Chadwick, Washington, Moriarty, Elmore & Bunn, P.C.

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# THE QUARTERLY ASSESSMENT

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**Ten Tips for Financial Responsibility**

1. Understand safe harbor investments.
2. Review financial documents of the Association periodically.
3. Make sure directors have updated bank signature cards
4. Review insurance coverage annually.
5. In the event of a transition audit, obtain documents immediately.
6. Always keep a sharp eye on reserves.
7. Take time with the annual audit.
8. For amounts over $1,000.00, require two or more directors' signatures.
9. Treat the Association's money as you would treat your own.
10. Know what bank is holding association funds and do not hesitate to contact them directly.

## THE LEASING QUESTION: CAN YOUR DOCUMENTS RESTRICT RENTALS?

BY BRENDAN BUNN

Tenants and rentals. For some communities, these two simple words conjure harrowing thoughts and images – overcrowded units, loud student parties, damage caused by numerous and careless move-ins, parking problems. Such problems can clog the works of even the most active covenants committees.

However, not all owners share the negative feelings associated with rental property. To investor owners, tenants mean extra income, and they believe renting to be a perfectly reasonable way to utilize property. These opposing viewpoints can polarize an association and create passionate debate regarding the right policy for the Association regarding leasing.

In the current market, many communities, even newer ones, are finding that they have a healthy

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## LEGISLATIVE UPDATE

BY SHEYNA BURT

Negotiating the entitlements and restrictions concerning the placement of the United States flag on private property can be difficult, just ask "The Donald". On November 1, 2006, the Associated Press reported that Palm Beach officials cited real estate tycoon Donald Trump for hoisting a 15 foot by 25 foot American flag atop an 80 foot flag pole at his Mar-a-Lago estate. According to a representative of the town's landmarks commission, the placement and size of the flag made Palm Beach look like it had "an Okeechobee car dealer." This abundance of patriotism could cause Trump to incur $250-a-day fines.

While the enormity of Trump's flag makes his case unusual, the question of the regulation of the display of the American flag regularly

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# *VIOLATION HEARINGS ARE NOT ALWAYS ABOUT VIOLATIONS*

*"The boards that enforce more effectively than others realize there is a lot more to enforcement than simply identifying violations and punishing violators."*

Most community associations have rules and regulations and some may have at least some residents who violate those rules occasionally, if not repeatedly. Enforcing the rules and the association's covenants, conditions, and restrictions, is the responsibility of the association's governing board or its designated committee — a responsibility that some boards execute more effectively than others. The boards that enforce more effectively than others realize there is a lot more to enforcement than simply identifying violations and punishing violators. Effective enforcement also requires communication and established procedures known to residents and administered with a judicious mix of discipline and discretion by the board.

This discipline and discretion will vary with the makeup of individual boards. Enforcement procedures will also vary somewhat from association to association, depending on what association documents require. In addition, Virginia and D.C. law spell out some requirements that boards must undertake in enforcement proceedings. One key requirement is the opportunity for violation hearings. The Virginia Condominium Act ("Condo Act"), the Virginia Property Owners' Association Act ("POAA"), and the D.C. Condominium Act ("D.C. Act") all require that the alleged offender be offered the opportunity to be heard, and to be provided with proper notice of such hearing. This violation hearing is mandated by law to prevent associations from imposing sanctions on members without a "due process" of law; however, a violation hearing can be a useful forum for an association's board to build open and non threatening communication between the board and the association members.

### Encouraging a Dialogue

While a complaint is inherently adversarial, violation hearings do not need to be. As much as possible, they should be structured to encourage a dialogue in which all parties have a chance both to explain their positions and to hear the positions of others. The "hearing" is as important as the telling. Alleged violators need to hear why the rule they may have violated is important and how a failure to comply affects others. The board, for its part, needs to hear why the violation may have been inadvertent or the result of circumstances beyond the owner's control, as well as determining whether the facts of the compliant support the violation and sanctions.

