

Fiduciary Duties & Responsibilities of Board Members

How should a director perform his or her duties in order to minimize the risk of personal liability?

Corporations Code section 7231, commonly known as the “Business Judgment Rule,” requires a director to perform his or her duties as follows:

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

1. One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matter presented;
2. Counsel, independent accountants or other persons as to matters which the director believes to be within such person’s professional or expert competence; or
3. A committee upon which the director does not serve that is composed exclusively of any or any combination of directors, persons described in paragraph (1), or persons described in paragraph (2), as to matters within the committee’s designated authority, which committee the director believes to merit confidence, so long as, in any case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

(c) A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person’s obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which assets held by a corporation are dedicated.

Does a director of a community association owe a fiduciary duty to the membership?

Yes. Having a fiduciary duty to another involves being in a position of confidence and trust. A director owes a fiduciary responsibility to the association and to all of its members. The director's personal needs and desires must be put aside in favor of the director acting in good faith and in the best interests of the association and the entire membership.

Is a director responsible for the actions of the other board members if the director is not at a meeting where the action was taken?

Failing to attend a meeting will not shield a director from liability. A director has a duty to participate in the affairs of the association, including attending meetings. A director can only protect himself or herself by attending the meetings and voting against actions which he or she cannot support.

How can a director fulfill his or her responsibility as a director if he or she is not an expert in all of the issues being considered?

No director can be knowledgeable about every subject which confronts the board. Frequently, the best directors are those people with good general knowledge. Directors must often rely on advice and information provided by experts or other professionals in the field being considered. The board need not always accept the advice given by the chosen expert. However, if professional advice is not going to be followed, the board should have good reasons for rejecting the advice, and should carefully document its decision.

How much time should a director spend on association business?

Enough to do the job properly. A director should attend all meetings of the board, should prepare for the meetings in advance and be knowledgeable on the issues to be discussed and decided. An association is not a social organization; it is a business, often involving assets in excess of several million dollars, and annual budgets that exceed hundreds of thousands of dollars. Protecting these assets and fulfilling a director's fiduciary duties requires spending sufficient time to enable the director to make informed decisions on the issues being decided.

Is a director individually liable for his or her acts as a director?

Provided a director does not intentionally act wrongfully, the acts of a director will be considered the acts of the association, and not the personal acts of the individual director. Under such circumstances, only the association can incur liability, if any, for the director's actions. Acting in good faith and with the interests of the association in mind will protect a director from individual liability. In addition, Civil Code section 5800 provides that a director will not be personally liable for any personal injury or property damage in excess of the association's insurance, if:

DISCLAIMER: The contents provided herein are the suggestions and opinions of Epsten, APC on general legal issues involving California community associations and common interest developments. This content is for educational purposes only, is not intended for commercial use and may not be relied upon in addressing any specific legal issues. Specific policies and procedures that your association, management company and/or law firm have developed may differ and may fully satisfy all applicable laws. Copyright 2020 by EPSTEN, APC, unless otherwise indicated. These materials may not be reproduced or distributed without express permission of Epsten, APC. (Published and/or Last Updated on 1.2.2020)

- (a) the association has at least \$1,000,000 in general liability and directors & officers insurance (\$500,000 if there are 100 or less units in the development);
- (b) the director is a volunteer;
- (c) the act or omission performed by the director was within the scope of the director's duties;
- (d) the act or omission was performed in good faith;
- (e) the act or omission was not willful, wanton or grossly negligent

Can a director also perform services to the association for which he or she is paid?

Although it is not necessarily improper for a volunteer director to agree to provide paid services to the association, such a relationship is unwise. The protection against liability afforded by section 5800 of the Civil Code, discussed above, could be lost. The director will often be accused of having a conflict of interest and the homeowners may never be satisfied that the director is not taking unfair advantage of his or her position as a director in order to improve his or her financial situation. If a director does offer a compensable service to the association, the association should endeavor to comply with Corporations Code section 7233. That section states that a transaction may be valid even if a director has a financial interest in the transaction, if there is full disclosure of all material facts and if the transaction is approved by either the membership of the association or the board, excluding the vote of the interested director. Also, many governing documents expressly preclude compensation to directors without a vote of the members.

How does a director avoid personal liability if he or she disagrees with a decision made by the other board members?

A director will not incur responsibility for an erroneous decision made by the majority of the board if the director is in attendance at the meeting when the vote is held and votes "No" on the resolution. The director should also request that his or her opposition to the motion be recorded in the minutes of the meeting.

Does the board need to maintain minutes of its board meetings, and what should they contain?

Yes, Corporations Code section 8320 requires corporations to keep board meeting minutes. The minutes are an excellent source of protection for a board, as they provide a written record of the actions taken. Over time, the minutes become the association's historical record. Minutes should not be lengthy dissertations of everything that was said at the meeting, but they should contain all motions made at the meeting, and the results of the vote on each motion. It is not necessary to indicate how each individual voted, although a director may ask

that his or her specific objection to the motion be recorded. The minutes should also include a summary of the factors considered by the board in passing or rejecting each motion.

What sort of protection should the association provide its individual directors?

The members of the board are volunteers. Every association should provide the board with broad indemnification rights in the governing documents, and should also provide adequate directors and officers insurance coverage. No director should be asked to place his or her personal assets in jeopardy for performing a volunteer service.