

FIDUCIARY DUTY – WHAT IT IS (AND ISN'T!)

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Miss the webinar? Watch it here: <https://youtu.be/QN6VmH1msM8>

In this webinar, noted attorney Kelly Richardson builds on his blog [article](#) on this topic, affirming that boards are fiduciaries, and explaining what that looks like in ongoing board actions. In summary...

Fiduciaries owe their duty to the association, not to individual owners

A Fiduciary operates with:

- Good Faith (doing what is in the best interests of the association)
- Duty of Loyalty
 - Avoiding or eliminating Conflicts of Interest
 - Ensuring the Board operates as a team – with one voice
 - Providing the funds necessary to sustain the association
- Duty of Care
 - Making reasonable and responsible inquiries – avoiding guessing!
 - Avoiding unlicensed and unqualified board opinions/suggestions

Read more about Protection for Volunteers – the Business Judgment Rule [here](#), and read how the Business Judgment Rule is not a “free pass” for board behavior [here](#).

*** New in 2020 *** When making Reserve budget decisions, test all your “what if?” and “doesn’t fit” problems! Get real-time answers with uPlanIt, a powerful online Reserve calculator only from Association Reserves. uPlanIt is free with every completed Association Reserves Reserve Study (\$149/yr for all others).

For additional information, visit two companies interested in guiding your association towards an improved future:

www.ReserveStudy.com

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Webinar Questions Asked By Attendees

Fiduciary Duty – Legal Questions

Q: Fiduciary A is breaching a fiduciary duty. Fiduciary B requests Fiduciary A to stop. Fiduciary A refuses. What action must Fiduciary B take? How far does Fiduciary B have to pursue the matter if Fiduciary A continues to refuse? Could Fiduciary B be required to seek assistance from the courts?

A: First, the matter should be brought to the attention of legal counsel. The actions of Fiduciary A may appear but may not actually be violating a fiduciary duty. If counsel confirms a duty is being breached, the matter should be brought to the board's attention. If Fiduciary A refuses to cease their actions, a motion to censure the Fiduciary may be necessary, also a demand letter from the HOA through legal counsel. Do NOT take matters into your own hands.

Q: We have 1-2 board members that are not voting on repair bids. What is their obligation to vote on needed repairs?

A: So long as the majority is taking the action necessary, the failure of 1 or 2 directors to vote is irrelevant. If the refusal to vote interferes with the HOA's duty to act, that is another problem.

Q: I am currently being accused of violating my Fiduciary Responsibilities by my HOA mgr. Am I really violating them if I simply disagree with the majority of the board? There are 5 members, including myself. Recently, it was recommended I be REMOVED because I posted my minority position on NextDoor, even though I informed the other board members in advance that I was doing so.

A: Disagreeing during the vote is one thing. After the vote has been taken, your obligation to the corporation is to support the corporation's actions (as decided by the board vote), not defiantly broadcast your personal opinion on social media, breaching your Duty of Loyalty.

Q: Is there a line where a board member should NOT post on social media especially when questioning the majority will of the board or, simply calling for action outside of an open meeting?

A: Members of the board should not be criticizing the board or lobbying against board decisions. Once the decision is made in the board meeting, the directors all should unite to support the action decided upon.

Q: If a board member feels strongly about heating the pool and it was voted down, can he keep bringing it up at every subsequent meeting and recruit homeowners to attend and speak or submit written letters.

A: That is action fighting against the board's decision. If the person wants to resign the board, then go ahead and stir up opposition to the board's position. But while you are on the board, you support board decisions.

Q: If I am the lone vote against an action, and the association is called to task or a lawsuit, what are my responsibilities then?

A: Talk to the HOA's legal counsel

Q: When you say members should not have business relationships with the association, do you mean all association members or only board members? In other words, is it ok to hire a non-board member of the association to do a project or repair?

A: When I refer to "member" I mean any homeowner. When I refer to someone on the board, I say "director." Members and directors raise conflict of interest concerns if hired by the association.

Q: How about a homeowner's interest in a potential vendor contract? Is it ok to hire a vendor that doesn't have a board member connection, but does have a homeowner connection?

A: I generally discourage hiring vendors connected to any member of the HOA, particularly if it is a small business. Even though the member may help the HOA get a better deal, there will always be others who cry foul, and assume the business got the work just because of the connection.

