

Control: Books and Records, Document Retention, and How Janet Jackson Albums Are Surprisingly Relevant to Community Associations

Presentation to the NLG Leadership Conference

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I. Introduction – The Pleasure Principle

Good morning, all. To those of you I haven't met, I can confirm that my name is Sheyna Burt and I am delighted spend the next hour or so with you. Today, we are going to focus on your Association's internal controls, so naturally, I will be organizing my remarks around Janet Jackson's seminal album, 1986's "Control".

As an introduction, we begin with "The Pleasure Principle," because I'm talking about one of my favorite topics: me. I am an attorney with an office in Manassas, but we serve clients throughout northern Virginia and D.C. In addition to my practice, I serve on a number of Boards in the area: Old Bridge Chamber Orchestra, World Doctors Orchestra, Friday Morning Music Club, Hylton Performing Arts Center, Court Appointed Special Advocates, Manassas Business Council, Keep Prince William Beautiful, and the ACLU of Virginia. Of those, I am president of three. So, I spend *an unnatural* amount of time thinking about nonprofits and how they function.

Today, we're going to focus on maybe the least sexy of the Association issues: books and records and document retention as they relate to organizational internal controls. Today's we'll cover: *Let's Wait a While* – my pitch for why you should not wait a while to deal with this; *Nasty* – some of the rules that make internal document controls not just a good idea, but mandatory; *Control* – the plan for establishing and implementing best practices; and *Funny How Time Flies (When You're Having Fun)* – a wrap up including your questions.

II. The Pitch – Let’s Wait a While

I am not too proud to admit the fundamental truth that nobody wants to deal with internal control of documents. We have that gala coming up. The concert is next week. The community clean-up needs more volunteers. Internal controls, they can wait. Things slow down in the summer – we’ll deal with this then.

It’s not for nothing that a lawyer is here talking to you about this. The more you hear, really hear, this advice from a lawyer now, the less you’ll pay that lawyer later. I have three thoughts for you on this:

1. Some of the record-keeping at play is mandated by law – we’ll come back to that, but suffice it to say for now that violating those laws can result in fines and penalties and I’m guessing that your association doesn’t have a well-stocked slush fund for bailing the organization out of record-related legal problems.
2. Well-intentioned as they may be, associations get sued. And what you do not want is to have your litigation hand forced because you don’t have a mechanism for tracking, sorting, and producing discovery requests for old emails, contracts, and meeting minutes.
3. Poor or inconsistent archiving of records can cost your business (never forget that you are a business) money. How do you negotiate favorable contract terms if you have no idea what terms previously existed, because you can’t find any old contracts? For that matter, has anyone ever found himself or herself stuck in a never-ending vortex of contract auto-renewals because the document that would tell you how to terminate the agreement is saved as a .pdf of the Vice President’s Dropbox account and no one remembers that? Or have you ever been running your organization relying on an adopted policy resolution on, say, membership dues, only to find out that resolution was superseded four boards ago and the dues program you put in place violates your own documents? Your ability to make smart business decisions is directly tied to your ability to put your hands on current, relevant, documents without having to dig through rotting banker’s boxes.

Unfortunately, too many associations don’t act proactively on this. They don’t learn the lesson until something goes wrong – the auditors come knocking looking for source materials or a disgruntled former board member wants to know exactly which set of meeting minutes captured your decision on a specific, controversial topic.

Further complicating this is *all the paper*. I don’t know about you, but I don’t work with a single nonprofit that has all the storage space it needs. So, we make the call to go paperless or quasi-paperless. Without a plan, even that well-intentioned transition promises to be a logistical nightmare.

III. The Rules – Nasty

Now, please allow me to make my pitch nasty. Or, at least boring and kind of a pain. Or, *nasty*. Let's talk rules.

Both the Property Owners Association Act and Condominium Act deal expressly with Association books and records. In the POA, it's section 55-510; in the Condo Act, it's section 55-79.74:1.

