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I am the Association! How to Handle the Overbearing Board Member.

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This document is intended to provide general information. It does not and cannot provide specific legal advice. For additional information or answers to questions, you may contact Augustus H. Shaw IV, Esq. of Shaw & Lines, LLC at 480-456-1500 or send questions to ashaw@shawlines.com.

This course is approved by Community Association Managers International Certification Board (CAMICB) to fulfill continuing education requirements for the CMCA® certification. www.Camicb.org.

Efficiency
is doing *better* what is
already *being done.*

Shaw & Lines, LLC, focuses its practice to General Real Estate Law and Community Association Law. The Firm represents Community Associations, Developers of Community Associations, Developers of Professional Office Condominiums, Professional Office Condominium Associations and Timeshare Associations.

The Firm was founded and continues to operate on the goal of promising and providing efficient, competent and quality legal services to its clients. Shaw & Lines, LLC, distinguishes itself by efficiently and effectively “doing better what is already being done.” Shaw & Lines, Arizona’s Counselors to Community Associations.

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Advising developers and community associations on forming corporations, funding reserves, compliance issues, and other general counsel matters.

COLLECTING ASSESSMENTS

Applying efficient, fair and effective collection strategies proven to recoup unpaid assessments, including collection demand letters, litigation, overseeing payment agreements, recording liens, wage and bank garnishments and foreclosures.

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Our attorneys are experienced in drafting and amending association documents that are easy to read, understand and apply. We also assist you in analyzing and interpreting provisions of association documents to help you better understand their meaning and application.

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Providing competent and assertive representation for community associations in court on matters typically involving assessment collection, enforcing restrictions, foreclosure, defending community associations in lawsuits and protecting rights in bankruptcy.

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We help review, interpret and negotiate contracts between vendors.

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Assisting planned community associations in reducing tax liability for common area property tax liens.

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Advising developers of community associations concerning applicable city ordinances, planning restrictions and similar land use issues.

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A multifaceted real estate practice offering clients a wide range of services for issues pertaining to zoning regulations, ordinance violations, land use and other general real estate and legal matters.

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Representing Insurance Companies in defending claims against their insured.

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Offering the Lunch & Learn Lecture Series and the Community Association Desk Reference Set for community association professionals to “be in the know” concerning changes in the law and effectively managing community associations.

Syllabus

Learning Objectives:

HOAs sometimes face a Board Member (or two) who believes they are "in charge." The Board Member takes action without full Board approval, interrupts Board Meeting discussions and imposes their will upon the association. Overbearing Board Members can cause a host of issues that affect the working dynamics of the Board of Directors. This seminar will discuss the definition of an overbearing Board Member, the pitfalls an overbearing Board Member may cause and how Boards can overcome an overbearing Board Member.

- I. Introduction.**
- II. What is an Overbearing Board Member?**
- III. Association Liability Concerning the Overbearing Board Member.**
 - a. Uncivil behavior at meetings of the Board of Directors.**
 - b. Enforcement of the restrictive covenants without Board Approval.**
 - c. Failure to keep confidential information.**
 - d. Speaking badly about other Board Members.**
 - e. Failure to thoughtfully consider the advice of experts (i.e. the Association's manager, attorney or other professionals).**
- IV. How to Prevent the Overbearing Board Member.**
 - a. Board Member Code of Conduct.**
 - b. Board of Directors Retreat.**
 - c. Other Techniques.**
- V. How to Handle the Overbearing Board Member.**
 - a. Informal Process.**
 - b. Formal Process.**
 - c. The calling of a special meeting of the association to discuss the removal of the Overbearing Board Member from the Board of Directors.**
 - d. Filing a breach of fiduciary duty lawsuit.**
- VI. Conclusion.**

I. Introduction.

Every Community Association (or almost) has an Overbearing Board Member, a Member who refuses to keep confidential information, interrupts meetings or represents the Association without full Board approval. Overbearing Board Members can cause a host of legal issues for an association, the Board and the Overbearing Member. This document will discuss the legal liability facing community associations regarding Overbearing Board Members and how community associations should address the situation.

As a starting point, it is important to understand that not all Overbearing Board Members have a nefarious intent. Most Overbearing Board Members have a sincere desire to better the community association. Sometimes Overbearing Board Members feel that their actions are in response to a perceived lack of action by the full Board of Directors. Most Overbearing Board Members want to make their communities better but are simply not educated regarding the proper way to accomplish their goals.

So, while this document is meant to instruct community associations on how to identify and address an Overbearing Board Member; this document may also serve as a reflection tool to Board Members so that they may ensure that they do not become an Overbearing Board Member.

II. What is an Overbearing Board Member?

An Overbearing Board Member is a member of a Community Association Board of Directors who displays the following types of behavior:

1. Treats management poorly;
2. Conducts himself or herself uncivilly at meetings of the Board of Directors;
3. Seeks to enforce the restrictive covenants on his or her own;
4. Fails to keep confidential information;
5. Talks badly about other Board Members; and
6. Fails to thoughtfully consider the advice of experts (i.e. the association's manager, attorney or other professionals).

