



Helping You Run Your Condo or Homeowners Association Legally and Efficiently

APRIL 2015

FEATURE

A clear code of conduct can help you deal with board members behaving badly.

Use Board Member Code of Conduct to Eliminate Unprofessional Behavior

Ideally, association boards would act in the best interest of the community, fairly treating homeowners and ethically conducting business to further the interests of the community. Unfortunately, board members sometimes stray from the mission statement and purpose of the association, using the “power” of being on the board to stack the board with friends or members who will side with them when it comes time to vote on issues. It’s not uncommon for board members to band together to show favoritism toward certain vendors, mismanage association funds, or even engage in discrimination.

The good news is that it’s possible for managers to prevent board members from behaving badly in the first place, and to reign in an unruly board after an abuse of power is discovered.

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Draft Code for Guidance, Enforcement

There is a simple preventative measure to keep a board functioning professionally and to deal with board members who are not performing in accordance with association standards: a board member code of conduct. Community association management expert Paul Grucza strongly recommends that associations establish a behavioral code of conduct for the board. “This is a specific, matriculated document that says board members will or will not do certain things, and it has terms built into it that allow the association to remove members from the board if it’s found that they have not lived up to acceptable board conduct,” Grucza explains.

Although a code of conduct makes it possible to penalize board members who already have been inappropriate, it should be considered a useful tool to prevent bad behavior before it starts. Because a code of conduct includes a list of behavior that is considered to be grounds for dismissal or a warning, it can be used as a guide for what not to do. “A code of conduct is the best tool to help control board behavior and provide board members with the tools to do a better job from the outset,” Grucza points out.

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Board Member Code of Conduct

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Grucza recommends that an association's code of conduct include, at a minimum, an introductory paragraph that speaks to the importance and significance of what a person is going to do by being a board member. It should also list elements that board members are responsible for, such as being prepared for a meeting, reading all of the information disseminated among board members, treating each other with respect at meetings or in other forums, speaking with one voice when they go out, even if privately there are conflicting opinions, understanding the fiduciary responsibility of handling other people's money, and properly spending money for the association.

Along with tangible actions that each member needs to follow, the code of conduct should include the consequences for an infraction. This could range from a censure—such as a note documenting improper behavior—to expulsion from the board for a genuinely harmful action such as collusion with other board members or favoring vendors or members in a way that's detrimental to the community. And the legal steps that are needed to remove the person from the board should be spelled out clearly, so managers and associations should work with their attorney when drafting the document.

Like our Model Policy: Ask Board to Sign Code of Conduct, your code should make it clear when the code will apply and to whom. For example, you may wish to clarify if it applies only at board meetings, or also at official board visits and at events where individuals represent the board. It should also state your board's values, role, or mission. For example, say that "in all our operations and relationships we value," and list those items. Consider covering these points in your code of conduct:

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Board Member Code of Conduct

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Conduct. Define the personal behavior board members are expected to adhere to, such as:

- Acting ethically and with integrity;
- Acting according to the legislative requirements, policies, and ethical codes that apply;
- Making decisions fairly, impartially, and promptly, considering all available information, legislation, policies, and procedures;
- Treating members of the public and colleagues with respect, courtesy, honesty, and fairness;
- Having proper regard for the interests, rights, safety, and welfare of those members;
- Not harassing, bullying, or discriminating against colleagues, members of the public, and employees;
- Contributing to a harmonious, safe, and productive work environment by good work habits and professional workplace relationships; and
- Serving the government of the day by fulfilling the board's purpose and statutory requirements.

Communication and official information. Inform board members that they should:

- Not disclose official information or documents acquired through their work, other than as required by law or where proper authorization is given;
- Not misuse official information for personal or commercial gain for themselves or another;
- Adhere to legal requirements, policies, and all other lawful directives regarding communication with members of the media and members of the public generally; and
- Respect the confidentiality and privacy of all information as it pertains to individuals.