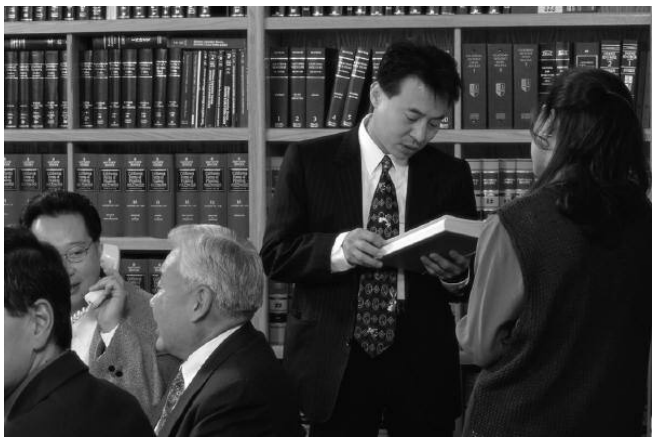
This exchange of views is more likely to occur if the hearing is relatively informal. Enforcement hearings do not need and probably should not have the rigidity and formality of a courtroom trial. But they do need sufficient structure to ensure that the discussion is orderly and that all parties are treated fairly.

Fairness, both actual and perceived, is essential. Although this does not require the complete "due process" granted to parties in a court proceeding, this hearing can sometimes serve as more than just a formality for the board to undertake before they can assess charges. There exist, however, some procedural steps a Board can adopt to diminish feelings of hostility while promoting an atmosphere of fairness, impartiality, and justice.

# *Violation Hearings Are Not Always About Violations*

### An Owner's Rights

However the hearing is structured, under Virginia law, owners have a few mandatory rights. First, owners must be notified of their right to be represented by an attorney. If the owner is accompanied by an attorney, then necessity of the presence of the association's attorney should be considered, to provide advice, if needed, and to ensure that the hearing is conducted properly, in accordance with the procedures the board has adopted.



Second, owners should be given the right to present witnesses on their behalf, but they do not have to be given the opportunity they would have in court to "confront their accusers." The board or hearing officer should definitely hear from all parties and sometimes having warring neighbors in the same room can clear the air constructively, producing a mutually satisfactory solution to their dispute. If emotions on both sides make a calm discussion impossible, however, it will likely be more productive if the parties present their testimony separately. The hearing procedures should allow the board or hearing officer to determine how the testimony will be heard.

Third, owners must be presented with notice of the hearing at least fourteen days in advance of the hearing, as mandated by Section 55-79.80:2 of the Condo Act and Section 55-513 of the POAA. Boards should be aware that both statutes only require the opportunity to be heard. Section 42-1903.08 of the D.C. Act does state that a board has the power to levy a reasonable violation charge after an opportunity to be heard has been offered; the D.C. Act, however, does not explicitly state a specific time frame for this to occur. Regardless, in both Virginia and D.C., an owner must be offered the opportunity to request a hearing. If the owner does not respond within the time frame (either the fourteen days under the Condo Act and the POAA, or if in D.C., a board determined time period), their right for a hearing is deemed to be waived under the law.

While owners do not have the right to "confront their accusers" in an enforcement hearing, in most cases, they should be told who their accusers are. Except in rare situations where a threat of physical violence exists, associations should insist that all complaints be submitted in writing and signed by the owners bringing the complaints. Absent a signed complaint, boards should not seek sanctions against an owner unless board members are able to confirm the violation independently.

### A Matter of Process

In addition to statutory consideration, there are a few points that associations should at least consider when formulating or reviewing the procedures for their violation hearings. First, a board needs to be familiar with any guidelines in their governing documents, including rules, regulations, and resolutions which may contain written procedures detailing how the hearings will be conducted. Some basic procedures a board might adopt could be:

- Outlining a hearing order (e.g. who speaks first, when each side may examine and cross-examine witnesses, etc.);
- At the start, the Board may want to give a brief introduction detailing why the hearing is taking place and what rule (and alleged violation) is brought into question; Initiating a Board action that proper notice was served on the alleged violator.