Overbearing Board Members can cause a number of practical problems for the Board and the Community Association. Overbearing Board Members can interrupt the flow of Board Meetings and make meetings more difficult to conduct. Additionally, Overbearing Board Members can discourage other Members of the Association's Board from fully participating in Board Meetings.

III. Association Liability Concerning the Overbearing Board Member.

While there are a number of practical reasons why Overbearing Board Members are not good for community associations, there are more important legal reasons why Overbearing Board Members should be addressed.

Overbearing Board Members may be difficult to deal with, but they also create a wide range of legal issues for a community association. In order to fully discuss the different types of potential liability, it is important to revisit the actual behaviors.

Uncivil behavior at meetings of the Board of Directors

When an Overbearing Board Member conducts himself or herself uncivilly at Board meetings, said behavior could disrupt the Board meeting and may lead to important issues not being fully discussed. In addition, other Board members may feel deeply offended or intimidated by the Overbearing Board Member's conduct.

The above could lead to legal liability in the form of a harassment lawsuit against the Overbearing Board Members and a lawsuit against the Community Association for failing to address the Overbearing Board Member's conduct.

Enforcement of the restrictive covenants without Board Approval

When an Overbearing Board Members seeks to enforce the restrictive covenants on their own, this activity could lead to breach of the Community Association's policies on enforcement. When an Overbearing Board Member takes enforcement action outside of the Association's normal enforcement policies and procedures, this could subject the association to legal liability based on unequal enforcement and breach of the Association's own policies and procedures.

Failure to keep confidential information

Every Community Association Board discusses information that, for a number of reasons, should be kept confidential. It is important for Board members to keep confidential information confidential. An Overbearing Board Member's failure to keep confidential information confidential could lead to legal liability based on harassment, libel, slander and misrepresentation. Divulging confidential information could also lead to a breach of the attorney client privilege and negatively affect legal action involving the Community Association.

Speaking badly about other Board Members

Speaking badly about a fellow Board member can lead to ill feelings and resentment that can affect the efficient operation of the Board. Moreover, such behavior could lead to libel and slander liability if the statements made by the Overbearing Board Member are false or misleading.

Failure to thoughtfully consider the advice of experts (i.e. the Association's manager, attorney or other professionals)

Under Arizona Law, a Board member will be held to not breach their fiduciary duty if they thoughtfully consider the advice of experts. Overbearing Board Members tend to believe that they are the expert in everything and hiring an expert is not needed. This type of behavior could lead to a host of liabilities depending on the area of expertise not sought.

IV. How to Prevent the Overbearing Board Member

Now that we have identified the Overbearing Board Member, we may now identify ways to prevent a good Board Member from becoming an Overbearing Board Member.

Board Member Code of Conduct

Board of Director Codes of Conduct are becoming more prevalent. Codes of Conduct, at their core, establish a pattern of acceptable behavior among Board Members. Codes of Conduct can also provide examples of unacceptable behavior that may be used to later show the Overbearing Board Member the errors of his/her ways.

In most jurisdictions, a Code of Conduct may not be used to remove an Overbearing Board Member should the Codes of Conduct be violated. Again, the value of a Code of Conduct is providing Board Members with the accepted norms of behavior. Enclosed as **Exhibit A** please find an example of a Code of Conduct.

Board of Directors Retreat

A good way to prevent the problem of the Overbearing Board Members is to educate all Board Members on several issues, such as: Board Member Fiduciary Duty, Board Meeting Procedures, the responsibilities of Board Members and proper Board Member etiquette.

This may be accomplished by conducting an annual Board Retreat. A Board Retreat may be a gathering where no association business is conducted, however, the Board is trained on the issues listed above. Education can go a long way in preventing an Overbearing Board Member.

Other Techniques

Other techniques for preventing the Overbearing Board Member include requiring full Board approval regarding requests of the potential Overbearing Board Member. Requiring full Board approval may limit the activity of the Overbearing Board Member.

Also, when the potential Overbearing Board Member calls or sends an e-mail, forward the correspondence to the entire Board so that the entire Board can see the correspondence and comment. This may limit inappropriate communication by a potential Overbearing Board Member.

V. How to Handle the Overbearing Board Member.

Addressing the behavior of an Overbearing Board Member is a delicate matter. This is because, as stated above, the Overbearing Board Member may not feel that their actions are harmful to the Association. Moreover, the Overbearing Board Member may feel that they have no other choice but to engage in this type of behavior.

Prior to addressing an Overbearing Board Member, it is important that the manager and other Board Members agree that the behavior of the Overbearing Board Member is problematic. Also, the Association may want to obtain legal advice regarding whether the activities of the Overbearing Board Member present an imminent danger to the Association.

When addressing an Overbearing Board Member, there are two main processes. There is the informal process and the formal process.

Informal Process

The first step of the Informal Process to address an Overbearing Board would be to, in an executive session meeting of the Board of Directors, present the Overbearing Board Member with a written list of the behaviors the Overbearing Board Member is engaging in. This should be followed up with a discussion on how the behavior could harm the association and ways to positively address the behavior.

