





Board Member Duties and Responsibilities

Common Mistakes and Missteps

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Dean Lennon is a Partner with the Firm of Marcus, Errico, Emmer & Brooks. Dean concentrates his practice on the general representation of condo and HOA boards in Massachusetts, New Hampshire and Rhode Island. Such representation includes lien enforcement and rules enforcement matters as well as condo document amendments and interpretation. He works closely with boards to provide legal advice and counsel for day to day governance issues. Dean is a member of the CAI New Hampshire Legislative Action Committee (NHLAC) and is a regular contributor to *Condo Media* magazine and speaker at CAI-NE events.

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What Duty of Care is Owed by the Board to the Owners?

The MA Condo Statute does not explicitly reference fiduciary duties. However, under case law in Massachusetts, the Board of Trustees owes a fiduciary duty to the Condominium itself, not to the individual unit owners.

“Any duties of a fiduciary nature that may be owed in this context run to the condominium trust, and not to the plaintiffs themselves” Office One v. Lopez

Takeaway: the Trustees must put the best interests of the Condominium at the forefront, not their own interests or the interests of any particular owner.



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What Duty of Care is Owed by the Board to the Owners?

Fiduciary Duty

What Is a Fiduciary Duty?

- *Fiduciary duty refers to the relationship between a fiduciary and the principal or beneficiary (here it is the condo) on whose behalf the fiduciary acts.*
- *The fiduciary accepts legal responsibility for duties of care, loyalty, good faith, confidentiality, and more when serving the best interests of a beneficiary. Strict care must be taken to ensure that no conflict of interest arises to jeopardize those interests.*



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What Duty of Care is Owed by the Board to the Owners?

Board Member Duty in Practice

Example 1: The board needs to have the buildings painted or the parking area resurfaced

Exercising ordinary and reasonable care means getting more than one estimate so as to not unnecessarily overspend the condo's money.

It does NOT mean finding the perfect contractor who performs the work perfectly and finishes perfectly on time.



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Example 2: The board is developing a rule book

- The board must make reasonable rules, not arbitrary ones.
 - *The rule must have a reasonable basis in terms of solving a particular problem or promoting a certain goal.*
 - *A rule prohibiting autobody work in the parking lot makes good sense to prevent staining of the asphalt and promoting a residential atmosphere.*
 - *A rule prohibiting "old" cars would be arbitrary and not related to any legitimate goal.*
- *The board must not create rules that unfairly impinge upon owners.*



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Example 3: The Board creates a rule that during snowstorms, any owner that does not move their car within 10 minutes of notice will have their car towed.

- *This is an example of a totally unreasonable rule as there is no way owners can comply, particularly during the middle of the night.*
- *While the goal of clearing snow and keeping parking areas safe are clearly legitimate aims, the method of doing so is patently unreasonable.*

Yes, this is an extreme example, but it highlights the point of ensuring rules are reasonable and created in good faith.



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Example 4: The condo is considering obtaining a loan to finance new roofs on all 10 buildings at the condo

- *The loan means all owners will be paying \$100/month additional for the next 5 years.*
- *A director is having a hard time financially and will struggle to afford \$100/month*
- *But, the board is getting reports of leaking roofs and the engineer that was hired says they are at the end of their useful life*

Here, the director must vote to approve the roof project, and loan, since the board is charged with maintenance and repair of common area.

- *Remember, the duty owed is to the condo itself. Since the docs require the board to properly maintain the common area, the director has to put his personal financial situation aside and think only about what is best for the association.*
- *Having roofs that do not leak is what is best, and is necessary, for the condo.*



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What Duty of Care is Owed by the Board to the Owners?

Example 5: Your condo has a number of past due capital repair projects that prior boards have ignored for far too long

- *The board is entitled to prioritize certain projects.*
- *A leaking roof is clearly more urgent than fixing the pool's heater, e.g.*
- *The board is entitled to spread out projects to make the financial impact more manageable.*

Practical tip: *Having a fiduciary duty doesn't mean just approving every project that comes up. You are not required to constantly upgrade common elements regardless of the financial impact. It's a constant balancing act.*



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Example 6: The board gets a reserve study stating that \$500,000 in work is needed for various common elements.