Q: Regarding conflict of interest: our HOA has hired a homeowner for doing maintenance. We also just got liability insurance for this person. Did we make a huge mistake?

A: See above answers.

Q: We have a management company that manages our association. They hired the son of a Board Member to work at our Association. Would you see this as a conflict of interest?

A: Yes. See the prior answers on this.

Q: If a homeowner in the community owns a business providing a service that the HOA is soliciting bids for, should that homeowner vendor be allowed to bid as well?

A: As stated in a previous answer, I discourage the HOA from doing business with its members or residents. Anyone should be able to submit a bid. But the board should consider that even if the member could give the HOA a better price, there are so many other complications and potential problems, it is rarely worth the risk.

Q: If a board member rents a storage unit from the association, should he vote or comment during discussions to raise the rental rates? Who should let him know?

A: No. This is a conflict. The director should recognize that, and announce the conflict and not discuss or vote upon the motion. The exception would be if everybody in the HOA has a storage unit, then the director is in the same position as everybody else.

Q: What type of communication do you recommend? I live in an association that has a Facebook page organized by homeowners not by Board. Homeowners frequently request updates or ask questions on Facebook. Board members don't feel like they can respond on Facebook. Any suggestions? Homeowners are encouraged to attend meetings but they don't.

A: I do not recommend communication media not under the control of the association. There are many ways to communicate - email blasts, web site updates, newsletters, and meaningful informative reports in the board meetings. If the board meetings drag on too long, and are disorganized, then people will not want to attend.

Q: Do you have suggested talking points for Boards to use when homeowners ask why we're doing what we are doing? For example, we consult with legal and insurance company on implementing local health order regarding COVID pool rules but homeowners don't like the guidance and question why the Board is upholding it. How should a Board respond to this type of inquiry?

A: You are in a position of service, and that means extra effort to communicate is expected. Be communicative, so the members understand and trust the board is acting in Good Faith, loyal to the association's best interests.

Q: Is it a failure of duty of care if you choose one biased expert rather than looking carefully at alternatives - I'm thinking of road maintenance where there are a variety of remedies.

A: The obligation of “reasonable inquiry” or “due diligence” means you must obtain reliable and qualified expert input. What are the factors that make you think a particular expert is biased? If they are not credible they should not have been hired in the first place. If they are credible, then the board should be following that expert’s advice.

Q: You said to look for an independent expert. But not all experts are truly “expert” and can give less than expert advice. How can a board member address a recommendation that may in fact be erroneous?

A: A basic obligation is to hire the appropriate qualified expert, not just anyone. If an individual director thinks that a certain expert opinion is erroneous, is that director themselves an expert on that subject? Sometimes an expert will not provide a straight answer, or will otherwise shake the board’s confidence in the expert and it is necessary to hire a second opinion from another highly qualified expert. But, don’t seek out a second opinion just because you didn’t like the first opinion.

Q: How do you square fiduciary responsibility with a “business judgment” call?

A: The board operates under the Business Judgment Rule (BJR), which makes board actions defensible (from a personal liability standpoint) if they make a mistake as long as they were operating in good faith, in the best interests of the association as a whole, and after reasonable inquiry. Fiduciary Duty is a responsibility, the BJR is a defensive strategy.

Q: Can you touch on director's fiduciary responsibility and director's conflict of interest?

A: The two cannot coexist. A director must put the association first. If there is a conflict of interest, as discussed in the webinar the director must not be involved in decisions involving the subject upon which the director has a conflict.

Q: The members want our monthly expense sheet posted on our secure website, however the Board refuses. What do you recommend?

A: The association is not legally required to post the monthly expenses. However, each member does have the right to request certain financial records listed by statute. Is there a specific concern? Perhaps talk to the

board about some reasonable disclosure without placing too much administrative burden upon them and the management.

Q: Can the HOA president make motions?

A: Generally under parliamentary procedure the chair (usually the president) calls for motions but does not make them. If the president wishes to make a motion personally for some reason, normally on that subject they would temporarily pass the “gavel” to the vice chair (or vice president) so the president can make the motion.

Q: Can you talk about fiduciary duty with respect to our community pool being kept closed by us (the Board of Directors) based on the COVID-19 situation?

