

Fiduciary Duty



Before we begin, you are reminded that, as training officers, we are here to provide general information and education on NRS/NAC 116, 116A & 116B, and NAC 38. We do not provide legal advice, interpret the law, or give opinions on individual circumstances. Our goal is to help you learn, understand, and apply relevant statutes and regulations. We want to equip you with the knowledge and tools necessary to effectively manage and live within your common-interest communities.

We will have dedicated time for questions and answers towards the end of the class. Please note that the Q&A session is intended to clarify the material covered today and not to address specific issues you might be facing. Feel free to jot down any questions regarding the class that you may have as we go along, and we will address them during the Q&A period. Thank you.

For online live classes:

Please ensure your display name is the name you want your certificate of attendance to be issued in.

By the end of the course, attendees will:

- 1. Be able to define Fiduciary Duty.**
- 2. Gain an understanding of acting on an informed basis.**
- 3. Learn the limitations on board authority.**
- 4. Explore the Role of the Community Manager.**
- 5. Gain an understanding of the behavioral Prohibitions.**
- 6. Will be able to identify key considerations and disciplinary actions.**

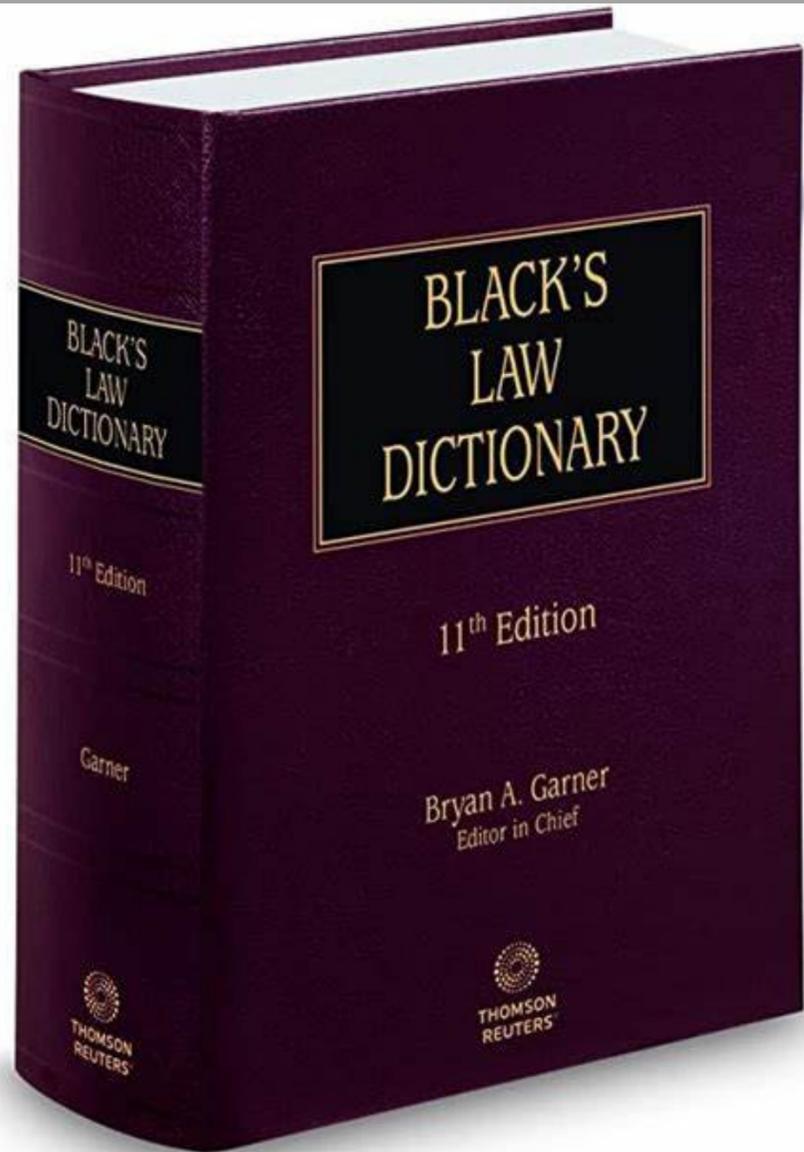
OBJECTIVES

ICEBREAKER

INTRODUCTION

- The board of directors collectively represents and acts on behalf of the association.
- Board members also have a fiduciary duty to the association, a responsibility we will explore in detail during this presentation.

Fiduciary Duty Defined



- Black's Law Dictionary defines fiduciary duty as: "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).

Candidate Disclosures

- **Before being elected to the board, board members are required to make a good faith effort to disclose in writing with the nomination form:**
 - **Whether they are in “good standing”, meaning that they do not have any past due assessments or construction penalties owed to the association; and**
 - **Any financial, business, professional or personal relationship or interest that would result OR would appear to a reasonable person to result in a potential conflict of interest, meaning the member stands to gain any personal profit or compensation from the association.**

NRS 116.31034(9)

Nevada Real Estate Division



Fiduciary Responsibility in Action

- Executive board members are fiduciaries and must:
 - Act in good faith and with an honest belief that their actions serve the association's best interests (NRS 116.3103).
 - Represent the association's collective interests, not their own personal interests.
- Board members are entrusted with:
 - Managing the association's property and finances.
 - Safeguarding the association's general welfare.
- Serving on the board is not personal; all decisions should prioritize the association's well-being.



Purpose and Accountability of Board Service

- **Role of the Executive Board:**
 - Acts on behalf of the association unless otherwise specified in the CC&Rs, bylaws, or NRS 116 (NRS 116.3103).
 - Expresses opinions through votes at meetings, resulting in decisions for the association.
- **Documenting Decisions:**
 - Decisions are recorded as meeting minutes and audio recordings, both are official association records (NRS 116.31083).
 - Meeting minutes are maintained indefinitely, from the association's inception to termination.

Purpose and Accountability of Board Service, Cont.

