

Fiduciary Duty

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Agenda



- Definition
- Prohibited Acts
- Considerations according to NAC 116.405
- Complaints

Fiduciary Duty Defined

- Black's Law Dictionary: "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person."
- A Fiduciary is an individual in whom another (unit owners) has placed the utmost trust and confidence to manage and protect property or money (the association)
- A Fiduciary Duty is an obligation to act in the best interest of another party, such as the common-interest community (CIC).



Fiduciary Duty Defined continued

NRS 116.3103

- In performance of their duties, officers and board members are fiduciaries.
- Except as otherwise provided in the laws, declaration, or bylaws, members act on behalf of the association and shall act;
 - On an informed basis,
 - In good faith, and
 - In the honest belief that their actions are in the best interests of the association.



"Ultimately my decisions are based on logic."

Fiduciary Duty Defined continued

NRS 116.3103





- Board members are required to exercise ordinary and reasonable care of officers and directors of a nonprofit, subject to the business-judgement rule.
 - This is a legal term describing how board members are immune from liability if a decision made in good faith has bad results.
- Board members are subject to conflict-of-interest rules governing officers and directors of a nonprofit organized under NV law.



Prohibited Acts

NRS 116.3103(2)

➤ The executive board may not:

-  Amend the declaration (CC&R's).
 - CC&R's are amended by majority vote or agreement of unit's owners [NRS 116.3104].
-  Terminate the CIC.
 - CIC be terminated by 80% or greater vote of unit's owners or other unique situations [NRS 116.2118].
-  Determine the qualifications, powers, duties or terms of office of members.
 - These are outlined in the bylaws and may only be amended by unit owners [NRS 116.3102].
-  Elect board members except to fill vacancies which occur between elections, in accordance with the governing documents.

Knowledge Check



1. What is a fiduciary duty?
2. True/False: In performance of their duties, officers and board members are fiduciaries.
3. True/False: Board members are not obligated to act on an informed basis.
4. Board members are required to exercise ordinary and reasonable care of officers and directors, subject to the _____ rule.
 - A) good faith
 - B) honesty
 - C) business-judgement
 - D) fiduciary duty

Considerations

In determining whether a board member has performed their duties, the Commission will consider each of the actions listed in NAC 116.405.

The rest of this presentation addresses and clarifies each of those actions.



Kept informed of, and caused the association to comply with, all applicable federal/state/local laws, regulations and developments relating to CIC's and the association's governing documents.

- **Nevada Revised Statutes (NRS):** Laws passed by the NV legislature
- **Nevada Administrative Code (NAC):** Codified administrative regulations of the Executive Branch of the State of Nevada.

Most Common Referenced

- 116: Common – Interest Ownership
- 116A: CIC CAM and Other Personnel
- 116B: Condominium Hotel Act
- 38: Mediation & Arbitration
- 82: Nonprofit Organizations

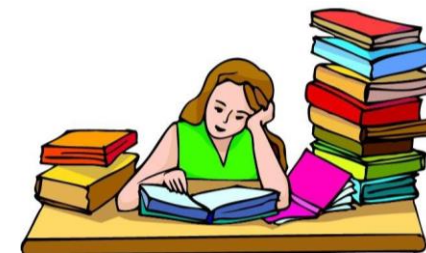
Other Possibly Applicable

- 84: Corporations Sole
- 86: Limited-Liability Companies
- 87: Partnerships
- 88A: Business Trusts
- 89: Professional Entities and Associations



Kept informed of, and caused the association to comply with, all applicable federal/state/local laws, regulations and developments relating to CIC's and the associations governing documents. [continued]

- Each board member MUST, to the best of their ability, read and understand: NRS 116.31034(19)
 - NRS 116 & NAC 116.
 - All association governing documents.
 - CC&Rs,
 - Articles,
 - Bylaws,
 - Rules & Regulations,
 - All other association documents [including contracts]
- Certified via Form 602.
<http://red.nv.gov/uploadedFiles/rednvgov/Content/Forms/602.pdf>



Acted outside the scope of the authority granted in the governing documents.

Declaration:

- AKA Covenants, Conditions & Restrictions (CC&R's) contains [not all inclusive]: NRS 116.31034
 - A description of the real estate included in the CIC;
 - Identifies each unit boundaries;
 - Identifies all Common Elements;
 - Describes allocation of voting rights & assessment liabilities;
 - Any restrictions on use & occupancy; and
 - Any other matters the declarant considers appropriate.
- May be amended only by majority vote or agreement of unit's owners.
 - Unless the declaration specifies a different percentage.