While the Board is granted the authority to adopt a resolution outlining procedures in a hearing, they may or may not be the best entity to conduct the actual hearing.

*(Continued on page 4)*

*"As much as possible, [violation hearings] should be structured to encourage a dialogue in which all parties have a chance both to explain their positions and to hear the positions of others."*

# *Violation Hearings Are Not Always About Violations*

*"It is important to remember, though, that the goal is not to punish violators or to produce revenues for the community, but to encourage compliance with the rules."*

*(Continued from page 3)*

**Who Should Hear the Complaint?**

The board is the obvious choice for this assignment, but, in some cases, may not be the best one. If the board presides over the hearing, it may be required both to lodge complaints and to rule on them, which can create the appearance that the board is acting unfairly. Some associations have created a special committee to conduct violation hearings to separate the board's legislative and judicial responsibilities; this approach has the added advantage of creating a potential appeals process by allowing owners unhappy with the initial decision to seek further review by the board. There is no right or wrong approach; boards should use the hearing structure that works best for them and for their associations. But they should also have their attorneys review their procedures to make sure they are consistent with the association's documents and the Condo Act, POAA, and D.C. Act.

**Sanctions**

Associations usually have some discretion in the sanctions they impose, although there are some statutory limits. Because residents of the community typically own their properties, boards do not have the option of "voting them off the island;" however, they may be able to revoke some of the privileges of association membership. Association documents may allow a board to suspend voting rights, although, if owners do not regularly vote, it is may not be effective. The Condo Act and the POAA allow boards to suspend access to recreational amenities, as well as impose violation charges — the sanction of choice for most communities. The Condo Act and POAA, however, limit these violation charges to $50.00 for one occurrence, and $10.00 a day (for a maximum of ninety days) for a continuing occurrence. The D.C. Act does not place a limit on the amount of the violation charge, only that it be "reasonable." Whatever sanctions the Board deems appropriate after conducting a hearing, they must notify the owner, in writing, of their decision no later than seven days after the hearing, as dictated by both the Condo Act and the POAA. The D.C. Act does not require notification of the results sent to the owner. It is important to remember, though, that the goal is not to punish violators or to produce revenues for the community, but to encourage compliance with the rules.

Although even-handed application of the rules and the sanctions is essential, rigid enforcement is not. Boards have the discretion to waive or reduce sanctions and may do so if they determine that extenuating circumstances justify those decisions. That said, boards must also consider the ramifications if they impose a sanction against one owner but waive it for another accused of the same violation. This does not mean boards should not exercise their discretion, only that they should have a good, defensible reason, and the documentation to support it, when they do so.

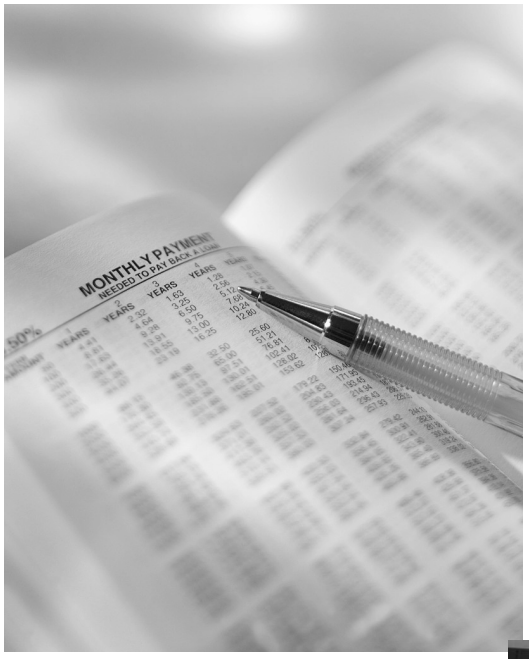
The pre-sanction hearing provides an organized structure within which to evaluate complaints and enforce association rules. But at its best, this process also has the potential to mediate disputes and to dispel the residual ill feelings that could otherwise continue to cloud relations between neighbors or between owners and the board long after a violation has been alleged and a sanction imposed. In this sense, violation hearings can be an effective community building tool, and they should be structured and conducted with that overriding purpose in mind.