If the Overbearing Board Members continues his/her behavior, then the next step would be to send the Overbearing Board Member an official letter of censure. The Censure Letter should list out the areas of concern and should also list the ramifications if the Overbearing Board Member continues their behavior.

Formal Process

If the Overbearing Board Member continues his/her activities after a formal Censure Letter has been issued, then the Association may now move to a more formal process of confrontation, beginning with discussing the Overbearing Board Member's actions in an open meeting of the Board of Directors.

If the Overbearing Board Member continues their activities, then the Association will have no choice but to engage in the following:

- a. Call a special meeting of the association to discuss the removal of the Overbearing Board Member from the Board of Directors; or
- b. File a breach of fiduciary duty lawsuit.

The calling of a special meeting of the association to discuss the removal of the Overbearing Board Member from the Board of Directors

Most community association bylaws allow either the President of the Association or a majority of the Board of Directors to call a special meeting of the members. This special meeting of the members could be held to discuss the removal of a member from the Association's Board of Directors.

Calling a removal meeting should be only done in extreme circumstances. It is always advisable that prior to calling the removal meeting, the Association seek the advice of its attorney.

At the special meeting of the members, the Board should lay out the behaviors of the Overbearing Board Member and how said behavior has an adverse effect on the Association. The Board should also allow the Overbearing Board Member to speak and provide their side of the story.

Filing a breach of fiduciary duty lawsuit

This is absolutely the last option an Association may take regarding an Overbearing Board Member and the most drastic. Before considering this option, the Association should consult with its attorney to determine whether this option may be effectuated.

The basis of a breach of fiduciary duty lawsuit is that the behavior of the Overbearing Board Member is having an adverse effect on the Association and must be enjoined by the court. Again, this type of lawsuit is a last resort and is the most difficult remedy to pursue.

VI. Conclusion.

Addressing the issue of an Overbearing Board Member is not easy. Community Associations, however, must be able to identify the warning signs and address the issue quickly before the behavior leads to legal liability.

Exhibit A

SAMPLE CODE OF CONDUCT

_____ OWNERS ASSOCIATION, INC.

**BOARD OF DIRECTORS
CODE OF CONDUCT**

The Board of Directors of the _____ Association hereby adopts the following rules of conduct, standards of behavior, ethical rules, and enforcement procedures that are applicable to the fiduciary duties required of all members of the Board of Directors:

1. **Members of the Board of Directors shall act in the best interests of the Association as a whole.** Board Members serve for the benefit of the entire community, and shall, at all times strive to do what is best for the Association as a whole. Board Members shall not use their positions as such for private gain, for example:

- No Board Member shall solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value from a person who is seeking financial relationship with the Association.
- No Board Member shall seek preferential treatment by the board, officers, any of its committees, or any contractors or suppliers.
- No Board Member shall accept a gift or favor made with the intent of influencing a decision or action on any official matter.
- No Board Member shall receive any compensation from the Association for serving on the Board or Committee.
- No Board Member shall willfully misrepresent facts to advance a personal cause.
- No Board Member shall use his/her position to enhance his/her financial status through the use of certain contractors or suppliers.

The above list of examples is offered for illustration purposes only and is not intended to be exclusive.

2. **Board Members shall comply with governing documents and relevant laws.** Board Members shall use their best efforts at all times to make reasonable decisions that are consistent with the Declaration, Bylaws and other governing documents of the Association and to be familiar with all such documents. Board Members shall likewise comply with and make decisions that are consistent with all applicable laws, include, but not limited to refraining from discriminating against any person on the basis of race, color, religion, national origin, gender, family status or mental or physical disability.
3. **Board Members are strictly prohibited** from harassment or intimidation of any member of the Association. This includes harassment or intimidation directed by or

toward fellow Board Members. The Association shall deem any Board member who harasses, threatens or otherwise attempts to intimidate other Association members or residents to be acting outside the scope of his/her authority as a Board member.

4. **Board Members shall maintain confidentiality.** Board Members shall at all times maintain the confidentiality of all legal, contractual, personnel and management matters involving the Association.
5. **Board Members shall refrain from defaming anyone within the Association.** Board Members shall not engage in defamation, by any means, of other Board Members and Association members. The Association shall deem any Board Member who engages in defamation to be acting outside the scope of his/her authority as a Board Member.
6. **Board Members shall behave professionally at meetings.** Board Members shall conduct themselves at all meetings, including board meetings and annual meetings in a professional businesslike manner. Personal attacks against other Board members, Officers, Committee members, Association members, management staff or guests are not consistent with the best interest of the community and will not be tolerated. Though differences of opinion are inevitable, they must be expressed in a professional and businesslike manner.
7. **Board Members shall refrain from interfering with management staff and contractors.** No Board Member shall interfere with the duties of Committee members, management staff or any contractor executing a contract in progress. All communications with contractors must go through one designated Board member, Officer or Committee member.

By signing below, I agree to be bound by this Code of Conduct until the expiration of my term on the Board of Directors.

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COUNSELORS TO COMMUNITY ASSOCIATIONS

“DOING BETTER WHAT IS ALREADY BEING DONE.”

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