

## A FIELD GUIDE FOR BOARD MEMBERS

### *Board Confidentiality*

*Michael Rome, Esq.  
Rome & Goldin, PC*

*This marks the sixth installment of a series for board members about commonly faced questions and issues. Many of these challenges require a combination of legal, political and practical solutions. Hopefully these articles will be useful for board members in determining what is in the best interest of the association.*

Recently I have received several requests for advice regarding board confidentiality. Here is a typical scenario:

The board holds an executive session to privately discuss sending delinquent homeowners to an attorney for collections. It turns out one of the board members is friends with a homeowner on the list. The board member informs the delinquent homeowner he's in legal collections and is about to have a lien filed on his home; he also mentions this to a mutual acquaintance.

It is later discovered that the board did not have the most recent collection report. In fact, the delinquent homeowner had paid in full a month earlier. The homeowner sues the Association for slander, and sues the individual board members. The board is horrified to find that their Directors and Officers policy does not cover slander or libel because of intentional act exclusions.

There are certain privileged or private matters that should not be discussed outside of a board meeting, including:

- Communications with the association attorney;
- Discussions by the board regarding possible litigation; and
- Private issues involving specific homeowners, such as covenant violations and collection of delinquent assessments.

These types of topics should be addressed during an executive session of the board. The purpose of an executive session is to keep privileged, private, or otherwise sensitive subjects confidential. If the board goes into an executive session, it should be noted in the minutes along with a brief description, such as "*The board then went into an executive session to discuss sending delinquent accounts for legal collection and voted to do so.*" If your bylaws require the board to hold meetings that are open to homeowners, all such observers must leave before the beginning of the executive session.

Most community associations use Robert's Rules of Order for procedural issues. Section 9 addresses executive sessions, and provides in part that a board member "*...can be punished under disciplinary procedure if he violates the secrecy of an executive session.*" The question then becomes what kind of disciplinary actions can be taken by the board.

Almost all bylaws require a vote of the homeowners in order to remove a board member...except perhaps for continued absences or delinquent payment of assessments, in which case they can be removed by the board itself. On the other hand, bylaws often allow the board to strip the member of their officer designation (President, Treasurer, Secretary, etc.). If a member is stripped of their office they would still serve on the board with a vote, but would only as a Member-At-Large.

You may want to consider having all board members sign an acknowledgement regarding their duty to maintain confidentiality. For example:

*I [BOARD MEMBER] agree that all information learned or discussed at an Executive Session of the board of Directors is privileged and confidential, and I acknowledge that such matters are not to be publicly discussed until such information becomes part of the Association's public records. I understand that if I violate board confidentiality I may lose my officer position; and the defense of any possible claims or lawsuits might not be covered by the Association's Directors & Officers insurance. Further I may not be entitled to indemnification/reimbursement by the Association for any damages I incur as a result of my actions.*

Of course, you should consult with an attorney to obtain the proper language for your particular situation.