Chadwick Washington Moriarty Elmore & Bunn P.C.

# THE LEASING QUESTION: CAN YOUR DOCUMENTS RESTRICT RENTALS?

(Continued from page 1)

percentage of investor owners among their members – and that frightens some associations, creating an impetus to consider a Declaration or Bylaw provision which restricts the number of units or lots which can be leased. As your Board grapples with this issue, it may find that many owners are strong-willed on this topic, both for personal and policy reasons. For example, owners who favor leasing restrictions typically argue that fewer renters mean higher property values, since owner-occupants tend to take better care of the community due to their vested interest. Opponents argue that the inflexibility of requiring a certain level of owner-occupancy shrinks the market of potential buyers by excluding investor-owners. Both positions have potential merit.




To further mix up the issues, secondary lending institutions (FNMA, FHA, Freddie Mac) who acquire loans from primary lenders usually maintain certain standards for the loans they acquire, including those for homes in community associations. These institutions implicitly believe that a high owner-occupancy ratio helps to maintain the property values for the community, which, in turn, helps preserve the value of the asset securing the loan – the unit or lot. FNMA currently requires that at least 60 percent of the units or lots in the project be owner-occupied. FHA standards require at least 51 percent owner occupancy.

One way to assure that these minimum owner-occupancy percentages are maintained is to adopt an amendment to the governing documents setting forth the minimum percentage of owner-occupied units or lots – thus restricting the right of owners to lease units/lots or sell them to non-occupants once that percentage is reached. Most governing documents may be amended upon securing the approval of a certain percentage of votes in the Association.

There are several approaches the Association could take in considering an amendment to restrict leasing.

### All Owner-Occupants

One approach would be to require outright that all units be owned by purchasers who occupy the units. If an owner could not, for some reason, occupy his or her unit, such a restriction could require that the owner sell or convey his unit to an owner-occupant. This "all or nothing" approach has a potential negative consequence of its inflexibility – that is, a court could view the restriction as unduly restrictive as to the rights of the property owner and therefore an unreasonable restraint on alienation.

### FNMA-determined Cap

Another, more common, approach would be to adopt an amendment requiring that a certain minimum percentage number of units be occupied by owners at any one time. Many associations pursue this type of restriction and base the percentage of units which must be owner-

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# THE LEASING QUESTION: CAN YOUR DOCUMENTS RESTRICT RENTALS?

*"If the Board intends to submit a leasing restriction amendment to the association for a vote, it must grapple with differing views of the owners on this issue."*

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occupied upon the standards set by FNMA, FHA and other secondary mortgage institutions. The Association could choose to adopt the standard of one of these institutions or choose its own desired percentage of owner-occupied units in the development (see below).

### Hard Cap

A third option would be to adopt a "hard cap" or a specific percentage of units which must be owner-occupied at any given time. This is probably the most straightforward type of restriction to administer, although care should be taken to ensure that the cap is sensible for the community.

### Other issues

Whatever method is adopted to set the cap, the Board may adopt a "hardship" provision allowing the Board to grant a waiver of the restriction in appropriate circumstances. This waiver would typically apply where an owner is transferred by his employer or if there is a family emergency which requires that the owner be away for long enough period that leasing is required. Such an accommodation would help make the restriction more "reasonable" if ever reviewed by a court. In addition, the Board could also adopt an exemption for mortgagees so that the amendment would not compromise their rights, thus, under most documents, obviating the need for mortgagee approval of the amendment.

Any association considering an amendment should bear in mind that some courts have ruled rental caps to be invalid in certain circumstances. For example, even if duly voted upon and recorded, amendments have been ruled invalid by a court because they were considered "oppressive" or "discriminatory" or found to violate the rights of owners who purchased their property prior to adoption of the restriction. Also, in one case from the Midwest, a rental cap was set aside because it created a disparate impact on one racial group in the association, thus violating fair housing laws.

