has authority to investigate and enforce provisions of Nevada's Common Interest Ownership Act.<sup>20</sup> The commission can impose fines not to exceed \$1000 for each violation and has the power to remove board members or officers of the association.<sup>21</sup>

### ***Fees and Funding***

An annual assessment of no more than \$3.00 per unit in each community that is not exempt funds the office. Late receipt of unit fees results in a penalty and interest, if applicable.<sup>22</sup>

Nevada's Business and Industry 2012-2013 annual budget for Common Interest Communities was \$2,929,656, with a \$1,483,952 balance carried over from the previous year, funding seventeen full-time positions.<sup>23</sup>

### ***Virginia***

The Office of the Common Interest Community Ombudsman ("Virginia CIC Office") and the Common Interest Community Board ("Virginia CIC Board") are within the Virginia Department of Professional and Occupational Regulation ("DPOR").

### ***Office of the Common Interest Community Ombudsman***

The Virginia CIC Office is a resource for unit owners, boards of directors and community managers.

The Virginia CIC Office:

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<sup>19</sup>NRS § 116; and at [www.red.state.nv.us/cic/about.htm](http://www.red.state.nv.us/cic/about.htm).

<sup>20</sup>NRS § 116.600, *et. seq.*

<sup>21</sup>NRS § 116.785.

<sup>22</sup>NRS § 116.31155.

<sup>23</sup>Nevada Legislative Counsel Bureau Budget Account Detail with Position Summary for Commerce & Industry, Page 531, dated June 8, 2011.

- Assists members in understanding their rights and the processes available for resolving issues with their common interest community;
- Offers referrals to alternative dispute resolution services;
- Receives and reviews “notices of final adverse decisions” from persons who believe an association violated common interest community laws and regulations;
- Makes a final determination on whether a "notice of final adverse decision" may constitute a violation of CIC law or regulation, and, if so, may refer the matter to the CIC board; and
- Issues nonbinding explanations, but not interpretations, of laws and regulations governing associations.<sup>24</sup>

The Virginia CIC Office does not review any complaints alleging violations of association governing documents or provide alternative dispute resolution, legal advice, or interpretation. The final determination issued by the ombudsman is nonbinding.

### ***Common Interest Community Board***

The Virginia CIC Board was established to regulate common interest community managers and certain licensed management firm employees, register condominium and timeshare projects, and handle certain matters pertaining to associations referred to it by the ombudsman. The board can take enforcement action, including issuing cease and desist orders, initiating suit to enjoin an act or practice, and imposing penalties for violations of Virginia's CIC laws.<sup>25</sup>

### ***Fees and Funding***

The office collects a fee for community association registration and renewal fees based upon a sliding scale:<sup>26</sup>

Lots/Units	Application Fee	Renewal Fee
1-50	\$45	\$30
51-100	\$65	\$50
101-200	\$100	\$80
201-500	\$135	\$115
501-1000	\$145	\$130
1001-5000	\$165	\$150
>5000	\$180	\$170

Two additional fees the offices assesses are a recovery fund fee of \$25, and an amount based upon gross assessment income, including any mandatory fees that the association imposes on its members, during the preceding year. The amount due is as follows:<sup>27</sup>

0.05% of gross assessment income	Amount Due
< \$10	\$10
from \$10 to \$1000	0.05% of gross assessment income
> \$1000	\$1000

<sup>24</sup>Va. Code § 55-530; and [www.dpor.virginia.gov/CIC-Ombudsman/#what-ombudsman](http://www.dpor.virginia.gov/CIC-Ombudsman/#what-ombudsman).

<sup>25</sup>Va. Code § 54.1-2351.

<sup>26</sup>18 VAC 48-60-60 (Virginia Register of Regulations).

<sup>27</sup>Va. Code §§ 55-516.1.C, 55-79.93:1.C, 55-504.1.C.

Biennial revenue for the CIC department of the DPOR for 2010-2012 was \$2,022,799, with biennial expenditures of \$1,443,162.<sup>28</sup> Interest earned and monies collected annually from the Common Interest Community Management Fund finances the ombudsman's office.<sup>29</sup>