Fraudulent and corrupt behavior. Warn members that they should:

- Not engage in fraud or corruption;
- Report any fraudulent or corrupt behavior;
- Report any breaches of the code of conduct; and
- Understand and apply the accountability requirements that apply.

Use of public resources. Members should also be prepared to:

- Be accountable for official expenditure;
- Use funded resources diligently and efficiently;
- Use corporate credit cards only for board-related expenditures;
- Not use office time or resources for party political work or for personal gain, financial, or otherwise; and
- Keep to policies and guidelines in the use of computing and communication facilities, and use these resources in a responsible and practical manner.

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Board Member Code of Conduct

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Record keeping and use of information. Members should:

- Record actions and reasons for decisions to ensure transparency;
- Ensure the secure storage of sensitive or confidential information;
- Comply with the board's record keeping plan; and
- Where permissible, share information to fulfill the board's role.

Conflicts of interest. Members should:

- Ensure personal or financial interests do not conflict with their ability to perform official duties in an impartial manner;
- Manage and declare any conflict between personal and public duty; and
- Where conflicts of interest do arise, ensure they are managed in the public interest.

Your code of conduct could also include a pledge for members to commit to:

- Taking responsibility for reporting improper conduct or misconduct that has been, or may be occurring in the workplace and reporting the details to the relevant people or agency; and
- Taking responsibility for contributing in a constructive and positive way to enhance good governance and the reputation of the board.

Take Proper Precautions

Be prepared for controversy if you must oust a board member for bad behavior. She could try to petition the board. In some cases, an angry former board member could try to sue current board members. But every association should have directors and officers insurance—a D&O policy—to protect the individual board members from a lawsuit.

For behavior that doesn't fall under a D&O policy, you could hold a hearing, affording the board member due process and an opportunity to be heard. Code of conduct documents should be progressive in nature—that is, making lesser violations subject to a hearing process, but resorting to removal of a board member who has seriously compromised the association with his behavior, Grucza points out. For a lesser infraction, the board can make a determination based on the hearing as to whether the member should stay on the board, but specify that a future incident will result in removal.

Don't Cave in to Pressure

When board issues become apparent, you'll have to act accordingly to get things back on track. But you may wonder if your job is at stake if you disagree with board members who have banded together or are using their status inappropriately.

“You can protect your job when there is board dissent,” says Grucza. He has seen infighting between board members with strong personalities and association managers who feel boxed into a corner when board members who disagree with each other approach him about getting something done. It's ultimately the board's responsibility to agree on certain issues, but some board members will

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Board Member Code of Conduct

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try to shift issues to the manager to settle, which can lead to a manager feeling that if he acts out of sync with what some board members want, his job security would be compromised, Grucza says.

It's helpful for a conflicted manager to remember that he works as a representative for the association as an entity and not for individual board members, Grucza notes. "Board members are elected to represent people in the community, but if they fail to do so managers still should stay on task—following the association's mission statement regardless of what one or more board members ask, especially if the request is detrimental to the association.

"Managers work for the association, not the board of directors," Grucza stresses. It's not uncommon for the president of a board to feel that he should be able to persuade the manager to side with him. Grucza recommends that managers say that while they respect the fact that that person is the president of the board, unless there's engagement and approval by the board the manager will not automatically act on the president's request if it's not appropriate to.

Grucza points out that the management contract should also provide clarity: If the manager is doing an appropriate job pursuant to the management contract and/or the association documents, the threat of firing would be purely subjective and emotional and it could easily be challenged.

Grucza recommends providing focused and intensive training for boards, but notes that in cases where a board is extremely dysfunctional, you or the management company might want to evaluate whether working for a particular association is worth it. "Occasionally, a board of directors will go wild no matter how much training about appropriate conduct has been provided, and the best business decision is to terminate the relationship," he says.

Document in a letter the board's refusal to follow management recommendations or training and that you have decided to sever services for a board that is acting unprofessionally or even bordering on improper or illegal behavior that could get you as the manager into trouble.

