



# WORKING WITH A DIVIDED BOARD

Presented to EJF Real Estate  
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# Board Dynamics





# Problems caused by Divided Board

- Minority of Directors acting to undermine vote of majority
- Majority marginalizing Minority
- Membership losing faith in Boar



## Results of Split Vote

- Board members, as fiduciaries, can disagree on policy while still working together for a common goal.
- Important for Board members to respect decision of majority of Board





# Fiduciary Duty

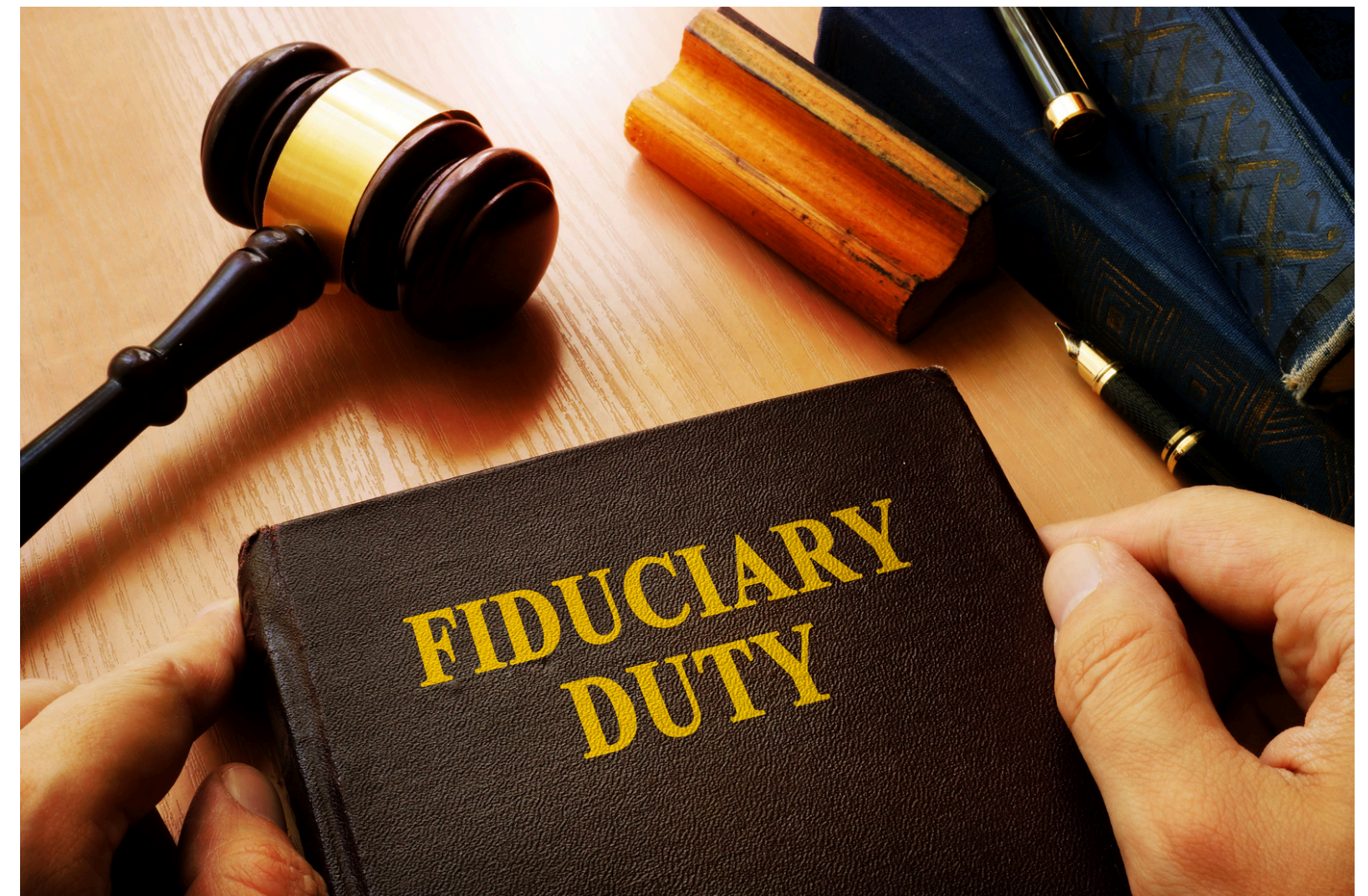
- Imposed on Board members by either statute or common law
- Understand it - don't fear it
- Elements - Take no advantage
- Disclose interests
- Don't do it; don't tolerate it — inappropriate behavior and violations of each director's duty of loyalty.