## Comparison of Functions and Duties

Function or Duty <sup>30</sup>	Colorado	Florida	Nevada	Virginia
I - Accepts Complaints	YES	YES <sup>31</sup>	YES <sup>32</sup>	LIMITED <sup>33</sup>
I - Investigates/Verifies Complaints	NO	LIMITED <sup>34</sup>	YES	YES <sup>35</sup>
I - Resolves Complaints	NO	YES	YES	LIMITED <sup>36</sup>
II - In-House Mediation	NO	YES <sup>37</sup>	YES <sup>38</sup>	NO
III - Mandates Mediation	NO	NO	LIMITED <sup>39</sup>	NO
IV - ADR Referrals	YES <sup>40</sup>	YES	YES	YES
V - Administrative Hearing	NO	YES	YES	YES <sup>41</sup>
VI(A) -Monitor/Review Election Procedures, Disputes	NO	YES	YES	YES <sup>42</sup>
VI(B) -Reports Alleged Election Misconduct	YES <sup>43</sup>	YES	YES	NO
VI(C) - Appoints Election Monitors	NO	YES	YES	NO
VII –Per-Unit Fee	NO	YES	YES	NO <sup>44</sup>
VIII - Oversight Over Declarant Boards	NO	YES	YES	YES
IX - Protect (...) from Threats, Defamation	NO	NO	YES <sup>45</sup>	NO
X – Other HOA Functions or Duties Studied				NONE

<sup>28</sup>Virginia Department of Professional and Occupational Regulation, Biennial Report 2010-2012, page 4.

<sup>29</sup>Va. Code § 55-530.

<sup>30</sup>Numbering from C.R.S. § 12-61-406.7(1)(b).

<sup>31</sup>For subdivisions, only petitions for mandatory, binding arbitration of election and recall disputes are accepted.

<sup>32</sup>In the form of "Intervention Affidavits".

<sup>33</sup>The Virginia CIC Office will not accept complaints involving an association's governing documents.

<sup>34</sup>The Florida Division does not have authority to investigate subdivisions.

<sup>35</sup>Va. Code § 55-79.99(A); a function of the Virginia CIC Board.

<sup>36</sup>The Virginia CIC Office may refer complaints that involve violations of CIC laws or regulations to the Virginia CIC Board for possible regulatory action, but is not empowered to resolve other complaints or disputes.

<sup>37</sup>Alongside private mediation, the Florida Division has one in-house mediator in the Bureau of Compliance.

<sup>38</sup>Alongside private mediation, the Nevada CIC Office has an Ombudsman Informal Conference/Mediation program.

<sup>39</sup>Pre-suit mediation is mandated if both parties do not agree to use the referee program – NRS § 38.310.

<sup>40</sup>The HOA Information Officer provides information about ADR services via phone and e-mail. The Center's website also provides links to ADR providers.

<sup>41</sup>Va. Code § 55-79.99(B); a function of the Virginia CIC Board.

<sup>42</sup>The Virginia CIC Board only reviews egregious instances of election misconduct referred by the Virginia CIC Office.

<sup>43</sup>2012 Annual Report of the HOA Information and Resource Center, pages 10-11 (Elections and Voting).

<sup>44</sup>Funding is provided by a tiered fee, based the number of units, and a percentage of annual assessment income.

<sup>45</sup>Nevada state law also protects homeowners against bullying and retaliation. NRS §§ 116.31183, 116.31184.

## Analysis and Recommendations

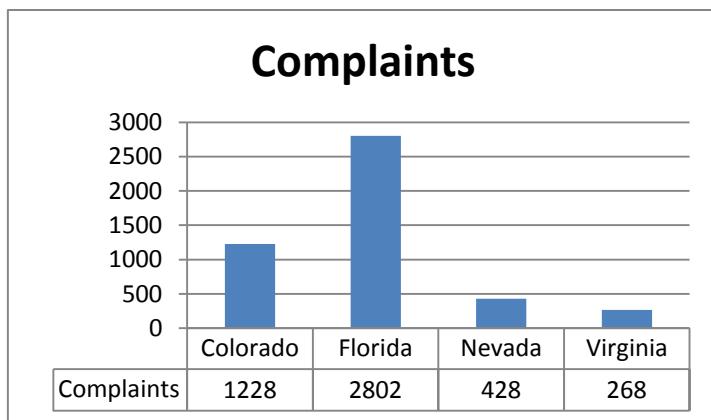
The Division has prepared this list of recommendations and analysis for consideration by the Legislature. Many of the recommendations incorporate aspects of HOA programs already operational in Florida, Nevada, and Virginia, with selection limited to measures that are efficient, cost-effective, and applicable to Colorado.

### Recommendation 1 - Establish a Foundation for Possible Compliance Programs for HOAs

#### Phase Out Exemptions for Pre-CCIOA HOAs and Large Planned Communities

The Division recommends that the exemptions discussed below expire prior to any compliance program becoming effective.

