



# AVOIDING LEGAL EXPOSURE & DEALING WITH LITIGATION

BY

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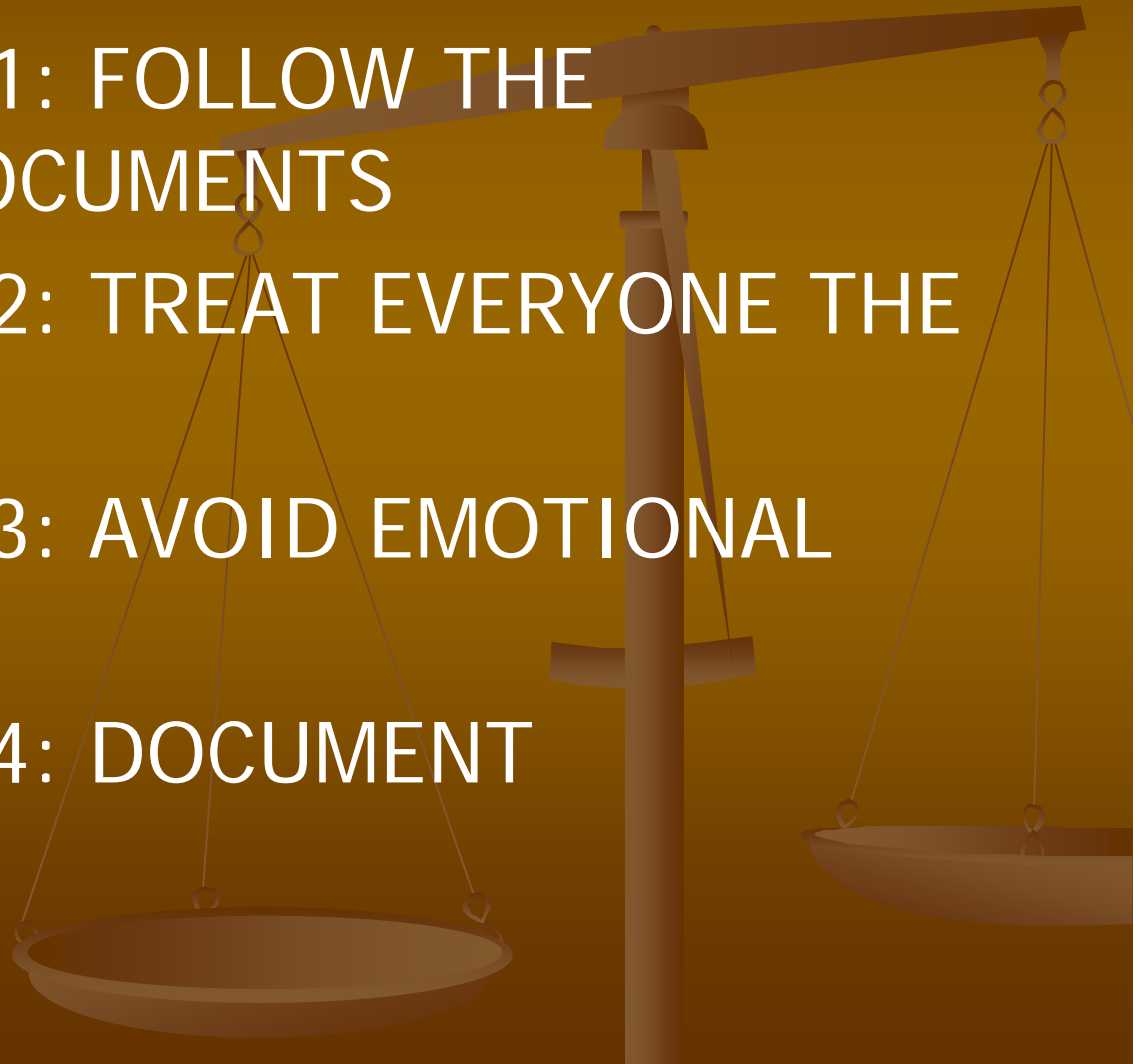
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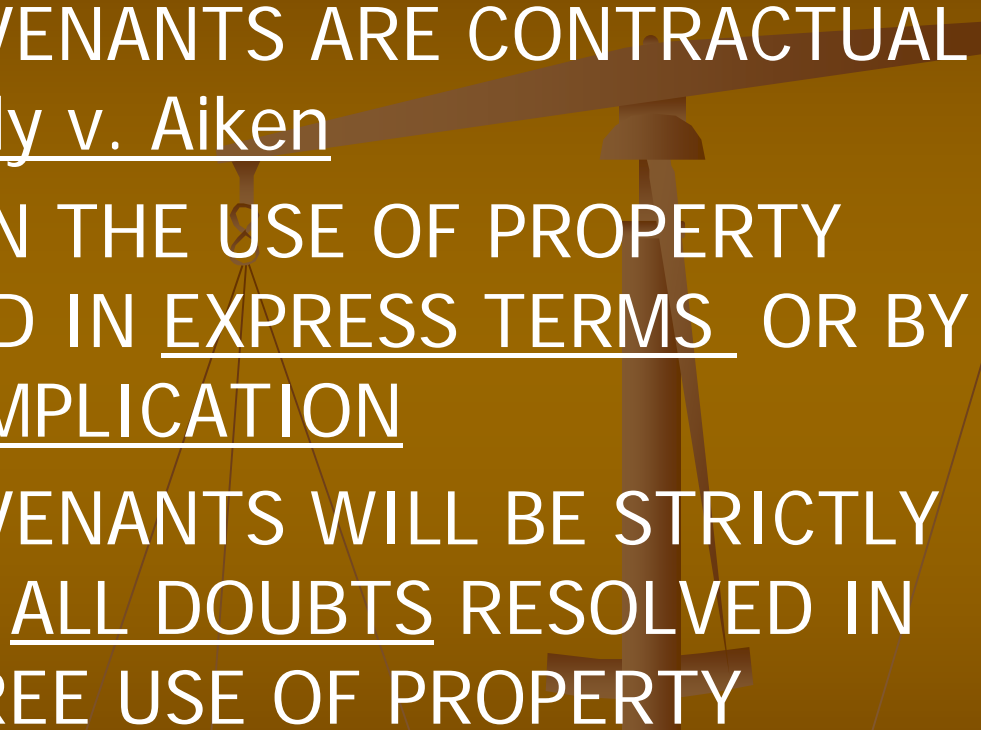
Charleston SC

