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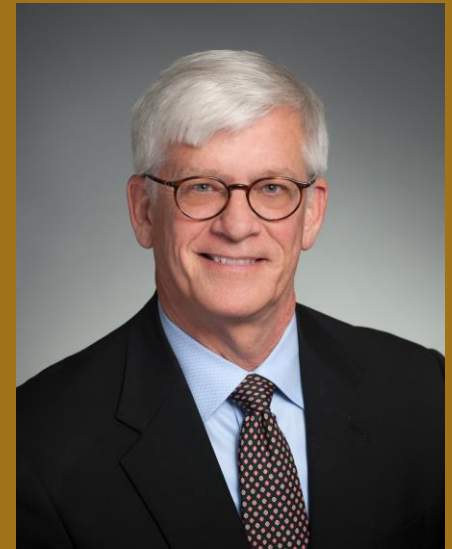
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# 2019 Community Association Legal Forum & Expo

## Welcome!



# Meet our Team





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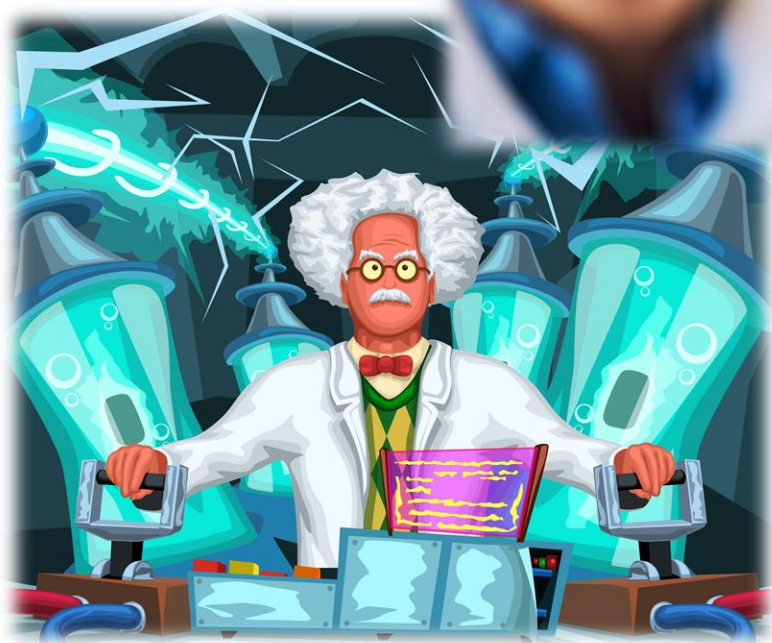




# Challenges to Managing & Managing those Challenges

Presented by  
George E. Nowack, Jr.  
03.16.2019









Create housing where you can own airspace, have access to otherwise unaffordable amenities and services, maintenance free lifestyle and everybody lives in peace and harmony.



## Video



# How goes the experiment?

















The Challenges to successfully operating a community association are:

- ☐ Income
- ☐ Enforcement
- ☐ Expectations



# Evolution of Community Associations





# Evolution of Community Associations









## QUESTION

Restrictive  
Covenants  
are:

## ANSWER

“Fences” imposed on the  
use of property with  
words.





“Thou shalt not...”





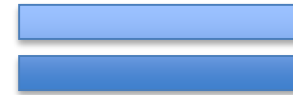
Covenants restricting the free use of land are disfavored. Restrictive covenants clearly expressed may not be enlarged by implication or extended by construction or custom. They must be given effect and enforced as written. Any doubt will be construed in favor of the land owner.



Thou shalt not



thou shall



Declarations.



# Income





## Income: add more without raising assessments

### Fees:

- ☐ Move in/Move out
- ☐ Pet fees
- ☐ Surcharges
- ☐ ACC charges
- ☐ Outside members
- ☐ Administrative fees
- ☐ Costs of collection



# Where is the Authority?

## Heartland v. Dotlich

- ☐ Declaration provided: court costs, attorney fees, and “any other amounts provided or permitted by law”
  - ☐ 33% late fee
  - ☐ 50% flat rate attorney fees
  - ☐ \$50.00 “administrative fee”





## Crawford v. Dammann: GA Court of Appeals 2006

- ☐ Declaration authorized imposing fees for water services on the basis of “benefits received.”
- ☐ No construction could be commenced without obtaining a permit from the ACC.
- ☐ Association imposed a \$3,000.00 building fee to obtain a permit and a \$100.00 water permit processing fee.
- ☐ Fees were unauthorized; need to amend the Declaration.



