

Winter 2018
“Special Edition”
Election Guide



ROSENBAUM PLLC

ATTORNEYS AT LAW



It's that time of the year again. The weather has grown cold up in the northern parts of the US, and many of our seasonal residents have arrived in sunny South Florida to enjoy the winter. For most Associations, while residency is at full capacity, it's time for the Annual Membership meeting, and the election of the Board of Directors.

This Special Edition will offer the best guidance on the Election process for Condominiums, Homeowners Associations, and Co-Operatives. Our legal team at Rosenbaum PLLC has years of experience in community association law, and plenty of insight into the current hot topics and questions surrounding this important annual event. We will also provide for you helpful tips to make your election as smooth as possible, as well as answers to some of the difficult situations that could arise.

At Rosenbaum PLLC, we care deeply about our clients. Our aim is to assist in providing the highest level of expertise on Annual Meetings and Elections, both in preparation of the event, during the event, and after, in the event of an election challenge.

PROPER NOTICE OF THE ELECTION OF DIRECTORS

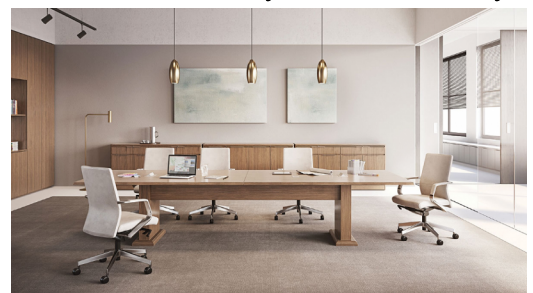
Each type of Association has its own unique process for noticing an Election of Directors and Annual Members Meeting. Summarized below is the process for Notice and requirements for each of the different types of Associations.

Condominiums and Co-Operatives:

Elections are to be held in accordance with Florida Statutes. Condominiums are governed by Chapter 718.112(2)(d), and Rule 61B-23.0021 in the Florida Administrative Code ("FAC") unless your association has fewer than 10 units and has adopted an alternative election procedure within the governing documents. Co-Operatives follow the same rules, and are subject to governance by Chapter 719.106(1)(e), and Rule 61B-75.005 in the FAC. These procedures are mandatory, regardless of what is stated in your association's governing documents.

The process is as follows: Two notices must be mailed or delivered to the unit owners prior to the date of your election and Annual Meeting. The first notice must be sent at least sixty (60) days prior to the meeting, and the second notice must be sent no less than fourteen (14) days prior to the meeting, and not more than thirty-four (34) days prior.

Unit owners desiring to be a candidate must return their Notice of Intent to be a candidate, in writing, no less than forty (40) days prior to the meeting. If a candidate wishes to submit an information sheet about himself or herself, it must be received no less than thirty-five (35) days prior to the meeting, and may not exceed one side of an 8 ½ x 11 inch page.



Once all submissions are received and you have determined an election is necessary, the second notice must be sent to each unit owner with at least one outer envelope, one inner envelope, and one ballot for each unit owned by that owner. The inner and outer envelopes are for returning the completed ballots, and ensuring secrecy in voting. Each smaller, inner envelope, is to contain one completed ballot, and should not be returned with any other information within the envelope or any markings on the exterior—meaning the envelope should be clean on the outside.

The larger, outer envelope is to be pre-addressed to the person or entity authorized to receive the ballots on behalf of the association. The outside of this envelope must have a place for the name of

the eligible voter, unit number, and the voter's signature.

Once the association has received the ballot, by mail or hand delivery, no ballot may be rescinded or changed. All envelopes received by the association are not to be opened until the commencement of the election.

Homeowners Associations:

Unlike Condominiums and Co-Op's, Homeowners Association election notice procedures are set forth by the governing documents (F.S 720.306(9)(a)). Community Association Managers are prohibited from interpreting legal documents. It is important to speak with your Association's attorney to review the procedure that is required by your community's declaration and bylaws.

QUALIFICATIONS AND ELIGIBILITY OF BOARD MEMBERS

One of today's hot topics is eligibility of board candidates. In recent years, there have been changes regarding delinquency of owners. The current requirement for all associations is that owners must be fully paid (not owing any assessments, fines, or any other monetary obligation) on the final date that nominations are allowed. For Condominiums and Co-Ops, this is the last date that the Intent to Run may be submitted. For HOA's, this can depend on the governing documents, as some Associations still allow nominations from the floor.