# PART ONE: HOW TO AVOID BECOMING INVOLVED IN LITIGATION

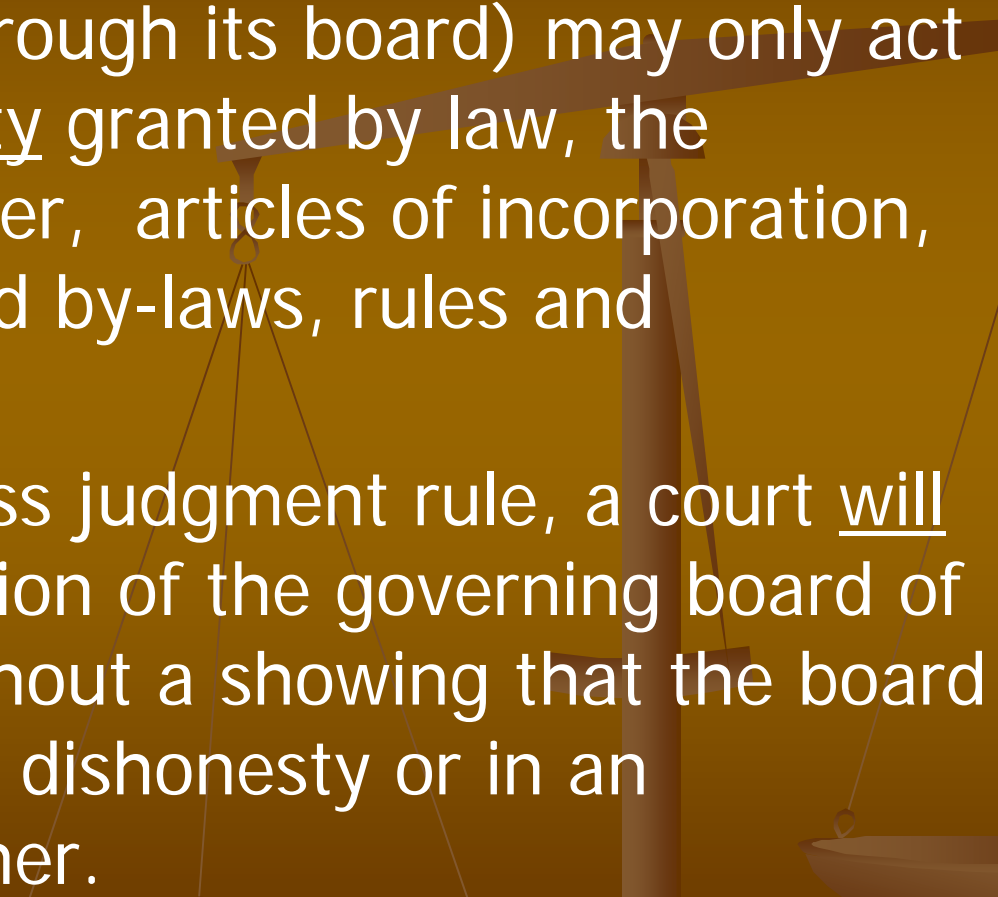
- RULE NUMBER 1: FOLLOW THE GOVERNING DOCUMENTS
- RULE NUMBER 2: TREAT EVERYONE THE SAME
- RULE NUMBER 3: AVOID EMOTIONAL DECISIONS
- RULE NUMBER 4: DOCUMENT EVERYTHING



