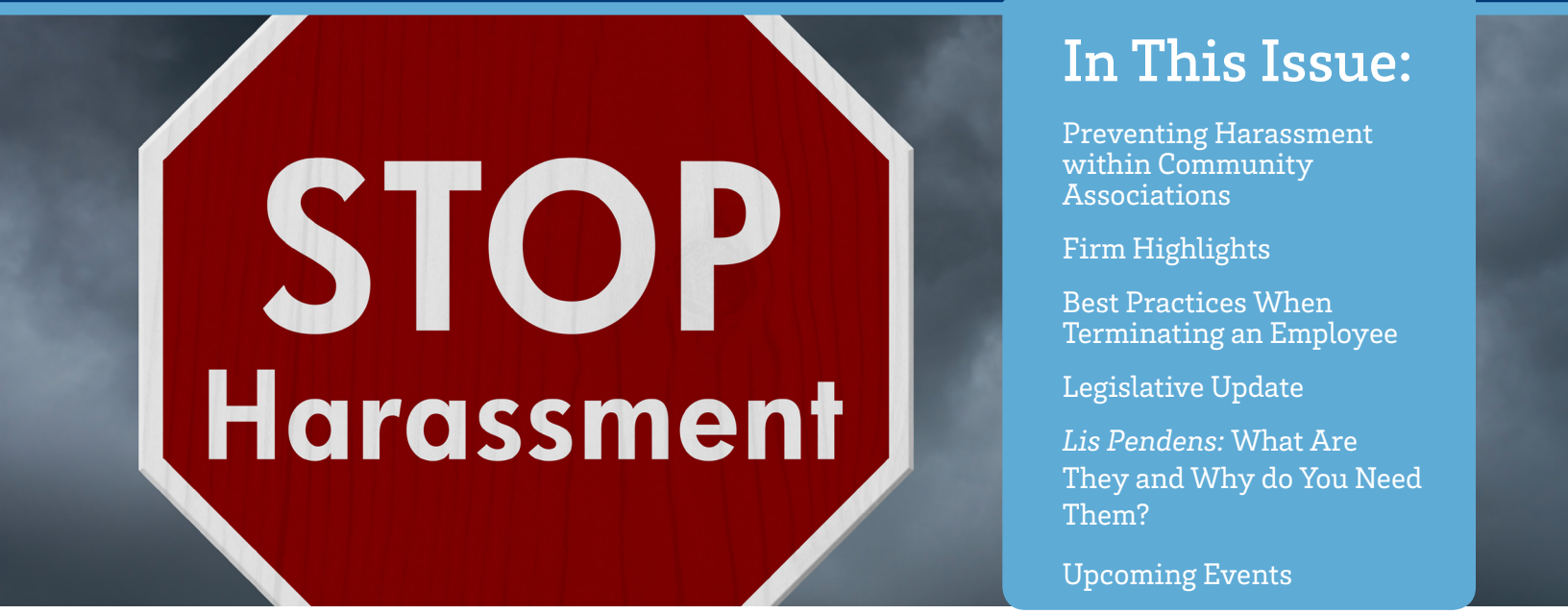
ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

Community Association Newsletter

EXPERIENCED. EFFICIENT. EFFECTIVE.

MAY 2019



In This Issue:

Preventing Harassment within Community Associations

By Justin Markel

Recently, there has been more public awareness of sexual harassment in the workplace and in housing. The #MeToo movement has given light to countless stories of employees and residents—especially women and apartment tenants—being subjected to sexual harassment. Given the current climate, employers and housing providers alike have become aware of the need to be more proactive in identifying and preventing harassment from occurring. In this article, we explain how community associations and management companies may be found liable for hostile-environment harassment in the workplace and in housing, and we suggest affirmative steps which may be taken to prevent harassment from occurring.

Potential Claims for Harassment in Community Associations

Community associations and management companies may be faced with harassment claims in the contexts of employment and housing. Although many of the concepts overlap between these contexts, it's important to be aware of the differences in the laws when evaluating potential risks and preventive measures.

Harassment in the Workplace

In Texas, workplace harassment is prohibited by Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Chapter 21 of the Texas Labor Code. The Age Discrimination in Employment Act governs employers with 20 or more employees[1] and the other statutes listed govern employers with 15 or more employees.[2] Workplace harassment claims most commonly occur when an employee sustains or witnesses unwelcome harassment based on a protected class (such as race, color, religion, sex, national origin, age, or disability) or harassment of a sexual nature, and the harassment is so severe or pervasive that it creates an abusive work environment.