All Associations require that candidates not be convicted of any felony in the United States, convicted of any other offense which would be considered a felony in this state, or who have not had their civil rights restored for at least 5 years. The candidates also must not be charged with, or currently under investigation for, any felony theft or embezzlement offenses involving the Association's funds.

In addition to the standard eligibility requirements, the 2017 legislation imposed new term limits to condominiums, limiting two year term directors to 8 consecutive years, unless there are not enough eligible candidates for an election {F.S. 718.112(2)(d)2}.

Once elected, Board members must comply with the state requirements applicable to all Association types. This requirement states that within 90 days after being elected or appointed to the board, each director shall certify, in writing to the secretary of the association, that he or she has read the association's declaration, articles of incorporation, bylaws, and current written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members. In lieu of this written certification, a director may submit a certificate of satisfactory completion of Board member certification class, which is good for up to 5 years. Our firm will be announcing multiple dates and locations on our website, www.rosenbaumpllc.com, in the near future.

Board members who fall behind more than ninety (90) days past due, for any monetary delinquency, will be deemed to have abandoned their position on the board.



PROCEDURAL REFERENCE GUIDE FOR ELECTIONS

	CONDOMINIUMS (718) / CO-OPERATIVES (719)	HOMEOWNERS ASSOCIATIONS(720)
1st Notice	60 Days from the Election date	Notice procedure is determined by the governing documents, and may or may not require more than one meeting notice
Intent to Run Due	40 Days from the Election date, no nominations from the floor of the meeting	Determined by the governing documents / May allow for nominations from the floor
Candidate Information Sheet Due	35 Days from the Election date. May not exceed one side of one page that is 8 1/2 x 11 inches	Notice procedure is determined by the governing documents
2nd Notice	Not less than 14 days, or more than 34 days from the Election date.	Notice procedure is determined by the governing documents, and may or may not require more than one meeting notice
Nominating Committee	Not Permitted	Determined by the governing documents.
Proxy Voting	Not Permitted. The proxy is used only for the determination of a quorum of the Members Meeting.	Determined by the governing documents.
Quorum	Unless a lower percentage is permitted in the By-laws, only 20% of the eligible voters need to have cast Ballots in order to hold a valid election. A quorum of the Members Meeting is not required.	A quorum of the membership where the Election is to be held meeting is required, and shall be 30% of the total, eligible, voting interests, unless a lower number is provided in the By-laws





ELECTRONIC VOTING

Electronic voting, or conducting your election through an Internet-based, on line voting system, is a fairly new trend in community associations today. There are some restrictions, and there are some Associations' that this type of voting just will not work for.

The following conditions for condominiums, as set forth by the Florida Department of Business and Professional Regulation (DBPR), are:

Each member voting electronically must consent, in writing, to electronic voting.

The Association must provide each member with a method to:

- *Authenticate the member's identity to the on line voting system.*
- *Transmit an electronic ballot for board elections to the electronic voting system that ensures the secrecy and integrity of each ballot.*
- *Verify the authenticity of receipts sent from the electronic voting system.*
- *Confirm, at least 14 days before the voting deadline that the member's electronic device can successfully communicate with the on line voting system.*

In addition, the condominium association's on line voting system must be able to:

Authenticate the member's identity.

- *Authenticate the validity of each electronic vote to ensure that the vote is not altered in transit.*
- *Transmit a receipt from the on line voting system to each member who casts an electronic vote.*
- *Permanently separate any authentication or identifying information from an electronic ballot for board elections, rendering it impossible to tie a ballot to a specific member.*
- *Store and keep electronic ballots accessible to election officials for recount, inspection, and review purposes.*
- *A member voting electronically is counted as being in attendance at the meeting for purposes of determining a quorum, and for condominium associations, a quorum established based on members voting electronically*

For homeowners associations, the statute virtually mirrors the condominium rules above, with the additional language that the voting method must be consistent with the voting procedures in the association's bylaws. Statute 720.317(4) further states that a resolution by the board of directors is required to conduct electronic elections. This resolution is required to be noticed, in writing, 14 days in advance of the meeting at which it will be approved.

WHEN THERE IS A DISPUTE



Each Association type has different rules regarding election disputes, but all of them will need to follow the guidelines set forth by the DBPR. For all community types, the time period to dispute your election is sixty (60) days after the conclusion of the election. In a condominium or a cop-op, disputes would typically be filed as a DBPR complaint. In a homeowners association, pursuant to F.S. 720.306(9) and 720.311, mandatory binding arbitration is required

for all election disputes. There is a cost to this, and you must have supporting documentation. These forms are available at:

<http://www.myfloridalicense.com/dbpr/lsc/forms.html>.