- *The board is not required to immediately assess the full \$500,000 to 20 unit owners at \$25k a unit.*
- *Rather, the board can decide that the two most important projects can be done this year, then 1 the next and 1 after that and 1 in the 4th year, e.g.*
 - *In this way, the funds needed are spread over 2-4 years making the expense manageable for owners.*



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Example 7 : Some of the limited common area decks are rotting and need to be replaced soon. But the Board just found out that a structural repair to a building is urgently needed.

- ***Again, the Board has the authority to prioritize what work is done first if there are not sufficient funds available to fund both projects.***
 - *Clearly the structural repair is of primary importance so it's okay to put the decks on the backburner and wait until next year.*
 - *Or, the Board may decide to make repairs to the 5 decks that desperately need to be replaced, but wait until next year for the other 15.*
 - *Or, the board may decide to do 5 per year over 4 years.*
 - ***There is not one single right answer.***



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What Duty of Care is Owed by the Board to the Owners?

Example 7 (continued)

- ***One of the best things you can do as a board is to have a reserve study done by a reputable company.***
 - *The reserve study involves an engineer looking at every common element (roofs, siding, roads, pipes, conduits, HVAC equipment, windows, etc) and determining how much useful life remains on each, and how much it will cost to replace.*
 - *The study also involves reviewing how much money the condo has and how much will need to be raised over time.*
 - *The study ultimately will show what type of financial shortfall exists, if any, and propose ways to bridge the gap.*



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What Duty of Care is Owed by the Board to the Owners?

The Board gets to decide how to finance projects.

- *A forward-thinking board may raise fees immediately and put all additional money into reserves so that a big pot of money is created to pay for necessary projects in the future.*
- *If reserves have not been built up, a board could decide to create a temporary condo fee for say 6-12 months in order to raise funds for specific projects.*
- *Or, the board could create a one-time special assessment due within 30 days so that the necessary funds are quickly available.*
- *Finally, the board could obtain a loan so that funds are immediately available but paid over years so as to minimize the impact on owners.*

In MA (unlike NH or RI), a condo board will have unfettered discretion to decide the best way to pay for a project.

An owner vote is not required under 99% of condo docs.



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What Duty of Care is Owed by the Board to the Owners?

Practical Tip:

No solution is one-size fits all. The board members need to think about their own community and determine the best way to go. That is all part of a director's fulfillment of their duty.

Again, there is very rarely one single correct answer to a problem. There can be many right answers and many viable solutions to a problem.



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What Duty of Care is Owed by the Board to the Owners?

The Business Judgment Rule

The Business Judgment Rule is a legal concept that gives deference to Board decisions.

- *The Business Judgment Rule “grants considerable deference to a condominium board’s decisions and prohibits judicial inquiry so long as the board acted for the condominium, within the bounds of its authority, and in good faith.” Cimino v. Ornstedt*
- *If a board is making reasonable decisions in good faith, the BJR protects that decision even if the decision goes bad in some way.*



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What Duty of Care is Owed by the Board to the Owners?

The Business Judgment Rule - Continued

- *If you decide to undertake a project and due to unforeseen circumstances, the cost of the project ends up 50% more than anticipated, the Board is not somehow liable for the overrun.*
 - *The board made a reasonable decision to undertake a necessary repair project and the board doesn’t open themselves up to claims by the owners just because unknowable things went wrong during the process.*



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How Can a board get itself in Trouble?

- . *Making unreasonable decisions*
- . *Picking and choosing which rules to enforce*
- . *Inconsistent enforcement of the same rule*
- . *Acting in bad faith*



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How Can a board get itself in Trouble?

Making unreasonable decisions

- . *An owner informs you that the roof is leaking.*
 - . *Board decides that this owner is a complainer and probably over-exaggerating the situation.*
 - . *So, the Board does nothing.*
 - . *Owner suffers \$30k in damages when water ruins his unit after a big storm*

The board is going to be liable to this owner because it was unreasonable to not investigate the water leak. A contractor should have been hired to take a look at the issue and determine what was going on.

- . *Sometimes the issue will really be something in the unit that the owner must fix*
- . *But many times, it's going to actually be the roof and the Board must act on behalf of the owner to fix the roof.*



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How Can a board get itself in Trouble?