A: That is a hard balance - what is more important... the risk of a dangerous disease being shared or the unhappiness from missing a major HOA amenity? There are two sides to that coin - hopefully the board and members will acknowledge there is no perfect answer on that subject.

Q: Regarding opening the pool - our lawyer has suggested against it, because our insurance policy will not cover anything. The "lawyers" on the Board say they will write up a waiver. I think the BOD is still at risk, especially for going against the insurance and the Board lawyer. How do I avoid personal liability as a Board member if the rest should vote to open and I am against?

A: Hard to comment on this without knowing more. I think waivers are overrated and unlikely to hold up in court. You are protected by the business judgment rule (and your directors and officers insurance) so long as you are acting in good faith as a board, seeking the best interests of the HOA as a whole, and using reasonable inquiry (due diligence).

Q: Are there any particular precautions that HOAs should take with regards to liability insurance policies?

A: Broad question - consult with your insurance broker. They normally don't charge for a question or consultation. It is best to have legal counsel participate in the discussion, to make sure the insurance matches up with the governing document requirements.

Q: Has any one tested if a zoom member board meeting can be recorded as its content is broadcasted to an audience and not contained within the 4 walls of a meeting room and would assume 2 party consent would not apply?

A: I think that recording board meetings is generally a bad idea. Make sure good minutes are kept, recording the actions taken and identifying the reports received, and don't keep a recording.

Q: Does the board have a duty that goes beyond conservatism? For example, should the board be proposing improvements to HOA property for the benefit of all, even though that will increase cost?

A: The basic duty of the HOA board is to preserve, protect, and maintain the association assets. Improving the assets is nice, but the board does not have a duty to improve. If the board does not wish to improve the property, that is not a breach of their basic duties.

Q: Can you comment on Developer board vs homeowner board, and the common need for homeowner boards to adjust (raise) assessments that were set artificially too low?

A: That is a very common problem. In California, initial budgets are almost always too low, because developers are allowed to use a pro forma budget from the Department of Real Estate which is outdated. Most new HOAs find they need a substantial revision of their budget and assessments once they take control from the developer over their association.

Q: How do you explain making up for artificially low maintenance fees while building developer was in control of board from 2007 to mid-2016? We're 14 units and self-managed.

A: See above.

Q: Do Fiduciary Duty concepts apply nationally, or vary state by state? Do they apply in Arizona?

A: The principles of Fiduciary Duty apply nationally, and Reserve Studies are prepared according to National Reserve Study Standards. So all principles discussed today apply even in AZ!

Q: Is there any fiduciary duty for the board to take actions to defend or maintain property value for homeowners?

A: The basic job is to preserve, protect, and maintain the property. Property value is something different, and can go up or down due to market

conditions having nothing to do with how well the property is preserved, protected, and maintained.

Q: Can you please define "undivided" loyalty?

A: Loyalty first and foremost to the beneficiary- in this context it is the HOA.

Q: When Board makes a decision that violates its duty, should an opposing Board member have the opposition stated in the minutes?

A: The minutes should record who attended, reports received, and motions made and how they were voted. If a person really wants their yes or no vote noted in the minutes, then call for a roll call vote and move on.

Q: What if a Board decision will place the HOA and or the BOD at financial risk? If I disagree and then decide to quit the Board, does that release me from liability?

A: Once you are no longer a director on the board, you no longer have to support the board decisions. You are not able to disclose executive session information, however, even after you leave the board.

Q: What is Board's fiduciary duty regarding permitting owners to keep pit bulls, Rottweilers, etc. and the subsequent insurance premium impact?

A: This is a broad question that depends upon a variety of factors. Talk to your insurance broker and legal counsel about that.

Q: Can you comment on the issue of confidentiality – how Fiduciary Duty affects how the minutes should read when an owner is fined or other action taken? Can it be discussed in an open meeting?

A: In California where I practice, disciplinary action can and should occur in closed session where it is confidential. I cannot comment upon other state law.

Q: In our state the homeowners have to approve the budget. How do you handle the situation where the homeowners vote down the board's budget, voting a monthly assessment rate that is unsustainable? We're trying to do our job, but are thwarted by the homeowners. Can you provide some insights how we can still act in our Duty of Care, and Duty of Loyalty?

