

Drafting a Code of Conduct for the Board of Directors

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A common frustration for managers and association boards of directors is dealing with issues that arise out of conflict with individual board members. At some point we have all heard of the board member who is hostile, disagreeable or the proverbial “loose cannon.” Other boards have struggled with how to rein in the director who consistently advances his or her own agenda without regard to the best interests of the association. Finally, there are directors elected, for whatever reason, who feel compelled to reveal confidential information about the association to third parties. Unfortunately, the Corporations Code does not yet contain a provision allowing the board to remove a director for behaving badly. The slap on the wrist that follows improper disclosure or misconduct does little to undo the damage already done.

There are, however, viable options available to managers and boards to address misconduct. In most cases, the most direct option to control improper behavior is censure. There is no more effective method of controlling improper behavior than by confrontation by one’s own peers. Like any disciplinary hearing, the director should be advised of the improper conduct committed and be provided with an opportunity to explain his or her actions. The director should also be cautioned that continued misconduct will result in further disciplinary action by the board to protect the association and could include obtaining a court order seeking to enjoin their conduct detrimental to the association.

If the conduct committed is improper disclosure of confidential information, the best option is to exclude that board member from executive session meetings, or from receiving executive session material or both. Such an extraordinary precaution is justified by the board’s fiduciary obligation to protect the association. Providing confidential information to a director with knowledge that the director will share that information with a non-board member subjects the association to unreasonable risk. If the issue is severe enough, make sure the board consults with association legal counsel about the potential ramifications. If the issue relates to litigation the board can form a litigation committee and specifically exclude the offending board member from the committee.

A director must refrain from misconduct and improper disclosure of confidential information. In addition, each director has an affirmative obligation to monitor the conduct of every other director to ensure that all directors act in furtherance of his or her fiduciary obligation to the association. A board that regulates itself will send a positive message to the community that its association is governed by those with a high regard for the best interests of the community.

Understandably, a director may be uncomfortable with the task of disciplining a fellow director. Therefore, although the Corporations Code already establishes a bench mark for acceptable conduct by board members, your association should consider establishing a code of conduct which outlines the obligations of a director, and the consequences of failing to meet those obligations. If the board chooses to require a code of conduct it should be adopted and in place before an issue arises. That said, associations should not hesitate to implement one at the sign of a problem.

If used, a code of conduct should include the following obligations:

- To maintain the confidentiality of executive session information;
- To put personal interests aside and advance the best interests of the association;
- To respect, abide by, and carry out the decisions of the majority of the board; and
- To treat both fellow directors and homeowners with respect, and approach board decisions prepared and with an objective, open mind.

Boards of directors are encouraged to adopt a code that meets the needs of their associations. The directors should evaluate those issues that have historically been problems and reach a consensus on what to include in the code of conduct. The more agreement there is among directors about what to include in the code, the more likely directors will comply. Once the code is completed, a resolution should be drafted by legal counsel detailing among other things, the reasons for the code, and the board should vote to adopt the code of conduct for the association. Until revised or removed, that code will govern the conduct of all current and future directors. Like all rules, the code of conduct must be enforced fairly, uniformly and consistently.

Directors and homeowners should be reminded of the code of conduct for board members on an annual basis, prior to director elections. Community association managers should be prepared to review the code of conduct with the new board following their election and ensure that each director signs a simple document prepared by legal counsel, indicating his or her agreement to its provisions and acknowledging the consequences of noncompliance. If, however, a board member refuses to sign a code of conduct, he or she cannot be forced to do so or resign, unless the association's bylaws require same.