CCIOA compliance efforts would be curtailed for some pre-CCIOA HOAs,<sup>46</sup> as those entities may not be subject to all provisions of the CCIOA.<sup>47</sup> Special exemptions also exist for large planned communities,<sup>48</sup> and these could pose similar problems for future compliance programs. Frustration by homeowners living in HOAs that CCIOA exempts from provisions that the Division would enforce for some HOAs, but not their own, may constitute grounds for emphasis towards greater uniformity and equality in the law. After the two decades that have passed since the CCIOA was enacted, pre-CCIOA issues are still a routine source of confusion and concern, and are poised to grow as the legislative gap is widened by amendments to the CCIOA.



#### Analysis on Future Compliance Possibilities for HOAs

The Division recommends that its first objective should be the successful implementation of the manager-licensing program. Waiting until manager licensing becomes effective will also allow the Division to determine appropriate staffing and enforcement capabilities for any possible expansion to include HOAs. The Director of the Division of Real Estate will

make a progress report to the Legislature on or before January 1, 2016, which may be an opportune time to discuss any possible compliance programs for HOAs.

Florida, Nevada, and Virginia all have compliance mechanisms in place for HOAs to complement manager licensing. Between July 1, 2012 and June 30, 2013, the Florida Division received 1,802 complaints regarding condominium associations, containing 2,802 alleged violations.<sup>49</sup> In fiscal year

<sup>46</sup>2012 Annual Report of the HOA Information and Resource Center, Registration, Pre-CCIOA, page 3.

<sup>47</sup>C.R.S. § 38-33.3-117.

<sup>48</sup>C.R.S. § 38-33.3-116.3.

<sup>49</sup>Division of Florida Condominium, Timeshares, and Mobile Homes Annual Report for Fiscal Year 2012-2013, pg 1.

2013, 262 Intervention Affidavits, or complaints related to a board of directors and 166 Statements of Facts, or complaints related to managers, were submitted to the Nevada Division.<sup>50</sup> The Virginia CIC Office received 268 complaints during the 2012-2013 reporting period. Included in that number are Notices of Final Adverse Decision, with 34 being received in 2013.<sup>51</sup> At the time of writing, for 2013, the Center has received 1228 complaints.

Starting January 1<sup>st</sup>, 2015, a community association manager licensing and regulation regime, in the form of HB13-1277, will include violations of the CCIOA as one of the deeds that may result in actions against the licensee.<sup>52</sup> For 2012, however, the share of complaints attributable to managers only totaled 27% of those received.<sup>53</sup> In many instances, managers are merely trying to carry out the will of the HOA board and this legislation, without an accompanying law to regulate the behavior of the HOA, ensures that any penalties will land solely on managers. Of the complainants that have contacted the Office, 23.51% are from self-managed HOAs. An additional concern is that this law may encourage HOAs to forego professional management, and switch to self-management as insulation from investigation into CCIOA violations. After July 1, 2015, complaints concerning managers will begin to flow in, and complainants may seek to implicate managers in order to obtain state intervention if current law exempts HOAs from enforcement.

Any future authorization given to the Division to investigate, verify, and take appropriate enforcement actions, if warranted, on complaints, would need to be on the basis of violations of the CCIOA and other applicable laws, such as the Colorado Revised Nonprofit Corporation Act and Colorado Business Corporation Act.<sup>54</sup> In addition, such an authorization should place instances of election misconduct established by the Division within the scope of enforcement, as commensurate to the severity of such acts.

### ***Declarant-Controlled Boards***

CCIOA contains many provisions that govern declarants' actions,<sup>55</sup> including declarant transition and turnover of control of the association to homeowners. These matters should be handled in any future compliance program as other violations of CCIOA are, which accords with the approach taken by Florida, Nevada, and Virginia, which provide oversight over declarant-controlled boards by the same means as other boards.

### ***Add Penalties for Failing to Produce Records***

The Center is receiving complaints and numerous inquiries concerning the ability of homeowners to obtain association records pursuant to HB12-1237<sup>56</sup> and the unreasonable costs associated with obtaining these documents. The Division recommends the addition of a penalty in the CCIOA for not producing these records, such as tying it the HOAs' ability to file and enforce liens.

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<sup>50</sup>Nevada CIC Compliance Section Reporting Period for Fiscal Year 13: 7/1/12 to 6/30/13, page 1.

<sup>51</sup>Virginia Office of the Common Interest Community Ombudsman Annual Report 2012-2013, pgs 2, 3.