Both Acts require the Association to keep detailed records of receipts and expenditures related to the Association and financial books and records must be kept in accordance with generally accepted accounting practices. This is in addition to other records – such as?

Importantly, any member of the Association who is in good standing gets to see and access the Association's books and records as long as the request is for a proper purpose related to her membership in the Association. The request cannot be for pecuniary gain or commercial solicitation.

What if you have an owner who wants to know the salary info for the Association's employees? Here's where the POA and the Condo Act part ways a bit. Condos owners are entitled to aggregate salary info of all employees. POA owners? They get to know the actual salary of the six highest compensated employees earning over \$75k and aggregate salary info for all other employees.

Note that it's not enough for owners to catch you in the street and demand five years of meeting minutes. They need to write the request and "reasonably identify the purpose" of the request. If you're professionally managed, you have five business days to respond. If you're self-managed, you have ten.

This right to access has limits. Owners cannot have: personnel matters relating to specific, identified persons or health information; contracts that are pending or in negotiation; pending or probable litigation; communication with counsel; anything that would violate the law; meeting minutes and other confidential records from executive session; and individual owner files that aren't those of the requesting owner. If you have docs that are partially accessible and partially confidential, redact them.

Slight silver lining – you are allowed to impose and collect a charge that reflects the reasonable, ACTUAL costs of materials and labor. If you expect to impose these charges, though, you first have to adopt a resolution that lists the schedule of charges.

The Virginia Nonstock Corporation Act and the Sarbanes-Oxley Act also are at play.

Let's start with the very nasty Nonstock Corporation Act. There are sections of it that specifically address corporate record keeping. Section 13.1-932 requires all corporations to

“keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.” Virginia makes a couple of things clear here: 1) all actions of boards, members, and committees must be tracked in meeting minutes; and 2) those meeting minutes need to be retained for the life of the organization.

Section 13.1-932 isn't finished with you, though. It goes on to require that corporations maintain accounting records, records of members (names and addresses), governing documents (Articles of Incorporation, Bylaws, and Resolutions), names and addresses of current directors and officers, and Annual Reports delivered to the SCC. And for good measure, 13.1-932 tells us that we have to maintain for three years records of actions taken by members without a meeting AND all written communications to members generally.

And in case you thought you might blow past this, the Act goes on to make it crystal clear that members and directors and litigants have inspection rights to those records so long as they give five business days' worth of notice and are making the request in good faith and for a proper purpose. In your records' current state, could you find, search, and produce records pursuant to a legitimate request in five business days? Without a life coach and a Sherpa? The Nonstock Corporation Act says you have to be able to do so.

With that nastiness hanging over our heads, we turn to The American Competitiveness and Corporate Accountability Act of 2002, aka Sarbanes-Oxley. We have corporate scandals like the revenue-inflating Enron to thank for the presence of SOX in our lives. Most of it doesn't apply to nonprofits, but there are two provisions relevant to today's topic that are worth minding.

1. Section 802 makes it a crime to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any federal department or agency” or any case filed under the bankruptcy code. The penalty: a fine and/or imprisonment for up to 20 years.
2. Section 1102 also makes it a crime to corruptly destroy a doc to impair the doc's integrity or availability for use in an official proceeding. The penalty: a fine and/or imprisonment for up to 20 years.

Any guesses about the most likely “federal department or agency” SOX has in mind? If a nonprofit is going to screw this up, the screw up probably going to be related to the Internal Revenue Service or the Equal Opportunity Employment Commission.

In addition to sparing you 20 years of communal jail underwear, organizing yourself with SOX and the Virginia Nonstock Corporation Act can be something that you can leverage into growth and sustainability. Lenders, investors, and donors care a lot about your governance practices.

IV. The Plan – Control

We've focused on the why, now let's talk about how you become the one in Control. We'll talk first about document retention, then we'll turn to going paperless.