- Evaluating Fiduciary Duty (NAC 116.405):
 - Did the board member ensure the association:
 - Held sufficient meetings to address its affairs?
 - Maintained accurate and up-to-date financial records?
 - Established policies to ensure financial reporting reliability and prevent fraud?



What Informs a Responsible Vote?

- Fiduciary Duty in a CIC includes:
 - Act on an informed basis (NRS 116.3103).
 - Consult appropriate professionals before major decisions (NAC 116.405[8][e]).



Building a Foundation for Informed Leadership

- **Knowledge Requirements for Board Members:**
 - Read and understand NRS 116 and NAC 116 to the best of their ability.
 - Familiarize themselves with governing documents, including:
 - CC&Rs, Bylaws, Articles, Rules & Regulations, and any other relevant documents.
- **Certification of Understanding:**
 - Complete and sign the Declaration of Certification (Form 602) affirming compliance.
 - Maintain Form 602 as part of the association's official records.
 - Do not submit the form to the Division unless requested.
 - The form 602 is available at:
<http://red.nv.gov/uploadedFiles/rednvgov/Content/Forms/602.pdf>



**ALL YOU
NEED
TO KNOW**

Limits and Responsibilities of Fiduciary Duties

- Restrictions for Officers and Board Members (NRS 116.3103[2]):
 - Prohibited Actions:
 - Amending the declaration or terminating the CIC.
 - Electing board members outside of appointments for vacancies.
 - Defining qualifications, powers, duties, or terms of office for board members.
 - Appointments are temporary and last until:
 - The unexpired term ends, or
 - The next regular election, whichever comes first.
- Key Responsibility:
 - Adopt and amend budgets.

NRS 116.3102(I)B)

Understanding Indemnification and Insurance Coverage

- Insurance Requirements (NRS 116.3113[1][d]):
 - Directors and Officers Insurance:
 - Nonprofit Errors and Omissions policy.
 - Minimum coverage: \$1,000,000 aggregate.
 - Covers board members, officers, employees, agents, volunteers, community managers, and others acting as agents.
- Indemnification for Board Members:
 - The association must:
 - Indemnify board members against losses or claims from actions performed in their official capacity.
 - Cover all defense costs.

Exceptions:

- If proven that a board member acted with:
 - Willful or wanton misfeasance.
 - Gross negligence.
- The association may recover costs from the board member.





True or False: A fiduciary duty requires board members to prioritize their personal interests over the association's interests.

True or False: A fiduciary duty requires board members to prioritize their personal interests over the association's interests.

Answer: False. Fiduciary duty requires prioritizing the association's interests over personal interests.

What is the primary obligation of a fiduciary in a CIC?

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Answer: To act in the best interest of the association while subordinating personal interests.

How long does an appointment to a board vacancy last?

What is the primary obligation of a fiduciary in a CIC?

Answer: Until the unexpired term ends or the next regularly scheduled election, whichever occurs first.

Multiple Choice: What documents must board members certify they have read and understood?

- a) NRS 116 and NAC 116
- b) The association's CC&Rs, bylaws, articles, and rules & regulations
- c) Both a and b

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True or False: The association is required to indemnify board members in all cases, even if they acted with gross negligence.

True or False: The association is required to indemnify board members in all cases, even if they acted with gross negligence.

Answer: False. Indemnification does not apply if it is proven that the board member acted with gross negligence or willful misfeasance.

THE COMMUNITY MANAGER

and their fiduciary duty to the association...

The Role of the Community Manager

- Decision-making authority lies with the executive board of directors.
- Delegated powers, as outlined in the association's bylaws, can be assigned to the community manager under NRS 116.3106(1)(d).
- These responsibilities are detailed in the management agreement, which defines the manager's duties and obligations.
- The community manager is bound to perform the tasks as stipulated in the management agreement.

Responsibilities of the Community Manager

- A community manager SHALL (not all-inclusive):
 - Act as a fiduciary in all client relationships.
 - Comply with federal and state laws, as well as the governing documents of each client.
 - Stay informed of industry developments through continuing education.
 - Recommend independent expert advice for matters outside their expertise.
 - Ensure financial transactions are accurate, current, and properly documented, with internal controls.
 - Follow client directions unless they conflict with governing documents or laws.
 - Advise clients in writing to remain compliant with all applicable laws and regulations.



Roles and
Responsibilities

NRS 116A.630



- **Ensure financial transactions are current, accurate, and properly documented.**
- **Establish and follow policies to maintain reliable financial reporting, including:**
 - **Accounting record maintenance.**
 - **Authorization documentation for purchases and disbursements.**
 - **Fraud prevention and data integrity measures.**
 - **Compliance with laws governing financial records.**

Financial Oversight

Authority of the Community Manager

- The community manager's authority includes carrying out duties listed in the management agreement, which MAY include:
 - Entering the grounds of a vacant unit to address health and safety violations (with notice and hearing) (NRS 116.310312).
 - Acting on behalf of the association to collect past-due obligations (NRS 116.310313).
 - Developing written collection policies, approved by the executive board, and providing timely updates (NRS 116A.630).
 - Posting official opinions, providing notices, and conducting elections (NRS 116.31035).

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Authority of the Community Manager Cont.

- Receiving petitions for board recalls or special meetings (NRS 116.31036 & 116.3108).
- Obtaining bids for capital improvement projects (NRS 116A.630).
- Making association records available for review.
- Managing association funds by depositing or investing them appropriately (NRS 116A.630).
- Withdrawing money from the association's operating account with required approvals for essential expenses (NRS 116.31153).



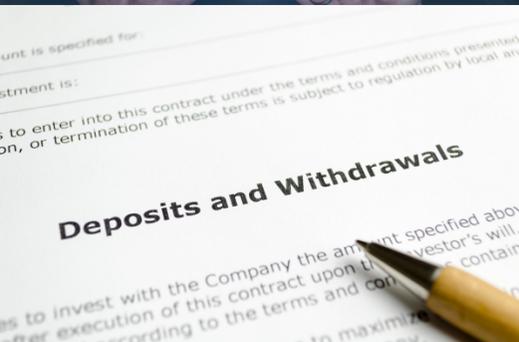
Transparency and Safeguards in Financial Management

Facilitate independent audits or financial reviews as necessary.