On the other hand, many courts have upheld leasing restrictions provided that they are evenhanded, not arbitrary, and reasonably related to the common good of all the owners. In these cases, the courts noted that owners who took ownership prior to adoption of an amendment do so with the knowledge that the documents may be amended in the future.

Most governing documents have clear provisions relating to amendment of the Bylaws and therefore should be able to take advantage of such an argument.

If the Board intends to submit a leasing restriction amendment to the association for a vote, it must grapple with differing views of the owners on this issue. Many owners may be unwilling to vote for such a provision if renting out their unit is a right they intended to utilize in the future. One option in dealing with this issue is to "grandfather" current owners so that the provision will only apply to those who purchase units after a certain date. Grandfathering may make the proposal politically viable, even if the effect of the restriction won't take hold until the next generation of owners.

If an association's board would like to pursue a potential amendment to restrict leasing, a logical first step would be an informal meeting of the community first be held to gauge the relative feelings and concerns of the membership on this issue. The information gathered could assist the Board in crafting an amendment which stands a reasonable chance of being passed by the members. Boards who do not first seek input from the members may unknowingly propose an amendment which does not reflect the true will of the membership, which could deaden the chance for the amendment's passage.

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# LEGISLATIVE UPDATE

(Continued from page 1)

confronts condominium and property owners' associations. On July 24, 2006, President Bush signed into law a piece of legislation intended to address this matter: the Freedom to Display the American Flag Act of 2005 ("Flag Act" or "Act").

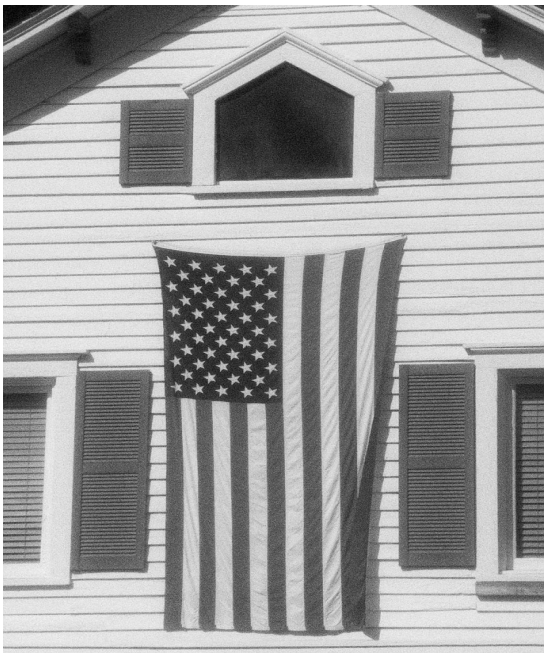
### Text of and Legislative History behind the Flag Act

The Flag Act, located in Title 4, Section 5 of the United States Code Annotated (Pub.L. 109-243, HR 42), is relatively brief. After identifying the short title and defining a few relevant terms, the Flag Act provides as follows:

A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

Nothing in this Act shall be considered to permit any display or use that is inconsistent with –(1) any provision of chapter 1 of title 4, United States Code, or any rule or custom pertaining to the proper display or use of the flag of the United States (as established pursuant to such chapter or any otherwise applicable provision of law); or

(2)any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association. 4. U.S.C.A. 5, §§ 3, 4 (2006).



The Act was introduced on January 4, 2005, by Rep. Roscoe Bartlett (R-Md) and co-sponsored by several members of the House: Rep. James Barrett (R-SC), Rep. Virginia Brown-Waite (R-FL), Rep. John Culberson (R-TX), Rep. Jo Ann Davis (R-VA), Rep. John Doolittle (R-CA), Rep. Luis Fortuno (R-PR), Rep. Raymond Green (D-TX), Rep. Mark Green (R-WI), Rep. John Kuhl (R-NY), Rep. Patrick McHenry (R-NC), Rep. Sue Myrick (R-NC), Rep. Charles Norwood (R-GA), and Rep Addison Wilson (R-SC).