# RULE NUMBER 1: FOLLOW THE GOVERNING DOCUMENTS

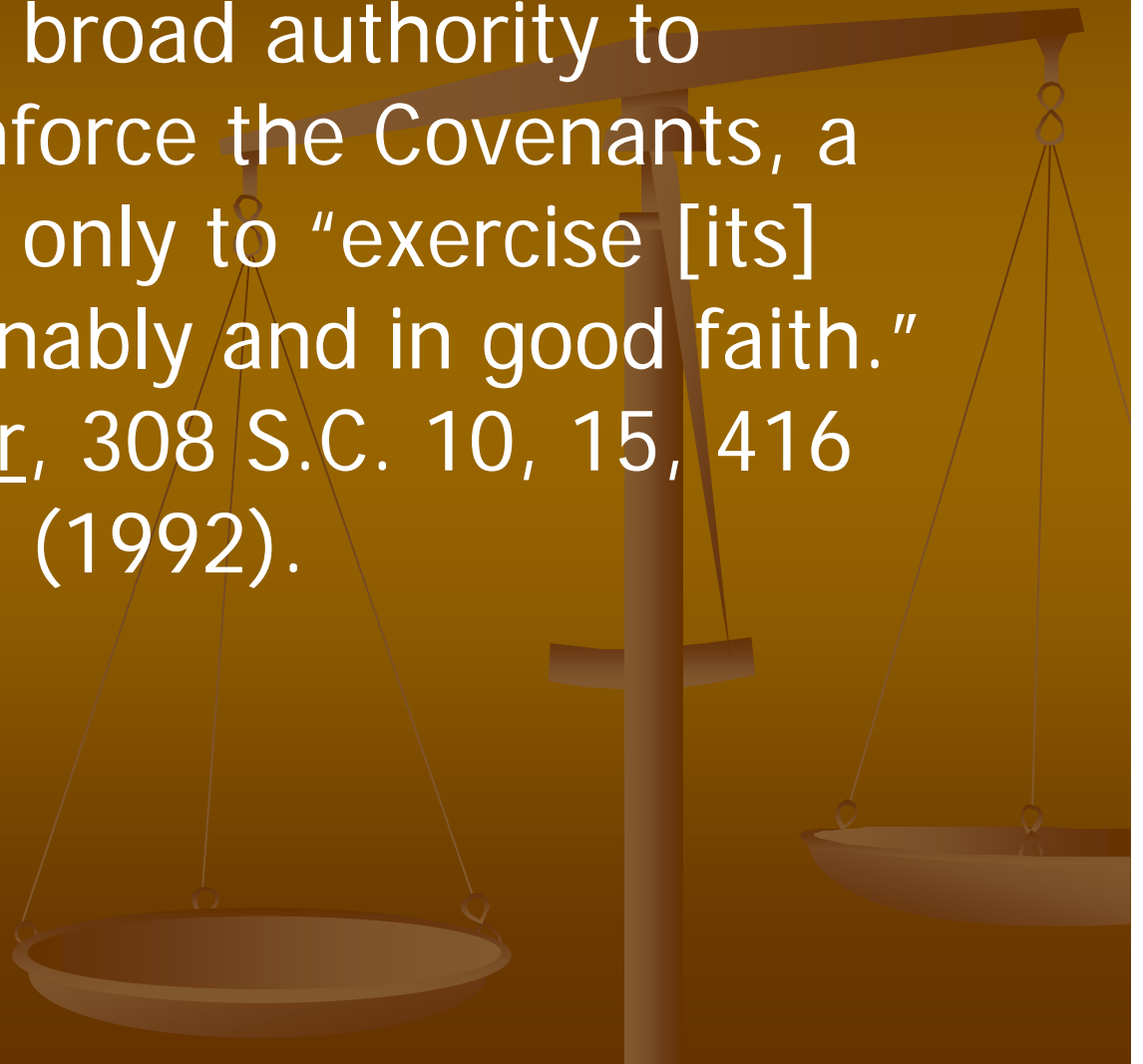
- RESTRICTIVE COVENANTS ARE CONTRACTUAL IN NATURE - Hardy v. Aiken
  - RESTRICTIONS ON THE USE OF PROPERTY MUST BE CREATED IN EXPRESS TERMS OR BY UNMISTAKABLE IMPLICATION
  - RESTRICTIVE COVENANTS WILL BE STRICTLY CONSTRUED AND ALL DOUBTS RESOLVED IN FAVOR OF THE FREE USE OF PROPERTY
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# BUSINESS JUDGMENT RULE

- An association (through its board) may only act within the authority granted by law, the association's charter, articles of incorporation, and any authorized by-laws, rules and regulations.
  - Under the business judgment rule, a court will not review a decision of the governing board of an association without a showing that the board acted in bad faith, dishonesty or in an incompetent manner.
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# Reasonable Judgment and good Faith

- In exercising its broad authority to interpret and enforce the Covenants, a Board is bound only to “exercise [its] judgment reasonably and in good faith.” O’Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992).

