

Two Hats in the Era of Transparency

ILLUSTRATION BY MARCELLUS HALL

It's a high-wire act. A lawyer who specializes in co-op and condo law happens to be the president of his condo board. To avoid potential conflicts of interest or legal liability, the board has hired an outside attorney to provide legal advice. To complicate the picture even further, a new state law seeks

to eliminate conflicts of interest by requiring boards to compile annual lists of every contract they awarded in which a director has a financial interest. The list must then be distributed to all residents.

Such a high-wire act is being played out at the 128-unit Yacht Club Condominium in Island Park,

Long Island, where veteran co-op and condo attorney Stewart Wurtzel, a partner at Tane Waterman & Wurtzel, is the board president. When it needs legal advice, the board turns to its attorney, Evan Gitter, a partner at Cohen, Warren, Meyer & Gitter. The two lawyers responded to questions about their delicate balancing act.

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Stewart Wurtzel

If there's a lawyer serving on a co-op or condo board, why should the board pay for outside legal counsel?

STEWART WURTZEL: My role as a board member is very different from the role I play as a building's attorney. I try to be very careful at our Yacht Club board meetings not to come across as giving legal advice. As an attorney, I certainly have encountered many of the issues that I face as a board member, but when a legal opinion is needed, I turn to Evan.

First, as a board member, I do not have the level of independence necessary to review my thoughts and actions objectively. Second, I am not insured for legal decisions made as a board member. The concern would be that I fall between the cracks. If I were providing legal advice, my malpractice carrier might say that I was serving as a board member while my directors-and-officers carrier might say that I was serving as an attorney – and consequently, both might decline coverage. In the many areas where there is not a clear interpretation of legal documents, the best advice is given by an independent counselor. No one should be able to accuse me of manipulating the legal opinion to meet my desires.

EVAN GITTER: It's imperative that co-op and condo boards receive and act upon advice from an independent attorney who has no personal interest in the outcome. Board decisions are legally protected under the Business Judgment Rule, which says that if a board acted on an informed basis, within the scope of its authority, in good faith, and in the honest belief that the action taken was in the best interests of the community – then the courts are prohibited from second-guessing the board's decision.

An attorney serving on the board has an interest in the board's actions,

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Evan Gitter

like all fellow shareholders, and his advice may not appear to be as objective as the advice of an independent attorney. That dual loyalty could possibly be used by an outside party to rebut the Business Judgment Rule, by arguing that the board did not act in good faith or on an informed basis when it relied on the legal opinion of a board member. Also, the attorney serving on the board may be subject to malpractice liability when rendering legal advice to the board instead of a business opinion.

Will this new conflict-of-interest law have any effect?

WURTZEL: If the cooperative were to retain the services of the board member/lawyer to provide legal services, that contract would need to be disclosed. But simply giving legal advice to the board as a board member would not trigger any obligation under the new legislation.

GITTER: I agree. This legislation, which became effective January 1, 2018, relates to conflicts of interest that could arise between board members and vendors. The purpose of the legislation is transparency. If the board member/attorney is not actually retained by the board but is only providing advice and insight based upon his or her professional background, the requirements would not be triggered.

What are the benefits of having a lawyer on the board?

WURTZEL: We do bring a different approach. We're trained to consider what we can and cannot do. While what you can do is not always the same thing as what you should do, it helps to understand your rights as a board. We also can sometimes see the pitfalls and problems of board



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Using a board member as the building's attorney is like a lawyer representing himself: he has a fool for a client.

actions. If there is litigation, we often understand the cost, expense, and frustration that goes with it. We also understand the risks of losing and the need, sometimes, to accept offers of settlement.

GITTER: I find that working with a board member who is a co-op/condo attorney helps because he or she brings an understanding of the issues. Co-op/condo law is a niche specialty, and a lawyer who practices in this field possesses a unique understanding of the rules and problems. Non-attorney board members may not understand the complexities of litigation. I have found that an attorney on the board can serve as a legal liaison. Not only can the attorney assist with the discovery process, but he or she can also help the rest of the board understand what is involved in litigation.

What are the downsides of having a lawyer on the board?

WURTZEL: Lawyers often micromanage issues. It's the way we're trained. We often think we know more than we do. I have come across attorneys who do not practice in the co-op/condo field who nonetheless believe they understand what's involved in running a building in New York. I can't tell you how many times I've seen an attorney on a board review a contract and not spot an issue that Evan or I, as co-op/condo attorneys, would recognize. Laundry contracts come to mind. The laundry companies write their contracts as leases. A savvy attorney wants to change that to a license and eliminate the automatic renewal provisions. An attorney unfamiliar with these areas might not spot those issues.

GITTER: There are so many nuances and intricacies in co-op/condo

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practice that an attorney who does not practice in this area may have difficulties. That attorney may try to use expertise that may not be applicable to the issues facing the community and might end up being detrimental. Another problem with having a lawyer on the board is that other board members, intentionally or otherwise, may defer to the opinion of an authoritative-sounding attorney/board member.

Since you are both co-op lawyers, do you agree on all issues?

WURTZEL: Not at all. We have different approaches to problems, as all lawyers do. But we're able to discuss our respective positions and usually agree on a way to proceed. There have been instances where Evan and I have disagreed on the approach or meaning of something, and when he gives the board his opinion, he is speaking as the sole legal counsel of the building. The board weighs his advice accordingly. I may say I disagree, but Evan's position is the only one set forth as the legal advice to the board. I know it's hard to believe, but clients don't always follow their attorney's advice!

GITTER: Stewart and I may analyze issues differently based on our experiences and practices. When we disagree, that can sometimes work to the benefit of the condominium. Stewart and I have the ability to brainstorm together, explain our respective positions, listen to one another, and come to an ultimate agreement as to the handling of an issue. That agreement may be one of our positions from the outset, or a conglomeration of the two. Either way, our relationship is one that I believe leads to the best governance of the Yacht Club Condominium. ■

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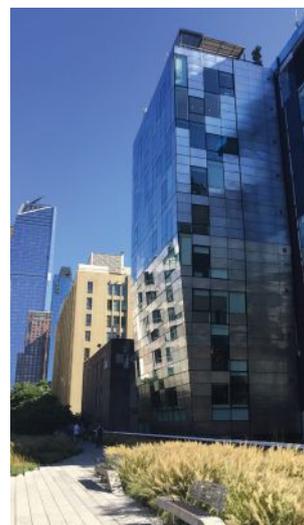
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