Make financial records available to unit owners upon written request.

Maintain separate accounts for various funds.

Prohibited from signing withdrawals from reserve accounts.



Prohibited Conduct for Community Managers

A community manager **SHALL NOT**:

- Disclose confidential information related to a client unless required by law, court order, or written client consent.
- Impede or interfere with Division investigations by:
- Failing to provide requested documents.
- Providing false or misleading information.
- Concealing facts or documents.

Prohibited Conduct for Community Managers

37

Cont.

NRS 116A.640

- Provide services outside their competence or licensing without disclosure and compliance with the law.
- Intentionally apply an assessment payment from a unit owner toward a fine, fee, or other charge instead of the intended assessment.
- Refuse to accept payment for any amount due from a unit owner due to an outstanding balance.
- Collect fees or charges from a client not specified in the management agreement.
- Accept compensation, gifts, or items of value for referrals or duties UNLESS:
 - Compliant with NRS 116.31185 or 116B.695 and applicable laws.
 - Disclosed in writing to the client, and client consent is obtained.

True/False:

The manager can use the association's money for their own personal use if they plan to reimburse it later.

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Answer: False

True/False:

A community manager is allowed to be a signer on withdrawals from the reserve account.

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Answer: False

Multiple Choice:

When is it acceptable for a manager to choose not to comply with directions from the board?

- A) When the manager disagrees with the board's decision.
- B) When following the direction would violate the law or governing documents.
- C) When the manager has a better alternative in mind.
- D) When the manager is too busy to comply.

Multiple Choice:

When is it acceptable for a manager to choose not to comply with directions from the board?

- A) When the manager disagrees with the board's decision.
- B) When following the direction would violate the law or governing documents.
- C) When the manager has a better alternative in mind.
- D) When the manager is too busy to comply.

Answer: B) When following the direction would violate the law or governing documents



PROHIBITED ACTS

Avoiding Conflicts of Interest in Voting

- A person MAY NOT serve as a candidate or member of the executive board if they stand to gain profit or compensation from matters before the board.
- If a member does not resign under these circumstances, the board may remove them by majority vote during a meeting (NRS 116.31034(10)(a)(2) & NRS 116.31034(13)(b)).
- An executive board member must disclose if a relative (by blood, adoption, or marriage) stands to gain personal profit or compensation from a matter before the board, prior to voting on the matter.

Prohibition on Profiting from Position

- Personal profit or compensation to a board member's spouse is typically considered profit or compensation to the board member.
 - This conflict must be disclosed, and the board member must abstain from voting (NRS 116.31084(1)).
 - The association must prohibit individuals with such conflicts from serving on the board or as officers.

Reference:

http://red.nv.gov/Content/CIC/Program_Training/FAQs/.

- When evaluating fiduciary duty, the Commission may consider whether the board member caused the association to:
 - Establish policies and procedures for disclosing potential conflicts of interest.
 - Implement appropriate methods to resolve such conflicts

NAC 116.405

Board Meetings

- All actions of the executive board that impact the community must be taken at a board meeting in compliance with NRS 116.31083.

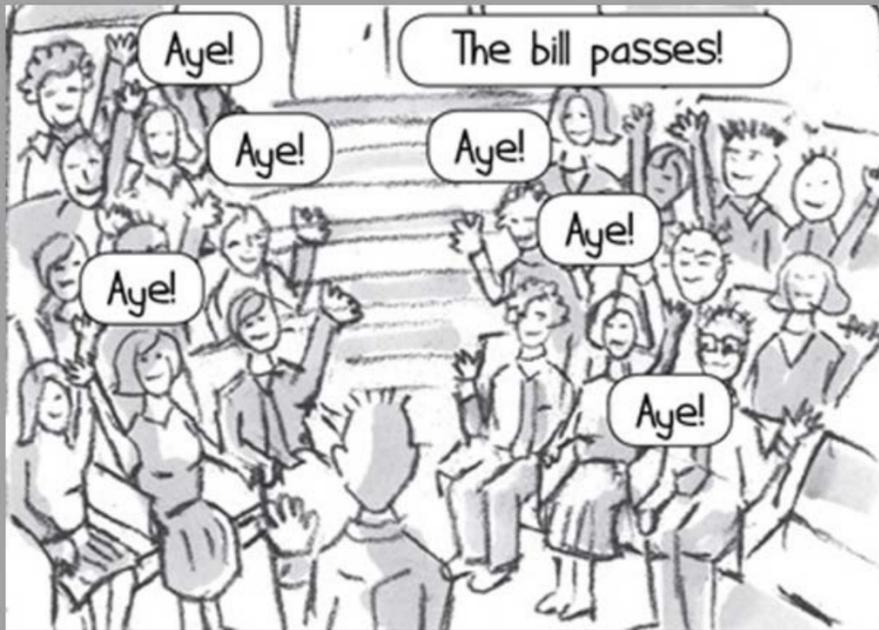
- Requirements for board meetings:
 - Proper notice must be provided.
 - An agenda must be prepared and adhered to.
 - Minutes must be recorded and maintained.

- The executive board may hold more than the minimum number of required meetings (at least once per quarter) to address association business.

- As fiduciaries, the board should use common sense to determine:
 - When a meeting is necessary.
 - What items should be included on the agenda.

NRS 116.31083 (6)

Quorum Requirements



- A quorum is required to validate any action taken at an executive board meeting.
- By default, a quorum exists when individuals entitled to cast a majority of votes on the board are present during a vote, unless the governing documents specify otherwise.
- If a quorum is present:
 - The affirmative vote of the majority validates the action.
- No board member can act alone to make decisions on behalf of the association.

