Fiduciary Responsibilities

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November 6, 2017

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What is a fiduciary?

- A **fiduciary** is a person who holds a legal or ethical relationship of trust with one or more other parties (person or group of persons). Typically, a fiduciary prudently takes care of money or other asset for another person.
  - https://en.wikipedia.org/wiki/Fiduciary
- Public office is a public trust for the sole benefit of the people

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What is a fiduciary duty?

- A **fiduciary duty**, is the highest standard of care at either equity or law. A fiduciary is expected to be extremely loyal to whom the duty is owed such that there must be no conflict of duty and the fiduciary must not profit or seek personal gain.

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Fiduciary Duties

Fiduciary duties include, but are not limited to:

- Duty of care
- Duty of loyalty
- Duty of account
- Duty of confidentiality
- Duty of full disclosure
- Duty of good faith and fair dealing
- Duty of due diligence
- Duty of prudence
- Duty to central purpose within governing laws, policy and practices

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Test of Fiduciary Obligation

- Justice Frankfurter: SEC v. Chenery Corp.

  "…. to say a man is a fiduciary only begins the analysis; it gives direction to further inquiry
  - To whom is he a fiduciary?
  - What obligations does he owe as a fiduciary?
  - And what are the consequences of his deviation from duty?"

What are the Consequences?

- Breaching fiduciary duty can result in litigation with the following potential consequences:
  - Compensatory Damages
  - Punitive Damages
  - Professional Damages
  - Grand Jury Investigation
  - Personal liability
- Although school trustees are covered through insurance policies, it is possible to be affected personally depending on the breach.

Fiduciary Duties Include Compliance

- Ethical Standards
- Federal Regulations
- Nevada Revised Statutes
- Nevada Administrative Code
- Local policies, ordinances, codes
- Governmental accounting standards
- Generally acceptable accounting principles
- Grant/Donor restrictions or directives

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Breach of fiduciary duty

To prove a breach of fiduciary duty claim, plaintiff must show:

- The existence of a fiduciary relationship
- A breach of the duty owed
  - Intentional or unintentional
  - Act of omission
- Damages proximately caused by the breach
- Most breaches of fiduciary duty, experts say, involve ignorance, poor judgment or negligence

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Measure

- The **Prudent Man Rule** is based on common law stemming from the 1830 Massachusetts court formulation, *Harvard College v. Amory*[1] The prudent man rule directs trustees "to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."
- https://en.wikipedia.org/wiki/Prudent_man_rule

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Code of Ethical Standards for Public Officer or Employee

- Shall not seek or accept any
  - Gift
  - Service
  - Favor
  - Employment
  - Engagement
  - Emolument or
  - Economic opportunity

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Code of Ethical Standards for Public Officer or Employee

- Shall not use public position to:
  - Negotiate for, secure, or grant
    - unwarranted privileges
    - Preferences
    - exemptions or
    - Advantages

    for self or any business entity in which he has a pecuniary interest or a commitment in a private capacity to the interests of that person

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Code of Ethical Standards for Public Officer or Employee

- **Shall not accept** any compensation <u>for self or others to whom there is a commitment in a private capacity</u> from any private source for performance of public duties
- **Shall not bid on or contract** with agency whom he serves as a public officer (except under limited circumstances)
- **Shall not <u>use information</u>** not available to public to further his own significant pecuniary interests or the interests of others <u>to whom there is a commitment in a private capacity</u>

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How is a breach discovered?

- Public officials and public records are among the most scrutinized
  - Public meetings
  - Public Information Requests
  - Independent audits
  - Federal audits
  - State audits
  - Internal Revenue Service audits
  - PERS audits
  - Worker's compensation audits
  - Internal audits
  - Legislative Counsel Bureau
  - Committee on Local Government Finance
  - Department of Taxation
  - Department of Education (State and Federal)
  - Federal Equal Opportunity
  - Market Disclosure
  - Rating Agencies

Examples of Potential Breach

- Failure to keep informed about the business
- Knowingly or unknowingly violating laws, policies or other governing authorities (a.k.a. non-compliance).
  - Lack of knowledge is not a defense
- Taking what may be perceived as unreasonable risk (investments, financial projections, waiting to improve a condition)
- Misleading or false information or misrepresentation (act or omission)
- Failure to prevent an action

Examples of Potential Breach

- Over reliance on professional advice
- Serving an interest in conflict with the greater good or serving a self-interest
- Failing to act in accordance with building codes and obtain proper inspections
- Non compliance or Inconsistent application of rules, regulations, laws
- Deficit spending
- Violation of ethics code

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How to Avoid Claims

- Education about the business
- Know rules of governance and ethics
- Attend professional development
- Be conservative
- Understand concepts, rules, initiatives, etc.
- Listen to advice but do not blindly follow
- Know and follow federal, state and local laws
- Know and follow policies and procedures
- Consistently follow past practice
- Avoid conflicts and comingling

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Questions/Comments

Fiduciary Liabilty claims[8]

Type of claim	Percent
Benefits disputes, including denial	47%
Civil rights, including discrimination	9%
Reduction of plan benefits	9%
Communication of plan benefits	7%
Misleading representations	6%
Administrative error in benefit plan	5%
Imprudent investments/services	4%
Other issues	13%

http://www.roughnotes.com/rnmagazine/2002/november02/11p32.htm

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