A: If the board is unable to act because the members of the association will not empower them to act, it is hard to envision how the board would be held liable for problems arising from that. I do think that oftentimes boards and managers need to spend more time educating the membership and

informing the membership, to help the members understand why certain actions are necessary for the best interests of the association.

Q: Do we have a Fiduciary duty to keep, or postpone our annual meeting due to COVID-19?

A: I would think most states allow measures to be taken which include a meeting which is largely virtual. In California, voting has for many years already been by essentially an absentee ballot, so actual physical presence at the annual meeting is less important. Talk to your HOA legal counsel about options and recommendations.

Q: Does Fiduciary Duty require an HOA Board to comply with the State and Federal constitutions (in addition to Governing Documents)?

A: Yes. HOA boards should comply with all applicable laws as well as the governing documents. Your legal counsel and manager should be vital on this issue.

Q: What if the Board votes to do something illegal or chooses to not follow state guidance/law?

A: If the board is clearly stepping outside its fiduciary and legal duties, it may be best to resign (and then to get a better board elected).

Q: What about a letter of protest? I've experienced former board members brazenly ignoring the Governing Documents.

A: A letter of protest kept within the board may document one director's objection. But, is the letter really for the rest of the HOA? Then it is opposing the corporate action, which then would violate the objecting director's duty of loyalty to the HOA.

Q: What if the decision by the board violates jurisdictional safety codes that can cause a fire?

A: The HOA and its board should be following all applicable laws. Willfully not following stated guidance (laws and Governing Documents) exposes the board to liability, which may not be defended by the association's D&O insurance.

Q: Having a licensed EXPERT, like an attorney, on the Board of Directors always gives the impression to other Board members and homeowners that the advice given by that particular board member is going to be 'free' advice. Should it become a policy of the Board (association) to use 'outside' experts when needed?

A: Is the board willing to sue the attorney on the board for malpractice if the attorney gives bad advice? Is the attorney willing to put their errors and omissions insurance in play? Since the attorney board member is not being paid, it seems unfair to ask them for free advice... even if they are qualified on the subject at hand. Seeking outside expertise is good policy.

Q: How do you utilize committees for the board that provide expertise such as contractors who are owners?

A: It is best to hire outside expertise. The expertise in-house (from committees or directors) may help to evaluate whether the expert was responsive and complete in their analysis. But don't ask the volunteer committee member to act as a free expert.

Q: I found the VP of the board connected their EV charger to the Association's electric panel and did not pay for the common area electricity for 6 years. The VP represented themselves as the owner of the electric panel to the Department of Planning and Permitting. What can a director do who finds the violation?

A: Report it to the manager and the board.

Q: You mentioned the association's responsibility to disclose financial information. What are the next steps as a homeowner when the HOA board and management company refuse to provide the requested information? Specifically, fees are being collected for a review completed by volunteers in the community. The homeowners have asked for the HOA and management company to document what is happening with those fees as they do not appear anywhere on our accounting summary. It seems like a straightforward request that should be documented as receiving funds and where they are deposited.

A: HOA boards and managers should be careful to provide REASONABLE accounting information to the community. Being defensive or refusing to disclose reasonable information will build further conflict. However, bluntly, a lot of times a well-meaning member will ask for financial information which really requires not disclosure but some sort of study or research.

Q: How to we prevent one Board member from controlling the Board, the Maintenance AND the Landscaping committee all at once? This Board member resigned recently (thank goodness), but we want to prevent such from occurring happening again in the future.

A: The board acts as a group and decides as a group. If the rest of the board allows one director to run the HOA, then the rest of the board should stand up and demand respect of the board role, or elect a new president. Rogue directors can be reined in, but it takes the rest of the board to stand up and be counted.

Q: The past few years, our HOA president delivered our budget to our management firm, but lowered the board-agreed upon monthly dues before handing it over. We wouldn't learn about the new numbers until the budget was mailed to all the owners and we received our copies. He is no longer on the board. Can we do anything about what happened?

A: That should be discussed with management, and probably legal counsel, as to how to correct this.

Q: Where can we find Kelly's blog?

A: www.hoahomefront.com or www.rodllp.com

Q: What is the risk of having a Board member who is associated with an organization with potential conflicts with your own HOA?

A: It depends upon the conflict, whether the conflict is disclosed, and whether the director recuses on issues on which the conflict arises.