"There is a strong level of protection for managers that comes from the governing documents and the management contract—even in the face of board members who are trying to manipulate those managers," he adds, noting that managers faced with this chaos should remain calm and unemotional. "Interjecting emotion inflames the situation; instead, state the facts when you observe coziness or comfort between members that could have a negative impact on the association," he suggests.

A code of conduct can go a long way toward having a productive board, but that doesn't mean that board members will be happy at first to have to follow one. And it may not solve some of the problems you're experiencing that don't fall under its purview. Managers who feel they're becoming mired in the inability of a board to behave professionally should take a step back.

"It's crucial to remember that the role of the board is to establish policies, but the role of management is to carry out and make sure that rules are followed—for the good of the entire community," Grucza says. Managers who keep that in mind will feel more confident when enforcing the code of conduct.

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Board Member Code of Conduct

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What to Emphasize in Board Training

Board training should include a reminder to members that: (1) they're representing the association; (2) they must vote as individuals doing the best they can for the entity; and (3) they shouldn't be swayed to cast votes in the direction that they've been asked to by other board members.

Training materials should also emphasize the personal consequences of impropriety. For a board member who enjoys being on the board, removal could be unpleasant and take away the sense of fulfillment that immersion in association operations provides—especially for retirees who see it as a fun “second job” of sorts or young members who are eager to get involved in the community.

“It's helpful to remind members that their role is voluntary, and not the result of a life-and-death situation in which it's necessary for them to serve on the board; they can be removed and replaced with members who will be objective if they aren't,” says Grucza. Members should serve on the board because they want to give back and help the community, not so they can invest themselves to the extreme in the operation of the association. ♦

Insider Source

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MODEL POLICY

Ask Board Members to Sign Code of Conduct

A well-drafted code of conduct serves important dual purposes. It can be instrumental in encouraging board members to do the best job they possibly can when serving the interests of the community. It can also be used to deal with board members who have acted inappropriately. Ask your association's attorney to help you adapt the following code of conduct, provided by Seattle-based community association expert, Paul D. Grucza, for your needs.

CODE OF CONDUCT Shady Acres Community Association

WHEREAS, the governing documents of ABC Association, Inc. has delegated the authority and responsibility to govern the operations of the community to its Board of Directors, and

WHEREAS, the Board of Directors is responsible to appoint officers and committee members, and

WHEREAS, the volunteer leaders of the Association have the fiduciary duty and responsibility to set a standard and level of behavior that is conducive to the best interests of the entire community,

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Directors of ABC Association, Inc. hereby adopts the following code of conduct, standards of behavior, ethical rules, and enforcement procedures that are applicable to all Board members and volunteers serving the community:

1. The Board of Directors will use its best efforts at all times to make decisions that are consistent with high principles, and to protect and enhance the safety and property value of the residents.
2. No Board member or Committee member shall receive any compensation for serving on behalf of the Association, except for expense reimbursements approved by the Board of Directors or for specific functions as approved by a majority vote of the Board.
3. No Board member or Committee member shall solicit or accept, directly or indirectly, any gifts, gratu-

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MODEL POLICY: CODE OF CONDUCT *(continued)*

