

**Board Members Who Sell Homes in Their Own HOA**  
*NO ONE CAN SERVE TWO MASTERS*  
*The Dilemma Facing Board Members Who Sell Homes in Their Own HOA*

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Real estate agents who serve on their community association boards and market properties in their community, or board members who are thinking of selling or actively marketing their own home may find themselves faced with conflicting duties. This article is intended to make directors aware of the potential problem before it arises, so that they can take appropriate action to avoid having to face a conflict.

First, as board members, directors have duties not to disclose information that is confidential within the Board. California Civil Code §4935 specifically authorizes executive sessions of the Board to address confidential issues including litigation, matters relating to the formation of contracts, member discipline, personnel matters, and meeting with a member, at the member's request, regarding the member's payment of assessments. Executive sessions are closed meetings. Thus, members are excluded from executive sessions to preserve the confidentiality of discussions and decisions made in executive sessions. Litigation matters and other matters that could lead to litigation and involving attorney-client communications involve privileged communications. If it were otherwise, it would be comparable to playing poker while another player looks at your cards, while you lack the same opportunity.

The confidential communications that take place in executive session may deal with threats of pending law suits, actual law suits, an association's potential for liability, the risks of settling versus litigating, the strategy for handling a lawsuit or making a settlement offer, how far the association is willing to go or to spend to reach a settlement with another party and so on. It is essential for board members to keep this information confidential, as it can put the association at a serious disadvantage if the information becomes public or finds its way to the other side.

On the other hand, board members who are selling homes in their own development also have duties, but their duties extend in the direction of full disclosure rather than maintaining confidentiality. This applies, whether a board member is selling his or her own home, or a board member who is a real estate agent listing or showing a property in the association to a prospective buyer.

An owner's duties are set forth, at least in part, in a statutory form found in Civil Code §1102.6. An owner is required to disclose the following items, each of which could involve a claim that might involve or be asserted against the association:

1. Lawsuits by or against the seller threatening to or affecting the seller's property, including any lawsuits alleging a defect or deficiency in the seller's property or "common areas" (facilities such as pools, tennis courts, walkways, or other areas co-owned in undivided interest with others or owned by the association);
2. Substances, materials, or products that may be an environmental hazard such as, but not limited to, asbestos, formaldehyde, radon gas, lead-based paint, mold, fuel or chemical storage tanks, and contaminated soil or water on the subject property;
3. Architectural changes made without necessary permits;
4. Settling from any cause, or slippage, sliding, or other soil problems;
5. Flooding, drainage or grading problems;
6. Major damage to the property or any of the structures from fire, earthquake, floods, or landslides;
7. Zoning violations, nonconforming uses, or violations of "setback" requirements;
8. Neighborhood noise problems or other nuisances; and
9. Notices of abatement or citations issued against the property.

Real estate agents and brokers are required to fill out another portion of the same form found in Civil Code §1102.6, and they have statutory duties to the prospective purchasers of residential property under Civil Code §2079 et seq. Among other things, the agent or broker is required to make "a reasonably competent and diligent visual inspection of the accessible areas of the property" under Civil Code §2079 and to disclose to the prospective purchaser "all facts materially affecting the value or desirability of the property that an investigation would reveal."

Thus, when a board member is selling or contemplating the sale of his or her unit, or if the board member is a real estate agent or broker and may be selling or listing property for sale in the development, the disclosure duties owed by an owner or real estate agent or broker can come into direct conflict with the duty of loyalty owed to the association and its board, including the duty to keep confidential information confidential. A real estate agent or broker may have no listings in the development at a given time, and perhaps no homes are even listed for sale by someone else, but that could change overnight, after a real estate agent or broker has already obtained confidential information that now may be relevant to a potential buyer. However, a board member has neither the unilateral authority to waive the association's attorney-client privilege, nor to waive the confidentiality of executive session information. The association also has a right to seek legal recourse against a board member who attempts to disclose confidential information that the agent or broker otherwise would not have, except for his or her position as a director in the association. The association could take action to obtain an injunction against a director to prevent the disclosure of confidential information, and it also has the right to claim damages flowing from any unauthorized disclosure of confidential information.

It is probably best for a director-seller or director-agent or director-broker to be very careful and avoid putting himself or herself in a position where any actual conflict in duties would arise. This would require the director to refuse to accept, review, discuss or listen to any

attorney-client privileged materials or executive session information, at least if learning about such information may create a mandatory duty of disclosure involving a pending or future real estate sale in the development. It does not necessarily mean that the director must avoid access to all confidential information. However, the director should avoid information about any actual, threatened or other potential litigation involving the association and possibly other confidential items as well. Certainly, if any confidential or executive session information may affect the value or desirability of any property for sale within the development, then it is probably confidential information that the director should avoid seeing or hearing at all.

In my view, it is each director's obligation to avoid contact with information that can lead to the conflicting duty that arises when the individual is under simultaneous duties to disclose the information on the one hand and the obligation to keep the same information confidential. It is neither the association's fault nor the association's problem to fix, if a director learns of confidential information and ends up with conflicting duties. In other words, it is the director's problem.

According to the California courts, the duty to avoid conflicting interests is considered to be self-evident. In *Stockton Plumbing & Supply Co. v. Wheeler* (1924) 68 Cal. App. 592, the court indicated that this principle

"... is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. The principle has always been one of the essential attributes of every rational system of positive law, even reaching to private contractual transactions, whereby there are created between individuals trust or fiduciary relations. *Stockton Plumbing & Supply* at 601-2.

In summary, all directors need to be aware of the potential problems that can arise as part of a sale of property in which the director is either the seller or a real estate agent or broker. In addition, directors must then exercise great care to avoid contact with any confidential information that might create a conflicting duty to disclose that information to the detriment of the association.