An employer's liability typically depends on the alleged harasser's position in the company. If the harasser is considered a supervisor—someone with the authority to take tangible employment actions such as hiring, promoting, demoting, and terminating—the employer will be liable unless the employer can prove that the employer exercised reasonable care to prevent or correct harassing behavior, and the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. If, however, the alleged harasser is a coworker (not a supervisor), or a third party (such as a vendor or a homeowner), then in order to prevail, the employee must show that the employer knew or should have known of the harassment and failed to take prompt remedial action. In federal courts in Texas, this includes showing that the employee complied with the employer's harassment-reporting procedures.

In the section below, titled "Preventive Action," we discuss what community associations and management companies can do to prepare to prove they exercised reasonable care to prevent or correct harassment, and that they took prompt remedial action once becoming aware of alleged harassment.

Harassment in Housing

Harassment in housing is prohibited by the federal and Texas Fair Housing Acts. Unlike the employment statutes, these statutes apply to all community associations and management companies, regardless of the number of homes or units in the community.

Harassment claims under the Fair Housing Acts may occur if a resident sustains unwelcome conduct because of a protected class, such as race, color, religion, sex, national origin, familial status, or disability that is sufficiently severe or pervasive so as to interfere with the terms, conditions, or privileges of a dwelling or with the enjoyment of community services or facilities.

The scope of potential liability for harassment under the Fair Housing Acts is broader than under employment statutes. Community associations and management companies are simply liable for unlawful harassment in housing committed by their agents and employees. Unlike the employment statutes, there is no defense that the community association or management company exercised reasonable care to prevent harassment, or that the resident failed to take advantage of preventive or corrective opportunities.

Similar to coworker and third-party harassment cases, in the employment context, for a resident to prevail in a third-party harassment case under the Fair Housing Acts, the resident must show that the community association or management company knew or had reason to know about the harassment committed by the third party, had the power to correct it and failed to take prompt corrective action. However, unlike coworker-harassment cases, the resident's failure to comply with a harassment-reporting policy does not impair the resident's ability to assert a third-party harassment claim.

Preventive Action

Given the legal framework outlined above, what can be done to prevent harassment from occurring and limit the potential liability exposure for harassment that does occur? Community associations and management

[1]Although the Age Discrimination in Employment Act does not cover employers with less than 20 employees, the Texas Labor Code's provisions prohibiting age-based discrimination and harassment (as against employees 40 years old and older) apply to employers with 15 or more employees.

[2]Readers should also be aware that although the statutes listed do not cover employers with less than a certain number of employees, another civil-rights statute commonly referred to as "Section 1981" prohibits discrimination and harassment on the basis of race and national-origin in all workplaces, regardless of the number of employees. See 42 U.S.C. § 1981; Johnson v. Railway Exp. Agency, Inc., 421 U.S. 454, 459–60 (1975).

companies should consider the following measures:

Harassment-Reporting Policies

In the employment context, an employer will have a better chance at defending a supervisor-harassment claim, and defeating a coworker or third-party harassment claim, if the employer has a widely disseminated harassment-reporting policy. This is because harassment-reporting policies help an employer prove it exercised reasonable care in preventing harassment, and that it afforded employees opportunities to correct harassment after it has occurred. It also helps the employer prove that the employee failed to take advantage of corrective opportunities if the employee does not immediately report harassment to the persons identified in the reporting policy.

An employer's anti-harassment policy should clearly state the employer's no-tolerance stance on workplace harassment and clearly require employees to report harassment to specified individuals, such as the Human Resources Department, the employee's immediate supervisor (if the employee is comfortable reporting to him or her), and/or an executive of the Company. If the employee is dissatisfied with the outcome of a resulting investigation, the policy should require the employee to continue reporting to other individuals higher up the authority chain.

In the housing context, it is less clear that a harassment-reporting policy would actually help a respondent mitigate against liability. This is because a respondent in a fair-housing harassment claim does not have the same defenses available in employment cases. Rather than helping establish the respondent's reasonable care or provision of corrective measures (which help in an employment case), a harassment-reporting policy in the housing context is unlikely to do anything other than encourage reports. Additional reports of harassment would only make it easier to prove the respondent's knowledge (or constructive knowledge) of the harassment, thus further exposing the respondent to additional potential liability.

Regular Training

One of the best risk-mitigation measures a community association or management company can take is regular anti-harassment training. Coupled with harassment-reporting policy, regular training also helps an employer establish that it exercised reasonable care to prevent harassment from occurring, and that it took its harassment-reporting procedure seriously.