NRS 116.3109

Safeguarding Integrity: Prohibitions on Compensation

- A member of the executive board or an officer of an association shall NOT:
 - Enter into a contract with the association to provide financing, goods, or services.
 - Accept any commission, personal profit, or compensation of any kind from the association.

NRS 116.31187

Ethical Boundaries: Prohibitions on Solicitation

NRS 116.31185

- Members of the executive board or officers of an association SHALL NOT:
 - Solicit or accept any form of compensation that:
 - Would improperly, or appear to improperly, influence their decisions.
 - Would result in, or appear to a reasonable person to result in, a conflict of interest.
- Accept, directly or indirectly, any gifts, incentives, gratuities, rewards, or other items of value from:
 - Any one attorney, law firm, declarant, affiliate of a declarant, or vendor exceeding \$100 per year.

Consequences of Bribery

- Any executive board member or community manager who asks for or receives, directly or indirectly, compensation, gratuity, or a reward— or any promise thereof— with the understanding that their vote, opinion, or action will be influenced, is guilty of a Category D felony.
- Anyone offering a bribe is also guilty of a Category D felony.

Important Note: Felony offenses are NOT enforceable by the Division.

NRS 116.31189



Prohibition Against Retaliation

- **The executive board must not retaliate against a unit owner who:**
 - Complains in good faith about a violation of NRS 116 or the association's governing documents.
 - Suggests the selection or replacement of any attorney, community manager, or vendor.
 - Requests in good faith to review the association's books, records, or other papers.

- **If retaliation occurs, the unit owner may bring a separate action to recover:**
 - Compensatory damages
 - Attorney's fees and legal costs

NRS 116.31183



RETALIATION
CLAIM

Threats and Harassment Prohibition

- **Board members are prohibited from:**
 - Willfully threatening or harassing any person within the community.
 - Engaging in conduct that causes:
 - Harm or serious emotional distress.
 - A hostile environment for any person.
- Violating this provision results in a misdemeanor.

NRS 116.31184

NRS 116.745 explicitly defines a violation as “any provision of chapter 116 except NRS 116.31184.” As the NRED may only act with regard to certain violations, NRS 116.31184 is not enforceable by this office.

**STOP
HARASSMENT**

True/False:

A board member is allowed to enter into a service contract with the association if they disclose their conflict of interest.

True/False:

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Answer: False

Multiple Choice:

Does the law allow a board member to offer payment to another board member in exchange for their vote?

- A) Yes, if the payment is disclosed
- B) Yes, as long as it benefits the association
- C) No, under any circumstances
- D) No, unless approved by the executive board

Multiple Choice:

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- C) No, under any circumstances
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Answer: C) No, under any circumstances

True/False:

The Division has the authority to enforce NRS 116.31184, which prohibits threats and harassment.

True/False:

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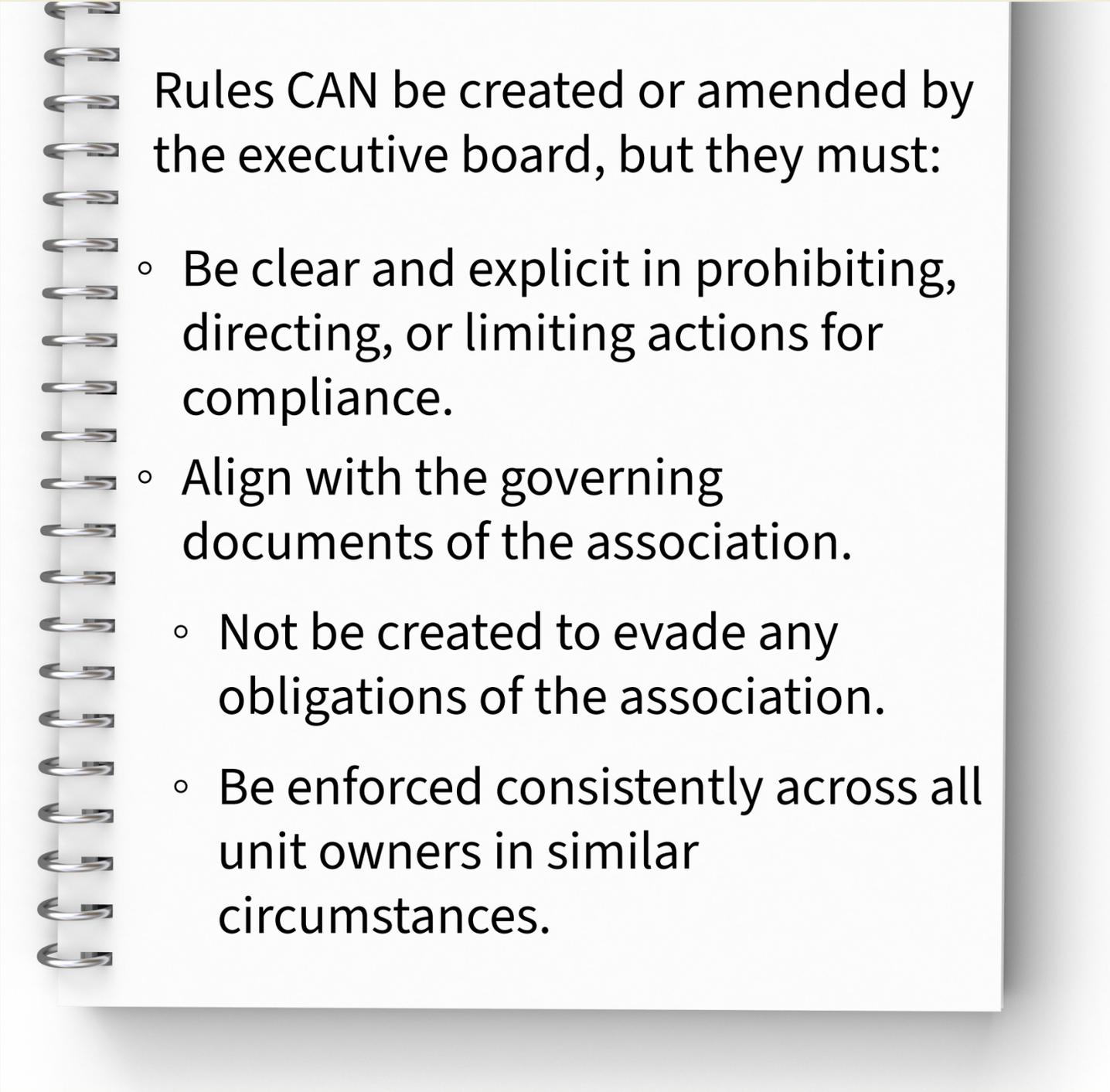
Answer: False