Picking and Choosing which rules to enforce and inconsistent enforcement of rules

- *There are two main defenses when I send an owner a rules violation letter.*
 - *One is that his neighbor is violating another rule and gets away with it*
 - *The other is that another neighbor is allowed to do the same thing.*

As a Board you want to enforce all rules in a consistent manner. The greater your ability to do that, the greater your ability to successfully enforce.



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How Can a board get itself in Trouble?

Picking and Choosing which rules to enforce and inconsistent enforcement of rules – Continued

- *One of the worst things a Board can do is allow one owner to violate a rule but enforce it against another. If such a case ends up in court, you are much more likely to lose since a judge can find that the Board acted in bad faith in enforcing inconsistently*
- *If 5 owners are allowing dogs off a leash on common area, all 5 must get a letter even though one is on the board or is good friends with a member of the board.*



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How Can a board get itself in Trouble?

Acting in Bad Faith

- *This is very rare but it does still happen.*
 - *Unit Owner X has been a thorn in the board's side for years. He is constantly berating the board and questioning their ability to make good decisions.*
 - *The Board then sends the owner a slew of rules violation letters and assesses hundreds of dollars in fines.*
 - *Another example: the board passes a new rule which is done for the purpose of angering or targeting a particular owner.*



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How Can a board get itself in Trouble?

Know your Condo Docs

- *What is considered part of the unit?*
- *What is considered common area?*
- *What do the owners have maintenance responsibility for?*
 - *Regarding boundary issues, things are always going to come up where an owner wants something fixed. Perhaps what needs fixing is an owner responsibility and that can be pushed off to the owner saving common funds*
- *What restrictions exist in the unit?*
 - *Smoking*
 - *Dogs/Pets*
 - *Running a business*
- *Periodically review and update the Rules and Regs that have developed over the years*



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How Can a board get itself in Trouble?

Ethical Considerations

- *At the top we talked about the Board's duty to the condo. In fulfilling that duty, a board member should always be acting in **good faith** and **ethically***

Let's look at a couple examples



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How Can a board get itself in Trouble?

The requirement to act in good faith would prevent a board member from:

- *Targeting one particular owner for a violation but not another*
- *Voting to hire a landscaper just because his brother owns the company even though another company provided a better bid.*
- *Voting to hire a vendor because of a kickback from the vendor.*



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How Can a board get itself in Trouble?

Ethics is a thornier issue and much less straight-forward than acting in good faith. I want to discuss two common issues I see.

Issue 1:

- *A board member who feeds info and documentation to a group of angry owners who oppose the majority of the board and hope to unseat them.*

My response: *Each board member should keep confidential any board deliberations and information meant for only board members.*



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What Duty of Care is Owed by the Board to the Owners?

How Can a board get itself in Trouble?

Ethics - Continued

- *A board member can never disclose an owner's private information such as revealing that someone is in collections or revealing that someone requested a reasonable accommodation.*
- *A board member should never inform a non-board member of how the board voted on private matters or concerning litigation or of who voted yes/no on a particular issue.*
- *A board member should not disclose information which is not available to the ownership. This would include who is in collections, the amount of various bids obtained for a project, who has been issued violation notices and things of that nature*



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What Duty of Care is Owed by the Board to the Owners?

How Can a board get itself in Trouble?

Ethics - Continued

The 2nd example is a board member who publicly lampoons other board members. Often there is one member who is at odds with the other members and takes it upon him or herself to make the other members' lives miserable.

This director will make personal attacks on board members, insult them and speak against the board publicly.



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What Duty of Care is Owed by the Board to the Owners?

My response to this type of Board Member:

- *Dissenting opinions should be kept "in-house"*
- *The best thing a board can do is discuss disagreements. If you all agreed on everything every time, the board is almost certainly missing something.*
- *You WANT to hear different opinions. You want to discuss various ways of doing things so that you can figure out the BEST way.*
 - *But, once the board decides to do A and not B, a board member should not go on Facebook and talk about how dumb the board is to go with A instead of B.*
 - *The board member should voice his opinion at the meeting but keep quiet publicly about the fact that he disagreed with the majority's decision.*
- ***Why? There is no upside to publicly assailing the other board members. It will hurt the image of the board and cause a rift in the community.***



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QUESTIONS



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