On the employment side, training should be conducted at the employee and the supervisor level. This training should educate employees and supervisors on how to identify prohibited harassment, and what to do if the employee or supervisor witnesses harassment. Employees should be directed to report harassment consistently with the employer's harassment-reporting procedure. Supervisors should be additionally trained on how the employer conducts investigations into allegations of harassment.

Community associations and management companies should also conduct fair-housing training, including training on potential harassment claims under the Fair Housing Acts. Although the law does not specifically incentivize training (by making it count towards a respondent's defense), it is still a good idea to be aware of the issues. A better-informed employee or board member is less likely to make a misstep and expose his or her community association or management company to liability as its agent.

Response Plans

Whether it's in the context of employment or housing, community associations and management companies could benefit from having a response plan in place, in the event it receives a complaint of harassment. In the employment context, and also in the housing context, if the alleged harasser is an agent, the community association or management company should be prepared to investigate the facts, reviewing any relevant documents and interviewing relevant witnesses.

If a community association or management company receives a harassment-complaint alleging third-party harassment, it should first assess its power to correct the harassment. For associations, this will largely depend on the authority granted by the dedicatory instruments. If the alleged harassment does not violate the deed restrictions or community rules or policies, an association or management company might not have to take any further action

besides sending a letter asking the alleged offender to stop the alleged conduct, or in some circumstances, calling the police. However, if the alleged harassment (if true) does violate the restrictions, the association should carefully determine, with the advice of counsel, whether it should proceed against the alleged harasser.[3]

When in doubt, call the lawyers!

Identifying harassment is half the battle. In situations where it's unclear or uncertain whether an act could count as unlawful harassment, community associations and management companies are well advised to call their lawyers for advice. Generally, the earlier harassment is identified and resolved, the better. Even in situations where it's clear that harassment is being alleged, it's still helpful to have experienced counsel walk the respondent through next steps so as to mitigate against further risk.

Conclusion

In this new era of heightened awareness of harassment claims, it is paramount for community associations and management companies to understand the legal framework in which harassment claims can arise in this industry. By taking the preventive measures outlined above, community associations and management companies will be less likely to be named in a harassment lawsuit, and they will be in a better position to defend against any harassment claims that may occur. The community association and employment lawyers at RMWBH Law are here to answer any questions you may have regarding these or any related issues.

[3]See Justin Markel, RMWBH White Paper: New Fair Housing Act Regulations Potentially Expand Community Associations' Liability for Harassment (Feb. 25, 2017).

Justin Markel is a shareholder with the firm's Labor and Employment, Corporate, and Community Association sections. He regularly advises community associations regarding their obligations under the federal and Texas Fair Housing Acts. He also defends community associations and management companies against agency investigations and litigation involving housing-discrimination claims. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization. Justin graduated summa cum laude from South Texas College of Law in 2010.

Firm Highlights

Brady Ortego and Paul Gaines Nominated for Best San Antonio Lawyers 2019

Congratulations to Equity Shareholder Brady Ortego and Associate Paul Gaines on their nominations for *Scene Magazine's* Best San Antonio Lawyers 2019 list. Brady has been nominated for his work in the Business and Corporate, Corporate Governance/Compliance and Non-Profit practice areas. Paul has been nominated for his work in the Real Estate Litigation, Corporate Governance/Compliance and Non-Profit practice areas. Look for the announcement of the Best San Antonio Lawyers 2019 in *Scene Magazine* later this year.

We're Just Not That into You: Best Practices When Terminating an Employee

By Ashley Koirtyohann

The unfortunate reality of being an employer is that you will almost certainly be faced with a situation where you need to let an employee go for performance issues. If your company finds itself in such a situation, you might consider the steps below to limit the potential for liability and to create a thorough record in the event an employment decision is challenged through a lawsuit or charge of discrimination. While this article focuses on management companies and their employees, these steps would also be appropriate for community associations who choose to hire employees of their own. Please note these steps are most useful to prepare for terminations based on performance issues, and they are not intended to replace the advice of counsel as every situation is unique.

