

Going Rogue: What To Do With The Rogue Board Member

Authored and presented by
Augustus H. Shaw IV, Esq, CCAL*
Shaw & Lines, LLC
4523 E. Broadway Road
Phoenix, AZ 85040
Phone 480-456-1500
Fax 480-456-1515
e-mail ashaw@shawlines.com
web site www.shawlines.com

*Member, College of Community Association Lawyers

TABLE OF CONTENTS

- I. Introduction.**
- II. What is a Rogue Board Member.**
- III. Association Liability Concerning the Rogue Board Member.**
 - a. Uncivil behavior at meetings of the Board of Directors;**
 - b. Enforcement of the restrictive covenants without Board Approval;**
 - c. Failure to keep confidential information;**
 - d. Speaking badly about other Board Members;**
 - e. Failure to thoughtfully consider the advice of experts (i.e. the association's manager, attorney or other professionals).**
- IV. How to Handle the Rogue Board Member.**
 - a. Informal Process;**
 - b. Formal Process;**
 - i. Letter of Censure;**
 - ii. The calling of a special meeting of the Association to discuss the removal of the Rogue Board Member from the Board of Directors;**
 - iii. Filing a breach of fiduciary duty lawsuit.**
- V. Conclusion.**

This document is intended to provide general information. It does not and cannot provide specific legal advice. For additional information or answers to questions, you may contact Augustus H. Shaw IV, Esq. of Shaw & Lines, LLC at 480-456-1500 or send questions to ashaw@shawlines.com.

I. Introduction.

Every Community Association (or almost) has a Rogue Board Member, a Member who refuses to keep confidential information, interrupts meetings or represents the Association without full Board approval. Rogue Board Members can cause a host of legal issues for an association, the Board and the Rogue Member. This document will discuss the legal liability facing community associations regarding Rogue Board Members and how community associations should address the situation and protect itself.

As a starting point, it is important to understand that not all Rogue Board Members have a nefarious intent. Most Rogue Board Members have a sincere desire to better the community association. Sometimes Rogue Board Members feel that their actions are in response to a perceived lack of action by the full Board of Directors. Most Rogue Board Members want to make their communities better but are simply not educated regarding the proper way to accomplish their goals.

So, while this document is meant to instruct community associations on how to identify and address a Rogue Board Member; this document may also serve as a reflection tool to Board Members so that they may ensure that they do not become a Rogue Board Member.

II. What is a Rogue Board Member.

A Rogue Board Member is a member of a community association Board of Directors who displays the following types of behavior:

1. Conducts himself or herself uncivilly at meetings of the Board of Directors;
2. Seeks to enforce the restrictive covenants on his or her own;
3. Fails to keep confidential information;
4. Talks badly about other Board Members; and
5. Fails to thoughtfully consider the advice of experts (i.e. the association's manager, attorney or other professionals);

Rogue Board Members can cause a number of practical problems for the Board and the community association. Rogue Board Members can interrupt the flow of Board meetings and make them more difficult to conduct. Additionally, Rouge Board Members can discourage other Members of the Association's Board from fully participating in Board Meetings.

III. Association Liability Concerning the Rogue Board Member.

While there are a number of practical reasons why Rogue Board Members are not good for community associations, there are more important legal reasons why Rogue Board Members should be addressed.

Rogue Board Members may be difficult to deal with, but they also create a wide range of legal issues for a community association. In order to fully discuss the different types of potential liability, it is important to revisit the actual behaviors.

Uncivil behavior at meetings of the Board of Directors

When a Rogue Board Member conducts himself or herself uncivilly at Board meetings, said behavior could disrupt the Board meeting and may lead to important issues not being fully discussed. In addition, other Board members may feel deeply offended or intimidated by the Rogue Board Member's conduct.

The above could lead to legal liability in the form of a harassment lawsuit against the Rogue Board Members and a lawsuit against the community association for failing to address the Rogue Board Member's conduct.