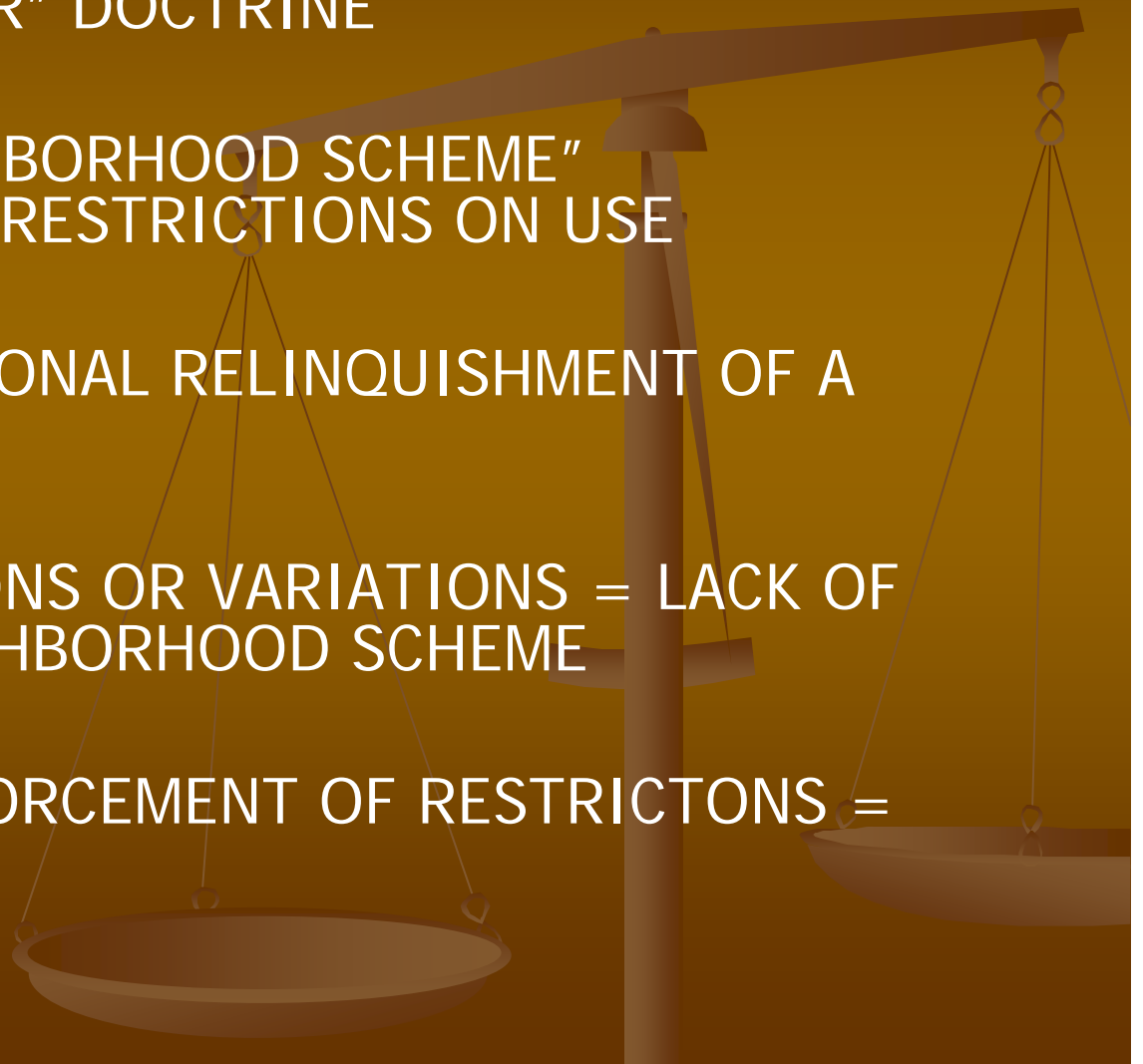


# Follow the Rules to be Able to Argue the Business Judgment Rule

- Bauman v. Long Cove Owners Ass'n
- The Covenants required Long Cove to obtain member approval by referendum or in the annual budget for expenditures over \$150,000. Long Cove secured the member approval by referendum. Although the notice of the meeting included a statement prepared by the Members giving the reasons for the meeting, Long Cove did not phrase the referendum questions in the manner the Baumanns proposed. Nonetheless, the choices at the meeting amounted to either approving the expenditures or denying the expenditures. Because the majority voted for no referendum, the expenditures were approved by referendum. Accordingly, the record contained evidence Long Cove did not violate the Covenants.

# RULE NUMBER TWO: TREAT EVERYONE THE SAME

- BEWARE OF "WAIVER" DOCTRINE
- MUST SHOW "NEIGHBORHOOD SCHEME" ACCOMPLISHED BY RESTRICTIONS ON USE
- WAIVER = "INTENTIONAL RELINQUISHMENT OF A KNOWN RIGHT"
- EXTENSIVE OMISSIONS OR VARIATIONS = LACK OF EXISTENCE OF NEIGHBORHOOD SCHEME
- INCONSISTENT ENFORCEMENT OF RESTRICTONS = WAIVER