1. **Begin documenting performance deficiencies as soon as they arise.** You should do this even if you anticipate the employee making a complete turnaround. Keep contemporaneous notes outlining each incident or issue and how it was addressed and follow up on any oral conversations with the employee in writing. If you issue a written warning, ask the employee to sign the warning, acknowledging receipt. In addition to ensuring that an accurate timeline can be compiled if it becomes necessary, written communications serve to clarify areas of concern as well as expectations for the employee going forward. This documentation can also be used to establish that the company had a "legitimate, non-discriminatory reason" for terminating the employee, which becomes vitally important when an employee later alleges discrimination or retaliation.
2. **Determine whether your company has a progressive discipline policy.** These policies (which are most often found in employee handbooks but could be in a standalone document) set forth the procedure for disciplining employees, often outlining several levels of written warnings which eventually result in termination. If your company has such a policy, it is best practice to follow it as closely as possible. If a situation arises where you feel you need to bypass a step, you should consult with an attorney regarding the available options and their potential impact. If your company does not have such a policy, identify any informal patterns or procedures and try to avoid any major deviations from past practices.
3. **Be open and honest with the employee.** Conversations about performance issues can be uncomfortable, particularly when the employee's problems are not related to their attitude or personality, but no one is served by avoiding these tough discussions. Employees cannot be expected to improve when they haven't been told there is a problem. Additionally, sweeping issues under the rug can lead to an employee feeling blindsided when the decision is ultimately made to let them go. These conversations should be between the employee and their supervisor or a member of HR. Performance issues should be clearly spelled out, and the steps necessary for correction should be identified. While the discussion can take an overall positive tone by focusing on the potential for improvement, you should set the employee's expectations for what will happen if these improvements are not made. As discussed above, these conversations should be

documented in writing.

4. **Analyze potential risks before proceeding with termination.** There are several things to consider when you're making the decision to terminate an employee. Is there an employment agreement that governs issues such as severance and notice requirements? Has the employee made any threats (veiled or otherwise) regarding potential litigation? Have there been any recent complaints to HR that could give the impression of unlawful retaliation? If these or any other areas of concern exist, it is best to discuss them with an employment attorney before termination occurs. This gives the attorney an opportunity to identify risks and draft a separation agreement designed to address those specific risks. Separation agreements typically offer a severance payment in exchange for the employee's release of any potential claims against the employer and related parties (such as the associations the employee worked with). It is important to note that separation agreements must meet specific requirements to be enforceable. These requirements vary based on certain factors such as the employee's age and the nature of the claims being released. Having an attorney draft or review a separation agreement to assess its scope and enforceability in advance is significantly less expensive than litigating these same issues down the line.
5. **Keep "the talk" short and sweet.** Once the decision has been made to proceed with termination and an appropriate separation agreement has been prepared, the only thing left to do is tell the employee. The news should be delivered by a member of HR or the employee's supervisor, but another member of HR or management should be present to act as a witness. It would not be inappropriate to ask the company's attorney to be present. In fact, their presence would be advisable if you have reason to believe the employee will allege discrimination or any other unlawful activity. The conversation itself should be short and to the point. The employee should be notified that the decision to terminate their employment has been made and is not up for discussion. If a separation agreement is being offered, let the employee know how long the offer will remain open and present them with a copy that they can take home and review. Let the employee know who they should contact with any questions about the agreement or other outstanding issues (such as COBRA benefits or return of any company-owned property) and then end the conversation. At the end of the conversation, make sure the employee returns any company property, such as keys, access cards, and company equipment. If the employee has remote access to the employer's electronic systems, make sure the IT department is notified and ready to disable their log-in credentials.
6. **Be neutral when notifying third parties.** After the termination occurs, you will likely have to inform other employees of the separation, as well as the Board of Directors of any associations the employee worked with, so that they know the person doesn't have the authority to act for the company. It's best not to mention that the person was terminated or the reasons for the termination. Rather, it's generally advisable to simply let them know the person is no longer employed and that the management company wishes them the best in their future endeavors. If a prospective employer calls for a reference, it's best only to disclose the person's name, dates of employment, and last position held. By limiting this disclosure, it is less likely the departing employee will be able to assert a defamation claim.

Terminating an employee is often uncomfortable and unpleasant, even when you know it's in the company's best interest. These steps will help give employees the tools they need to be successful by making sure they are aware of any existing performance issues and the actions that can be taken to improve. However, if no improvements are made and termination becomes necessary, the same steps can help reduce the company's exposure to claims of discrimination or other unlawful activity.

