

FIDUCIARY DUTIES AND PUBLIC TRUST

NSHE Board of Regents

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Examples of Fiduciary Duties

- The trustee of a trust, who has a fiduciary duty to the beneficiary of the trust;*
- A member of a corporate board of directors, who has a fiduciary duty to the shareholders of the company;*
- Some (not all) securities brokers and investment advisors, who have fiduciary duties to their clients;*
- A court appointed guardian, who has a fiduciary duty to her or his ward;*
- An attorney who has a fiduciary duty to her or his client.*

Examples of Ethical Duties for Public Servants Holding a Public Trust

--Public Officials Must be Transparent as to Economic and Personal Interests--

--Public Officials Must Promote Fair Process and Merit-Based Decisions--

--Public Officials Cannot Use Office for Personal Financial Gain;

--Public Officials Must Not Receive or Make Inappropriate Gifts or Other Perquisites.

Institute for Local Government

Starting Point: Statutory Regent Fiduciary and Public Trust Duties

Nevada Revised Statutes 396.122 – Interest in certain
contracts prohibited

A member of the Board of Regents shall not be interested, directly or indirectly, as principal, partner, agent or otherwise, in any contract or expenditure created by the Board of Regents, or in the profits or results thereof.

Nevada Revised Statutes 281A.420

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

- (a) The public officer's acceptance of a gift or loan;**
- (b) The public officer's significant pecuniary interest; or**
- (c) The public officer's commitment in a private capacity to the interests of another person.**

Nevada Revised Statutes 281A.420

4. In interpreting and applying the provisions of subsection 3:

(b) *The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer makes a proper disclosure at the time the matter is considered and in the manner required by subsection .* Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, *the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.*

A brief definition of the term “fiduciary” is also helpful to the discussion of this concept, both as it relates to fiduciary duties and to the public trust:

** The term “fiduciary” was first used in the English language sometime around 1593 (according to the Oxford English Dictionary).*

** The term originated with the Latin term “fiduciarius,” which means, literally: “A person who takes possession or control of a thing or a position, coupled with a promise to care for that thing or position, and then, at a later time and on certain conditions, to deliver or transfer it to another person.”*

** The concept came into being in ancient Roman law, but it was adopted in the English common law, and then incorporated into American jurisprudence.*

Used as a noun, the term “fiduciary” may apply to an individual who is appointed to be a “fiduciary,” meaning:

“A person to whom property or power is entrusted for the benefit of another.”

Used as an adjective, a fiduciary may have a “fiduciary” duty to others, meaning:

A duty that is “based on, or in the nature of trust and confidence, as in public affairs; for example, a fiduciary obligation of certain (but not all) elected officials.”

* A fiduciary (and a person holding a position of public trust) has a duty to not be in a situation in which the fiduciary's personal or family interests/responsibilities conflict in any way with her or his fiduciary obligations.

* A fiduciary (and a person holding a position of public trust) has a duty to not be in a situation in which her or his fiduciary duty conflicts with another different fiduciary duty.

* Fiduciaries (and persons holding a position of public trust) have a duty to not profit in any way from her or his fiduciary position without the knowledge and specific, unambiguous consent of those for whom the fiduciary has responsibility.

* Fiduciaries (and persons holding a position of public trust) must conduct themselves "at a level higher than that trodden by the crowd," and "the distinguishing or overriding duty of a fiduciary is the obligation of undivided loyalty."

1. Regents shouldn't ever use their office to benefit themselves, their family, or other individuals or groups with which or with whom they have a connection financially, or professionally, in any way. (Such benefits include the solicitation or acceptance of gifts, favors, or other perquisites.)
2. Regents shouldn't use their public office to further political ambitions or to favor any particular group or individual.
3. Regents have a duty of absolute honesty in their public dealings—remembering that honesty, by itself, is a necessary but not a sufficient condition.
 4. Regents have a duty of absolute loyalty to the institutions they serve.
5. Regents have a duty of inquiry—to ask sometimes difficult, challenging questions.
 6. Regents have a duty to be duly prepared, and to disagree as appropriate.
 7. Regents have a duty to act, if action is required, in order to protect NSHE institutions and assets, even when such actions may be difficult or unpopular, and even when such actions may have adverse political repercussions.

“A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principle is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of the fiduciary obligations. They are the defining characteristics of a fiduciary.”

Lord Peter Millet, 1998 (U.K.) *Bristol and West Building Society v. Matthew*

Duties and Public Trust:

The duty of care generally requires officers and governing board members to carry out their responsibilities in good-faith and using that degree of diligence, care, and skill which ordinarily prudent persons would reasonably exercise under similar circumstances in like positions. Accordingly, a board member must act in a manner that he or she reasonably believes to be in the best interests of the institution.

(continued)

The duty of loyalty requires officers and board members to act in good-faith and in a manner that is reasonably believed to be in the interests of the college or university and its nonprofit or public purposes rather than their own interests or the interests of another person or organization. The fiduciary must not act out of expedience, avarice, or self-interest.

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A third fiduciary duty, which is arguably an element of the duties of care and loyalty, is the duty of obedience. This is the duty of board members to ensure that the college or university is operating in furtherance of its stated purposes (as set forth in its governing documents) and is operating in compliance with the law.