

24--How Should the Board Deal with an Adverse Party Who Is Also a Board Member?

Boards must prevent sharing privileged information with a Board Member who is in conflict with the Association. The Board can ask Owners to remove the adverse member. Short of removal, Board should only discuss the dispute in executive sessions that do not include the adverse Board Member. The Board must meticulously follow procedures and comply with statutes and Governing Documents to avoid creating valid claims against the Association.

When a Board Member disagrees with the Board, they are not an adverse party. But if they “lawyer up,” sue, or threaten to sue, they become a party in opposition. When this happens, a conflict of interest arises that may result in the Board Member placing their interests over that of the Association. Further, by nature of their position they may gain access to privileged information that may benefit them in their suit against the Association and that they otherwise would not be entitled to under law. Any activities taken by the Board must be designed to remedy these concerns.

A Board Member has a legal duty to act in the best interest of the Association.¹ When a director is engaged in a dispute with the Association, their personal interests conflict with the Association's. For instance, the Board has the power to authorize a lawsuit against an Owner or to settle such a lawsuit. As such, a Board Member has the power to vote against filing a lawsuit or to approve a beneficial settlement (*vis-à-vis* the adverse director). This conflict renders them incapable of performing their duty to the Association. This is a compelling argument that might cause Owners to remove the director.

CondoLaw's 2018 Handbook for Community Associations

Some Board Members believe that they can set aside this conflict and put the Association's interest ahead of their own. Even if this is true, they still have access to privileged information pertaining to their dispute with the Association. For example, reports to the Board from their attorney (which an opponent in a dispute is not entitled to view). Only the Board as a whole may waive attorney-client privilege.² Permitting an adverse director access to privileged information is a violation of the Board's duty to protect privileged information.

The best response to this type of conflict is to remove the adverse director from the Board. The easiest way to achieve this is to ask the Board Member to resign. If they refuse, call a membership meeting to remove the adverse Member. The process to do so is in the Governing Documents or in the Governing Statute.³ Generally, removal will require a vote by the Owners.

Removal can be difficult, time consuming, or impossible. In such cases, the Board should screen the adverse party from information related to the dispute. The Board should exclude the member from any discussions and Board actions related to the dispute. The Board should only discuss the dispute in an executive session that excludes the adverse Board Member. The Board may make decisions in the executive session without the adverse Board Member. The Board can also create a "legal committee" with at least two Board Members and delegate to the committee all authority to deal with the situation.

This situation presents a difficult issue for the Board to navigate. It is best to work in tandem with the Association's attorney, who will identify privileged information and recommend appropriate steps given the situation. Other Board Members should avoid speaking to the adverse member about the dispute unless authorized and only after consultation with the rest of the Board and its attorney. It is best for the Association if the Board addresses the dispute with a unified and decisive voice.

CondoLaw's 2018 Handbook for Community Associations

¹ See, RCW 24.03.127; RCW 24.06.153(1); RCW 64.34.308.

² While there is no Washington case law on this point, it stands to reason that the power to waive a corporation's attorney-client privilege must be exercised by its board of directors. This reasoning is supported in cases out of Wisconsin and the United States Supreme Court. See, *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 348 (1985) (the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.) and *Lane v. Sharp Packaging Systems, Inc.*, 251 Wis.2d 68 (2002) ("A dissident director...has no authority to pierce or otherwise frustrate the attorney-client privilege...")

³ RCW 24.03.103.

The bylaws or articles of incorporation may contain a procedure for removal of directors. If the articles of incorporation or bylaws provide for the election of any director or directors by members, then in the absence of any provision regarding removal of directors:

- (1) Any director elected by members may be removed, with or without cause, by two-thirds of the votes cast by members having voting rights with regard to the election of any director, represented in person or by proxy at a meeting of members at which a quorum is present;
- (2) In the case of a corporation having cumulative voting, ...; and
- (3) Whenever the members of any class are entitled to elect one or more directors by the provisions of the articles of incorporation, the provisions of this section shall apply, in respect to the removal of a director

RCW 24.06.130. ("...A director may be removed from office pursuant to any procedure therefor provided in the articles of incorporation.")

RCW 64.38.025(5) ("The owners by a majority vote of the voting power in the association present, in person or by proxy, and entitled to vote at any meeting of the owners at which a quorum is present, may remove any member of the board of directors with or without cause.")

RCW 64.90.520(1) ("Unit owners present in person, by proxy, or by absentee ballot at any meeting of the unit owners at which a quorum is present may remove any board member and any officer elected by the unit owners, with or without cause, if the number of votes in favor of removal cast by unit owners entitled to vote for election of the board member or officer proposed to be removed is at least the lesser of (a) a majority of the votes in the association held by such unit owners or (b) two-thirds of the votes cast by such unit owners at the meeting...")