Ashley Koirtyohann is an associate with the firm's Litigation and Real Estate Section and is a member of the Community Association Team. Her practice focuses on directors and officers defense, community associations, labor and employment, and corporate transactions. Ashley graduated in the top 10 percent from Texas A&M University School of Law in 2017

Legislative Update

By Brady Ortego

The 86th Texas Legislative Session has passed the midway point and is now speeding towards the finish line on May 27th. Committees are quickly moving through the over 7,000 bills filed in this legislative session, including the many bills potentially affecting property owners' associations, reading them in committee, holding public hearings and some being voted out of committee and moving to calendars. Most of the activity regarding POA legislation during this session occurred in the month of April; this week and last week.

The legislation that everyone has been talking about since filed on December 11, 2018 in the Senate regarding religious displays, is moving through the legislative process via its companion bill, HB 2302. A public hearing occurred on April 23. The bill was voted out of the House of Representative's Business and Industry Committee and reported favorably without amendment. We are watching this bill closely to see if it is placed on calendars, which is the next step in the legislative process.

For other bills we have been following closely, such as HB 3445 (Declarant Control Period of POAs), also was heard publicly on April 23 but has not been voted out of committee. Another public hearing occurred on April 30 regarding HB 660 (Fines); the latest status indicates that this bill is left pending in committee.

But for several other bills, action has been even more swift. Votes have been taken and the bills are being passed from one house of the Texas Legislature to the other. Some might even eventually make their way to Governor Abbott's desk. For our May Legislative Update, we will shine a light on these bills.

- Representative Bohac's, HB 1025 (POA Board Member Eligibility), was heard publicly on April 23, reported favorably without amendments, and is now placed on Local, Consent and Residential Calendars for May 3. HB 1025 is moving folks.

- HB 302 by Dennis Paul (R), Houston, would affect the ability of POAs to regulate firearms on certain residential or commercial property. The bill was passed by the House on April 11 by a vote of 101 yeas, 44 nays, 2 present, not voting. In the Senate, the bill has been read and referred to the State Affairs Committee and as of this update has been reported favorably without amendments and placed on the intent calendar. This bill is moving.

- HB 347 by Phil King (R), Lubbock, would repeal the tier system in the Local Government Code and require all municipalities to secure landowner consent prior to annexation. The bill passed the House on April 9th with a vote of 133 yeas, 14 nays, and 1 present, not voting. The bill was then passed to the Senate and has been referred to the State Affairs Committee where it was reported favorably without amendments on April 29 and recommended for local and uncontested calendars.

- HB 234 by Matt Krause (R), Fort Worth, the lemonade bill – would allow for the occasional sale of lemonade by children under the age of 18 on private property or in a public park without a permit and would restrict

POAs from enforcing or adopting a restrictive covenant against this. The bill passed the House on March 20th by a vote of 144 yeas, 2 nays, and 1 present, not voting. The bill has been read in the Senate and was referred to the Intergovernmental Relations Committee on March 27th but has not moved since.

- SB 86 by Bob Hall (R), Edgewood, the chicken bill – in a major update, this bill now affects POAs. In an amendment to the original bill, Chapter 202 of the Property Code would be amended by adding Section 202.020. The new section would apply only to restrictive covenants created on or after September 1, 2019. The bill would prohibit POAs from adopting or enforcing a restrictive covenant prohibiting "the raising or keeping of six or fewer chickens on a single-family residential lot. The bill would allow POAs to adopt and enforce a restrictive covenant with reasonable requirements that "do not have the effect of prohibiting the raising or keeping of six or fewer chickens, including: (1) a limit on the number of chickens that may be raised or kept in excess of six; (2) a prohibition on breeding poultry; (3) a prohibition on raising or keeping roosters; or (4) the minimum distance between a chicken coop and another lot." The bill passed the Senate on April 16th with a vote of 29 yeas and 2 nays. The bill was introduced to the House on April 17th and referred to the Agriculture & Livestock Committee on April 23rd, and it was reported favorably as substituted on April 29th.

As the 86th Texas Legislative Session quickly draws to a close, we will have further updates on anything affecting the POA world. In our June issue, we will have a comprehensive look back at the legislative session, where all the POA and developer bills' journeys ended and what could have been for the law affecting Texas POAs.

Lis Pendens: What Are They and Why Do You Need Them?

By Clint Brown

Ah the term lis pendens. Just another latin term of art attorneys like to use in their vast repertoire of legal jargon that validates student loan payments. But what is a lis pendens? And why do associations need it?