<sup>52</sup>C.R.S. § 12-61-1010(1)(e).

<sup>53</sup>2012 Annual Report of the HOA Information and Resource Center, Complaint Types, page 8.

<sup>54</sup>C.R.S. § 38-33.3-306(1) – Bylaws.

<sup>55</sup>C.R.S. §§ 38-33.3-205, 38-33.3-210, 38-33.3-303(5), *et. seq.*

<sup>56</sup>Codified in C.R.S. § 38-33.3-317 – Association records; effective January 1<sup>st</sup>, 2013.

## **Recommendation 2 - Establish a Binding Arbitration Program for HOA Disputes**

### ***Study Findings and Analysis of Arbitration Programs in Other States***

Many homeowners have expressed a desire for an expedited, low-cost, non-adversarial, out-of-court means by which to settle disputes;<sup>57</sup> arbitration, when conducted by an impartial arbitrator, can offer this.<sup>58</sup> Two of the three HOA offices selected for study utilize binding arbitration. The Nevada CIC Office offers both binding and nonbinding arbitration for the resolution of disputes,<sup>59</sup> while Florida state law mandates binding arbitration<sup>60</sup> by the Florida Division for HOA election and recall disputes; Florida's legislature has found ADR successful enough to encode the following declaration,<sup>61</sup> preceding that requirement, in law:

*"The Legislature finds that alternative dispute resolution **has made progress in reducing court dockets and trials and in offering a more efficient, cost-effective option to litigation.**"*

Florida's Bureau of Compliance has a ten-member in-house arbitration section<sup>62</sup> that provides mandatory arbitration of disputes for over twenty-six thousand condominium associations<sup>63</sup> in the State of Florida. Florida has a population of over nineteen million.<sup>64</sup> The combined base salaries for those within the arbitration section total \$505,028.68. The numbers of arbitrations involving condominium or subdivision associations were 510 in 2011 and 555 in 2012.<sup>65</sup> On average, cases were resolved within 72 days of submission for fiscal year 2012-2013.<sup>66</sup>

Electing to provide two forms of arbitration, the Nevada CIC Office uses both the referee program, which limits monetary awards to \$7500, and traditional arbitration to resolve disputes; both divert disputes away from the court system. The referees and arbitrators are attorneys required to meet certain standards<sup>67</sup> and are not employees of the Nevada Division. The referee brings the parties together to listen to both sides of the dispute, reviews the evidence and governing documents, and then makes a

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<sup>57</sup>In 2013, the Center participated in over fifty public HOA forums, seminars, and conferences; attendees at those functions overwhelmingly related to the HOA Information Officer the desire and need for out of court alternatives for resolving HOA disputes.

<sup>58</sup>Black's Law Dictionary 96 (5<sup>th</sup> ed. 1979) – Arbitration.

<sup>59</sup>NRS § 38.330.

<sup>60</sup>Fla. Stat. §§ 720.306, 720.311.

<sup>61</sup>Fla. Stat. § 720.311(1).

<sup>62</sup>Legislative Budget Request for the Department of Business and Professional Regulation for 2014-15 Fiscal Year (10/15/2013), page 111.

<sup>63</sup>[http://www.myfloridalicense.com/dbpr/sto/file\\_download/public-records-CTMH.html](http://www.myfloridalicense.com/dbpr/sto/file_download/public-records-CTMH.html).

<sup>64</sup>2012 Estimate by U.S. Department of Commerce, United States Census Bureau.

<sup>65</sup>Kevin Stanfield (Dep. Director of FL Division), interviewed by Gary Kujawski (CO HOA Officer), on 10/28/13.

<sup>66</sup>Department of Business and Professional Regulation – Long Range Program Plan, 09/20/13.

<sup>67</sup>NRS § 38.340(1) provides that Nevada's Real Estate Division may require satisfactory proof that an arbitrator has received the training and experience necessary. On this basis, the division requires that arbitrators maintain a status of "Good Standing" with the "State Bar of Nevada"; see CIC-REF-14-001.

decision on the matter; participating without a hearing is an option for the parties. No awards of attorneys' fees or costs are made by the referee. The Nevada Division has related that the referee program has had good success since it began in July of 2012.<sup>68</sup> As of March 1, 2013, the Nevada Office reviewed and sent 68 cases to a referee for a hearing and a determination concerning governing document issues, and, on average, the referee issued a determination within a month.<sup>69</sup>

Colorado state law already encourages HOAs to require pre-suit mediation or arbitration<sup>70</sup> and explicitly establishes the acceptability of an association compelling binding arbitration via its governing documents.<sup>71</sup> However, by yielding the implementation of ADR to associations, associations are able to grant themselves conditions that are more favorable, such as the ability to designate the arbitrator in a dispute, which may threaten impartiality, or exempt certain matters from ADR that the association would prefer to litigate in court.<sup>72</sup> The ability of an HOA to contractually oblige a homeowner to submit disputes to ADR while preserving the HOA's ability to choose the most advantageous venue when seeking redress against a homeowner is distinctly one-sided.