## Managing the Challenge

- ☐ Identify portions of income budget that rely on charges and fees.
- ☐ Have counsel confirm charges are authorized.
- ☐ If not authorized accept the need to amend your documents.
- ☐ **Do Not** take the attitude of charging “and we will worry about it if we are challenged; we can always back off. “
- ☐ Owner likely entitled to attorneys fees.
- ☐ Don’t assume D&O insurance will defend a claim or pay attorneys fees – acting beyond the scope of authority.



# Enforcement



Aside from management of the common property, the chief function of a community association is ordinarily enforcement of the servitudes and the rules and regulations governing a community.



Imposing fines is a much more cost-effective and expeditious method of halting and deterring violations than going to court.



A Declaration provides:

“The Association can enforce its documents/rules and regulations by bringing suit for damages and injunctive relief.”

*Can this Association impose fines?*





## Georgia Condominium Act and Georgia Property Owners Association Act

“If and to the extent provided in the recorded declaration or bylaws the association shall be empowered to impose and assess fines.”



## Abdulla v. Winslow at Eagles Landing Homeowners Association: February 20, 2019

- ❑ Owner installed a flower bed without permission – could not grow grass due to roots/shade.
- ❑ \$100.00/week fine commenced in August ended in December when request/approval.
- ❑ Sued to collect the accumulated fines.



## Abdulla v. Winslow at Eagles Landing Homeowners Association: February 20, 2019

- ❑ Declaration provided owners would pay assessments including *reasonable fines as may be imposed in accordance with the terms of this Declaration.*
- ❑ POAA – if and to the extent provided in the instrument, the association shall be empowered to impose and assess fines.
- ❑ No provision in Declaration in fact impose fines. No rules, no fine schedule, no notice to owners.



*“The simple fact that the association has a ten year practice of levying fines against all owners at the rate of \$100.00 per week per covenant violation does not mean that such fines were properly implemented.”*



# How Much?



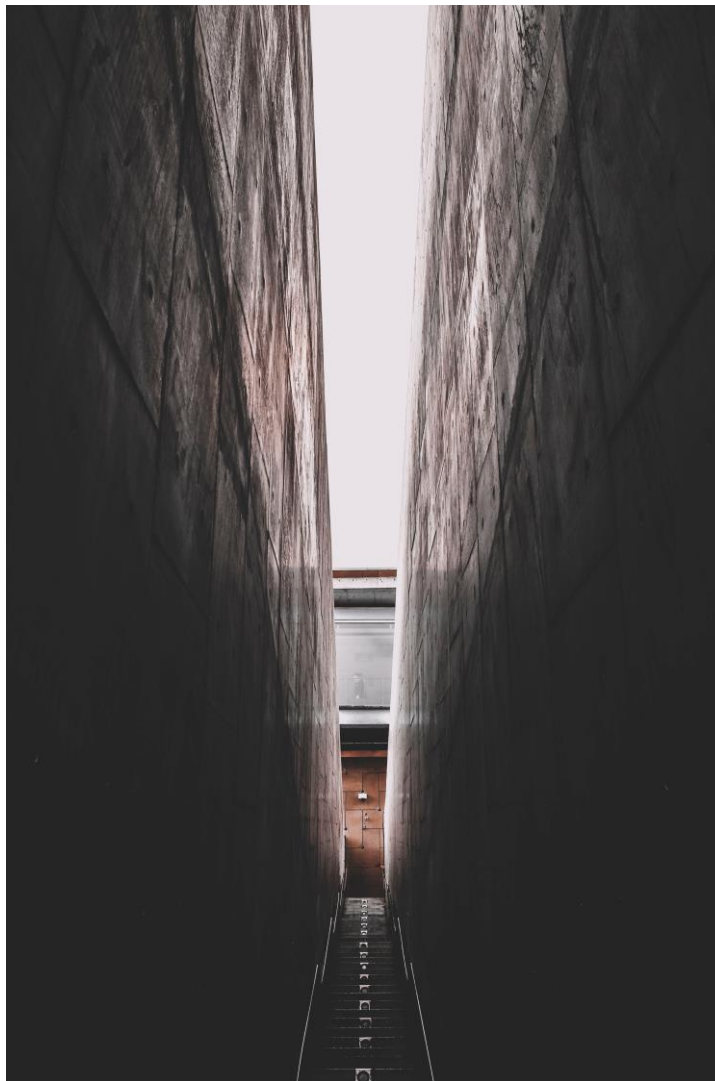
## Reasonable

- Not extreme, not arbitrary, capricious or confiscatory.
- What is reasonable depends on a variety of considerations and circumstances.



