

A Board Can Prevent a Dissident Board Member From Obtaining Privileged Information

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Practice Area: Community Associations

The dissident board member and talking with the attorney.

Q: One of our board members opposes the association's enforcement action against his close friend, the developer, but the action was approved by a majority vote of 4-1. Still, the director wants to be at all meetings with our lawyer. Anything we tell him goes straight to the developer, who has his own lawyer. Is this fair?

A: The Wisconsin Court of Appeals recently decided that the board of directors for a condominium association has the right to prevent one of its directors from obtaining the board's privileged communications with the association's attorney.

The key to determining the issue was that the attorney-client privilege protects communications between an attorney and its client. And, the court ruled, the client is the association (not the individual board member).

In the recent case, one of the directors believed that the association had wrongfully paid for the legal expenses of certain directors and other owners. To attempt to prove this, the director requested that the Association grant him full access to all Association records, including all attorney-client files. Generally speaking, a director would have access to this information; however, this situation was different due to the fact that the director had taken an adversarial position to the board.

In response to this request, the Association provided certain Association records, but removed all confidential communications with the attorney. The dissident director then sued the Association to obtain access to the records. (This was the fourth time the director had sued the Association).

The court agreed with the Association and reasoned that because the Association is the client, it has the exclusive right to withhold privileged information from current individual board members.

While the facts of the case are different than those in the question posed above, the principle from the decision is applicable: a condominium association is a legal entity and it has the right to protect itself—and that includes keeping communications with its attorney confidential. That said, even a dissident board member is charged with helping to govern the association, and he or she may become the "majority view" in the future with continued efforts at persuasion. Therefore, excluding a board member from deliberations should be done carefully.

So, here is our answer: You can tell the dissident board member that he cannot participate in certain attorney conversations, unless he can first persuade the board that he will keep the conversation confidential. Maybe that's not possible, or even reasonable, in which case he can be excluded.

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