### ***Binding Arbitration Program Recommendations***

The Division proposes to restore equality by providing a pathway for the resolution of disputes that meets the criteria expected by consumers with the added benefit of finality, by a neutral third-party entity or a panel of administrative law judges similar to that in the Colorado Public Utilities Commission. This arbitration program would accept petitions accompanied by a reasonable filing fee for binding arbitration. The expense incurred by program in employing arbitrators or administrative law judges could be supported by the per-unit fee discussed hereafter or after the Nevada model where the participants fully pay for the arbitrators fees which are limited and subsidized.

The top category of complaints the Center receives are matters involving governing documents;<sup>73</sup> deciding the validity of these claims is not likely to require hearings or a "mini-trial", reducing the need for parties to be physically present before the arbitrator and expediting the process. Unlike mediation, where encouraging dialog is a key part of the process, *ex parte* communications between an arbitrator and the parties to the dispute may lead to allegations of impropriety; relying primarily on submitted statements and documentation not only mitigates this risk but does not encounter the logistical problems associated with in-house mediation.

Under this system, homeowners and their HOAs would retain the right to file claims against the other in court. In addition, parties would have the right to have a court vacate the arbitration award for the grounds enumerated in the Colorado Revised Uniform Arbitration Act<sup>74</sup> or Federal Arbitration Act, as

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<sup>68</sup>Ken Richardson of Nevada Ombudsman's Office, interviewed by Gary Kujawski (CO HOA Officer), on 10/22/2013.

<sup>69</sup>Real Estate Division - Office of the Ombudsman 2013 Biennial Report, page 5.

<sup>70</sup>C.R.S. § 38-33.3-124(1)(a)(I) – (...) Alternative Dispute Resolution Encouraged (...).

<sup>71</sup>C.R.S. § 38-33.3-124(3) – (...) Policy Statement Required.

<sup>72</sup>The Officer has obtained governing documents that require binding arbitration of disputes but exclude actions brought by the association pertaining to enforcement of the association's declaration, bylaws or rules and regulations.

<sup>73</sup>2012 Annual Report of the HOA Information and Resource Center, page 10, Not Following Governing Documents.

<sup>74</sup>C.R.S. § 13-22-223, Vacating award.

applicable. Unlike non-binding or non-mandatory arbitration programs, aggrieved parties would not need to deal with the prospect of a trial *de novo* or an uncooperative party trying to make the dispute as costly as possible by rejecting offers of ADR. Smaller or less financially secure HOAs would also greatly benefit, as legal expenses that could otherwise consume significant resources would no longer be a factor with a fixed-cost process.

For binding arbitration to be effective, the Division recommends the following system:

#### **For HOAs to Petition for Binding Arbitration**

Purchasing a home within an HOA entails acceptance of the HOA's governing documents; as such, the documents are binding upon homeowners, and those that already contain binding arbitration clauses that apply to homeowners would be required to adapt them to specify the designated arbitration program. An HOA without a binding arbitration clause would have the choice of adopting such a clause, providing that it designates the arbitration unit, or obtaining the consent of the homeowner in question by some other means. The HOA must include either evidence of contractual obligation or agreement on the part of the homeowner along with its petition. If, after review, the arbitration unit determines such evidence or agreement to be valid and binding, it will proceed to arbitrate.

#### **For Homeowners to Petition for Binding Arbitration**

Notwithstanding any provision of their association's governing documents to the contrary, after a homeowner submits a valid petition, the arbitration unit shall have the power to compel their association, regardless of whether it has adopted a binding arbitration protocol, to enter into binding arbitration with them as arbitrator. Should the Legislature enact the restrictions on retaliation discussed hereafter in "Prohibit Retaliation", HOAs would be forbidden from retaliating against a homeowner who files a petition.