STATUTORY

Navigating Statutory Complexity

Creating and Amending Rules: Requirements and Limitations

- 
- A graphic of a spiral-bound notebook with a white page and a silver spiral binding on the left side. The page contains text and a bulleted list.
- Rules CAN be created or amended by the executive board, but they must:
- Be clear and explicit in prohibiting, directing, or limiting actions for compliance.
 - Align with the governing documents of the association.
 - Not be created to evade any obligations of the association.
 - Be enforced consistently across all unit owners in similar circumstances.

Safeguarding Association Funds

The executive board has a fiduciary duty to ensure that any institution holding the association's funds:

- Is located in Nevada,
- Is qualified to do business in Nevada, or
- Consents to Nevada court jurisdiction.

Funds must be deposited, maintained, or invested in:

- Institutions insured by FDIC, National Credit Union Share Insurance Fund, or SIPC.
- Private insurers approved under NRS 672.755.
- Government securities backed by the U.S. Government.

Safeguarding Financial Transactions

Reserve Account:

- Withdrawals require at least two board member signatures.
- Withdrawals require at least two board member signatures.

Operating Account:

- Withdrawals require:
 - Two board member signatures, OR
 - One board member and the community manager's signature.

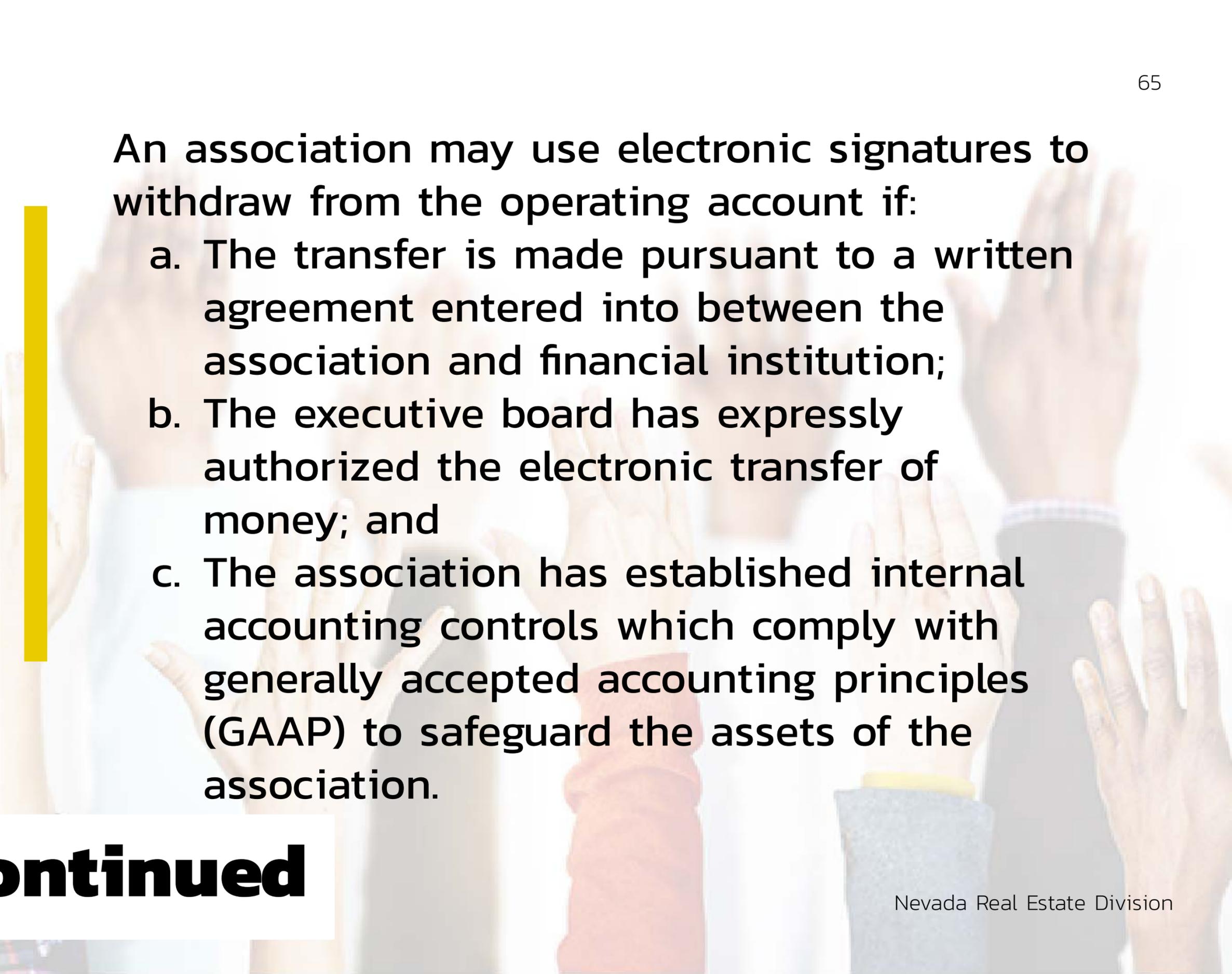
NRS 116.31153

Exceptions (No Signatures Needed):

- Transfers to the reserve account at regular intervals.
- Automatic payments for utilities.
- Electronic transfers to government agencies.