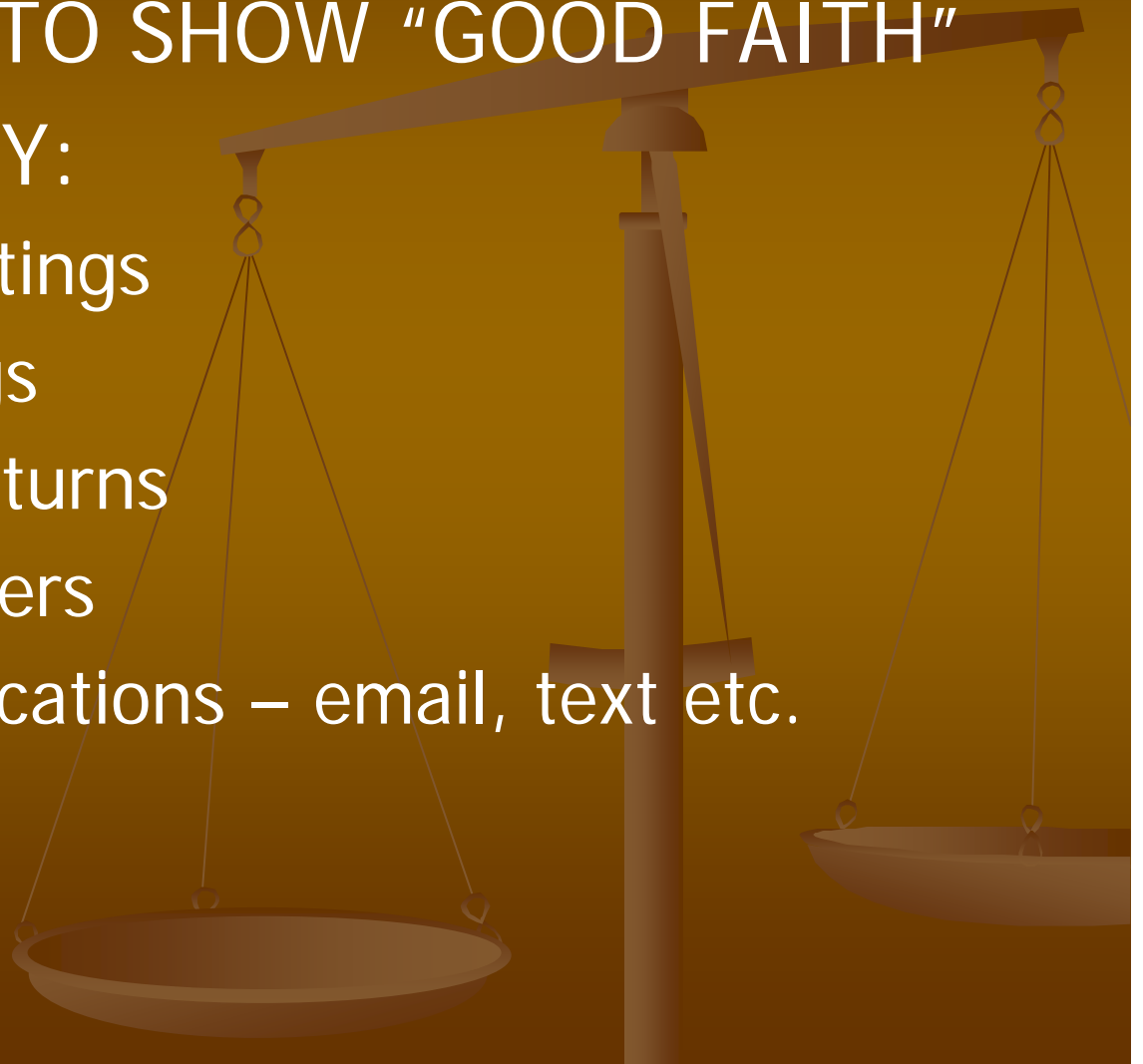
# RULE THREE: AVOID EMOTIONAL DECISIONS

- Emotional decisions will not be allowed to circumvent or supplement the express authority granted to the board by the governing documents.
- In fact, the Association's current president testified the Association's board was "fine with the fence," and that Cromer's husband "could have submitted a variance and it could've been approved by the board if he would've been hospitable, but he took it

on himself to do whatever." - **WAIVER OF  
RESTRICTIONS FOUND Hardy v. Aiken**

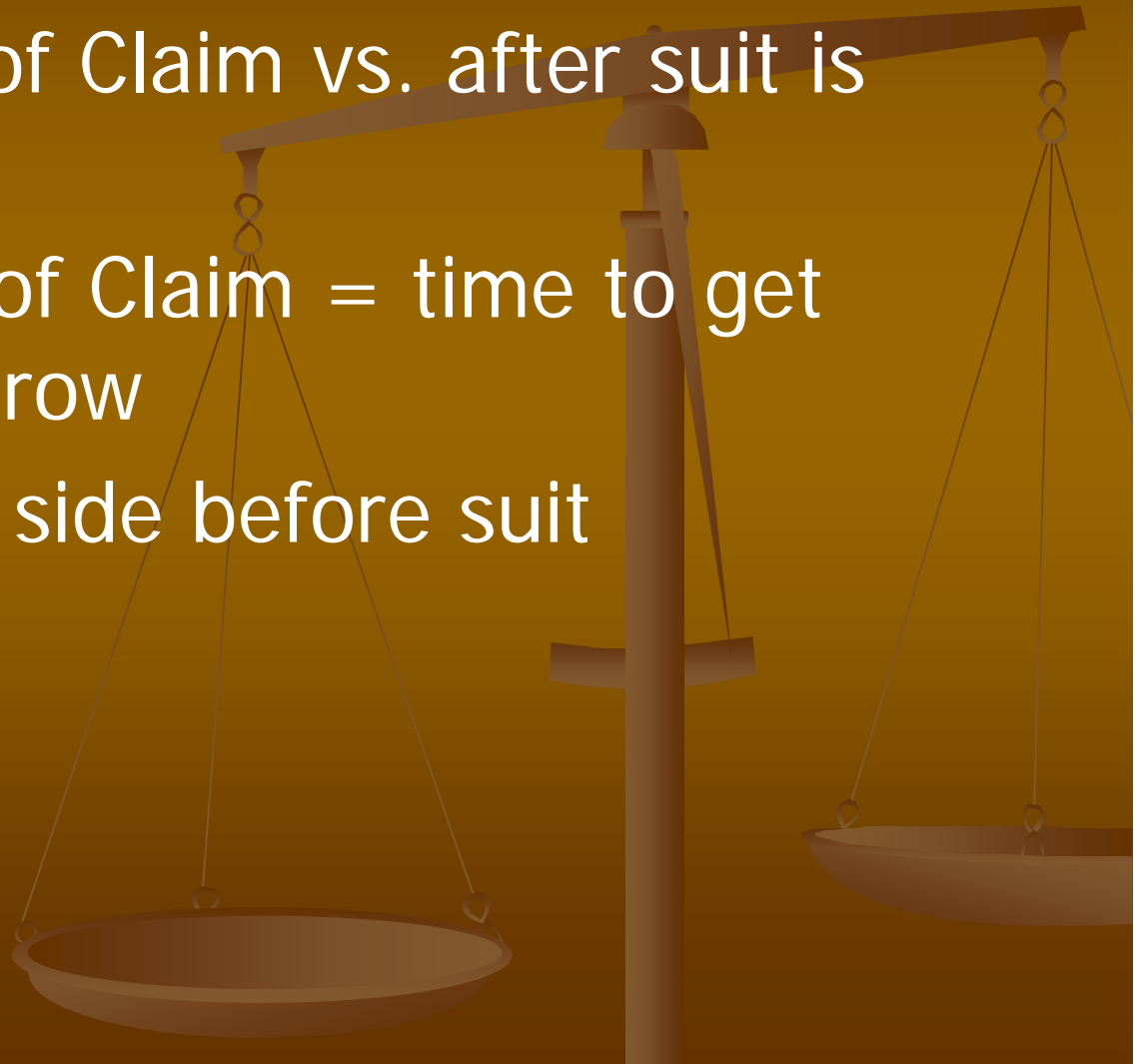
# RULE FOUR: DOCUMENT EVERYTHING

- MUST BE ABLE TO SHOW “GOOD FAITH”
- SHOWN BEST BY:
  - Minutes of meetings
  - Proof of mailings
  - Proof of vote returns
  - Letter to members
  - Other communications – email, text etc.



