



Rogue Directors: Battling Bad Behavior Measures for Dealing with Improper Director Conduct



Introduction

Serving as a Director can be a frustrating and thankless job. Raising assessments, enforcing the governing documents, and taking other potentially unpopular actions can lead to disputes and charged emotions. Despite that fact, Directors, as representatives of the Association, must conduct themselves in an appropriate manner. Overly aggressive or inappropriate behavior by a rogue Director or officer can give rise to liability for both the Association and the Board. Fortunately, there are mechanisms available to safeguard against liability in such situations and, if necessary, to have the rogue Director removed. This resource addresses those mechanisms.

Establishing a Record of Disapproval

When dealing with a rogue Director's improper conduct, the primary focus of the Board should be to establish a record of disapproval. As a first measure, the remaining Directors should prepare a written warning statement to the rogue Director (1) identifying the conduct at issue, (2) demanding that all such conduct cease immediately, and (3) stating that the Board as a whole does not condone the actions of the rogue Director. Additional statements should be prepared if the conduct does not cease. These statements may not be well-received by the rogue Director; however, they are crucial to establishing a record of disapproval necessary to protecting the Board and the Association.

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Conducting a Censure

If a written warning to the rogue Director fails to stem the inappropriate conduct, the Board should consider conducting a

public censure. A public censure is essentially a documented reprimand of the rogue Director. It is performed at a meeting of the membership and recorded in the official minutes of the Association. The censure is a useful means of insulating the Board and the Association from liability by publically disclosing the rogue Director's misconduct which the Board and the Association neither endorses nor approves. Depending on the severity and regularity of the misconduct, the Board may wish to take one step further by making an official

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request, recorded in the minutes of the Association, for the rogue Director's immediate resignation. The rogue Director has no obligation to resign; however, the request in itself establishes that the Association was working to remedy the problem.



Recall Election

In extreme cases it may be possible to have a rogue Director removed via a recall election pursuant to Corporations Code Section 7222. Although the procedure may vary depending upon the terms of the governing documents, a recall election provides a mechanism for removing a rogue Director if a majority of the members votes to approve the removal. However, a recall election is only advised when the party moving for the recall has reason to believe that a significant majority of the members would support the motion for removal. It should also be noted that recall procedures and requirements vary slightly with respect to Directors appointed by the Board or a court. Under those circumstances, the recall powers essentially rest in the hands of the party who appointed the rogue Director. Accordingly, in the event that the rogue Director was appointed by the Board, removing that rogue Director is much easier to achieve.



This resource is available for download from our website's library, located at <http://www.tinnellylaw.com/library.html>

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Removal via Order of the Court

As a final resort, and depending on the conduct in question, the Board may also seek to have the rogue Director removed by an order of the court. Corporations Code Section 7223 provides that a Director may be removed by court order for "fraudulent or dishonest acts or gross abuse of authority or discretion... or breach of any duty." It is important to note that merely aggressive or outlandish behavior is likely not sufficient to remove a rogue Director under Section 7223. However, to the extent that a rogue Director grossly abuses their authority as a result of their involvement in a dispute, or breaches any duty owed to the Association or its members, removal under Section 7223 may be a feasible option.

Summary

Various options are available to a Board to address the problematic conduct of a rogue Director. As noted above, the Board's initial response should always be to establish a record of the Board's/Association's disapproval of the Rogue Director's conduct. This can be done through either a written admonishment or a public censure recorded in the minutes of the Association. Furthermore, depending on the seriousness of the misconduct involved, the Board or the Association's members may seek removal of the rogue Director through either a recall election or court order. Boards which are troubled by the misconduct of a rogue Director are encouraged to contact their Association's legal counsel to determine the best method for resolving the problem and insulating the Board and the Association from potential liability.

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