Lis pendens quite literally means "suit pending" in latin. It is a document attorneys file in the real property records for the county in which the property is located. For a community association, it is most commonly associated with collection lawsuits and deed restriction enforcement lawsuits. Section 12.007 of the Texas Property Code concerns *lis pendens* and allows an attorney seeking relief in a lawsuit to file a *lis pendens* for eminent domain actions, and "…during the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property…"

Because community associations are either enforcing their lien rights against an owner for the failure to pay assessments or enforcing their deed restrictions against a violating owner, we are enforcing an "encumbrance against real property" and can thus file a lis pendens. Once the *lis pendens* is filed, it serves as notice to the world that the community association has a lawsuit pending that affects the title to the subject real property. So, if during the lawsuit or before the judgment is recorded, an owner tries to sell the property to a third party, that third party is subject to the lawsuit because he/she had notice of the lawsuit.

But, again, why is this important? It's important because if an owner conveys property to a third party during the lawsuit or before a judgment is recorded, without a lis pendens, there are many constables and county officials that say "sorry community association, I can't enforce your judgment against the third party because they didn't have notice of the lawsuit." The argument is that the third-party buyer did not have notice of the pending litigation at the time the buyer accepted title. Even though this may not be completely accurate under the law, it forces the community association's attorney to spend more association funds to try and fix the judgment or file a completely new lawsuit against the new owner. Simply put, it adds more time and attorney fees/expenses to the collection or deed restriction enforcement matter.

We hope this provides a little more clarification on another latin legal term of art and why the *lis pendens* is so important!

Upcoming Events

86th Texas Legislature Update

With the end of the regular session of the 86th Legislature coming May 27, 2019, the industry will be on the edge of its seat regarding pending legislation affecting Texas Property Owners' Associations. Shareholder Brady Ortego will provide an update on any pending POA-related legislation including a focus on key bills. Given the bills related to religious displays, fines, chickens, and condominium notices and elections, the finish of the 86th Legislature will be more exciting than any in recent memory.

May 15, 2019

RMWBH Training Room
4630 N Loop 1604 West, Ste. 311
San Antonio, Texas 78249
4:00 p.m. – 6:00 p.m.

*Appetizers and drinks will be provided.
Register Here>>

Tips and Traps for Community Association Contracts

Join CAI DFW for a presentation by RMWBH Founding Shareholder Marc Markel as he takes you through steps you need to know while reviewing a contract because after all it's just a contract — what could go wrong?

During the presentation, you will have a better understanding of critical contract provisions, including:

- Difference in contracts based upon the service.
- When is the right time to negotiate?
- What happens in the event of default?
- When and why do you need an attorney?

Wednesday, May 8, 2019
11:30 a.m. - 1:00 p.m.
The Brookhaven Country Club
3333 Golfing Green Dr.
Farmers Branch, TX 75234

Register Here>>

Hill Country Wine Tasting

Join Shareholder Clint Brown and RMWBH Austin for a great evening of wine, legal information and Hill Country views as we gear up for the long Texas summer. During the Hill Country Wine Tasting, Clint will be answering your HOA related legal questions and providing a quick update on the current events in case law and the Texas legislature. Don't miss out on this great evening from RMWBH.

May 16, 2019

RMWBH Training Room
317 Grace Lane, Suite 140
Austin, Texas 78746
4:00 p.m. – 6:00 p.m.

*Appetizers and Drinks will be Provided
Register Here>>

2019 CAI Annual Conference & Exposition

Join Founding Shareholder Marc Markel at the CAI Annual Conference & Exposition in Orlando, Fl. Marc will be a part of a panel of experts for the "Directors and Officers Insurance: The Good, the Bad, and the Ugly of D&O Claims. The panel will be speaking about current trends in the ever-expanding world of directors and officers (D&O) claims and best practices for how community associations handle and recover from them."

May 15 - 18, 2019

Rosen Shingle Creek Resort
9939 Universal Blvd.
Orlando, FL, 32810

Register Here>>

RMWBH PC

ROBERTS MARKEL WEINBERG BUTLER HAILEY

AUSTIN
317 Grace Lane
Suite 140
Austin, Texas 78746
512.279.7344

DALLAS
Mockingbird Station
5307 E. Mockingbird Ln.
Suite 685
Dallas, Texas 75206
214.365.9290

FORT BEND
Sugar Land Town Square
2277 Plaza Drive
Suite 290
Sugar Land, Texas 77479
281.207.7697

HOUSTON
2800 Post Oak Blvd
57th Floor
Houston, Texas 77056
713.840.1666

SAN ANTONIO
4630 N. Loop 1604 W.
Suite 311
San Antonio, Texas 78249
210.731.8858