Acted outside the scope of the authority granted in the governing documents.
[continued]

Articles:

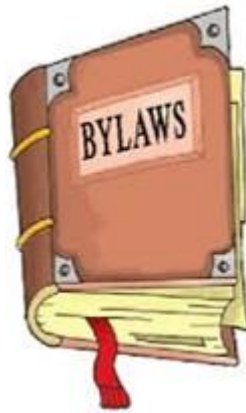
- These are the documents filed with the NV SOS forming the association as a business.
- The association **MUST:** NRS 116.3101(4)
 - Be organized as a profit or nonprofit corporation, association, limited-liability company, trust, partnership or any other form of organization authorized by Nevada law;
 - Include in its articles of incorporation that the purpose of the corporation is to operate as an association pursuant to NRS 116; and
 - Comply with the applicable corporate law (such as NRS 82) when filing with the Secretary of State's office.



Acted outside the scope of the authority granted in the governing documents.
[continued]

Bylaws:

- The bylaws of the association **MUST**: [not all inclusive] NRS 116.3106
 - Provide the number of members of the executive board and the titles of the officers;
 - Provide for election by the board of a president, treasurer, secretary and any other officers;
 - Specify the qualifications, powers and duties, terms of office and manner of electing and removing officers and filling vacancies;
 - Specify the powers that the board/officers may delegate to other persons or to a community manager;
 - Provide procedural rules for conducting meetings (Robert's Rules);
 - Specify a method for the units' owners to amend the bylaws; and
 - Provide procedural rules for conducting elections.



Acted outside the scope of the authority granted in the governing documents.
[continued]

Bylaws:

NRS 116.3106

- **May** provide for **any other** necessary or appropriate matters.
- Subject to provisions of the declaration and the bylaws, the association may amend bylaws.
 - Except the board may not amend the qualifications, powers, duties, or terms of office of the board.

NRS 116.3103(2)(d)



Acted outside the scope of the authority granted in the governing documents.
[continued]

Rules & Regulations:

- Subject to provisions of the declaration, rules and regulations may be created by the board [to clarify provisions of the governing documents that already exist.] NRS 116.31065
- The rules adopted by an association:
 - **MUST** be reasonably related to the purpose for which they are adopted;
 - **MUST** be sufficiently explicit in their prohibition, direction or limitation to inform a person of any action or omission required for compliance;
 - **MUST NOT** be adopted to evade any obligation of the association;



Acted outside the scope of the authority granted in the governing documents.
[continued]

Rules & Regulations:

- The rules adopted by an association: NRS 116.31065
 - **MUST** be **consistent** with the **governing documents** and **MUST NOT arbitrarily** restrict conduct or require the construction of any capital improvement by a unit's owner that is not required by the governing documents of the association.
 - **MUST** be uniformly enforced under the same or similar circumstances against all units' owners. **Any rule that is not uniformly enforced may not be enforced against any unit's owner.**
 - **MAY** be enforced by the association through the imposition of a fine, if the association complies with NRS 116.31031 (fining process).



Acted for reasons of self-interest, gain, prejudice or revenge.

Conflicts of interest:

- In a candidate's candidacy statement, the candidate made a good faith effort to honestly disclose: NRS 116.31034(9)
 - Any financial, business, professional or personal relationship(s) that could result in a potential conflict of interests; meaning that they stand to gain any profit or compensation of any kind from the association.
 - If a candidate stands to gain monetarily or materially from the association's business, they **cannot** be on the board.



Acted for reasons of self-interest, gain, prejudice or revenge. [continued]

Gain:

- Board members who stand to gain personal profit or compensation from a matter before the board **CANNOT** vote on that matter and **MAY NOT** serve on the board.
 - If the member does not resign, they can be removed, at a board meeting, by the majority of the board. NRS 116.31034(10)(a)(2) & (13)(b)

- A board member who has a family member or friend who stands to gain from a matter before the board shall **DISCLOSE** the matter to the board **BEFORE** voting on that matter. NRS 116.31084

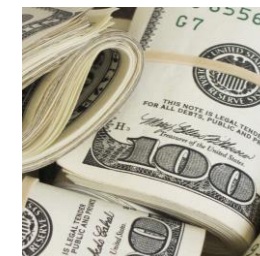


Acted for reasons of self-interest, gain, prejudice or revenge. [continued]

Gain:

NRS 116.31185

- A board member or officer shall not solicit or accept any form of compensation that:
 - Would improperly, or appear to improperly influence their decisions; or
 - Would result or appear to result in a conflict of interest.
- A board member or officer shall not accept, directly or indirectly, any gifts, incentives, gratuities, rewards or other items exceeding a value of \$100/yr from:
 - An attorney,
 - A law firm or vendor, or
 - Any person working directly or indirectly for any of the above