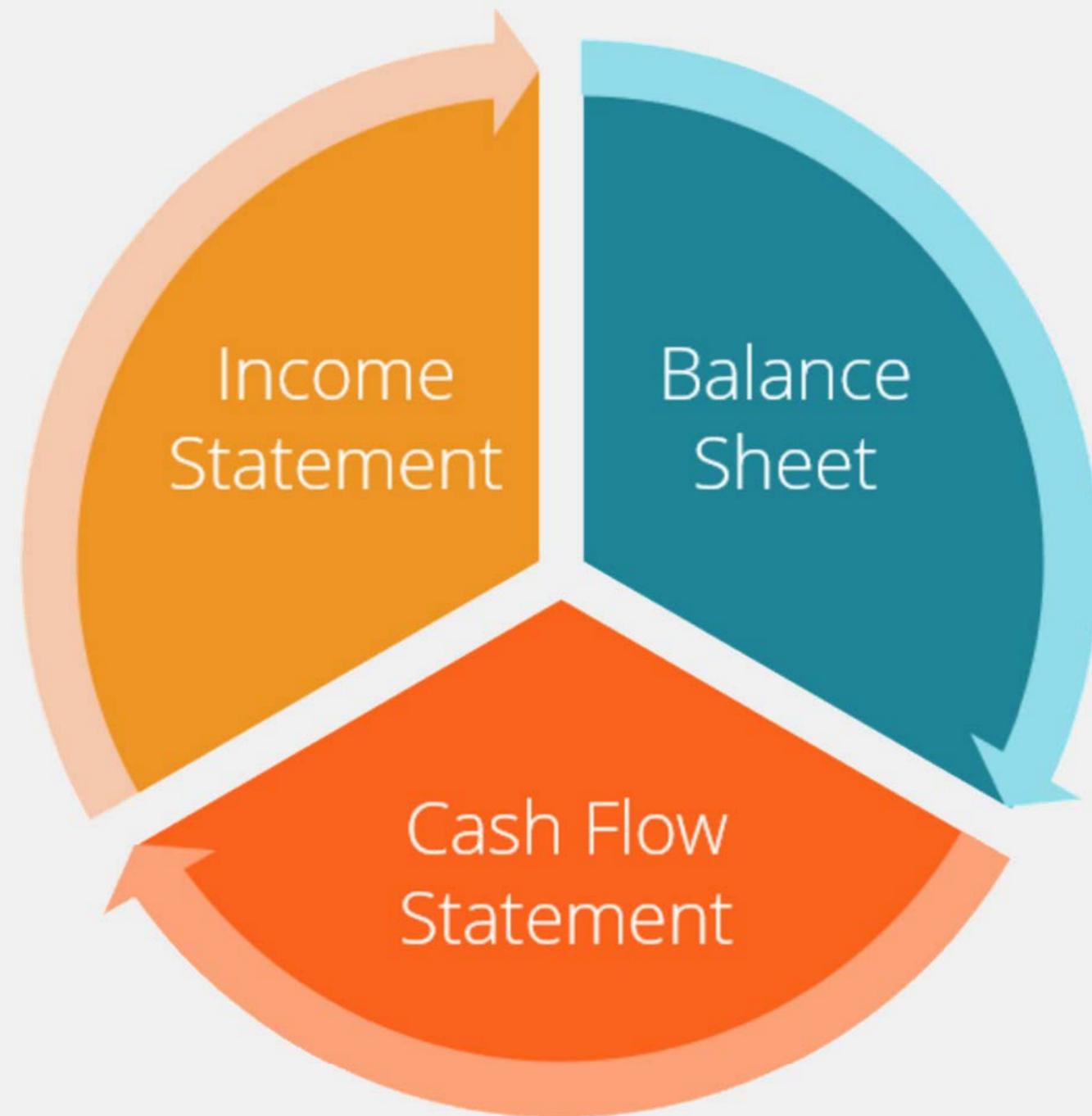
An association may use electronic signatures to withdraw from the operating account if:

- a. The transfer is made pursuant to a written agreement entered into between the association and financial institution;
 - b. The executive board has expressly authorized the electronic transfer of money; and
 - c. The association has established internal accounting controls which comply with generally accepted accounting principles (GAAP) to safeguard the assets of the association.
- 

Signatures Continued

At least once every quarter, and no less than once every 100 days, the executive board must review the following at a board meeting (NRS 116.31083[7]):

- **Year-to-Date Financial Statement:** A detailed report of the association's financial performance.
- **Revenues and Expenses vs. Budget:** A comparison of year-to-date revenues and expenses to the approved budget.
- **Account Reconciliations:** A current reconciliation of operating and reserve accounts to ensure accuracy.
- **Bank Statements:** The most recent bank statements for all association accounts.
- **Current status:** of any civil action or claim submitted to arbitration or mediation.



Quarterly Financial Review Requirements

Reserve Planning and Funding Responsibilities

The executive board has a fiduciary duty to plan for the financial sustainability of the association:

- **Funding Plan Creation:** Develop a funding plan to cover the costs of running the association and maintaining common elements (NRS 116.3107).
- **Reserve Fund Requirement:** Establish and maintain reserves sufficient to:
 - Uphold the maintenance, repair, and replacement of common elements as outlined in the governing documents and reserve study.
 - Avoid reliance on operating funds or imposing special or reserve assessments (NAC 116.425[2][b]).

The executive board SHALL:

- Conduct a reserve study at least every 5 years.
- Annually review the reserve study to assess sufficiency of funds.
- Annually adjust the funding plan as needed to maintain adequacy.

NRS 116.3115

Record Accessibility

- **Records Available to Unit Owners:** Upon written request, the board must provide access to:
 - Financial statements, budgets, and reserve studies (within 21 days of request).
 - Other books, records, and papers, including:
 - Financial records (NAC 116.0433).
 - General violation records.
 - All association contracts.
 - Records filed with a court to which the association is a party.