#### **Notice Requirement**

All three states' HOA offices require an aggrieved party to provide some form of notice to a respondent before they file a complaint or dispute. Virginia requires a homeowner to obtain a "Notice of Final Adverse Decision" from their HOA before filing a complaint, while Nevada requires a claimant to send written notice to the respondent before submitting an "Intervention Affidavit". Florida, which the Division has chosen to be the model for this aspect of the binding arbitration program, requires proof by a petitioner that they gave notice to the respondent.<sup>75</sup>

The Division recommends that all petitioners must provide proof of the notice given to the respondent as part of a valid petition. This notice would consist of the nature of the dispute, the remedy expected of the other party, and a warning that a petition for arbitration may be filed should the other party not comply. Once the petitioner receives an unsatisfactory response or the period discussed below in "Revise Written Dispute Policy Requirement" has elapsed without a response, the petition is eligible for filing. A petitioner must accompany their petition with the original request and, if received, a response, along with an explanation addressing why it is inadequate. If the petitioner did not receive a response, he or she must provide documentation of the effort to provide notice. These preliminary steps will give

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<sup>75</sup>Fla. Stat. § 718.1255(4)(b).

the homeowner or HOA an opportunity to address and possibly resolve the other's grievance as well as reduce the amount of work necessary by the arbitration unit in gathering documentation.

### **Revise Written Dispute Policy Requirement**

An HOA's written dispute policy<sup>76</sup> shall provide for submission of the aforementioned notice, and a reasonable period within which the homeowner should expect a response. If an HOA has a binding arbitration clause, the HOA must establish the period in which the HOA expects a homeowner to respond to a notice. An HOA shall also include prominent reference to the designated arbitration unit's dispute resolution services in said document.

### **Provide for Mediation through the Mediation Referral System**

The parties may agree to mediate at any time prior to the arbitrator making an award. After agreeing to mediate, the parties must mutually select one of the mediators provided on a list supplied by the Center, as discussed below in "Develop a Referral System for Mediation of HOA Disputes". If the parties fail to come to an agreement as to the selection of a mediator or they request the Center to select a mediator on their behalf, the Center shall select one of those listed within proximity of the parties. The Center will only give preferential selection to a subset of mediators when the situation calls for special qualifications (e.g., fluency in a particular language, skills required for certain disabilities, etc.). The arbitrator shall also have the authority to request the parties to attempt mediation, when he or she feels that the situation is particularly suitable for it. If any side should refuse to consider mediation, they shall not be eligible for an award of their attorney's fees and costs, if applicable. If the parties do not agree to settle during mediation, arbitration shall resume.

Cognizant of the impact that the expense of mediation may have on parties with limited financial resources, both Florida and Nevada provide ways to reduce the cost associated with mediation. Florida provides a list of volunteer mediators<sup>77</sup> while Nevada provides a subsidy.

### **Recommendation 3 - Develop a Referral System for Mediation of HOA Disputes**

The Legislature has already stated that resolving HOA disputes in court is inefficient.<sup>78</sup> Many of the complaints received by the Center involve poor communications by HOAs.<sup>79</sup> Unfortunately, when communications between homeowners and HOAs break down, disputes can tear apart communities. Regardless of the outcome of a dispute, homeowners will likely still be residing in the same HOA, which makes fostering better relationships within the community a top priority. Mediation can help by bringing together the parties to a dispute in a constructive atmosphere that engenders reconciliation and voluntary agreement before either party takes potentially irreparable actions.

Unnecessary litigation has adverse effects for all the parties involved. HOAs must compensate for unexpected legal expenses, in many instances by raising assessments on the entire community, possibly leading to further discontent, distrust, and resentment. Homeowners tend to be at a disadvantage when

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<sup>76</sup> An HOA is required to have a written dispute policy pursuant to C.R.S. § 38-33.3-124(1)(b).

<sup>77</sup> Fla. Stat. § 718.1255(4)(f).

<sup>78</sup> C.R.S. § 38-33.3-124(1)(a)(I) – Legislative Declaration (...).

<sup>79</sup> 2012 Annual Report of the HOA Information and Resource Center, Complaint Types, page 10.

defending an action brought by an HOA in court; they have to utilize their own financial resources, which often are more limited than those of the HOA, they are not experienced in dealing with litigation, and the legal resources available to represent them in these types of matters are limited. As an example of the impact that high demand for low-cost legal resources is creating, the HOA Information Officer has learned from homeowners that the Metro Volunteer attorney referral network is not even handling any HOA matters at this time.

Courts already refer many cases involving HOA disputes to mediation at the outset. Once a party initiates proceedings, however, damage to whatever already fragile sense of trust exists is likely complete. Diverting these disputes to mediation prior to filing in the courts could also lessen the administrative burden on the court system by resolving some disputes beforehand and removing the need for judges to refer disputes to mediation.