## Statutes:

- Virginia - \$50.00 per offense or \$10.00 per day up to 90 days
- North Carolina - \$100.00 per violation/\$100.00 aggregate
- Florida - \$100.00 per violation/\$1,000.00 aggregate







## Cases:

### Brown v. Spring Valley (2016) South Carolina Court of Appeals

- The amount of a fine may not be disproportionate to any probable damage to the association for the violation.
- The sum must have a relationship to any cost incurred by an association.
- In addition to being reasonable the owners must be given notice of their potential liabilities.



## Cases:

### Turtle Rock III v. Fisher (2015) Arizona Court of Appeals

- Declaration provided for a fine of \$25.00 per day/per violation.
- State Statute and declaration required the association to publish a schedule of fines.
- 93 notices of failure to maintain the house.
- Failure to publish a schedule invalidated the \$25.00 fine.
- “Even if the fine schedule existed, the HOA had the burden to prove its damages.”



## Managing the Challenge

- ☐ Have counsel confirm the authority to impose fines.
- ☐ Adopt a schedule of fines.
- ☐ Set a maximum amount.

OR

- ☐ Provide the formula \$ per day X # of days = the total amount of fines that may be imposed on account of a continuing violation.
- ☐ File suit to stop the violation and to collect fines.



# Expectations



The most difficult thing I encounter most often is that homeowners do not actually know what we do as a management company!

Many owners have the misconception that we are here to fix everything!

*Thank You*



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# Trends & Tactics

Presented by  
Julie McGhee Howard  
Jason LoMonaco  
Rebecca Drube

03.16.2019



# Short-Term Rentals: The Nitty Gritty

Presented by Julie McGhee Howard  
03.16.2019



# Video



## QUESTION

What issues do short-term rentals create?

## ANSWER

- Impact of extra use of common areas;
- Unknown occupants in space;
- Noxious and annoying behavior of tenants;
- Frequent move-ins/move-outs;
- Devaluation of owners' investment.



# Steps to Stop Short-Term Rentals



- Ensure enforcement authority exists in the Declaration.
- Add restriction by Amendment if you don't currently have the right to restrict in Declaration.





## QUESTION

What are the risks if a Board bans short-term rentals with no authority?

## ANSWER

- Owner claim for lost profits;
- Owner claim for interference with contract;
- No insurance coverage to defend Association in potential lawsuit; and
- A lost lawsuit weakening the Board's position in future enforcement.



# Use Restrictions

- General Rule of Law:
- Owner of land has right to use it for any lawful purpose.
- Restrictions on an owner's use of land must be clearly established and must be strictly construed.

Any doubt in meaning will be construed in favor of owner and covenants will not be enlarged or extended.



# Leasing Restrictions

- Restriction on use of the property must be in Declaration.
- Best prevention for leasing: an *express* restriction.
- Possible related restrictions to control:
  - Prohibitions on commercial use
  - Limits to residential use only

--BUT DON'T COUNT ON THESE!--



## QUESTION

Are Short-Term  
Rentals  
Commercial  
Use?

## ANSWER

**Not According to These Cases!**

Santa Monica Beach Property Owners Assn, Inc. v. Acord, 219 So.3d 111 (Fla. Ct. App. April 28, 2017)

- Florida Court of Appeal held that short-term rentals did not violate a restriction prohibiting commercial use.
- Receiving *rent for short-term stays did not convert property to commercial use.*



# Short-Term Rentals Are NOT Commercial Use

**Foreshee v. Neuschwander, 377 Wis.2d 162 (June 13, 2017)**

- Covenants restricted “*commercial activity*.”
- Wisconsin Court of Appeals held that this restriction *did not prohibit vacation rentals*.
- Intended restriction must be clear and unambiguous to be enforceable.



## Short-Term Rentals Are NOT Commercial Use

**Vera Lee Angel Revocable Trust v. O'Bryant, 2018 Ark. 38 (S.Ct. Ark February 8, 2018)**

- rentals on VRBCovenants prohibited use of lots for “any commercial purpose, including motels, tourist courts, motor hotels, hotels, etc.”
- Arkansas Supreme Court held that owners short-term O did not prohibit vacation rentals because the rentals *were still for a residential purpose of the renters.*





## QUESTION

Then, Are  
Short-Term  
Rentals  
Deemed  
“Residential  
Use”?