During his remarks in favor of the bill on June 27, 2006, Rep. Bartlett discussed his sense that his constituents were frustrated by community association restrictions or prohibitions on the flying of the American flag. In support of his conclusions, Rep. Bartlett made part of the official congressional record letters from a number of civic organizations, including letters from the Veterans of Foreign Wars of the United States, the Jewish War Veterans of the United States of America, American Veterans, Military Officers Association of America, and Gold Star Wives of America, Inc. As a group, the letters drove home the importance of balancing patriotism with reasonable limits on the time and manner of displaying the flag.

The bill met with virtually no resistance as it made its way through the legislative process. It passed in the House on June 27, 2006, by voice vote; it passed in the Senate by unanimous consent on July 17, 2006. President Bush endorsed the bill on July 24, 2006.

### Interpreting and Implementing the Flag Act

Understanding the meaning and consequences of the Flag Act is crucial to any condominium or property owners' association that either already has flag restrictions on its books, or is thinking about enacting them. First, community associations should be aware of the limited applicability of the Act: it does *not* ban associations from prohibiting the flying of flags. In actuality, the Act only applies to the United States flag; while there may

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*"First, community associations should be aware of the limited applicability of the Act: it does not ban associations from prohibiting the flying of flags."*

# Legislative Update

(Continued from page 7)

be free speech implications regarding restrictions on the hoisting of other types of flags, for now only the United States flag is the subject of the new legislation.

Second, it is important to note that not all parts of the association's property are affected in the same way by the Act. The language specifically references "residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use." This provision suggests that the limitations on the regulatory powers of associations apply to: 1) units or lots; and 2) limited or restricted common elements to which an individual owner has exclusive use (*e.g.*, balconies or patios). Common elements/areas are not discussed in the Flag Act, so associations appear to have the right to prohibit their placement there. Such an interpretation is consistent with nearly universally accepted interpretations of the Federal Communication Commission's rules regarding the placement of satellite dishes; currently, the rules are interpreted to mean that community associations are not permitted to ban the placement of dishes on balconies or patios under the exclusive control of owners, while associations may prohibit the placement of dishes on areas open to all owners.

*"While the Act does not appear to allow blanket prohibitions, it does permit associations to place 'reasonable restriction[s] pertaining to the time, place, or manner of displaying the flag' where a 'substantial interest' of the association needs to be protected."*

While the Act does not appear to allow blanket prohibitions, it does permit associations to place "reasonable restriction[s] pertaining to the time, place, or manner of displaying the flag" where a "substantial interest" of the association needs to be protected. What exactly does this all mean? The short answer is that no one knows. Until the judiciary has had the opportunity to review and consider the Act as applied by associations, it is impossible to articulate bright line rules regarding reasonableness and substantial interests of the association. We are thus left with good news and bad news. The good news is that the language in the Act is broad enough to offer associations the flexibility to measure the sensibilities of their respective communities and draft flag placement regulations that are appropriate. The bad news is that a court's estimation of what is reasonable in the eyes of the community could differ from that of an association's Board of Directors.

That ambiguity notwithstanding, there are a few considerations that may assist a community association contemplating the creation of a flag policy. Restrictions on the size of flags and flag poles are more likely to be deemed reasonable if the restrictions bear some relationship to the size of the lot or unit. For instance, the 15 foot by 25 foot flag planted by Donald Trump would undoubtedly be unreasonable on the balcony of an apartment-style condominium unit. Because the Act also specifically states that flag usage should be in line with the Flag Code and flag rules and customs, an association could use those traditions as the basis for its policy. As for what constitutes a substantial interest, arguably the association's duty to protect the aesthetic integrity of the property as a whole is a substantial interest, as it is one of the most fundamental reasons for the existence of community associations in the first place.

Associations would be well-advised to examine their governing documents to determine what if any restrictions on flags have been put in place. If there are provisions relating to the placement of the United States flag, the association should check those provisions for compliance with the statute and make any amendments that may be necessary. If an association does not have any policy in place, it will need to evaluate whether the creation of one is necessary by asking itself whether the community has expressed interest or concern about flag display. If so, a carefully drafted resolution may be in order.