Although regulation of mediation is well outside the scope of this report, the Mediation Association of Colorado (“MAC”) has expressed support for the Center developing a list of qualified mediators for referrals.<sup>80</sup> While Florida’s Division of Condominiums, Timeshares and Mobile Homes does have one in-house mediator who travels across Florida,<sup>81</sup> most mediations are conducted by private mediators of whom the division lists. Nevada exclusively relies upon private mediators, with the exception of conferences undertaken by the ombudsman.

Mediators frequently conduct sessions with the parties present in person. During mediation sessions, being able to perceive non-verbal communications, provide a calm and distraction free environment, and have the parties sign-off on a settlement agreement may make mediation more successful, as opposed to mediation carried out via telephone. With a state as large and with as much difficult terrain as Colorado, the logistics of relying solely upon in-house mediators would be challenging unless the possibility of mediation in person is removed or the Center is significantly expanded to include regional branches, similar to the Florida Division.

As one of two states to offer in-house mediation, Florida’s arbitration section, which employs one in-house mediator, has four branches throughout Florida.<sup>82</sup> The in-house mediator is utilized an average of one hundred times per year, with approximately eighty mediations in 2012 out of 555, or 14 percent of, petitions taken in.<sup>83</sup> The division does not bill the parties for the services of the in-house mediator.<sup>84</sup>

Over a two-year period, Nevada’s Ombudsman Informal Conference and Mediation program issued approximately 111 invitations to conferences.<sup>85</sup> Out of the 111 conferences by the ombudsman in 2012-2013, 53% ended in an agreed-upon solution;<sup>86</sup> there is no cost to the parties involved. Although Nevada’s Real Estate Division does not maintain branches throughout the state, 95% of HOAs within

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<sup>80</sup> Mediation Association of Colorado, in memo to Gary Kujawski (CO HOA Officer), dated 10/20/2013.

<sup>81</sup> The Florida Division classifies this position as a Senior Management Analyst II.

<sup>82</sup> These branches are located in Tallahassee, Orlando, Tampa, and Fort Lauderdale.

<sup>83</sup> Kevin Stanfield (Florida Deputy Director), interviewed by Gary Kujawski (CO HOA Officer), on 11/6/13.

<sup>84</sup> Kevin Stanfield (Florida Deputy Director), interviewed by Gary Kujawski (CO HOA Officer), on 11/6/13.

<sup>85</sup> Office of the Ombudsman – Real Estate Division, 2013 Biennial Report.

<sup>86</sup> Office of the Ombudsman – Real Estate Division, 2013 Biennial Report.

Nevada are located in two counties, Clark, which contains Nevada's most populous city, Las Vegas, and Washoe, of which Reno is the county seat.<sup>87</sup> Colorado's situation is not similar to Nevada's, as only 56% of HOAs are located in areas easily accessible from Denver.<sup>88</sup>

At present, the Center only provides referrals to organizations offering ADR, and not to specific ADR professionals. This leaves the task of selecting an ADR professional appropriate to the situation up to the individual requesting information. As professional mediators are already present throughout Colorado,<sup>89</sup> a private mediation program would be a less-costly alternative to in-house mediation. Florida and Nevada have incorporated private mediation programs.

The Division recommends that the Center be authorized to develop a mediation referral system for HOA disputes, and that it establish a standard for experience with HOA-related matters as a basis for qualification of mediators. Mediators who meet the standard would be eligible for entry onto a statewide list. As the Center has already deployed an informational website<sup>90</sup> for HOA related matters, the Center would also be responsible for the maintenance and publication of this list.

#### **Recommendation 4 - Revise Registration Requirements**

The following recommendations are for information that HOAs would provide in addition to that already specified as part of the registration requirement.<sup>91</sup> Many registrants supply addresses that are not useful for locating the homes that constitute the HOA, e.g., those of the manager or a mailing address for a post-office box, etc. For a higher certainty of accuracy, HOAs must provide a breakdown of all the homes they encompass into a list formed by a pairing of county and the city in which they are located in or in closest proximity, or cities, should they be equidistant from two or more, and a count of the homes contained therein. To plan for the distribution of legal expertise necessary for compliance efforts appropriate to the structure of HOAs within the State, HOAs should indicate whether they are a nonprofit or a for-profit corporation. A copy of the HOA's written dispute policy that incorporates the changes required hereinbefore in "Revise Written Dispute Policy Requirements", shall accompany the registration to assist homeowners submitting the notice referred to previously in "Notice Requirement".