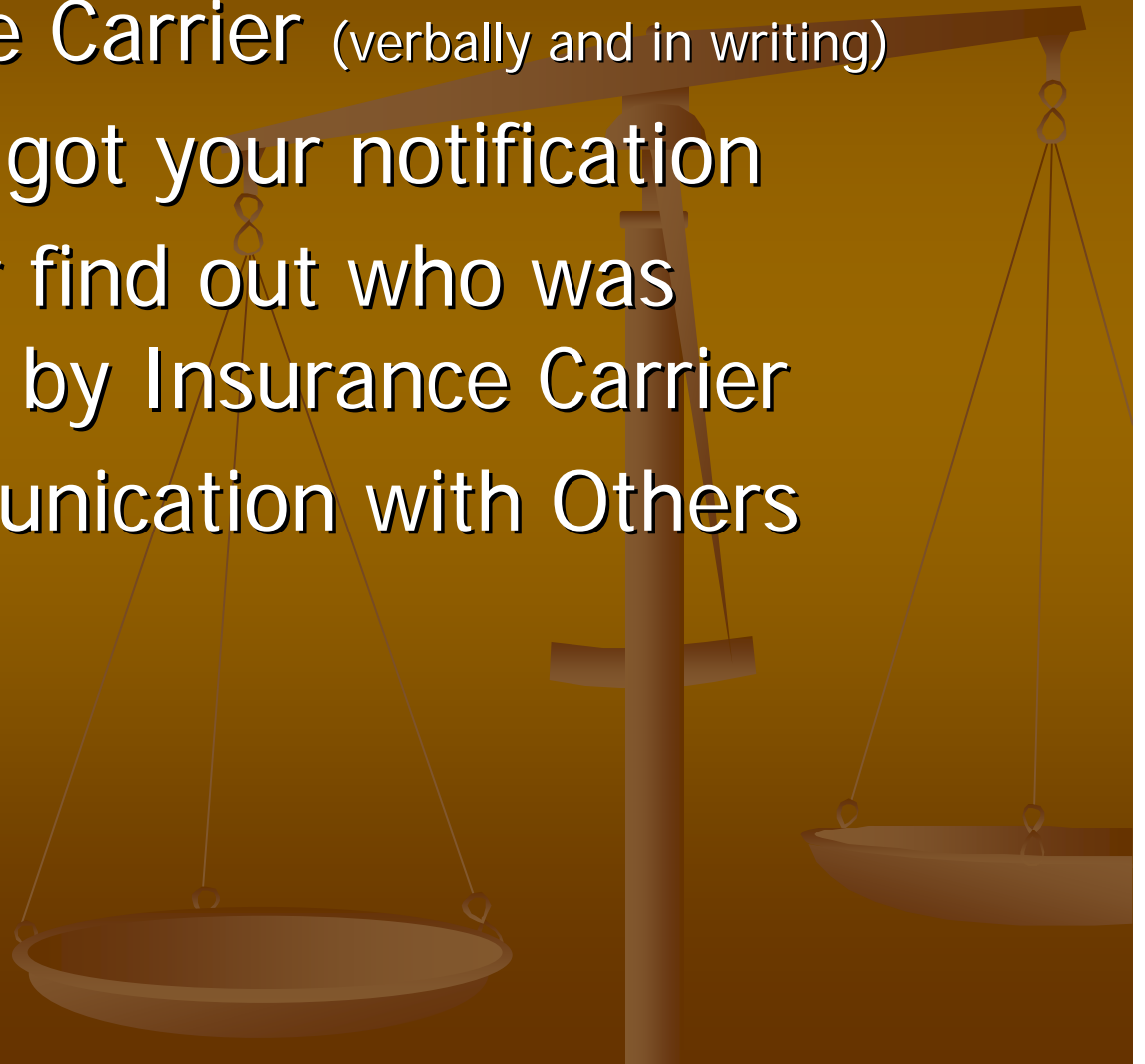
# PART TWO: DEALING WITH LITIGATION WHEN IT HAPPENS

- Pre-suit Notice of Claim vs. after suit is filed
- Pre-Suit Notice of Claim = time to get your ducks in a row
- Time is on your side before suit