Q: Does the Treasurer of the board have the right to speak with the bank rep where reserve accounts are held? Or does only the management company have access to discuss reserve accounts at the bank?

A: The board should decide who is the proper point of contact for a vendor or service provider. Everyone on the board should be regularly reviewing the bank account information (in California it is required monthly).

Fiduciary Duty – Reserve-Related Questions

Q: Could unbudgeted expenses come out of the reserve fund?

A: The Reserve Fund is for legitimate Reserve expenses, which should either be listed as “components” in the Reserve Study, or pass the National Reserve Study Standards [four-part test](#) (and thus be added in the next Reserve Study update).

Q: In our Reserve Study, some remaining useful life values are stated in large ranges, 0-20 years for example. Is this a red flag? Should the range be more specific or is there a suggested guideline on what ranges are reasonable in a reserve study?

A: Per National Reserve Study Standards, every component must have a specific Useful Life, Remaining Useful Life, and (Current) Replacement Cost. You may be looking at a summary table that has bundled many “like” components together, where components in any particular bundle may have differing Remaining Useful Life values (yielding the large range you mention). If it is a Component Detail report, start looking for a different Reserve Study provider. You need projections that allow you to budget for specific events, not “kinda” ranges.

Q: Are you saying that an association who does not save adequately for Reserves violates fiduciary duties?

A: Yes. A board is responsible to maintain the assets of the association, both physical and financial. A board that is not offsetting ongoing deterioration with appropriately sized Reserve contributions is gradually and unfairly building a deficit obligation (living on “credit card debt”) that will burden future owners.

Q: Our Board will not follow CA Civil Code 5500 (Reserve Study requirements) and states we are postponing reserve items (not deferring), with no date to revisit the issue. Stating they are not “deferring”, they claim there is no disclosure needed. What do you recommend?

A: How is “postponing” different from “deferring”? Sorry, but I think they mean the same thing. The board is responsible to maintain the common areas, and can’t hide behind slippery words.

- Q: After spending reserve funds how long before the HOA must replace those funds?**
- A: Reserves should be funded on a continual basis, offsetting the rate of ongoing deterioration. It takes years to collect funds for most (large) Reserve projects, so there is no need to replace those funds in the short term. It is all part of a multi-yr plan.
- Q: Do either or both of you recommend adding a line item in the 2021 budget for COVID or disaster expenses?**
- A: The roof & the asphalt don't care (or know) about COVID-19, they plan to age and fail on schedule. So don't shortchange your reserve contributions. Make sure to add any new assets (hand sanitizing stations) to your Reserve Study in your next update, so the funds will be ready to replace them when needed. Due to the uncertainty we learned to live with in 2020, you may wish to increase your "miscellaneous" Operational Budget line item a percentage point or two, and consider that your Owner Delinquencies may be higher than normal (by a few percentage points) well into 2021.
- Q: When you're determining how much to contribute monthly toward the capital reserve is the amount fixed and the same per unit? Or is the amount on a percentage scale where larger units pay a larger percentage and smaller units pay a smaller percentage? Currently in our HOA the small units pay a smaller percentage of operating costs compared to larger units.**
- A: That depends on what is stated in your governing documents. Some state that everyone pays the same share, some governing documents state everyone has different percentage ownerships and their homeowner assessments are calculated accordingly.
- Q: Will uPlanIt work on existing studies or just new ones being done?**
- A: uPlanIt works on any Reserve Study. Newly completed Reserve Studies from Association Reserves will be there automatically. Reserve Studies from prior years or from other providers will need to be uploaded into the tool. Fortunately, we've made the upload process rather simple.
- Q: How important is it that the reserve study specialist uses his own numbers rather than ones a board member with a conflict of interest?**
- A: The Reserve Study provider should act like an outside, independent consultant. That gives the board confidence they have done their Due Diligence, fulfilling their Duty of Care. The Reserve Study provider's logo is

on the cover of the report, so their report should be based on estimates they support (no matter their origin). The provider is not just a mouthpiece or spokesman for the board. To “do your own” Reserve Study, you only need software, not a Reserve Study specialist.

Q: Are reserve studies professionals licensed/regulated by the State of WA?

