



# Fiduciary Responsibilities of a Board Member

**MAY 18, 2023**

Eric M. Wohl  
Howard Schechter  
Peter R. Massa

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# The Framework

## 1. What is a fiduciary?

A. Other people's money/property

B. Examples of fiduciaries

(1) Trustee, Executor

(2) Authorized Agent

(3) Investment Advisor

(4) In each instance there is a **principal**, for whom the fiduciary is acting, and an **agent**, the fiduciary who is acting for the principal. Directors in a co-op and Managers in a condo and officers in both are fiduciaries.

(5) Duty is owed to the cooperative corporation or condominium association.

# The Framework

## 2. Duties of a Fiduciary

A. Good Faith – what the agent believes to be in the best interests of the principal

B. Loyalty – acting only in the interest of the principal and not for any other interest, including the agent’s own interest

(1) Avoid conflicts of interest/divided loyalties

C. Skill

(1) Know the extent of your authority and make decisions within that authority based on facts and knowledge

D. Care – exercise that degree of care that a reasonable fiduciary would exercise in similar circumstances

(1) This is a higher level of care than other typical relationships such as buyer/seller, shareholder/shareholder

# The Framework

## 3. New York Business Corporation Law (BCL)

### A. Applicability in co-ops and condos

- (1) We'll use the term "co-op" to refer to both co-ops and condos and the term "director" to mean directors, managers (in a condo) and officers.

### B. Role of Directors

- (1) BCL 701

- (a) "The business of a corporation shall be managed under the direction of its board of directors."

# The Framework

## (2) BCL 717 – Duty of Directors

- (a) “A director shall perform his duties as a director . . . in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”

# The Framework

- (3) BCL 720 – Action Against Directors and Officers for Misconduct
  - (a) “An action may be brought against one or more directors or officers of a corporation to procure a judgment . . . to compel [the director] to account for his official conduct in the following cases:
    - (i) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
    - (ii) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violations of his duties.”

# The Framework

- (4) BCL 722 – Authorization for Indemnification of Directors and Officers
  - (a) “A corporation may indemnify any person made, or threatened to be made, a party to an action or proceeding . . . by reason of the fact that he . . . was a director or officer of the corporation . . . if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in . . .the best interests of the corporation and, in criminal actions or proceedings, in addition, had no reasonable cause to believe that his conduct was unlawful.”
  - (b) Indemnity is the reciprocal of duty; it requires good faith and action in the best interests of the corporation.



# The Framework

- (5) BCL 717 – Duty of Directors
  - (a) “In performing his duties, 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:
    - (i) one or more officers or employees of the corporation . . . whom the director believes to be reliable and competent in the matters presented,
    - (ii) counsel, public accountants or other persons as to matters which the director believes to be within such person’s professional or expert competence, or
    - (iii) a committee of the board upon which he does not serve . . . as to matters within its designated authority, which committee the director believes to merit confidence,
      - I. so long as in so relying he shall be acting in good faith and with such degree of care, but he shall not be considered to be acting in good faith if he has knowledge concerning ten matter in question that would cause such reliance to be unwarranted.”

# The Framework

- (b) “A person who so performs his duties shall have no liability by reason of being or having been a director.”
- (6) BCL 402 – Certificate of Incorporation; Contents
  - (a) “The certificate of incorporation may set forth a provision eliminating or limiting the personal liability of directors to the corporation or its shareholders for damages for any breach of duty in such capacity, provided that no such provision shall eliminate or limit the liability of any director if a judgment or other final adjudication adverse to him establishes that his acts or omissions were
    - (i) in bad faith or involved intentional misconduct or a knowing violation of law or
    - (ii) that he personally gained in fact a financial profit or other advantage to which he was not legally entitled.”

# Examples

## Conflict of Interest

- **When a Board member takes an opportunity to gain personally or financially, directly or indirectly, as a result of a Board transaction.**
- **Examples:**
  - Building engages a Board member's company to perform alterations for the Building.
  - Building engages a Board member's accounting firm to prepare audited financials.
  - Board is asked to approve an apartment sale where the real estate broker for the sale is a Board member voting for sale.

# Examples

## Diverting Corporate Opportunity

- **When a Board member intentionally subverts a corporate obligation or opportunity for personal gain.**
  - Board member bidding against Board in auction for foreclosed condominium unit
  - Board member voting against sale in a co-op in order to lowball motivated seller once purchaser is rejected

# Examples

## Disclosing Confidential Information

- **When a Board member discloses information obtained during a board meeting or conversations between board members which is intended to be confidential**
  - Board member running for election discloses emails between board members in order to persuade residents to vote for certain people
- **Board member shares existing contract terms with potential vendors**

# Examples

- **Actions as Shareholders/Unit Owners vs. Actions as Board Members**
  - Apparent authority/reliance
- **Acting Outside Corporate Authority**
  - Board members bound to board decisions
- **Interfering with Management/Contractors**
  - Boards should make decisions and then rely on their professionals
- **Websites/Message Boards**
  - How to handle
- **Application**
  - Confidential information
  - Standards for decisions

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- Code Word: **BOARD**



**Eric M. Wohl**

212.209.4363

[ewohl@atllp.com](mailto:ewohl@atllp.com)



**Howard Schechter**

212.209.4400

[hschechter@atllp.com](mailto:hschechter@atllp.com)



**Peter R. Massa**

212.209.4455

[pmassa@atllp.com](mailto:pmassa@atllp.com)