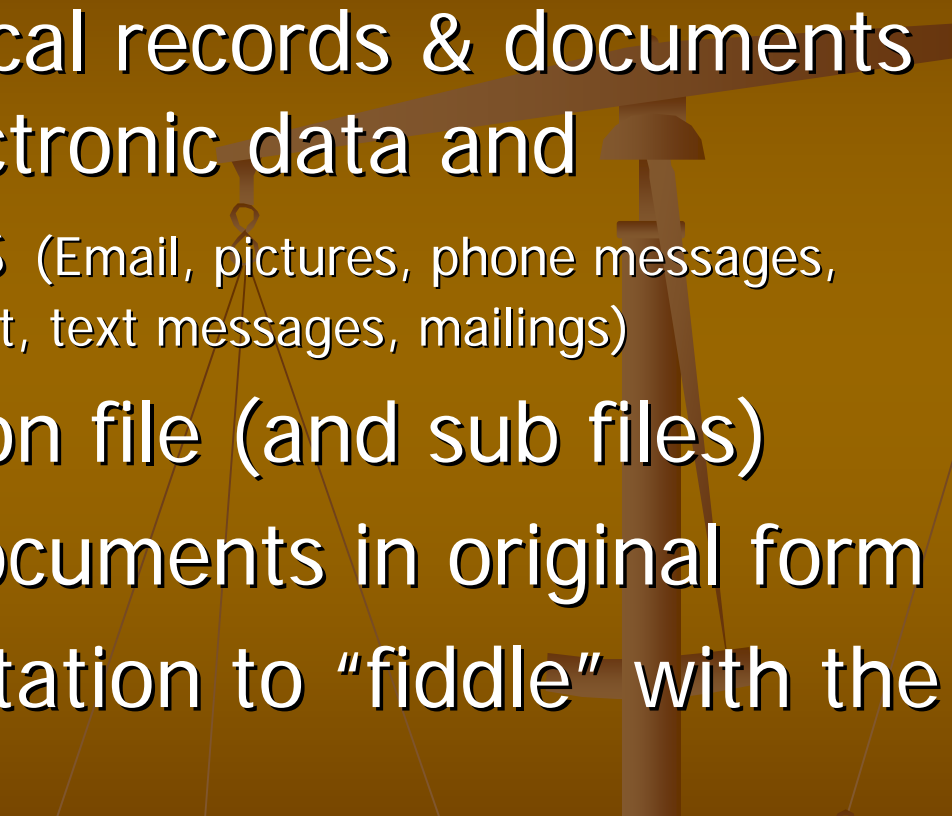


# Notice of claim or Lawsuit

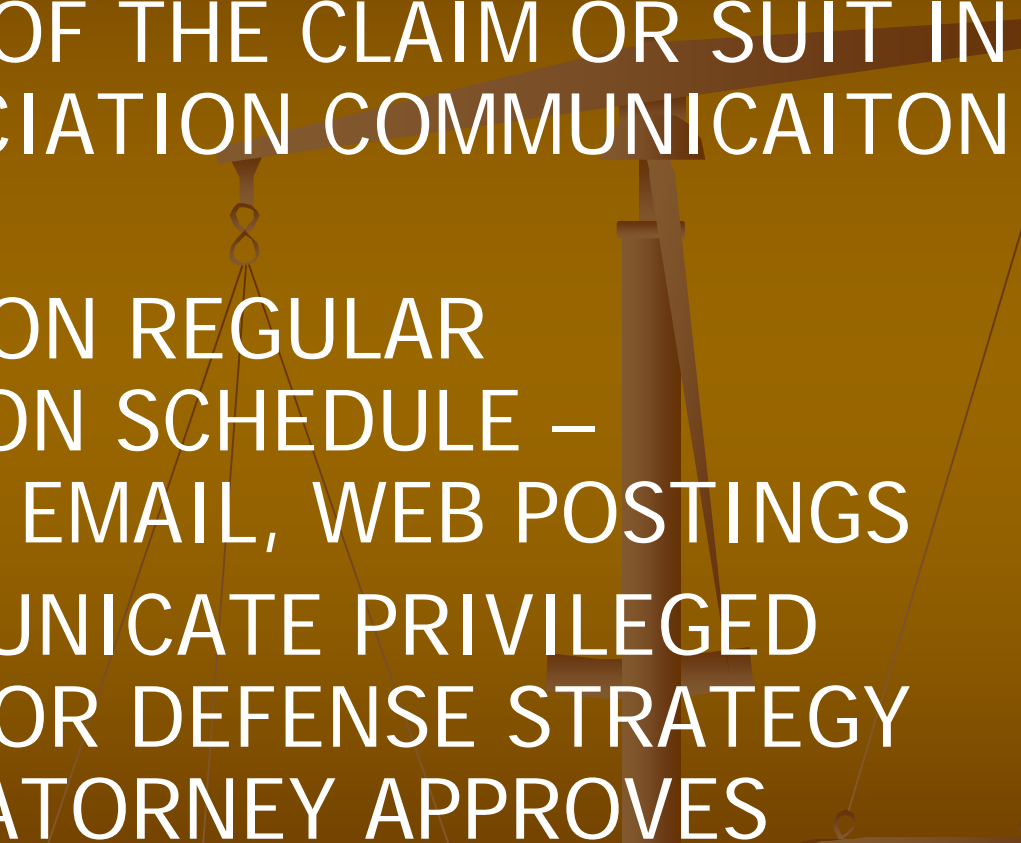
- Notify Insurance Carrier (verbally and in writing)
- Make sure they got your notification
- Hire a lawyer or find out who was assigned to you by Insurance Carrier
- Minimize Communication with Others



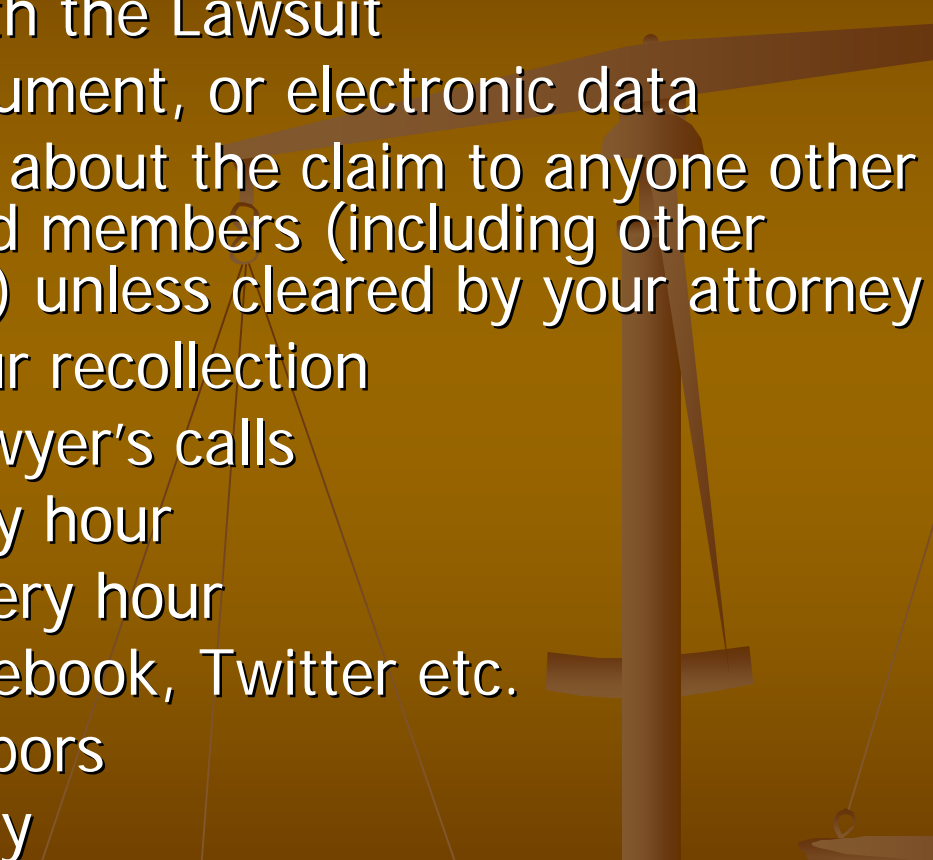
# Now that the Guns (Lawyers) have been Hired, What next – Pre-Suit and Post Suit

