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## Seahaus La Jolla Owners Association v. Superior Court:

Conversations Between Association's Legal Counsel, the Board of Directors and All Homeowners

By: Anne L. Rauch, Esq.\*

*Pop Quiz!* The board of directors for a community association retains litigation counsel to represent the association in an action for construction defect damages against the developers and others. During the lawsuit, the association's lawyer meets in executive session with the board of directors to discuss the lawsuit. The board also authorizes its lawyer to meet with the individual homeowners at certain points in the lawsuit to discuss the lawsuit. *Question:* Which of the following best describes the nature of the attorney's privileged communications (choose one):

- (a) The communications between the association's lawyer and the board of directors in executive session.
- (b) Any and all communications between the association's lawyer and all the individual homeowners, without any limitation.
- (c) Certain communications between the association's lawyer and the individual homeowners which are reasonably necessary to further the purposes for which the association's counsel has been retained.

  (d) All of the above.
- (e) (a) and (c) only.

If you chose (a), then you may not be aware of the recent decision in *Seahaus La Jolla Owners Association v. Superior Court* (2014) 224 Cal. App. 4th 754. The answer is (e)!

Many practitioners in the community association industry would assume that the attorney-client privilege only applies to communications between the association's attorney and the board of directors. In fact, in 2000, the California Court of Appeal concluded that homeowners who are not on the board cannot force disclosure, over the board's objection, of confidential material possessed by the association's attorney. The Court reasoned that the board of directors holds the privilege, and homeowners cannot compel disclosure of confidential information without the board's consent. (*Smith v. Laguna Sur* (2000) 79 Cal.App.4th 639.) Citing the many sleepless nights an association's litigation counsel would have worrying about the damage homeowners could do to an association client if any and all homeowners had unfettered access to its confidential information, the Court reasoned, "It's no secret that crowds can't keep them." (*Smith v. Laguna Sur, supra*, 79 Cal.App.4th at 645.)

If this is true, then what happens when the board authorizes its attorney to meet with homeowners for certain purposes related to the prosecution of the association's lawsuit? It is common for an association's litigation counsel to meet with homeowners to discuss things like investigation of the property, homeowner votes which may be called for under the CC&Rs, and the like. There are countless

reasons the association's lawyer may need to speak with homeowners. They own (or have an interest in) the property which is the subject of the lawsuit. Are those communications with the homeowners outside the "dome of silence" such that anyone can probe the details of those conversations? In other words, when the board authorizes the association's litigation attorney to speak with the individual homeowners about the lawsuit, can the defendants in the case capitalize on those communications by conducting discovery into the discussions and potentially using them at trial? Smith v. Laguna Sur only dealt with the issue of whether homeowners can force disclosure of information in the association's litigation file, over the board's objection. However, what happens when the board determines it is necessary for the success of the association's lawsuit to have its attorney address the membership? Can the defendants in the lawsuit (or any third party) inquire into the details of those communications?

The developers and other defendants in *Seahaus La Jolla Owners Association v. Superior Court* (2014) 224 Cal. App. 4th 754 certainly thought so. In that case, the Association's litigation counsel attended a series of meetings and spoke with homeowners (who were not on the board) concerning the Association's lawsuit. When the defendants started to take the homeowners' depositions, they asked questions about what the lawyers said at these meetings. The Association's counsel objected, and argued the communications were privileged because those communications were essential to the prosecution of the Association's lawsuit. The legal battle over the defendants' right to probe the details of these communications went all the way up to the California Court of Appeal.

In a unanimous published decision, the California Court of Appeal agreed with the Association and held that, although homeowners may not be able to compel disclosure of material in the Association's attorney's files over the Board's objection, the attorney's conversations with the homeowners may still be privileged from disclosure to the defense. When the Board determines that it is necessary to further the Association's lawsuit, the Association's counsel may speak with the homeowners confidentially. Those communications are privileged from disclosure to the defendants in the case. The *Seahaus* court came to this conclusion based upon the long standing rule that the attorney client privilege extends to communications between the attorney and non-clients when those communications are reasonably necessary to further the purpose for which the attorney has been retained. The Court also recognized the common interest between the Association and its members in the Association's lawsuit against the developers for construction defect damages. Applying well-settled general principles to the communications between the Association's litigation counsel and the homeowners at certain key points in the Association's lawsuit, the Court of Appeal held that association lawyer's communications with the homeowners were privileged.

This does not mean that **all** communications between an association's lawyer and individual homeowners not on the board will be confidential. The conversations have to be reasonably necessary and related to the association and its members' common interest in the lawsuit. However, the Seahaus court did not define what would be "reasonably necessary." This was probably for good reason. It would be impossible to list all the various circumstances that might arise during the course of a lawsuit by an association. As long as the communications are reasonably necessary to further the purposes for which the association has retained counsel, those communications should be considered privileged.

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