## Fiduciary Duty... Cont'd

- As stewards over property and funds of others, Directors are fiduciaries.
- Fiduciary duty is a broad term referring to a Director's duty of care and the duty of loyalty.
- Fiduciary duty invokes the highest standard of care under the law.
- The duty is owed to the Association as a whole. Best interests of the Association must guide a Board, not the interests of any individual member or Director





## Fiduciary Duty... Cont'd

- **Duty of care:**
  - Do not be wasteful.
  - Informed and careful decision making.
  - Offer solutions - do not just criticize.
  - Duty of Inquiry; Right to Rely on Others.
- **Duty of loyalty:**
  - Act in good faith and in the best interest of the Association. Put Association interests ahead of your individual interests.
  - Confidentiality.
  - Ensure Association obligations are carried out.

**Conflict of Interest:** Conflicted Directors must disclose conflicts and should recuse themselves from discussion and votes on matters on which they have a conflict.



## Business Judgement Rule

“Care and skill of ordinarily prudent director”

- attends meetings;
- reads board package prior to meetings and familiar with governing docs;
- seeks out assistance of management, legal counsel, and consultants.

Acts within the authority outlined in the recorded Condominium Declaration and Bylaws.



## Vicarious Liability

- Board and Committee members create vicarious liability for the Association.
- Can bind the Principal as further defined in Bylaw and Policies





# Indemnification

Officers and Directors  
Indemnified under  
Governing Documents  
and Potentially by  
Statute



No indemnification for

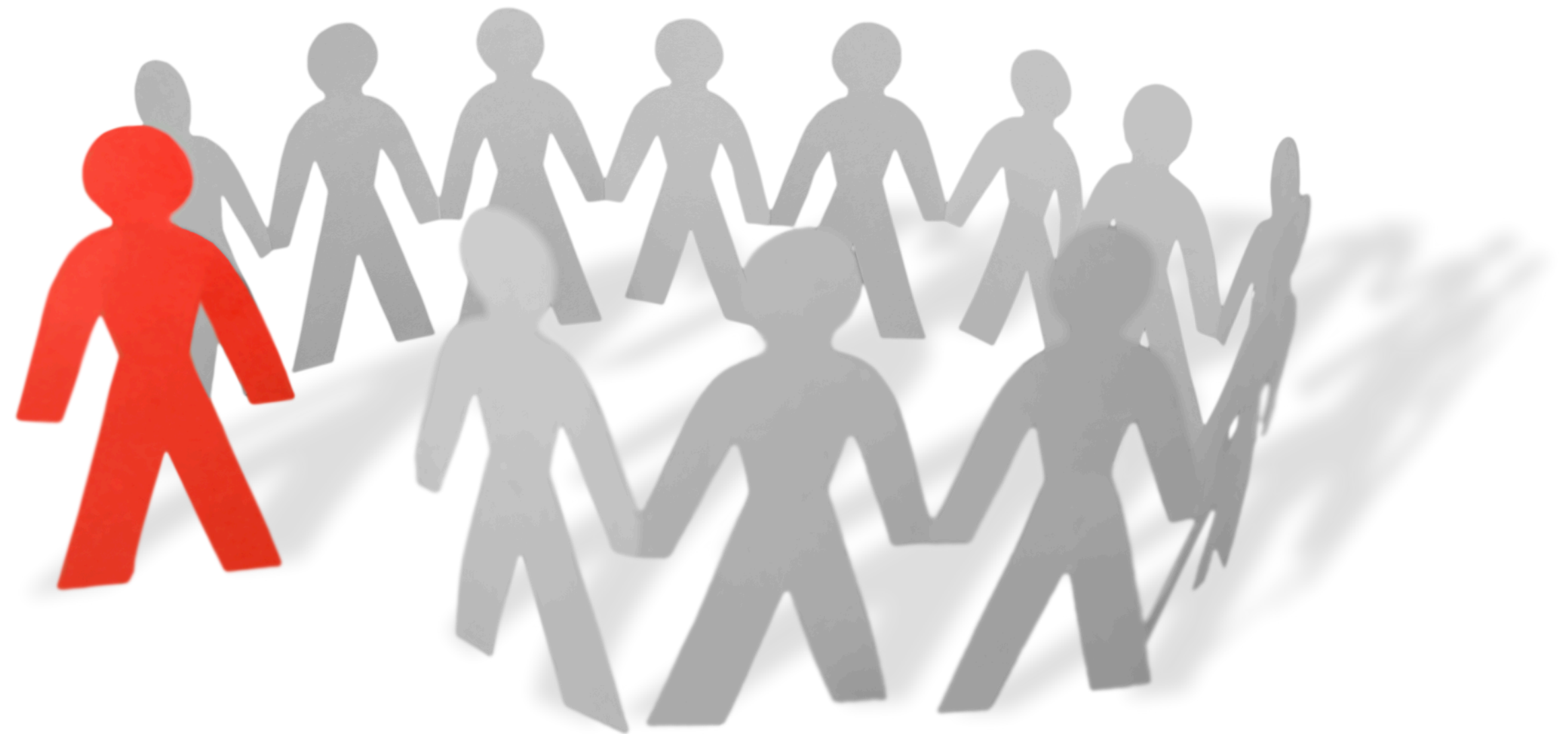
- an appropriation, in violation of his or her duties, of any business opportunity of the Association;
- intentional misconduct or knowing violation of the law;
- receipt of an improper personal benefit.