Acted for reasons of self-interest, gain, prejudice or revenge. [continued]

Revenge:

NRS 116.31183

- A board shall not take, or direct or encourage another person to take, any retaliatory action against a unit owner because they have:
 - Complained in good faith about an alleged violation of NRS or the governing documents;
 - Recommended the selection or replacement of an attorney, CAM or vendor; or
 - Requested in good faith to review the books, records or other papers of the association.
- In addition to any other remedy provided by law, upon a violation of this section, a unit's owner may bring a separate action to recover:
 - Compensatory damages; and
 - Attorney's fees and costs.



Knowledge Check



1. Are board members expected to keep informed of NRS and NAC?
2. May a board member act for self-interest?
3. True/False: Board members are not allowed to accept any gift, of any value, for any reason.
4. May a unit owner sue a board member for compensation and attorney's fees if that board member has acted for purposes of personal revenge?

Caused the association to establish policies and procedures for the disclosure of potential conflicts of interest and the appropriate manner which to resolve such conflicts.

- If a person is not eligible to be a candidate for or member of the board, the association: NRS 116.31034(12)
 - Must not place their name on the ballot; and
 - Must prohibit them from serving on the board

- Any other procedures must be placed in the governing documents.



Except when required by law or court order, disclosed confidential information relating to a unit owner/board member/officer/agent/employee without consent of the person to whom the information relates.

NRS 116.31175(4)&(5) & AO 10-03

- The provisions granting unit owners access to records do not apply to
 - The personnel records of association employees, except for those relating to number of hours worked, salaries and benefits; and
 - The records of the association relating to another unit's owner including, but not limited to, ARC plans or specifications submitted to the association during approval process.
- The association must maintain a general record of violations which does not contain the name or address of the person who was sanctioned for a violation.
- Consult with an attorney, in executive session, if the contents of the discussion would be governed by privilege.

NRS 116.31085(3)(a)



Cooperated with, or caused the association to cooperate with, the Division in resolving complaints filed with the Division.

NRS 116.750

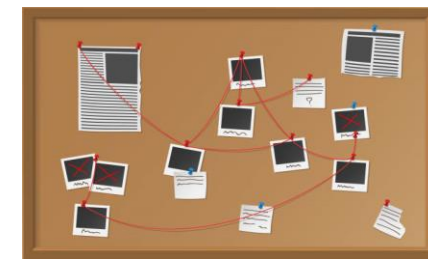
- The Division and the Ombudsman have jurisdiction to investigate accusations of violations of NRS/NAC.
- The Commission and each hearing panel has jurisdiction to take appropriate action against any person who commits a violation, including:
 - Any association and any officer, employee or agent of an association;
 - Any member of the executive board;
 - Any community manager;
 - Any declarant or affiliate of a declarant; and/or
 - Any person who conducts a study of reserves.



Cooperated with, or caused the association to cooperate with, the Division in resolving complaints filed with the Division. [continued]

NRS 116.750

- The Commission and each hearing panel has jurisdiction to take appropriate action against any person who commits a violation, including:
 - Any declarant or affiliate of a declarant.
 - Any unit's owner.
 - Any tenant of a unit's owner if
 - The tenant has entered into an agreement with the unit's owner to abide by the governing documents of the association and
 - The provisions of this chapter and any regulations adopted pursuant thereto.



Cooperated with, or caused the association to cooperate with, the Division in resolving complaints filed with the Division. [continued]

NRS 116.785

- If the Commission finds that a respondent has committed a violation, the Commission may take any or all of the following actions:
 - Issue a cease-and-desist order;
 - Issue orders directing specific actions be taken to correct/amend the violation;
 - Impose a fine not to exceed \$1,000 for each violation.
- If the Commission finds that a board member knowingly/willfully committed a violation, the Commission may:
 - Order that member removed from their position/office; and
 - Require them to pay all fines and costs imposed.



Impeded or otherwise interfered with an investigation of the Division by:

- Failing to comply with the Divisions request for information or records;
- Supplied false or misleading information to an investigator, auditor or any officer/agent of the Division; or
- Concealed any facts or documents relating to the business of the association.



Caused the association to uniformly enforce the governing documents of the association.

NRS 116.31065(5)

- The rules adopted by an association **MUST** be uniformly enforced under the same or similar circumstances.
 - Any rule that is not uniformly enforced **MAY NOT** be enforced against any unit's owner.