It is a requirement of all condominiums and co-ops to retain all election records for a period of one (1) year after the election. For HOAs, the period is seven years.

The Association's attorney represents the Association, and may not assist any owner with an election dispute, or recall of elected directors. Individual owners may obtain their own counsel to assist with any dispute or arbitration.

FREQUENTLY ASKED QUESTIONS

*And Other Information to make your
Election a smooth one.*



To help you plan and execute a smooth election, we have some frequently asked questions and answers below:

Q. What happens if there is a tie vote in our election?

A. For condo and co-op, a runoff election is required in the event of a tie (unless otherwise stated in the By-Laws). This runoff election must be held no less than 21 days, and no more than 30 days after the date of the election in which the tie occurred. A notice of this runoff election must be delivered to owners within 7 days after the original election, and must include a copy of the candidate information for the candidates in the election, a ballot, and envelopes conforming to the same procedure as the original election notice.

For a homeowners association, Chapter 720 does not provide a method for breaking a tie vote for the election of directors. Therefore, the association's Bylaws should be reviewed to determine if a procedure is specified for breaking a tie vote for the election of directors. In the absence of specific procedures in the Bylaws, the candidates must agree on procedure to break the tie, or agree to permit the Election Committee, if applicable, to determine the method of breaking the tie vote. The best option is a run-off election conducted in the same manner as condominium elections. This way, in the event an election challenge is filed after the election, the arbitrator assigned by the Division of Condominiums will already be familiar with the run-off process followed. Alternatively, the winner of a board seat can be determined by the flipping of a coin for a two-way tie. In the event of a three-way tie, the candidates can draw straws or a name can be drawn from a hat by a disinterested person to determine the winner. Again, the candidates would have to agree on the method used to break the tie.

Q. When is a Voting Certificate actually needed?

A. Voting certificates are generally needed when a unit or home is owned by more than one person, a corporation, other business entity, or trust. If your community does not use of voting certificates when the governing documents mandate their use, this could be grounds for an election challenge and a legal basis to invalidate the election. Accordingly you should consult association counsel to determine what action your association should take to comply with the governing documents or whether to amend the governing documents to eliminate the use of voting certificates for the election of directors.

FAQ Continued:

Q. I live in a condo, and one of the candidates is using his information sheet to write nasty things about other candidates running for the board. Can we disallow his information sheet from being mailed to the owners?

A. The answer is No. Section 718.112(d)4.a. of Florida's Condominium Act provides, "upon request of a candidate, an information sheet, no larger than 8 1/2 inches by 11 inches, which must be furnished by the candidate at least 35 days before the election, must be included with the mailing, delivery, or transmission of the ballot, with the costs of mailing, delivery, or electronic transmission and copying to be borne by the association. The association is not liable for the contents of the information sheets prepared by the candidates." Based upon the mandatory language in the statute, the association must mail the information sheet upon request by the candidate, but the association is not liable for the contents of the information sheet. This does not mean, however, that if a candidate "crosses the line" and defames another candidate that the candidate whose reputation has been attacked by another candidate is not without remedies.

Defamation constitutes an injury to reputation; the injury may occur by means of libel (written) or slander (spoken). Defamation, whether libel or slander, must expose a person to hatred, contempt or ridicule or cause them to be shunned or avoided, or injure them in their business or occupation. . . . words are actionable per se if by general consent their character is injurious e.g., conduct, characteristics or condition incompatible with the proper exercise of one's lawful business, trade, profession or office." See *Perez v. City of Key West*, Florida 823 F.Supp. 934, 938 (M.D. Fla. 1993).

We recommend that community associations do not become embroiled in personal disputes between candidates. On the other hand, if a member of a community association publishes defamatory statements regarding the manner in which the Board of Directors are managing the business of the Association, then the Board of Directors should consult association counsel for legal advice.

Q. For the quorum at the meeting, do we use the total number of units to determine the quorum? Or can we reduce the total number of units by the number of units that are past due over 90 days?