First, let's get your heads right with respect to document retention:

1. Think of document management not just as an organizational tool, but as part of your risk management.
2. Document retention is about more than documents – it's about regulating who touches those documents and what mechanisms and systems you use to store and track them.
3. Ultimately, you are going to boil all of this down to a physical policy.

A good document retention policy will be divided into categories. There is no magic list, but it might include the following:

1. Human Resources
2. Governance and Administration
3. Finance, Budgeting, and Accounting (including source documents like invoices, receipts, and ledgers)
4. Meeting Minutes
5. Correspondence and Communication
6. Contracts and Agreements
7. Litigation

For each type of document within the categories, the document retention policy will spell out the method of storage (*e.g.*, paper (and if so, where) and/or digital) and the length of time the nonprofit will keep the doc. I've had clients who learned the hard way that the property management company in charge of their docs was storing them in a completely unsecured area, an area that was subject to the elements ... their stuff got rained on. Have a better plan than that. And no, storage units aren't much better – they frequently have pest issues and inadvertent failure to pay can result in the destruction of the docs by the storage unit facility. Better to use professional document storage places if your documents go beyond what your organization's office can handle.

The policy will identify plans respecting the indexing and/or searchability of files. Stacks of meticulously kept boxes are rendered useless if you don't have a meaningful way to search for what you need without pulling an all-nighter.

The policy also will explain *how* the docs are to be destroyed. There should be a sign-off process so that the responsible parties confirm that there is no need to retain the document beyond the time outlined in the resolution and that sign-off should be documented among the permanently-retained meeting members of the executive body. which might mean investing in a shredder or hiring a company like Iron Mountain to do periodic pickups. It also includes digital destruction – digital storage space is not infinite and you should have a plan (and budget) for addressing digital storage limits. Whether we're dealing in paper or data, periodically scheduled purges are a very good thing.

There is a critical role that I haven't mentioned yet as we talk about control: The Gatekeeper. Whether we're talking about the Secretary, a specially-appointed committee, or the person who drew the short straw, someone has to be responsible for annual reviews of what is being stored, where, and whether it's time for destruction. This person or committee also has to make sure that as newbies are being onboarded into the organization's leadership, they receive training on the maintenance and organization of docs. Friday Morning Music Club, which is over 130 years old, elects an archivist whose job it is to harass me, I mean us, to make sure that she receives copies of all documents generated in the name of the organization. Not all heroes wear capes.

Let's talk brief about the security of going paperless. If I can be pedantic for a moment, when I'm talking about going paperless, I'm talking about exchanging and archiving information digitally instead of manually. Is this dangerous? Some argue that going paperless is more secure – it's easier to control who has access to docs, you don't have to address environmental concerns such as aging paper, flooding, pests, mold, errant coffee, and with respect to workforce flow, you can see who touches what files and you can access those files remotely. Let me not be too cute with this, though – of course, we have to be concerned about data breaches both inadvertent and malicious.

Okay, would you like to know what is best for your nonprofit? I'm a lawyer, I don't give direct answers. Besides, if I told you the answer, how would you learn? No, I won't tell you whether paperless is the answer, but I will tell you how you can make the call: both common law and the Nonstock Corporation Act refer to the business judgment rule. This is the proposition that courts will defer to the business decisions of corporate executives so long as their actions are taken in good faith, serving the best interests of the organization, without self-dealing, and after having exercised appropriate due diligence.

Section 13.1-870 of the Nonstock Corporation Act specifically encourages Board members to rely on expert service providers in those areas that are not within the Director's expertise. If you do that and you're not being ridiculous, you're covered.

Why am I discussing this now? I am discussing this now so that I do not have to answer the question about whether and how you should go paperless. My advice is that you make this decision based on your good faith effort to figure out what is best for your nonprofit after talking to non-paper storage companies about whether their products fit your needs.

V. The Conclusion – Funny How Time Flies (When You’re Having Fun)