## ANSWER

Depends on State & Restriction.

Tarr v. Timberwood Park Owners, 61  
Tex. Sup. Ct. J. 1174, 2018 WL 2372595  
(May 25, 2018)

- Covenants limited uses to “single-family residences.”
- Texas Supreme Court held restriction requiring land to be used solely for residential purposes did not prohibit use of homes for short-term vacation rentals.
- Intended restriction must be unambiguous.



## One State – Two Results

**Ridgepoint Rentals, LLC v. McGrath, 2017 WL 6062290  
(Tex. App. Dec. 7, 2017)**

- Texas Court of Appeals held that short-term leasing violated a *residential-purposes-only* use restriction.
- *The restriction specified that hotels and other commercial uses were not residential purposes.*



## Some Courts Say: Short-Term Rentals ARE Commercial Use

**Edwards v. Landry Chalet Rentals, 246 So.3d 754 (La.App. 2 Cir. Feb. 28, 2018)**

- Louisiana Court of Appeals held LLC violated restriction against using lot for “commercial purposes” because leased as vacation rental.

**Bauckham Trust v. Petter, 2017 WL 4158025 (Mich. Ct. App. September 19, 2017) (*Unpublished*)**

- Court held that short-term rentals constituted commercial use of a lot and violated deed restrictions.

**Eager v. Peasley, 911 N.W.2d 470 (Mich. Ct. App. November 30, 2017)**

- Court of Appeals held that renting a home to a third-party for short-term use constituted commercial use.



## Some Courts Say: Short-Term Rentals ARE Commercial Use

**Hensley v. Gadd, 560 S.W.3d 516 (S.Ct. KY, November 15, 2018) (S.Ct. KY M**

- Kentucky Supreme Court held that owners short-term HomeAway leasing violated restrictions that specified:
  - Lots shall be used for single-family residences for residential purposes only;
  - One specified Lot may be used for commercial use limited to food stores, marinas, offices, hotels, restaurants and similar retail;
  - No trade or business or professional shall be carried out on any residential lot.
- Court held that hotel like activity not the same as residential use.



## QUESTION

What do the  
Georgia  
courts say?

## ANSWER

We don't know yet.

Grave de Peralta v. Blackberry  
Mountain Association, Inc., 315  
Ga.App. 315 (March 29, 2012)

- Georgia Court of Appeals upheld right of lot owner to offer lot for short-term rentals.
- Held restriction requiring owners to designate persons entitled to use lots and Common Area did not apply.



## QUESTION

What's the  
Bottom Line  
on  
Preventing  
Short-Term  
Rentals?

## ANSWER

- To ensure enforcement, expressly prohibit short-term rentals in the Declaration.
- Cannot rely on vague terms such as “commercial” or “residential.”
- **You can, however, have rules to prohibit noxious behavior on the common areas, which apply to everyone!**



# Amendments

- General Rule: Amendment to existing declaration must be adopted in accordance with voting requirements found in the existing declaration.
- OCGA § 44-5-60(d)(4): “no change in the covenants which imposes a greater restriction on the use or development of the land will be enforced unless agreed to in writing by the owner of the affected property at the time such change is made.”



# Amendments

Charter Club on River Home Owners Ass'n v. Walker, 301 Ga.App. 898, 689 S.E.2d 344 (2009):

- HOA amended declaration to add leasing prohibition.
- Owner did not consent to amendment and leased her home.
- HOA fined Owner and she sued for breach of contract, nuisance and unjust enrichment.
- Court ruled leasing restriction prohibited specific use of property and required Owner's consent for her to be bound to it under OCGA §44-5-60(d)(4).





# Amendments

- Condominium Act and Property Owners' Association Act:
  - Expressly state that the limitations of OCGA §44-5-60(d)(4) do not apply.
  - Allow amendment to Declaration by agreement of owners holding two-thirds of the votes in the Association.
- Common Law HOA –Must first submit to Property Owners' Association Act to add leasing restrictions.



## QUESTION

Can you  
add Leasing  
Restrictions  
by Board  
Rule?

## ANSWER

**NO!!!**

- Charter Club expressly held leasing restrictions are a use restriction, which must be in original Declaration or added by amendment.



