RAFEL LAW GROUP PLLC

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The Ethics of Client Service

by Anthony L. Rafel

In many service occupations, what the customer has a right to expect – and what the service provider has a duty to provide – can be rather ambiguous. What standards govern the work of an IT consultant, a janitorial company, a landscaper? Other than the objective measure of hours worked and the subjective assessment of how well or badly the work was performed, there are no fixed standards to inform the provider or to establish reasonable expectations on the part of the client.

The legal profession is different. Fixed standards do govern the lawyer's work and provide a basis for reasonable client expectations. Those standards are codified in the Rules of Professional Conduct (RPCs), which have the force of law and apply to all lawyers practicing in the jurisdiction. Under the RPCs, a lawyer must be diligent, competent, candid with the client, and his or her fees must be reasonable.

The requirement that a lawyer be diligent means that the client has a right to expect phone calls and emails to be returned within a reasonable time, work to be performed timely, and reasonable client and all court deadlines met.

To accomplish this, the lawyer must control his or her work load so that he or she can competently pursue each client's interests. Because the RPCs have the force of law, a lawyer who fails to meet these standards is violating his or her professional duties to the client.

The requirement of competence means that the client has a right to expect that a lawyer who accepts an engagement has the ability to perform the work competently and will perform it competently. This is not a guarantee of success or a promise that the lawyer is superior to others practicing in the same area of law. But it does obligate the lawyer to provide and entitles the client to receive effective legal representation. At a minimum, this means conducting a reasonable investigation into the relevant facts and applicable law, obtaining necessary discovery, retaining experts when needed, making appropriate motions, and keeping the client informed of changes in the law that could impact the client's rights.

(continued on page 2)

Reserve Studies in Oregon and Washington

by David C. Martin

With the passage of Senate Bill 6215, effective June 12, 2008, Washington has imposed requirements for reserve studies similar to those in Oregon. However, significant differences remain. This article will review and compare the major provisions of each state's law.

RESERVE STUDY REQUIRED

As an initial point, both states require reserve studies for all new condominiums. Oregon requires the declarant to conduct the initial reserve study and the board of directors to conduct a new study or update the existing study annually. ORS 100.175(1)(a) & (3)(a). Washington does not require the declarant to prepare an initial study, but if the declarant fails to do so it must include a disclosure in the public offering statement that the association does not have a current reserve study and that the absence of a current study "poses certain risks to you, the purchaser," including the risk of a special assessment to fund major repairs or replacement in the future. RCW 64.34.380(2), 64.34.410(1)(oo).

Washington law requires all condominium associations intended in whole or in part for residential purposes to comply with the new law,

(continued on page 2)

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The Ethics of Client Service *(continued from page 1)*

A lawyer's duty to be candid with the client is especially important because it provides the foundation of trust essential to a successful attorney-client relationship. Unfortunately, the breach of this duty generates many lawyer disciplinary actions. It is simply unethical for a lawyer not to advise his or her client about risk factors in a litigation matter. Nor can a lawyer remain silent if a deadline is inadvertently missed or the court makes a ruling adverse to the client – the information must be shared. Just as importantly, a lawyer must make sure the client has the information it needs to make sound decisions. For example, an HOA Board prosecuting a construction defect claim cannot make prudent settlement decisions without knowing what insurance coverage exists for the claim. This is information the lawyers are entitled to obtain in litigation and should always pursue to the best of their ability (diligence and competence). In a recent case involving an HOA, the court found that the lawyers representing the HOA acted unethically and breached their duties to the HOA by failing to obtain insurance information from the developer, by assuming there was insurance and assuring the HOA of that when the lawyers had no information one way or the other, and by failing to advise the client of the true insurance picture when it later became known.

Whether a lawyer's fee is hourly or contingent, it must be reasonable. Under the RPCs, a reasonable fee is one that takes into account the skill and experience of the lawyer, the difficulty or novelty of the work, the risk assumed by the lawyer in a contingent case, the time actually spent performing the work, the hourly rates customarily charged for similar work in the locality, and other similar factors. It is ethical for a lawyer to advance costs for a client, but under the RPCs the client must remain "ultimately liable" to reimburse them. However, it is illegal and unethical for a lawyer to pay a referral fee or kickback. For example, a lawyer cannot pay an association manager to recommend the lawyer's services to an association. A lawyer can ethically share a fee with another lawyer, provided the fee sharing is based on the work performed by each and the arrangement is disclosed to the client.