Record Accessibility Cont.



- **Costs for Record Review:**

- A unit owner may be charged no more than \$25 per hour to review records.

(NRS 116.31175(8)).

- **Restricted Access:**

- Records listed under NRS 116.31175(4) are not accessible to unit owners.

- **Performance Evaluation:**

- The Commission may evaluate whether the board has fulfilled its duties by ensuring record availability (NRS 116.3103).

Enforcement Responsibilities and Decision-Making

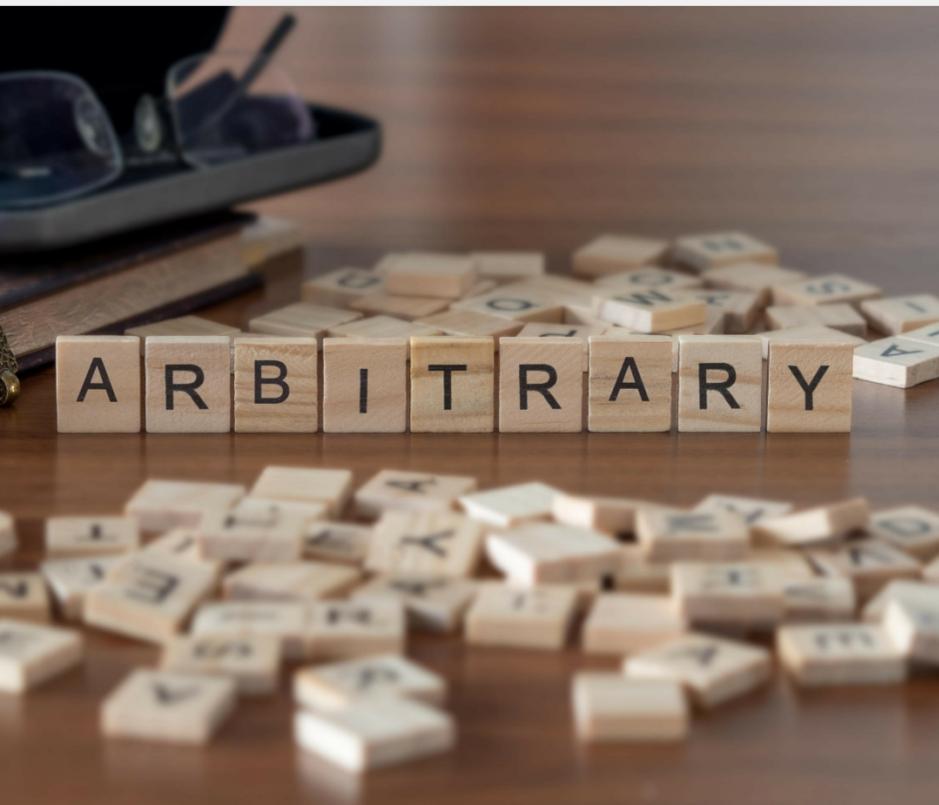


Determining Enforcement Actions:

- The board may negotiate fines and fees or decide not to pursue action if:
 - The legal position of the association is weak.
 - The rule or covenant conflicts with current law.
 - The violation is minor and does not justify using association resources.
 - Pursuing the action is not in the best interests of the association.
- Consistency in Enforcement:
 - Decisions must not be arbitrary or capricious.
 - A decision not to enforce in one case does not preclude action in another.
- Conflict of Interest Restrictions:
 - A board member with unpaid assessments cannot participate in hearings or votes related to fines (NRS 116.31031).

NRS 116.3102 (3) & (4)

Arbitrary and Capricious



- **Definition:**

- An arbitrary and capricious decision is “a willful and unreasonable action made without consideration of facts, law, or guiding principles” (Black’s Law Dictionary).