#### **Recommendation 5 - Establish a Per-Unit Fee**

A per-unit fee would be fairer than the current per-HOA fee, as the fee would be reflective of the size of the HOA. Florida and Nevada both use per-unit fees, while Virginia uses a combination of a tiered fee along with a percentage of annual assessments to similar effect. Presently, the per-HOA registration fee is not to exceed \$50.<sup>92</sup> For illustration of the impact of a per-unit fee, if a \$1 per-unit fee were

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<sup>87</sup> Association & Unit Chart, June, 2013 - [http://red.state.nv.us/CIC/stats/cic\\_stats\\_fy2013.htm](http://red.state.nv.us/CIC/stats/cic_stats_fy2013.htm).

<sup>88</sup> 2012 Annual Report of the HOA Information and Resource Center, Regions of HOAs (page 5); count includes Denver Central, Denver Surrounding, and the Front Range.

<sup>89</sup> Based on information from the Office of Dispute Resolution, part of the Colorado State Judicial Branch; the ODR maintains a database of active mediators that it has qualified in all the judicial districts within the State. It also assists those who speak Spanish to find a mediator with fluency in that language.

<sup>90</sup> At the time of writing, this site was the first result listed by Google for the search "colorado hoa".

<sup>91</sup> As codified in C.R.S. § 38-33.3-401.

<sup>92</sup> C.R.S. § 12-61-111.5(2)(a)(II).

established, 58% of registered HOAs would owe less than if the per-HOA registration fee was maximized at \$50. This per unit fee would be able to fund the binding arbitration program discussed hereinbefore.

## **Recommendation 6 - Establish an Election Monitoring Program**

The Florida Office routinely monitors elections, including approximately two hundred condominium elections per year.<sup>93</sup> Election monitors report some sort of election irregularity as high as sixty percent of the time.<sup>94</sup> The association pays for all of the costs of the election, including the following fees:

Units	Fee
1-25	\$150
26-50	\$225
51-99	\$300
100-150	\$150 +\$2.25/unit
>150	\$150 + \$2/unit

They also charge for mileage.<sup>95</sup>

Election monitoring would be an effective tool for helping homeowners remove board members in HOAs that undertake improper or fraudulent elections by permitting a monitor to oversee the election and make certain that proper procedures are followed. A requirement that an adequate number of homeowners must petition for election monitoring by the Center, similar to Florida's fifteen percent homeowner threshold, would be reasonable.<sup>96</sup> The election monitors would be qualified independent contractors, with the HOAs being responsible for all of the expenses associated with monitoring.

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<sup>93</sup>Telephone conference on 11/15/13 with the Ft. Lauderdale Office of the Condominium Ombudsman staff by Gary Kujawski (CO HOA Officer).

<sup>94</sup>Rick Luther (Office of the Florida Condominium Ombudsman) via email communication to Gary Kujawski (CO HOA Officer), on 12/12/13.

<sup>95</sup>Telephone conference on 11/15/13 with the Ft. Lauderdale Office of the Condominium Ombudsman staff by Gary Kujawski (CO HOA Officer).

<sup>96</sup>Fla. Stat. § 718.5012.

## Prohibition against Retaliation

The Colorado Legislature also requested the Division to review the states studied regarding their HOA laws concerning prohibitions against retaliation by parties in the HOA community. Nevada has a provision in state law regarding retaliation against a homeowner:

NRS 116.31183 -Retaliatory action prohibited; separate action by unit's owner.

1. An executive board, a member of an executive board, a community manager or an officer, employee or agent of an association shall not take, or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner has:
  - a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association;
  - b) Recommended the selection or replacement of an attorney, community manager or vendor; or
  - c) Requested in good faith to review the books, records or other papers of the association.
2. In addition to any other remedy provided by law, upon a violation of this section, a unit's owner may bring a separate action to recover:
  - a) Compensatory damages; and
  - b) Attorney's fees and costs of bringing the separate action.

While the Division has no recommendation at this time concerning the implementation of any prohibition on retaliation, if the Legislature added a similar provision to the CCIOA, instances of retaliation would then be subject to enforcement under the CCIOA. Nevada also has a harassment provision,<sup>97</sup> but as a misdemeanor, it is enforced through their criminal courts.

Harassment and defamatory conduct by homeowners against board members and other homeowners can be handled by the HOA's internal fining structure, orders for protection, and court intervention.

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<sup>97</sup> NRS § 116.31184 - Threats, harassment and other conduct prohibited; penalty.