- ity, favor, entertainment, loan, or any other thing of monetary value made with the intent of influencing decisions or actions on any official matter, or from a person who is seeking to obtain contractual or other business or financial relations with the Association.
4. No contributions will be made to any political parties or political candidates by the Association.
 5. No promise of anything not approved by the Board can be made to any subcontractor, supplier, or contractor during negotiations.
 6. No drugs, alcohol, or substance abuse will be tolerated.
 7. Any Board member convicted of a felony will voluntarily resign from his/her position.
 8. Board members will immediately remove any volunteer from such positions as officers or committee positions if said person has been convicted of a felony.
 9. Any Board member under investigation for a felony will request a leave of absence from the Board of Directors during the investigation and trial period.
 10. Confidentiality of all Board members' personal lives and all residents' personal lives will be protected by Board and Committee members.
 11. Language at Board meetings will be kept professional. It is understood that differences of opinion will exist. They should be expressed in a clear and business-like fashion. Personal attacks against owners, residents, officers, directors, and managers are prohibited and are not consistent with the best interest of the community. Board and Committee members who violate this provision are subject to removal by a majority vote of the Board after three recorded instances of said violation. Board and Committee members who sign this Code of Conduct agree to these conditions and subject themselves to this Code.
 12. No Board or staff member shall engage in any writing, publishing, or speech making that defames any other member of the Board or resident of the community.
 13. Proper parliamentary procedure should be followed to have dissenting positions stated clearly within the official records of the Association.
 14. No Board member or Committee member will knowingly misrepresent facts to the residents of the community for the sole purpose of advancing a personal cause or influencing the community to place pressure on the Board to advance a member's personal cause.
 15. No Board member or Committee member serving the community may use his/her position to enhance his/her financial status through the use of certain contractors or suppliers. Any potential conflict of interest must be exposed to the other volunteers, especially to the Board of Directors.
 16. No Board member will seek to have a contract implemented that has not been approved by the Board.
 17. No Board member will interfere with a contractor implementing a contract in progress. All communications with contractors will go through the Managing Agent or be in accordance with policy.
 18. No Board member will interfere with the system of management established by the Board and the management company.
 19. By virtue of serving on the Board and setting an example for all members of the community, the Board member covenants that she/he will resign from the Board in the event her/his assessment account becomes past due during her/his term on the Board more than sixty days unless otherwise approved by the Board of Directors. Should a member refuse to voluntarily resign for reasons related to delinquency, the Board of Directors has the right to action for removal by a majority vote of the homeowners.

New Board members will be given a copy of this code of conduct and will be asked to execute it to signify that they have received it, have read it, and agree to abide by it. The code of conduct is effective immediately. By signature below, each Board member attests to his or her acceptance.

[Insert lines for Board Members' signatures and dates]

RECENT COURT RULINGS

➤ Statute of Limitations Precluded Collection of Fines

FACTS: A homeowner made improvements to his community's common area that weren't approved by the association. The homeowner was fined. He later declared bankruptcy. The association filed a "proof of claim" against the homeowner. The homeowner objected to the claim. A California bankruptcy court ruled in favor of the homeowner after it determined that the association's claim was time barred under the state's statute of limitations for that type of claim. The association appealed.

DECISION: The United States Bankruptcy Appellate Panel upheld the lower court's ruling.

REASONING: On appeal, the association contended that the statute of limitations wasn't applicable to its claim because the claim was in essence "an action to recover possession of common area property that the homeowner's improvements encroached on." The panel disagreed. It stated that the claim was "nothing more than an action for money, that is, fines, for violation of the association's real property restrictions." The panel noted that this type of action "squarely falls within the scope of" the state law that imposed the statute of limitations on which the bankruptcy court based its decision.

The panel noted that the limitations period under state law began to run in 2006, when the homeowner constructed his landscaping improvements and by which time the association, with the aid of a site survey, should have known whether his improvements encroached on the common area. But the association didn't file its proof of claim until several years later—outside of the limitations period.

- Mesa Pines Homeowner's Assoc. v. Paterno, March 2015

➤ Homeowner Was 'Jointly and Severally' Liable with Renter to Pay Assessment

FACTS: Twenty-eight of the more than 1,000 units in a community were purchased by one homeowner. The homeowner leased the units to renters. The homeowner claimed that the renters were responsible for paying the monthly assessments for their respective units. For several years, monthly assessments weren't submitted by the majority of the homeowner's units. The monthly assessments were \$35 when the homeowner purchased his units; they were increased to \$45 and then \$50 by the board of directors over the course of several years. The association sued the homeowner for the unpaid assessments plus late fees. A trial court ruled in favor of the association. The homeowner appealed.

