

# What's the Worst that Can Happen?: Dysfunctional Board Members Part 2: A Post-Pandemic Update & Best Practices

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# INTRODUCTION

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- Definition of Dysfunction: “deviation from the norms of social behavior in a way regarded as bad”
- We live our lives adhering to social norms, and law provides detailed rules describing duties and functions of condo boards
- In the face of this, what causes dysfunction in condo boards, and what can be done to prevent problems before they occur
- Presentation Overview

# Origins of Board Power

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- Illinois Condominium Property Act (the “Act”) provides in Sec. 18.4 that the Board shall exercise for the Association all powers, duties and authority vested in the Association by law or the condominium instruments except for such powers, duties and authority reserved by law to the Members of the Association
- The Act further provides that an Association shall have no authority to forbear the payment of assessments by any Unit Owner
- Comparisons to Illinois Not For Profit Act which provides the Corporation is to exercise all powers necessary or convenient to effect any or all of the purposes for which the Corporation is formed
- Comparisons to Other Kinds of Boards—Municipalities and transparency
- Who would want to serve as a Board Member and why?
- Agenda driven Boards v. Board Members with mandates
- Backgrounds and time commitments? Financial Investment?

# Understanding the Limits of Board Fiduciary Responsibilities and Duties

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- Self-Dealing
- Due Diligence
- One class of Board members
- Duty of reasonable investigation into facts
- Record keeping
- Politics as a function of fiduciary duty
- Understanding the “hidden agenda”
- Checks and balances between management and the Board
- The role of the attorney advisor

# Case Studies of Dysfunction

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- Rogue Board member case study
- Dysfunction as a strategy for inaction
- Permanent politics on the agenda
- Those who always blame the third party
- “Problem staters” rather than “problem solvers”
- Prioritizing hidden agendas rather than Association--needs as number one
- Providing favors for others and being aware of favoritism
- Obstructionist Tactics
- Apathetic or uninformed Owners
- Proxies as a tool of abuse

# Case Studies in Dysfunction: Litigation and Politics Played Out in Courtroom

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- Examples of Issues brought to litigation:
  - Failure to disclose information
  - Breaches of Fiduciary Duty
  - Election irregularities
  - Self dealing
  - No audit as to income and expenses (Section 18 of the Act)
- Insurance availability and exclusions
- Psychology of litigation and issues with leaving resolution to a judge
- Not about who “wins” but about who is in “control”

# Role of Service Providers as it Relates to Dysfunctional Boards

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- Management Companies
- Attorneys
- Accountants
- Insurers
- Banks
- Reserve studies, construction specifications and the role of consulting engineers
- Contracting with Dysfunctional Boards—who is the point of contact?

# Non-Board Member Unit Owners—Ensuring Proper and Productive Communication

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- Provisions to be included in Declaration, Bylaws, Rules/Regulations
- Policies and Protocols—how to set up checks and balances in daily practice
- Palm issues
- Breach of Fiduciary Duty can be brought by a Unit Owner against a former or current director who violates a bylaw, the Illinois Condominium Property Act, or other statutes and thereby causes harm to the condominium association. *Davis v. Dyson*, 387 Ill.App.3d 676, 900 N.E.2d 698, 712 – 714, 326 Ill.Dec. 801 (1st Dist. 2008). For example, the board's failure to purchase adequate insurance, including coverage for fraud, may be grounds for a claim for breach of fiduciary duty. 900 N.E.2d at 713 – 714.



# Checklist of Measures to be Taken to Maintain a Healthy Board

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- Advance setting of objectives, and proper forum for certain measures to be vetted, considered, and approved, always at Board level;
- Board member orientation re: policies, procedures, and protocols;
- Clear rules and protocols re: calling and holding of meetings, drafting of agendas, and orderly presentation of issues;
- Policies regarding elections—when called, by whom, policies regarding proxies and transparency of results.

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- Establish clear lines of communication and ensure that checks exist to prevent single Board Members from making certain decisions without full Board review;
- Clear process in place to review, supervise, and hire professional service providers;
- Financial oversight, with distribution of financial information made to everyone;
- Regular protocols to communicate with Unit Owners (*i.e.*, newsletters, e-mail updates);
- Measures to ensure uniform enforcement of rules and policies;

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- Regular establishment and supervision of committee's that gets Unit Owners involved in governance—very underutilized these days;
- Protocol to resolve violations of bylaws and rules without resort to litigation—have the most reasonable board member handle;
- Regular documentation of rules violations and file of how violations were handled—awareness of precedent.
- Review storage and maintenance of documents and preparedness to respond to Unit Owner Requests for Information;
- ~~Sufficient time to review annual budget availability for~~  
revisions by Board;

# Presenter's Contact Information

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