### Fun with Flags: The Federal Flag Code and Flag Etiquette

The Act also states that those residents flying the United

States Flag must follow the rules for properly the Flag memorialized in Title 4, Chapter 1 of the United States Code ("Federal Flag Code"). Some highlights from the Federal Flag Code and other flag customs and procedures include:

- It is the universal custom to display the flag only from sunrise to sunset on buildings and on stationary flagstaffs in the open. An exception is typically made for patriotic effect, but only if the flag is properly illuminated at night.
- The flag should be hoisted briskly and lowered ceremoniously.
- The flag should be displayed everyday, but especially on federal holidays.
- The flag should not be displayed on a float in a parade except from a staff.
- No flag or pennant should be placed above or, if on the same level, to the right of the United States flag, except during church services conducted by naval chaplains at sea; there is an exception for this at the United Nations.
- When flags of two or more nations are displayed, they must be flown from two different staffs of the same height and be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in times of peace.
- The United States flag should be at the center and at the highest point of the group when a number of flags of States or localities or societies are grouped.
- When displayed either horizontally or vertically against a wall or in a window, the union should be uppermost and to the flag's own right, that is, to the observer's left.
- The flag should form a distinctive feature of the ceremony of unveiling a statute or monument, but is should never be used as the covering for the statute or monument.
- The flag, when flown at half-staff, should be first hoisted to the peak for an instant and then lowered to the half-staff position. The flag should be again raised to the peak before it is lowered for the day.
- The flag should never be displayed with the union down, except as a signal of dire distress in instances of extreme danger to life or property.
- The flag should never touch anything beneath it, such as the ground, the floor, water, or merchandise (though it need not be destroyed if it does; a simple cleaning is sufficient).

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Seminar Dates and Locations

*Details to follow*

Richmond, Wednesday, April 18

Chesterfield, Wednesday, May 9

Fairfax, Thursday, May 10

Loudoun, Thursday, May 17

Roanoke, Thursday, June 7

Arlington, Wednesday, June 13

Fredericksburg, Wednesday, June 20

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# WHO'S WORKING ON MY CASE?
# STEVE MORIARTY

CHADWICK
WASHINGTON

Steve Moriarty is a principal in the firm's Fairfax office. He has represented community associations since 1984, focusing on dispute avoidance and resolution, and trying cases in state and federal courts across Virginia. Steve attended the University of Virginia, where he received his Bachelor of Arts degree in History in 1976. He then attended the University of Richmond School of Law, where he earned his Juris Doctor in 1981. He served in the Fairfax Commonwealth's Attorney's Office from 1981-84 and was a contributing author of *Condominium and Homeowner Association Litigation: Community Association Law*, Wiley Law Publications, 1987. Steve has written articles for *Quorum* Magazine and has taught at the Northern Virginia Criminal Justice Academy in Ashburn, Virginia. Steve's work on notable cases in Virginia includes *Grillo v. Montebello*, 243 Va. 475 (Virginia Supreme Court, 1992); *Maplefield v. Basham, et al.*, Ch. No. 131341 (Fairfax County Circuit Court, 1994); *Bloomingdale, et al., v. Lake Holiday Country Club, Inc.*, Ch. 98-64 (Frederick County Circuit Court, 1998); *Wyndham v. Oulton*, Ch. 99-001468-00 (Henrico County Circuit Court, 2001); *Payandeh, et al., v. Neese, et al.*, Ch. No. Chancery No. 02-127 (Fauquier County Circuit Court, 2003).

**Quick Facts**

Favorite Movie: *High Noon*

Last Book Read: *Thirteen Moons* by Charles Frazier

Last Movie Seen: *The Illusionist*

Favorite Book: *Presumed Innocent* by Scott Turrow

Favorite Restaurant: The Lansdowne Grille

Favorite Sports Team: Univeristy of Virginia Cavaliers

Hobbies: Running, Home Improvement