A: No. Only the State of NV has a license for Reserve Study professionals. While not licensed in 49 other states, it is best to look for a provider with the “Reserve Specialist” (RS) or “Professional Reserve Analyst” (PRA) credential. The two credentials are essentially equivalent, and represent a provider who has a basic threshold of experience, and uses appropriate industry terminology and calculation methodologies.

Q: Our reserve cash is not designated towards individual projects. Is it necessary to do so? If so, how often should the cash be re-distributed, and how much should be in each category?

A: It is not necessary to associate Reserve cash with a particular component (unless yours is a Florida association and you are still using the Cash Flow methodology – which is not in the best interests of the association for a number of reasons). What is important is that the cash is available to perform projects in a timely manner. One “Reserve Fund” is just fine.

Q: What is a good target Reserves Percent Funded for an association? I have accounts that are 119% funded and others are 60%.

A: The risk of special assessment, a strong determinant of “Adequate Reserves”, is very low when the Percent Funded is above 70%. Stable Reserve contributions that keep the Reserve Fund above that level meet the [definition](#) of “adequacy”.

Q: Can a Board force the members to fund reserves, if the membership prefers to wait until an emergency? (State of Washington)

A: If the board has the power to set the budget in your state (and per your Governing Documents), the assessments are what they are. Every owner is obligated to pay. If they don’t like living in an association where there is freedom from the worry of special assessments, they can sell and move somewhere else.

Q: Is there a responsibility that our “expert” Reserve Study professional must adhere to certain standards regarding the underlying financial assumptions in the study? We believe ours was manipulated by our board president to doctor our numbers.

A: There are two national standards in the Reserve Study industry, the “Reserve Specialist” (RS) and the Professional Reserve Analyst (PRA). Note that both are almost identical. If the individual has either or both credentials, they have committed to standardized terminology, disclosures, and calculation methods.

Q: Is there a body where we could issue a complaint about our Reserve Study provider? We’re concerned about some ethical breaches (not working independently, and working towards a predetermined outcome).

A: If that person was credentialed, yes. If they have a “Reserve Specialist” (RS) credential, reach out to the [Community Associations Institute](#). If they have the “Professional Reserve Analyst” (PRA) credential, reach out to the [Association of Professional Reserve Analysts](#).

Q: We believe our board president has a conflict of interest with the paving company that botched our road repair a few years ago. This year, the board president asked the reserve study specialist to use the tainted vendor’s numbers and that was not disclosed. When asked, the reserve study specialist conceded the costs and life expectancy were not his own, but were provided to him by our board pres. Is this a concern?

A: National Reserve Study Standards protect the Reserve Study professional, stating that it is acceptable to rely on information provided to them by the client. It is not up to the Reserve Study professional to “audit” the starting Reserve balance, check the invoice (or specifications) for a roof or road project, etc. If the cost or life figures the Reserve Specialist is provided is “out of range” or the asset does not appear in the reported condition, the Reserve Study professional has a responsibility to then ask appropriate follow-up questions until they are confident the situation is correctly represented.

Q: Roads are our primary asset. We believe our recently updated Reserve Study is flawed because our bungled roadway resurface job (almost immediately afterwards it looked worse than before it was resurfaced) was reported to have been a “successful project”. What do we do now?

A: If the Reserve Study was a “No-Site-Visit Update”, the Reserve Study professional needs to rely on the information they are provided. That puts the responsibility for full disclosure on the board member contact. If the Reserve Study was a “Full” or “With-Site-Visit Update”, it sounds like the deteriorated roadway condition should have been observed and then reported accurately by your Reserve Study professional. If not, the shortcoming is their own.

Q: I'm specifically interested in Florida Statute 720.303(6)(g) and budgeting for reserve contributions. It seems to me that the statute is saying we must propose a budget to our membership which would result in 100% funding for future outlays for reserve items. Am I reading this correctly? Are the 70% funding levels reported in your reserve studies put there for disclosure purposes to help the board comply with their fiduciary duty? We want to make sure we are "doing the right thing" in using the information you provide.

A: The FL statutes require that an Association present a budget that shows what it would take to "fully fund" the Reserves. Unfortunately, this has two meanings in Florida, depending on the funding method used. If the association has their contributions calculated using the pooled (Cash Flow) method, then the statutory term "Fully Funding" is actually interpreted as "Baseline" funding, i.e. seeking a goal where the cash balance on hand just remains above zero throughout the forecasted timeline (again, the FL statute interpretation, not National Reserve Study Standards). If the association uses the straight-line (Component) method, then the result is a Fully Funded recommendation.