As lawyers, we are entrusted with protecting our client's rights, confidences and property. Our rules of ethics require, quite understandably, that we discharge this work diligently, competently and with candor, and that our fees be reasonable. Clients have the right to expect this.

Reserve Studies in Oregon and Washington

(continued from page 1)

and does not exempt condominiums created before the law went into effect. Indeed, the law even applies to condominiums formed under the prior condominium law (the Horizontal Property Regimes Act of 1963) unless "existing" provisions of the governing documents say otherwise. RCW 64.34.010(1). Presumably, "existing" provisions are those that were already in effect as of June 12, 2008, when the new law took effect. However, there is no reserve-study requirement in Washington for non-condo planned communities. In Oregon, by contrast, the same reserve-study requirements that apply to condominiums apply to planned communities. ORS 94.595.

UPDATES REQUIRED

Both states require annual updates to the reserve study. However, Washington requires that the update be based on a visual site inspection by a reserve study professional every three years. The updates in the other years can be made without a visual site inspection and without the assistance of a reserve study professional, RCW 64.34.380, although a prudent board will normally choose to rely on a reserve study professional to protect the interests of the association. Oregon law does not expressly require a visual site inspection but does mandate that the reserve study be based on "reliable information." ORS 100.175; ORS 94.595.

(continued on page 3)

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Reserve Studies in Oregon and Washington

(continued from page 2)

EXEMPTIONS

In Washington, a condominium association can exempt itself from the obligation to prepare or update a reserve study in the case of "unreasonable hardship." "Unreasonable hardship" includes a situation where the cost of the study would exceed 10 percent of the association's annual budget, but other circumstances (not defined by the statute) might qualify as well. RCW 64.34.380 & 386(2). In Oregon, the only exemption is for condominiums consisting of one or two units. ORS 100.175(5).

CONTENTS OF THE STUDY

A. Reserve Studies

In Washington, the study must include a reserve component list (including quantities and estimates for useful life for each reserve component) the remaining useful life of each reserve component, and the current repair or replacement cost for each reserve component. RCW 64.34.382. A reserve component is defined as a common element "whose cost of maintenance, repair, or replacement is infrequent, significant, and impractical to include in an annual budget." RCW 64.34.020(34). The study must indicate its date and a statement that it meets the requirements of RCW 64.34.382. Further, the study must contain a statement whether it is a Level I, II or III: a Level I study is a full reserve study with funding analysis and plan; a Level II study is an update with a visual site inspection; and a Level III study is an update with no visual site inspection. The study must also include the association's reserve account balance (if any); the percentage of the fully funded balance that the reserve account is funded; special assessments already implemented or planned; interest and inflation assumptions; current reserve account contribution rate; recommended reserve account contribution rate; projected reserve account balance for thirty years and a funding plan to pay for projected costs from those reserves without reliance on future unplanned special assessments; and whether the reserve study was prepared with the assistance of a reserve study professional. RCW 64.34.382. Finally, the study must include language to the effect that the study may not include all common elements that may require major maintenance, repair, or replacement and may not include regular contributions to a reserve account for the cost of such work, and accordingly a special assessment could be required.

In Oregon, the reserve study must identify all items for which reserves are or will be established; indicate the estimated remaining useful life of each item as of the date of the reserve study; and include an estimated cost of maintenance, repair and/or replacement at the end of each item's useful life, as applicable. ORS 100.175(3); ORS 94.595(3).

B. Maintenance Plans

Oregon also requires that the board prepare a maintenance plan "for the maintenance, repair and replacement of all property for which the association has maintenance, repair or replacement responsibility under the declaration, bylaws" or applicable law. ORS 100.175(4); ORS 94.595(4). The maintenance plan must describe the maintenance, repair and replacement to be conducted and include a schedule for its performance, must "be appropriate for the size and complexity" of the association's maintenance, repair and replacement responsibilities, and address issues that include but are not limited to warranties and the useful life of the items for which the association has maintenance, repair and replacement responsibility. There is no requirement for how often the maintenance plan must be reviewed and updated; the statute merely requires that it be reviewed and updated "as necessary." ORS 100.175(4); ORS 94.595(4). There is no requirement in Washington for a maintenance plan.