- A decision not to pursue enforcement under one set of circumstances does not prevent the taking of enforcement action under another set of circumstances.
 - The executive board may **NOT** be arbitrary or capricious in taking enforcement action.

NRS 116.3102(4)



Caused the association to adopt and fairly enforce the collection policies of the association.

NRS 116.31031(7)

➤ Continuing Violations:

- If a fine is imposed and the violation is not cured within 14 days, or longer period prescribed by the board, the violation shall be deemed a continuing violation.
 - This period begins the date the notice of the decision is provided to the sanctioned person.
- Thereafter, the board may impose an additional fine, equal to the original, for each 7-day period or portion thereof that the violation is not cured.
 - Additional fines do not apply to the \$1000 per hearing cap.
- Any additional fine may be imposed without providing the opportunity to cure the violation and without the notice and an opportunity to be heard.



Caused the association to adopt and fairly enforce the collection policies of the association.[continued]

NRS 116.31031(11)

- Any past due fine must not bear interest, but may include costs incurred during civil actions to enforce payment.
- Any assessment for common expenses that is 60 days or more past due bears interest at a rate equal to the prime rate at the largest bank in NV as ascertained by the Commissioner of Financial Institutions on Jan or Jul 1st. NRS 116.3115(3)
 - If an association had additional fees, they must be codified in the governing documents.



Knowledge Check

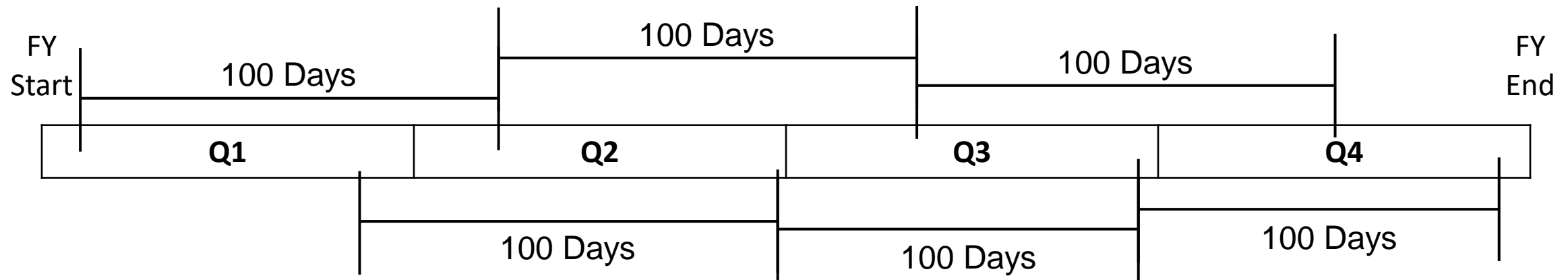


1. Do board members have an obligation to disclose conflicts of interest?
2. What is the maximum fine the Commission may impose on a respondent if they determine a violation has occurred?
3. Can the Commission impose additional monetary penalties beyond the \$1,000 fine?
4. The rules adopted by an association must be _____ enforced under the same or similar circumstances.

Caused the association to hold meetings of the executive board with such frequency as to properly and efficiently address the affairs of the association.

NRS 116.31083(2)

- Board meetings must be held at least once every quarter, not less than 100 days
 - Two of which, must be at a time other than normal business hours (9am-5pm).



Caused the association to obtain, when practicable, at least 3 bids from reputable service providers who possess the proper licensing before purchasing any such service for use by the association.

NRS 116.31086 & NAC 116.405

- If an association solicits bids for a project, the association **MUST**, whenever reasonably possible, solicit at least 3 bids:
 - If the project is expected to cost:
 - For associations with less than 1000 units: 3% or more of the annual budget
 - For associations with 1000 units or more: 1% of the annual budget
- “Association Project” includes:
 - The maintenance, repair, replacement or restoration of common elements, or
 - Professional services (accounting, engineering, legal, etc.)
- Bids **MUST** be obtained sealed and then opened and read aloud at an open meeting.



Caused the association to obtain, when practicable, at least 3 bids from reputable service providers who possess the proper licensing before purchasing any such service for use by the association. [continued]

AO 11-02

- It is not possible to define or interpret what “when practicable” means beyond the plain meaning of the language as defined by Black’s Law.
- Black’s Law defines practicable as: “that which may be done, practiced or accomplished; that which is performable, feasible, possible.”
- The specific facts surrounding a board’s failure to obtain at least 3 bids from 3 reputable service providers will be determined based upon the circumstances around the decision at the time the decision was made.