Our recommendation is that an association Fully Fund their Reserves (leading to being 100% Funded), using the Cash Flow method. This is a great combination of the more powerful calculation method and a conservative funding goal. We typically show an alternative contribution rate that leads to only 70% Funded so the board has some decision perspective on the matter. Either are well above the minimum required by FL Statutes. For more on Funding Methods and Funding Goals, please see our Reserve Studies 103 webinar [here](#), or the Explanation of National Reserve Study Standards [here](#).


Q: Is there a threshold where an HOA is no longer considered "non-profit" if the reserve study is funded at 125% or more?

A: No. There is no specific threshold. We have some clients over 130% Funded where some assets were "made new" with insurance proceeds following a fire, hurricane, or earthquake which resulted in the Reserve cash now being significant larger than the deterioration throughout the association (resulting in a high Percent Funded value). They are still nonprofits. Associations (well) over 100% Funded should be gradually working their Percent Funded down closer to the 100% level in their multi-yr Funding Plan.

**Fiduciary Duty – What it is
(and isn't)**

Featuring attorney Kelly G. Richardson CCAL

... a webinar brought to you by

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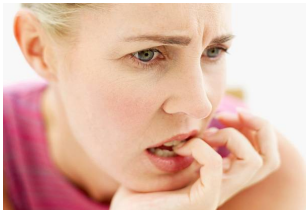
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I got this!

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5




We need to talk about the "F" word for a bit

- FIDUCIARY, as in DUTY
 - [what were YOU thinking, you naughty one?]

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WHAT is a "fiduciary"?

A **Fiduciary** is a person who occupies the position of a trustee with respect to a trust.

- Respect the confidence reposed by others
- Adhere to the scrupulous good faith, honesty and candor which the position requires
- Must meet high standards of honesty, integrity, undivided loyalty and diligence with respect to the corporation and all its members.

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If YOU are a fiduciary,
Who/What do you serve?

- Yourself? [Obviously not]
- Your neighbors? [nope]
 - Why aren't you a fiduciary to the homeowners?
 - Think about loyalty... can you be LOYAL to a homeowner if you have to vote to discipline them or pursue a delinquency against them?
- It is the ASSOCIATION – you serve the Association. Your fiduciary duties are owed to the entity (whether a corporation or not).

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WHAT ARE THOSE DUTIES?

- Good faith
- Loyalty - No self-interest – putting the HOA first
- A high degree of care – protection of assets/funds
- Accounting - disclosure

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Statutory duty -

CA Corporations Code Section 309.

- (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 its shareholders and with such **care, including reasonable inquiry**, as an ordinarily prudent person in a like position would use under similar circumstances.

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Fiduciary duty

The duty of disclosure and accounting

- Even "those" members are entitled to information about how the Association's funds are spent
- Record-keeping

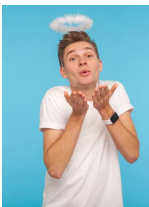
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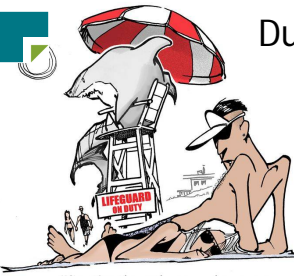
"Good faith"

- Motivated by best interests of corporation
- Not* motivated by ill will or retaliation
- Remember, others will decide if you acted in good faith....
 - What **evidence** do they have?
- Remember that e-mail from three years ago?



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Duty of Loyalty

- Conflict of Interest:
How to address
- How to respond to disclosure
- What the minutes should reflect

"So, I'm the only one who sees a conflict of interest here?"

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Duty of Loyalty


Avoiding a Conflict of Interest:

THE SCENARIO:

- A meeting of the Board to discuss a contract in which Director Roberts may have a personal interest.
- Roberts' nephew owns or works for the company proposing the contract

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Conflicts of Interest – the minutes

- **Unacceptable:** F !
- Motion made by Mr. Samuels to hire Roberts Janitorial Services, second by Ms. Johnson. After discussion, the motion passed, 4-1.