Enforcement of the restrictive covenants without Board Approval

When a Rogue Board Member seeks to enforce the restrictive covenants on their own, this activity could lead to breach of the community association's policies on enforcement. When a Rogue Board Member takes enforcement action outside of the association's normal enforcement policies and procedures, this could subject the Association to legal liability based on unequal enforcement and breach of the association's own policies and procedures.

Failure to keep confidential information

Every community association board discusses information that, for a number of reasons, should be kept confidential. It is important for Board members to keep confidential information confidential. Rogue Board Members fail to keep confidential information confidential which could lead to legal liability based on harassment, libel, slander and misrepresentation. Divulging confidential information could also lead to a breach of the attorney client privilege and negatively affect legal action involving the community association.

Speaking badly about other Board Members

Speaking badly about a fellow Board member can lead to ill feelings and resentment that can affect the efficient operation of the Board. Moreover, it could lead to liable and slander liability if the statements made by the Rogue Board Member are false or misleading.

Failure to thoughtfully consider the advice of experts (i.e. the association's manager, attorney or other professionals)

Under Arizona Law, a Board member will be held to not breach their fiduciary duty if they thoughtfully consider the advice of experts. Rogue Board Members tend to believe that they are the expert in everything and hiring an expert is not needed. This type of behavior could lead to a host of liabilities depending on the area of expertise not sought.

IV. How to Handle the Rogue Board Member.

Addressing the behavior of a Rogue Board Member is a delicate matter. This is because, as stated above, the Rogue Board Member may not feel that their actions are harmful to the Association. Moreover, the Rogue Board Member may feel that they have no other choice but to engage in this type of behavior.

Prior to addressing a Rogue Board Member, it is important that the manager and other Board Members agree that the behavior of the Rogue Board Member is problematic. Also, the association may want to obtain legal advice regarding whether the activities of the rogue Board Member present an imminent danger to the association.

When formally addressing a Rogue Board Member, there are two main processes. There is the informal process and the formal process.

Informal Process

The first step of the informal process concerning the addressing of a Rogue Board would be to, in an executive session meeting of the Board of Directors, present the Rogue Board Member with a written list of the behaviors the Rogue Board Member is engaging in. This should be followed up with a discussion on how the behavior could harm the Association and ways to positively address the behavior.

If the Rogue Board Member continues to engage in damaging behavior, the next step would be to discuss the Rogue Board Member's actions in an open meeting of the Board of Directors. A document should be drafted detailing the areas of concern and ways the Rogue Board Member can address the behavior.

Formal Process

If the Rogue Board Members continues his/her behavior after the informal process, then the next step would be to conduct the Formal Process. The Formal Process begins with an official letter of censure to the Rogue Board Member. The Censure Letter should list out the areas of concern and should also list the ramifications if the Rogue Board Member continues their behavior.

If the Rogue Board Member continues their activities after a formal Censure Letter has been issued, the Association has two remaining options, said options being:

- a. The calling of a special meeting of the Association to discuss the removal of the Rogue Board Member from the Board of Directors; or
- b. Filing a breach of fiduciary duty lawsuit.

The calling of a special meeting of the Association to discuss the removal of the Rogue Board Member from the Board of Directors

Most community association bylaws allow either the President of the association or a majority of the Board of Directors to call a special meeting of the members. This special meeting of the members could be held to discuss the removal of a member from the Association's Board of directors.

Calling a removal meeting should be only done in extreme circumstances. It is always advisable that prior to calling the removal meeting, the Association seek the advice of its attorney.

Filing a breach of fiduciary duty lawsuit

This is absolutely the last option an association make take regarding a Rogue Board Member and the most drastic. Before considering this option, the association should consult with its attorney to determine whether this option may be effectuated.

V. Conclusion.

Addressing the issue of a Rogue Board Member is not easy. Community associations, however, must be able to identify the warning signs and address the issue quickly before the issue leads to legal liability.