# Scope of Rules

- Board's Implied Power to Adopt Rules:
  - Govern the use of the common property;
  - Govern the use of individually owned property to protect common property.
- General Rule: Other Association rule-making authority is based on Declaration.
  - Typically extends to prevent neighborhood nuisances;
  - Unless there is specific authorization in the Declaration, Association has no authority to restrict use or occupancy of or behavior within individually owned lots or units.



*Thank You*

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# Limiting Liability with Amendments

Presented by Jason LoMonaco  
03.16.2019



# While you're at it. . . Limit Liability Through Amendments

- ❑ Owners have the power to determine how their community is governed and the rules they live by.
- ❑ Owners can amend the Declaration and the Association's By-Laws and Articles of Incorporation to protect themselves, their neighbors and the Association from liability.
- ❑ **Risk can never be eliminated**, but strategic changes to the governing documents can **reduce** the risk of being sued and make a lawsuit easier to win.



# Limit *Association* Liability

## Amend the Declaration to:

- ☐ Eliminate liability for ordinary negligence concerning common property/element maintenance and repair issues
- ☐ state that owners use the common property/elements at their own risk
- ☐ Limit “nuisance” provisions that can drag the Association you into neighbor disputes



## Limit *Director* Liability

- ❑ Amend the **Articles of Incorporation** to eliminate Director liability on corporate matters
  - The Nonprofit Code specifically allows this, except for, fraud misappropriation, self dealing and willful/wanton misconduct.
  - Most By-Laws already contain these protections. But, the protections **must be in the Articles**.
  - These protections only apply to the internal corporate functions of the Association.
- ❑ Amend the **Declaration** to do the same regarding property and covenant matters.





## Extend Protections

- ❑ Amend the Declaration and/or the By-Laws to extend “exculpatory clauses” and indemnification to the ACC, members of other committees, volunteers, agents, employees and the community manager.
- ❑ However, if a lawsuit involves personal injury or property damage, an “exculpatory clause” that limits liability will only apply to ordinary negligence and not “gross” negligence or willful/wanton misconduct.



## Limit Duties

Amend the Declaration and/or the By-Laws to *expressly* state that:

- ✓ Director/committee member duties are to the Association, not individual members/owners.
- ✓ They do not create a fiduciary duty between the Association/Directors/committee members and the owners/members
- ✓ The Association does not provide security or guaranty safety
- ✓ Clarify what the Association is obligated to do, what it is not obligated to do, and where it has discretion.

□ While you're at it, clarify and limit duties of the ACC, other committees, volunteers, agents, employees and the community manager.



# Limiting Liability Through Amendments

## ☐ Amend your Governing Documents to:

- ✓ Add “Exculpatory” Clauses
- ✓ Clearly Define Association and Board duties and obligations
- ✓ Clearly define Association and Board Authority
- ✓ Simplify procedures
- ✓ Give the Association and Board more Discretion
- ✓ Clarify ambiguous terms
- ✓ Eliminate problematic or impractical restrictions



# Be Careful What you Say!

- ❑ Don't say the Association has an obligation or the authority to do something when it does not!
- ❑ If the Declaration doesn't state the Association has a "duty" to enforce violations, don't say that it does!
  - "The Board has the duty to strictly enforce the Declaration. . ."  
No, it does not!
- ❑ Don't use the "F" word!
  - "The Board has a fiduciary duty to maintain the common area. . ."  
No, it does not!



# Be Careful What you Do!

- ☐ Don't assume duties you don't have!
  - If an owner is supposed to maintain and repair an area or part of a structure, **don't maintain it!**
- ☐ Don't exercise powers you don't have!
  - If a vote of the owners is required, don't get a loan, adopt a special assessment or sell common property etc. without a vote to approve.
- ☐ Don't exceed your authority!
  - Don't charge fees that aren't expressly authorized by the Declaration.
- ☐ Follow procedure!

**When in doubt, call Nowack Howard!**

*Thank You*



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# Protect your Association from Cyber-Threats

Presented by Rebecca Drube  
03.16.2019



## Top 3 Cyber-Threats:



1. Not having adequate cyber-liability insurance (or any at all)
2. Unauthorized use of technology for board/membership actions
3. Social Media





# Cyber-Liability Insurance: Not Enough Associations Have It

The national Community Association Institute 2018 “Survey of Cyber-Security in Community Associations” found that amongst Board members and property managers:

- Only half knew that cyber-coverage was available or knew of an insurance company that offers cyber-liability and data breach coverage (roughly 36% of Board members and 60% of managers surveyed)
- Of that 50% that was aware of the existence of cyber-liability insurance, only about half said that their associations or that their association clients had coverage



# Cyber-Liability Insurance: Your Association IS at Risk

- ❑ 43% of cyber attacks target small business
- ❑ 58% of malware attack victims are categorized as small businesses.
- ❑ 47% of small businesses suffered at least one cyber attack in the past 12 months. Of those, 44% experienced 2, 3, 4 or more attacks in the past year.
- ❑ In 2017, cyber attacks cost small and medium-sized businesses an average of \$2,235,000.
- ❑ Ransomware damage costs alone are on track to hit \$11.5 billion in 2019, when its estimated that a business will fall victim to a ransomware attack every 14 seconds.