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Conflicts of Interest – the minutes

- **Acceptable:**
- Motion made by Mr. Samuels to hire Roberts Janitorial services, second by Ms. Johnson.
- After discussion, the motion passed 3-1, 1 abstention (Roberts)

C

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Conflicts of Interest – the minutes

- **Good:**
- Motion made by Mr. Samuels to hire Roberts Janitorial services, second by Ms. Johnson.
- Vice Chair Roberts announced that Roberts Janitorial is owned by his cousin, Robbie Roberts, and said he would be abstaining from voting upon or discussing the motion.
- After discussion, the motion passed 3-1, 1 abstention (Roberts)

B

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Conflicts of Interest – the minutes

- **Better:**
- Motion made by Mr. Samuels to hire Roberts Janitorial services, second by Ms. Johnson.
- Vice Chair Roberts announced that Roberts Janitorial is owned by his cousin, Robbie Roberts, and said he would be abstaining from voting upon or discussing the motion. Mr. Roberts left the Board meeting at this point in the proceedings.
- After discussion, the motion passed 3-1.

B+

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Conflicts of Interest – the minutes

- **Best:**
- Motion made by Mr. Samuels to hire Roberts Janitorial services, second by Ms. Johnson. Vice Chair Roberts asked that this item be tabled until the end of the meeting, as he had a possible conflict of interest. By unanimous consent, the matter was tabled. ...
- The motion was taken from the table and opened for discussion.
- Vice Chair Roberts announced that Roberts Janitorial is owned by his cousin, Robbie Roberts, and said he would be abstaining from voting upon or discussing the motion. Mr. Roberts left the meeting.
- After discussion, the motion passed 3-1.

A

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Conflicts of Interest – the minutes

- **Platinum:**
- Mr. Roberts disclosed a conflict of interest and asked that the Board not consider Roberts Janitorial, since it was owned by a relative of a director, the Association should make every effort to hire another qualified vendor.
- [So Roberts Janitorial was never considered as a vendor, and the motion never was made.]

A+

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Duty of Loyalty

What if you Disagree?


My fiduciary duty is to do what or whom?

I said my piece, now I will either row with the team...

or get out of the boat





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Care of the Association's Finances

- Loyalty to membership wishes or what the HOA needs?
- Deferring maintenance?
- Failing to increase assessments to match increased costs?
- Failing to fund reserves?
 - *Short sightedness!!!*



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Reserve Math


- 20 years left in roof
- Replacement cost \$1,000,000
- Deterioration \$50,000 per year
- Deterioration \$4,166.67 per month.

Each month, if you are not setting aside \$4,166.67, the HOA...
IS FALLING INTO A DEFICIT BY THAT AMOUNT. So is the HOA saving money by not assessing to cover that amount?

Does that sound like good care of the finances and buildings?
Or is it more like living off credit cards?




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Duty of Care - "With reasonable inquiry"

- Seeking qualified expertise
- Following qualified expert advice
 - Not disregarding input of qualified experts

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Duty of Care - "With reasonable inquiry"

- The expense – often unbudgeted
- Who is qualified...
- Using board expertise?
 - Qualifications/licensing/insurance/liability
- Following the expert advice – consequences of ignoring input of qualified experts

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Duty of Inquiry (Due Diligence)


When you don't know...

Ask!



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Duty of Inquiry (Due Diligence)


- Get a Reserve Study – find out what contributions are required to offset deterioration
- If that contribution doesn't "fit"...
 - Have a good reason
 - Have a good plan ★

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Doing your Job...

New tool... 


- To enhance the Reserve Study process
- Test all your adjustments
- Document your plan (no guessing!)
- Free with every completed Reserve Study! (\$149 for all others)


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Doing your Job...





Solving the “doesn’t fit” and “what if” problem!

Budgeting will be hard enough in 2020

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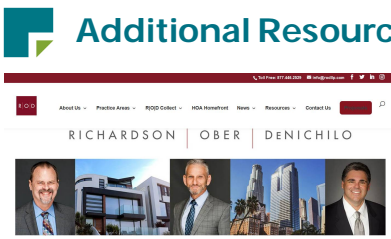




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Additional Resources

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Richardson | Ober | DeNichilo LLP combines the best in community association legal counsel throughout California.

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