RESERVE STUDY PROVIDER REQUIREMENTS

Washington requires that an initial reserve study be prepared by a "reserve study professional," which is defined as "an independent person suitably qualified by knowledge, skill, training, or education to prepare a reserve study" that meets the statutory requirements. RCW 64.34.020(35). While this definition does not require particular credentials, it does require two things: independence and competence. Also, as noted above, the law does not require that annual updates to the study be made by a reserve study professional, except when a visual site inspection is required (i.e., every 3 years).

Oregon law does not specify who may prepare a reserve study or establish qualifications for reserve study professionals. The law simply requires that the

(continued on page 4)

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Reserve Studies in Oregon and Washington

(continued from page 3)

declarant and, after turnover, the board of directors "conduct" a reserve study. ORS 100.175(3); ORS 94.595(3).

RESERVE ACCOUNT REQUIREMENTS

The Washington statute merely "encourages" associations to establish a reserve account "to fund major maintenance, repair and replacement of common elements," including limited common elements that will require major maintenance, repair and replacement within 30 years. RCW 64.34.380. It does not require a reserve account. If the association does establish a reserve account, it must segregate the account from operating funds and any transaction affecting the reserve account, including the issuance of checks, must require the signature of at least two persons who are officers or directors of the association. RCW 64.34.372(2). An association may withdraw funds from its reserve account to pay for "unforeseen or unbudgeted costs." RCW 64.34.384. However, in such event the board of directors must notify every unit owner in writing and must adopt a repayment schedule of not more than 24 months unless it would impose an unreasonable burden on the unit owners.

Oregon requires the declarant of a condominium or planned community to "establish" a reserve account. ORS 100.175(1); ORS 94.595(1). The purpose of the account is "to fund major maintenance, repair or replacement of those common elements all or part of which will normally require major maintenance, repair or replacement in more than one and less than 30 years, for exterior painting if the common elements include exterior painted surfaces, and for such other items as may be required by the declaration or bylaws." The account need not include items that can reasonably be funded from the general operating budget and reserves for limited common elements or other property that one or more but fewer than all of the owners are obligated to maintain and replace. ORS 100.175(2); ORS 94.595(2).

CONSEQUENCES FOR NONCOMPLIANCE

There is a big difference between Washington and Oregon law on this point. In Oregon, suit can be brought for a failure of the declarant, association, any association member or any other person to comply with the statute and in such action the prevailing party is entitled to reasonable attorney fees. ORS 100.470; ORS 94.780(1). Washington, by contrast, immunizes the association, the board of directors and "those persons who may have provided advice or assistance to the association or its officers or directors" from monetary liability. Those persons also have immunity from liability for failing to make the disclosure required to be included in the public offering statement and resale certificate when a reserve study has not been prepared. RCW 64.34.390. In Washington, if more than 3 years have passed since the board of directors had a reserve study professional prepare a reserve study, unit owners holding 20% or more of the voting power can vote to demand that the cost of a reserve study be included in the next year's budget and that the study be prepared. RCW 64.34.386. If the board of directors receives such a demand, it must advise the unit owners that submitted it that the board will include the cost of the study in the upcoming year's budget and, if the budget is approved, will arrange for completion of the reserve study. If the board thereafter fails to act, a unit owner can seek a court order directing specific performance and an award of its attorney's fees. An owner's duty to pay common expenses is not excused by a board's failure to act in accordance with such a demand.

CONCLUSION

With the passage of Senate Bill 6215, Washington has similar requirements to Oregon for reserve studies. Significant differences do exist, however, and careful attention should be paid to the specific requirements of each state's law. As a practical matter, a high quality reserve study will include a maintenance plan despite the absence of that requirement in Washington. Similarly, a well managed non-condo homeowners' association with responsibility to maintain common property will conduct and regularly update a reserve study, even though Washington law does not require it. At a minimum, Washington's new law will provide more protection to condominium purchasers than before, and is likely to create more equity among unit owners by paving the way for earlier and planned funding of major maintenance, repair and replacement costs.

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