DECISION: An Indiana appeals court reversed in part and affirmed in part the decision.

REASONING: The appeals court determined that the homeowner owed \$11,000 less than the trial court had ordered him to pay, so it reversed that portion of the decision and recalculated the amount owed. But it agreed that any owner in the community whose unit was rented was jointly and severally responsible for

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Recent Court Rulings

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paying the monthly assessment. That meant that if the renter failed to pay the monthly assessment, the owner was responsible for paying it.

The homeowner had also alleged that the board had no authority to raise the assessment amount to \$50 and that members had not agreed to the increased amount. But the appeals court noted that an article of the association's declaration allowed the board to fix assessments on each property without a vote by members. And any assessment was a personal obligation of an owner of a lot at the time when the assessment becomes due and payable. The board of directors has the right, power, and authority to fix a regular assessment without any vote of the members of the association, said the appeals court. ♦

- Robinson v. Estates at Eagle's Pointe, March 2015

RISK MANAGEMENT

Use Confidentiality and Indemnification Agreement When Divulging Membership List

With the proliferation of social media, YouTube, and photo-sharing websites, it may seem like personal information is everywhere—and easy to get. But in an era of what some people call “oversharing,” association managers need to remember that members still are entitled to some measure of personal privacy. You could be faced at some point with a member's request for a membership list. Prepare yourself for this request by having a plan for protecting the association when it divulges that information.

Membership List Uses

A membership list is helpful for a member to communicate with other members about issues concerning the community, seek signatures on a petition, solicit proxies, or campaign for office. Under many state laws, members of an association are entitled to the names and addresses (but not telephone numbers or other identifying information) of all other resident and nonresident members as long as the information is used for a “proper” purpose. (Most states provide members with a right to inspect association records, and this right usually includes a right to copy.)

If a member asks the association for the names and addresses of all members in the community, beware of automatically handing them out. You should consider privacy concerns or potential liability for damages related to providing this information without each member's express permission. Check with your association's attorney about the circumstances under which you must provide a membership list to another member.

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Risk Management

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Avoid Association Liability

If you must hand out a membership list, require as a condition of releasing the list that the member who requests the list sign a confidentiality and indemnification agreement. Your agreement, like our Model Agreement: Grant Membership List Request, should state that the member will: (1) use the list only for lawful association business; (2) not use it for any commercial or unlawful purpose; (3) not disseminate it to any other person; and (4) indemnify the association against claims and be subject to damages caused by any violation of the agreement.

Although, hopefully, the member requesting the list plans to use it for a lawful purpose, the association could land in hot water if it's not. An airtight confidentiality and indemnification agreement will help you avoid liability for any misuse of the information. ♦

MODEL AGREEMENT

Get Signature Before Providing Membership List

You should have any member who is requesting a membership list sign the following agreement before giving her access to that information. Ask your association's attorney about adapting it for use at your community.

CONFIDENTIALITY AND INDEMNIFICATION

In consideration for being allowed to copy the membership list with the names and addresses of all members of XYZ Condominium Association ("the Association"), I, [*insert name of requesting member*], hereby agree to the following:

1. I will not disseminate the information contained therein to any person who is not a member of the Association, other than to my attorney-at-law or accountant to the extent necessary for his or her professional services on my behalf, unless authorized in writing by the Association's board of Trustees to do so;
2. I will not disseminate copies of such records or the information contained therein to any person except for lawful use in matters regarding the governing of the Association and the XYZ Condominium;
3. I will not utilize or disseminate any such information for any commercial purpose;
4. If I disclose any such copies or information to any person and such disclosure gives rise to a claim for damages against the Association or me, I will hold the Association harmless and indemnify the Association against such claim and any damages awarded, regardless of the nature of the claim; and
5. Nothing herein shall be construed as the right to make copies of any such records. Whether copies may be made will depend upon the types of records being inspected and the Association's policies regarding copying records.

SIGNATURE: _____ DATE: _____