# Common Insurance Exclusions

- Defamation
- Criminal acts
- Claims for Non-Monetary Damages
- Particulates and Pathogens





# Managing Board Member Conduct



Many Boards adopts a Code of Ethics or Conduct



# Common Elements of a Code of Conduct

- General Conduct and Decorum
  - Attend Meetings and arrive on time;
  - Review Board materials in advance
  - Silence Devices
  - Avoid interruptions while others speak
  - No use of derogatory or insulting language
  - Directors owe duty of respect to Board, Association, their colleagues and membership
  - Maintaining confidentiality when required





# Conduct of Meetings

- President Chairs
- Use Robert's Rules of Order
  - Speak only when recognized by Chair;
  - Formal motions and votes thereon
  - Adhere to agenda, which should include
  - Adopting agenda;
  - Reading and approval of minutes
  - Open Forum
  - Officer, committee and management reports
  - Agenda action items
  - Unfinished Business
  - New Business





# Rules Governing Meeting and Agenda

- Once agenda is adopted, can only deviate by a vote of 2/3 of Directors
- Any matter that has been voted on previously by the Board or Committee may only be reconsidered if a director makes a formal motion to rescind the prior vote and the motion passes by a two-thirds vote of the Board or Committee.





# Leadership Skills

- Team Approach
- Be Positive
- Listen
- Manage Expectations
- Ask for Advice; Give Feedback
- Accept Criticism
- Communicate
- Work the Issue; Not the Person



# Dualities and Conflicts of Interest

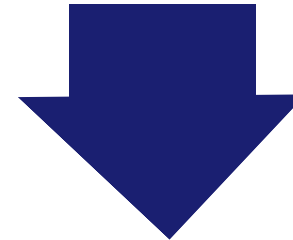
- As Fiduciaries, all directors owe an undivided duty of loyalty to the Association.
- Must strive to avoid personal conflicts of interest, nepotism, or personal benefits.
- If a potential conflict exists, director must disclose to other directors the potential conflict.
- If the director believes that such interest does not rise to the level of a conflict of interest and does not impede their ability to exercise their fiduciary duty, the director must state their reasons on the record and their intent to participate in the discussion and vote on the motion.
- If it is determined that a conflict exists, the directors must recuse themselves from the discussion and vote on the issue upon which they are conflicted.
- If Director refuses to recuse themselves, then they expose themselves to claims of possible breach of duty and personal liability



# Conflicts of Interest

## Examples include:

- When the Board intends to review a case involving the compliance of a Board member with the Association's legal requirements.
- When the Board intends to review a contract or expenditure of funds involving the direct pecuniary interest of a Board member.



No Board member should vote to approve the expenditure of funds for the acquisition of services or goods from any member, relative of a Board member, or entity which is affiliated with any of the members or their relatives, unless the Board member with such relationship discloses the relationship on the record and there is convincing reason to believe that a vote in favor of such an expenditure would be in the best interests of the Association. Under such circumstances, the vote must pass by at least a two-thirds majority of a quorum of Board members.

# Enforcement

- Private reprimand
- Public censure (notification of the name of the Board member and cited behavior in the association communications platforms); and
- Request to resign
- Suspend the Board Member's privileges and rights as a member of the Board (such as receiving confidential information);
- Impose fines for violations; after notice and an opportunity for a hearing
- Initiate removal process in accordance with Bylaws





## Best Practices

- Adopt Code of Conduct
- Conduct annual Board training
- Minimize email debate
- CAI Civility Pledge
- Attend industry educational sessions
- 3rd party mediation in egregious cases







# Questions?

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