# Cyber-Liability Insurance: Threats



- ☐ Ransom-ware
- ☐ Hackers
- ☐ Lost or stolen data
- ☐ Social engineering/False pretense/Phishing



# Cyber-Liability Insurance: How Insurance Can Help

## First Party Costs (losses & damages to the association)

- Legal and forensic services (how the breach occurred & how to fix)
- Notification costs
- Crisis management and public relations
- Cyber extortion (ransomware) assistance and reimbursement
- Reimbursement for funds stolen through social engineering/phishing/false pretense
- Defense costs for lawsuits against Association

## Third Party Costs (losses & damages to outside entity)

- Judgments and settlements after data breach
- Electronic media liability (defamation/cyber bullying, etc.)



# Unauthorized Use of Technology for Board Actions:

“Action without a meeting shall be taken by all members of the board, unless the articles or bylaws specifically permit such action to be taken by less than all, but not less than a majority of the Board...”

(Non Profit Corporations Code (NPCC) § 14-3-821(b))



# Unauthorized Use of Technology for Membership Actions:

Only 3 Methods for Membership Vote Outside a Meeting:

- Written Ballot (Non Profit Corporations Code (NPCC) § 14-3-708)
- Consent (NPCC § 14-3-704)
- Governing Document Specific Methods

Cannot take any vote outside of a meeting, electronically or otherwise, unless you are using one of these 3 methods and are following the requirements exactly.



## Social Media: RISKS

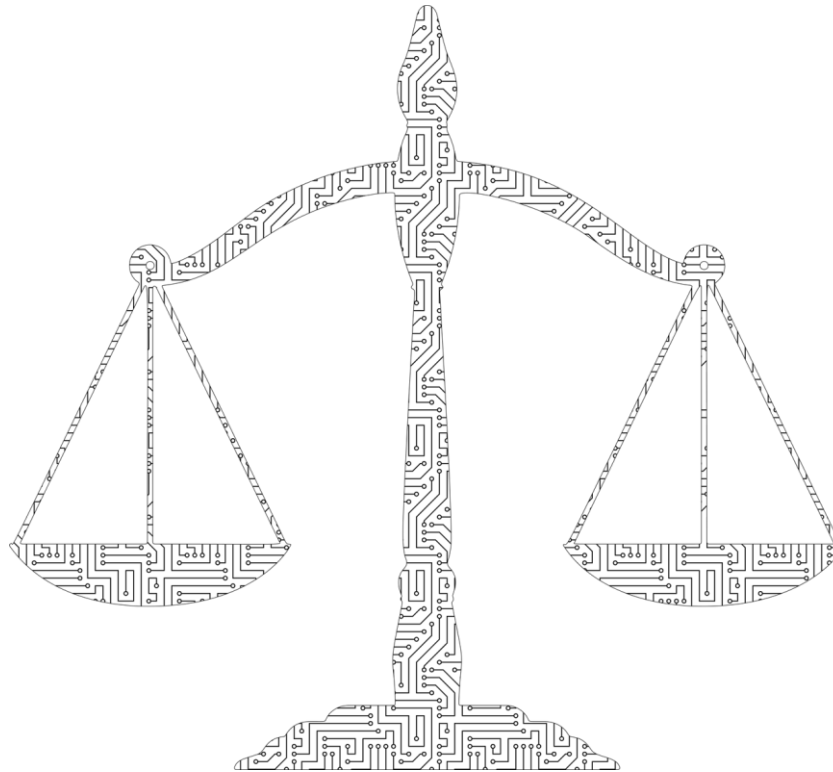


- ☐ Defamation
- ☐ Copyright/Trademark Infringement
- ☐ Cyber-bullying
- ☐ Invasion of Privacy
- ☐ Community Discord



# Social Media

Do the Benefits Outweigh the Risks?





*Thank You*



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