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THE PRACTICAL GUIDE TO HOMEOWNER ASSOCIATION MANAGEMENT

Discussion Forum Follow-Up: What Should You Share about Pending HOA Litigation?

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An HOAleader.com reader asks: "How much information must a board of directors divulge to the HOA when involved in court litigation ... especially when members of the association are the litigators? A resident filed suit when the nominations committee and board of directors determined the resident was not the owner of record/deed holder ... homeowner. While informing the association about the suit ... the board of directors were careful about the information it divulged because it threatened to affect the outcome of the case. Some homeowners felt the board of directors had an obligation to reveal all the facts of the case in order for the association to vote on how the board should proceed: proceed to court, settlement, countersuits, etc. How much information must the board of directors divulge to the association ... especially when the litigators are present?"

Reveal Basic Information, Not Strategy

Boards are in a bind when it comes to pending litigation. They must disclose to members some details. But just how much to reveal is tricky.

"Owners are entitled to some information, but how much becomes a real problem," says Robert Galvin, a partner at Davis, Malm & D'Agostine PC in Boston who specializes in representing condos and co–ops. "For example, the board can say, 'We're now conducting six lawsuits against people who haven't paid charges.' But you shouldn't name the people. Other lawsuits—the kinds associations bring or are subject to—can be discussed in general terms. But litigation strategy should never be discussed. After the public meeting, the board should go into executive session, and that's where board members should discuss litigation strategy."

"The big issue here for new condos are construction defect lawsuits," Galvin adds. "The board can say, 'We're going to sue the developer because the HVAC systems are defective, or the developer said the elevator would be replaced, but it was just patched.' The board shouldn't say, 'We're going to bring a lawsuit and try to disqualify the developer's lawyer for this reason,' or 'We're going to bring a motion for attachment of the developer's property.' Strategy like that should never be discussed with unit owners because there's too much risk of a leak."

State laws usually allow boards to refrain from divulging that type of information to too–curious owners. "Nevada law allows a board cover about how to talk about pending litigation with owners," explains Chris Yergensen, senior vice president and corporate counsel of RMI Management, a Las Vegas–based company that manages about 300 condo association and HOAs. "The board can at least tell owners that discussion of litigation can happen only in a board meeting, which doesn't allow owners a right to hear the discussion. But from a business side, anything that's filed in Clark County with respect to litigation is public knowledge. So if owners request something that's been filed, we give it to them, whether it's the complaint, the answer, or any motions for summary judgment. And those documents can certainly be talked about by the attorney. The attorney can say, 'Here's the motion. It lays out why we think this case should be dismissed.' Obviously, if it's early in litigation, typically, the board says, 'We're talking with our attorney and preparing our response, and as soon as we file it, we'll provide a copy.'"

Florida also provides statutory guidance on how boards should respond to requests for information on litigation. "Florida statutes allow boards to have closed meetings between the board and the association's attorney regarding any proposed or pending litigation with respect to matters that are subject to the attorney–client privilege," says Andrew Lewis of Eisinger, Brown, Lewis, Frankel & Chaiet PA in Hollywood, Fla., who specializes in representing community associations. "The association's strategies have to be safeguarded so unit owners don't jeopardize the association's position in the lawsuit. The more people who know the strategies, the more likely those strategies will wind up being divulged to the adverse party, especially when that's an owner in the association. By that same token, an association as a general rule can keep discussion regarding proposed and pending litigation to a minimum and between the board and the attorney."

That said, Lewis is like Yergensen and will provide public documents to owners who request them. "Certain things are public record, and we have no problem discussing with the general membership things in the public record," says Lewis. "If there's an off–the–cuff question at a meeting and the attorney handling the case isn't present, the board's canned answer should always be: 'Our attorney advised us not to speak about this case. But because there's some interest, I'm going to ask the attorney to be present at the next meeting to answer questions that aren't a problem to answer.'"

Careful You're Not Too Helpful

Don't run into trouble simply because you're trying to be open. "It's really important that boards have an experienced community association lawyer," saysElizabeth White, a shareholder and head of the community associations practice at the law firm of LeClairRyan in Williamsburg, Va. "I like to have written talking points or a disclosure about pending litigation to keep the board on track. Sometimes with litigation, when you try to make a disclosure and you're a lay person, you can botch it. You can use improper terms. I've had boards say, 'We won the case' when the association only won a motion."

White also advises being careful about disclosure requirements that may be mandated by your state law. "Our Virginia Property Owner Association Actrequires disclosures in writing to buyers if there's any pending litigation and whether the litigation has the potential to adversely impact the association's financials," she explains. "There are also audit requirements, so association lawyers have to respond to auditors about the nature of litigation, how much it's costing the association, and the impact. So boards have to make sure what shows up in the written work product of those audits doesn't create problems, too."