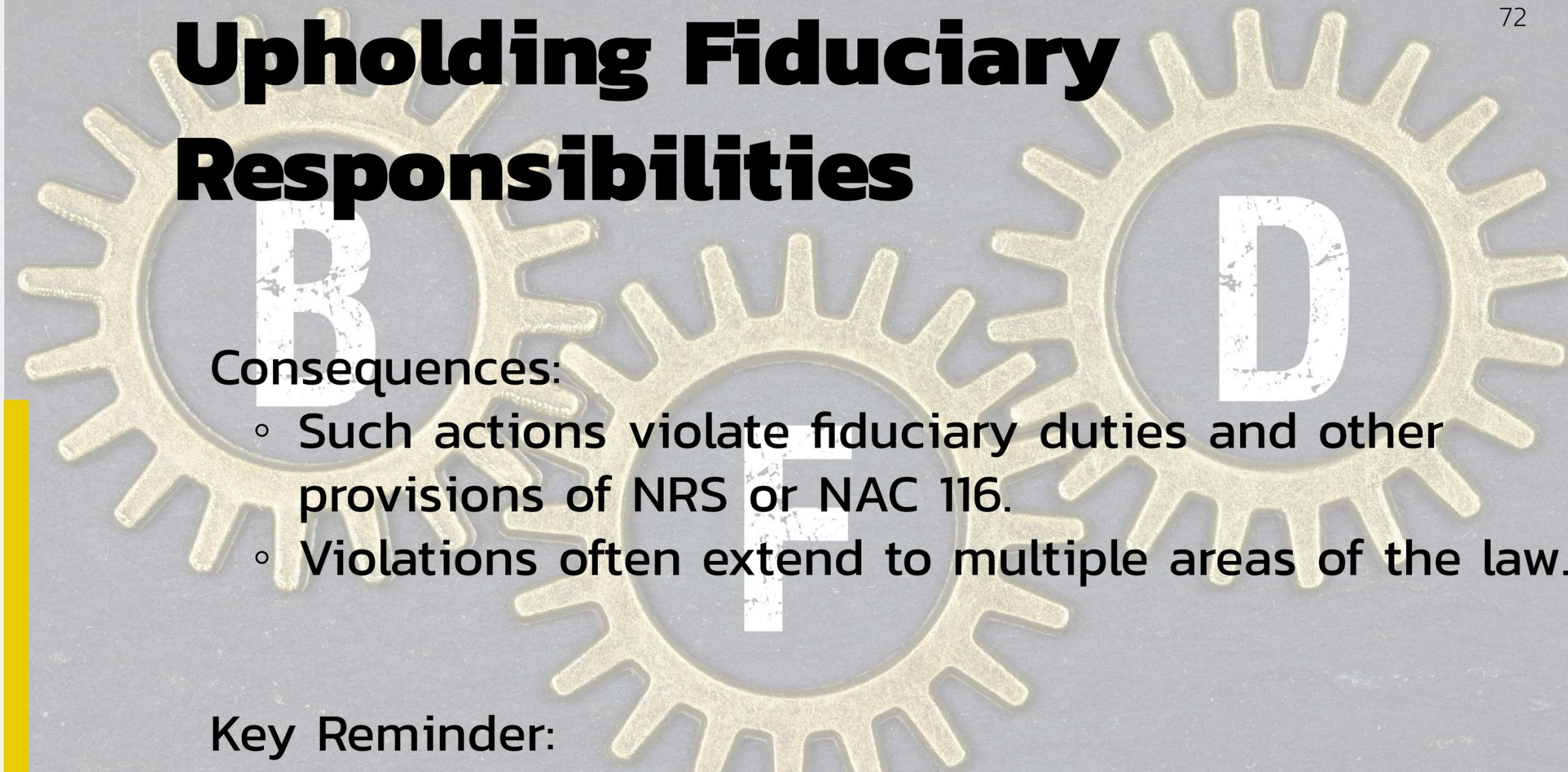
- **Guiding Principles:**

- Decisions must be based on established rules, precedents, or doctrines that ensure fairness and consistency.

- **Fiduciary Responsibility:**

- Under NRS 116.3103(1), officers and board members are fiduciaries who must act on an informed basis, considering relevant facts and laws in their decision-making.

Upholding Fiduciary Responsibilities



Examples of Fiduciary Breaches:

- Disclosing confidential information.
- Failing to hold meetings properly.
- Not maintaining or making financial records available.
- Profiting or accepting compensation from the association.
- Acting autonomously without board approval.

Consequences:

- Such actions violate fiduciary duties and other provisions of NRS or NAC 116.
- Violations often extend to multiple areas of the law.

Key Reminder:

- Abiding by fiduciary duties is both a legal and ethical obligation for all board members.

Breach of Fiduciary Duty

The Commission Considers:

1. Did the board member act within the authority granted by governing documents?
2. Were actions influenced by self-interest, gain, prejudice, or revenge?
3. Were there omissions indicating incompetence or negligence?

Acting Within Authority

NAC 116.405

The Commission Considers:

1. Was confidential information disclosed inappropriately?
2. Did the board member impede an investigation by:
 - Withholding documents or information?
 - Providing false or misleading information?
 - Concealing relevant facts?

Confidentiality and Cooperation

Staying Informed and Resolving Complaints

The Commission Considers:

1. Has the board member stayed informed about:
 - Relevant laws and regulations?
 - Changes and developments in common-interest communities?
2. Did the board member cooperate with the Division to resolve complaints?

Standards for the Association

The Commission Considers:

Has the board member ensured that the association:

1. Complies with federal and state laws?
2. Enforces governing documents uniformly?
3. Holds meetings frequently to address association affairs?

Financial and Professional Best Practices

The Commission Considers:

Has the board member ensured that the association:

1. Obtains at least three bids from reputable service providers with proper licenses?
2. Consults professionals for major decisions?
3. Maintains current, accurate, and well-documented financial records?

READY
FOR
A QUIZ?



True/False

The declaration of CC&Rs can be amended by the executive board without input from unit owners.

True/False

The declaration of CC&Rs can be amended by the executive board without input from unit owners.

False

Fill in the Blank

The board must review the association's
bank statements at least once every
_____ and not less than once every
_____ days.

Fill in the Blank

The board must review the association's bank statements at least once every **quarter** and not less than once every **100** days.

Multiple Choice

What constitutes an abuse of a board's discretionary authority when enforcing the governing documents?

- A. Acting for reasons of self-interest or personal gain
- B. Enforcing provisions inconsistently
- C. Making decisions based on prejudice or revenge
- D. All of the above

Multiple Choice

What constitutes an abuse of a board's discretionary authority when enforcing the governing documents?

- A. Acting for reasons of self-interest or personal gain
- B. Enforcing provisions inconsistently
- C. Making decisions based on prejudice or revenge
- D. All of the above

Answer: D. All of the above

Summary



Obligation of Good Faith:

- Every contract or duty under NRS 116 requires good faith in performance and enforcement (NRS 116.1113).



Fiduciary Responsibility:

- The executive board acts on behalf of the association and must:
 - Make informed decisions.
 - Act in good faith.
 - Always prioritize the association's best interests (NRS 116.3103).



Indemnification:

- If a board member faces legal action for their role, the association covers defense costs, except when:
 - The member intentionally violates the law.
 - Abuses their authority.
 - Acts with gross negligence (NRS 116.31037).



Before we move on to the Q&A session, I'd like to remind everyone that we are here to provide general information and guidance. We cannot give legal advice, interpret the law, or provide opinions on individual circumstances.

OFFICE OF THE OMBUDSMAN

FOR OWNERS IN COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

The purpose of this Q&A session is to help clarify the material covered in today's class. Please keep your questions focused on understanding and the application of the statutes and regulations relevant to your roles within your community.

For specific legal concerns or individual issues, please consult with a qualified attorney.



THANK YOU

EMAIL: CICOMBUDSMAN@RED.NV.GOV

PHONE: 702-486-4480