Caused the association to consult with appropriate professionals as necessary before making any major decision affecting the association or the common elements, including, without limitation, consulting with a reserve study specialist.

- RSS must be registered pursuant to NRS & NAC 116A.
 - Did you use the reserve study to build the funding plan?
- This is rooted in the other stipulations:
 - Solicitation of bids;
 - Business judgement rule;
 - Keeping informed of laws, regulations etc.



Caused the association to maintain current, accurate and properly documented financial records.

- These are the financial or transaction records necessary to support the financial statements of an association, including:

NAC 116.0433

- Receipts,
- Bank statements,
- Income tax reports,
- Contracts,
- Inventories of properties,



- Financial obligations,
- Depreciation in property or equipment,
- Contingent liabilities, and
- Any other records deemed necessary by the Division or by the accountants or auditors of an association.

- The association shall keep financial records sufficiently detailed to enable the association to comply with NRS 116.4109.

NRS 116.3118

Caused the association to establish policies and procedures that are designed to provide reasonable assurances in the reliability of financial reporting, including, proper maintenance of accounting records, documentation of the authorization for receipts and disbursements, verification of the integrity of the data used in making business decisions, facilitation of fraud detection and prevention, and compliance with the applicable laws and regulations governing financial records.

- NRS/NAC establishes minimum procedures (not all inclusive):
 - Money must be withdrawn using a 2-signature system: NRS 116.31153
 - Financial statements must be prepared by or under the supervision of a person with accounting knowledge and experience: NAC 116.451
 - Financial statements must be reviewed/audited by an independent CPA: NRS 116.31144
 - Reporting principles and practices of financial accounting as outlined in the *Guide*: NAC 116.410



Caused the association to make the financial records of the association available for inspection by the Division in accordance with the applicable laws and regulations of NV.

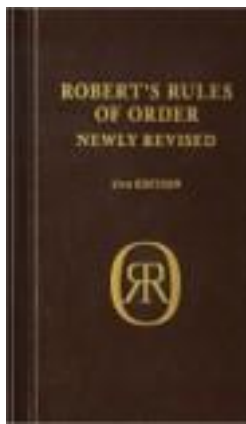
- If the executive board refuses to allow a unit owner to review the books, records or other papers of the association, the Ombudsman may review them and if the Ombudsman is denied access, request a subpoena from the Commission: NRS 116.31175(6)
- In carrying out the duties assigned by NRS 116, the Division and the Ombudsman have jurisdiction to investigate any person accused of a violation: NRS 116.751
- The Ombudsman shall investigate disputes involving the provisions of NRS: NRS 116.623(4)
- Upon receipt of a report from the Ombudsman, the Division shall conduct an investigation to determine whether good cause exists to proceed with a hearing: NRS 116.765



Committed an act or omission which amounts to incompetence, negligence or gross negligence.

➤ Black's Law Dictionary:

- **Incompetence:** a person is incapable, inefficient and without the qualities needed to discharge their obligations and duties.
- **Negligence:** Failure by action, behavior, or response, willful or not, to maintain the expected care required from a reasonable, prudent person under the circumstances.
- **Gross Negligence:** A severe degree of negligence taken as reckless disregard.
 - There is no specific legal definition.
 - Examples: Blatant indifference to one's legal duty, other's safety, or their rights.



Complaints: Forms

<http://red.nv.gov/Content/Forms/All/>

<u>Form</u>	<u>Purpose</u>
Form 530: Intervention Affidavit (IA)	Used to file a complaint against an association concerning a violation of NRS/NAC 116/116A.
Form 514a: Statement of Fact (SOF)	Used to file a complaint against a community manager concerning a violation of their standards of practice (NRS 116A.630).
Form 514b: Statement of Fact (SOF)	Used to file a complaint against a reserve study specialist concerning a violation of their standards of practice (NAC 116A.425).
Form 520: Alternative Dispute Resolution (ADR)	Used to resolve disputes involving the interpretation, application or enforcement of an association's governing documents or the procedures used for changing assessment amounts.
Form 910: Resale Package Overcharge	Used to file a complaint when a buyer has been charged fees in excess of NRS 116.4109.

Knowledge Check



1. Which advisory opinion addresses expectations for associations to obtain bids?
2. True/False: Associations are required to maintain purchase receipts and bank statements.
3. How many signatures are required for expenditures from association accounts?

Conclusion!



- Definition
- Prohibited Acts
- Considerations according to NAC 116.405
- Complaints

Questions?

- <http://red.nv.gov/> - Main Page
- CICOmbudsman@red.nv.gov – Email Questions
- http://red.nv.gov/Content/CIC/Program_Training/