- Gather all physical records & documents  
Preserve all electronic data and communications (Email, pictures, phone messages, Computer screen print out, text messages, mailings)
  - Create a litigation file (and sub files)
  - Keep original documents in original form
  - Resist the temptation to “fiddle” with the documents
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# WHAT ABOUT THE OTHER ASSOCIATION MEMBERS?

- INFORM THEM OF THE CLAIM OR SUIT IN NORMAL ASSOCIATION COMMUNICATION CHANNELS
  - UPDATE THEM ON REGULAR COMMUNICATION SCHEDULE – NEWSLETTERS, EMAIL, WEB POSTINGS
  - DO NOT COMMUNICATE PRIVILEGED INFORMATION OR DEFENSE STRATEGY UNLESS YOUR ATTORNEY APPROVES
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# What Should I NOT Do?

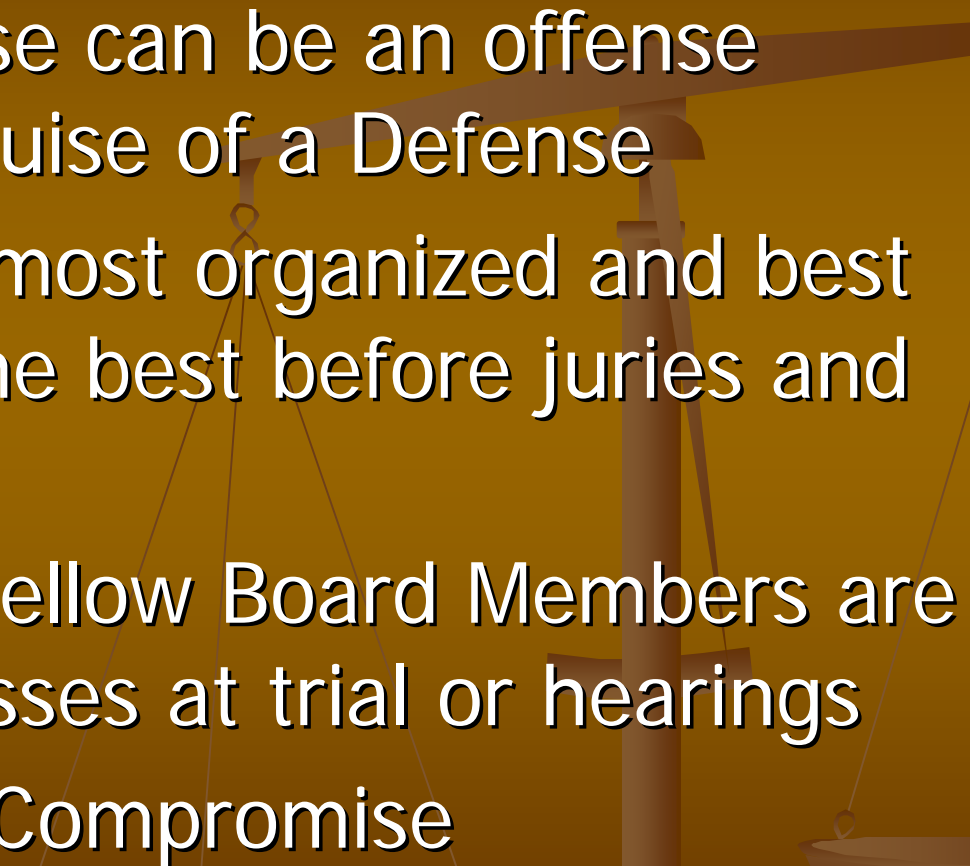
- Become obsessed with the Lawsuit
  - Alter any record, document, or electronic data
  - Talk or communicate about the claim to anyone other than your other board members (including other association members) unless cleared by your attorney
  - Fill in the gaps of your recollection
  - Fail to return your lawyer's calls
  - Call your lawyer every hour
  - Email your lawyer every hour
  - Post anything on Facebook, Twitter etc.
  - Ostracize your Neighbors
  - Withdraw from society
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# The Keys to Success in Litigation

- ORGANIZATION
- COMMUNICATION
- STRATEGIZATION
- RELAXATION



# The best defense

- The best Defense can be an offense cloaked in the guise of a Defense
  - Those who are most organized and best prepared fare the best before juries and judges
  - You and your Fellow Board Members are your best witnesses at trial or hearings
  - Be Prepared to Compromise
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# THANKS

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