A. Condos:

Pursuant to Section 718.303(5) of Florida's Condominium Act, the association may reduce the total number of units for purposes of calculating a quorum at the annual meeting by the number of units that have had their voting rights properly suspended. To suspend the voting rights of a unit owner, the unit owner must owe the Association more than \$1,000.00 for any fee, fine or their monetary obligation, which must be more than 90 days delinquent. The Association must provide proof of such outstanding monetary obligation to the unit owner at least 30 days before the suspension of the unit owner's voting rights can become effective. Also, the suspension of voting rights ends upon "full payment of all obligations currently due or overdue the association". Therefore, if your association intends to suspend voting rights before an annual meeting, it must plan sufficiently in advance to follow the suspension procedure set forth in Section 718.303(5), Florida Statutes.

HOA and Co-ops:

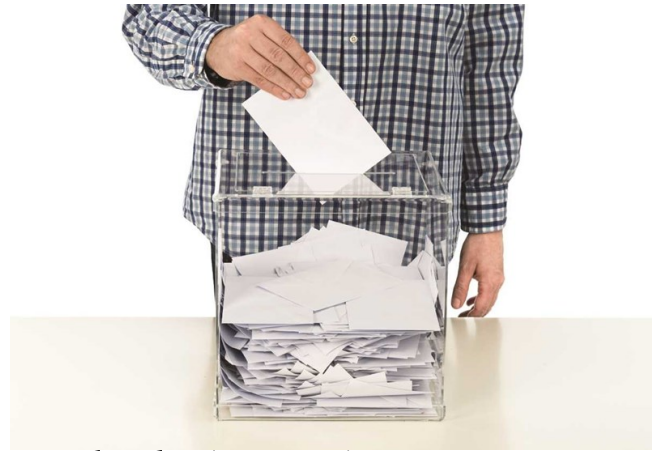
Homeowners associations and cooperative associations may also suspend the voting rights of a parcel owner or member for the nonpayment of any fee, fine, or other monetary obligation due to the association that is more than 90 days delinquent. For the time being, Section 720.305(4) of Florida's Homeowners Association Act and Section 719.303(5) of Florida's Cooperative Act do not impose the \$1,000.00 threshold amount that Florida's Condominium Act imposes. Like condominiums, the suspension of voting rights ends upon full payment of all obligations currently due or overdue to the association.

All of the above suspensions must be approved at a properly noticed board meeting, with notification to the owner and, if applicable the owner's occupant, licensee, or invitee by mail or hand delivery. We recommend notice of the suspension be delivered by certified mail, return receipt requested.

(Continued)

Q. Can the owners at a condominium force the board to hire an election monitor?

A. The unit owners can certainly request that the Board have an independent election monitor come and oversee the meetings, but the Board ultimately makes that decision. Alternately, unit owners can petition the Ombudsman to appoint an election monitor. It requires 15% of the total unit owners to complete the petition. The forms are available on line at the DBPR. The expense of the election monitor will be borne by the Association.



Q. Should we have our Association's attorney present at the election meeting?

A. We always recommend having your association attorney present at the election to address any unforeseen issues that may come up and to render a legal interpretation on the requirements of the association's documents and legislative requirements.

Q. We have had issues in the past with the volunteers that were appointed to tally the votes. Is it okay if our management company employees tally the votes at the meeting?

A. You must refer to your community Bylaws when it concerns a homeowners' association. The best practice in all instances is that the Board appoint an election committee consisting of three disinterested members.

Q. Does our organizational meeting need to be held in front of the membership? We have always held it in private in the past.

A. The Board of Directors organizational meeting to elect officers does not qualify as attorney client privilege, or personnel, and therefore it may not be held in private. The meeting should be properly noticed 48 hours in advance of the meeting, and must be open to the membership.



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Our Community Association attorneys will be offering Board Certification classes starting in January 2018, so stay tuned for a calendar of events coming soon! To subscribe to our email database, please email Catie Phillips, Community Association Education Director, at cphillips@rosenbaumpllc.com.

If you have any other questions about your Association's election process, please reach out to us at info@rosenbaumpllc.com.

Rosenbaum PLLC represents community associations throughout Florida and focuses on condominium and homeowner association law, real estate law, civil litigation, land use and zoning, and commercial transactions. The information provided herein is for informational purposes only and should not be construed as legal advice. The publication of this newsletter does not create an attorney-client relationship between the reader and Rosenbaum PLLC, or any of our attorneys. Readers should not act or refrain from acting based upon the information contained in this newsletter without first contacting an attorney, if you have questions about any of the issues raised herein. The hiring of an attorney is a decision that should not be based solely on advertisements or this newsletter.