

What are the fiduciary responsibilities of board members?

Members of the governing boards of colleges and universities hold a unique position with regard to stewardship of the institutions they serve, a position not shared with students, faculty, alumni, donors, regulators, or others in the community. Governing board members are fiduciaries.

The concept and practice of being a fiduciary cannot and should not be reduced to a legal principle with no real-world impact on a board member's behavior. Fiduciary principles and duties are at the heart of good governance. The fiduciary duties described here may seem, at first glance, to be a matter of common sense. What could be more essential for a board member than to act with good faith and care, with loyalty to the institution, and in compliance with its mission and the law? And yet, behind nearly every failure of governance and leadership at higher education institutions is a breach of the principles of fiduciary duty.

Upon whom do fiduciary responsibilities fall?

Fiduciary duties are defined in law as the personal responsibilities of board members.

While governing boards act as a body, the fiduciary duties applied by law and best practice fall on individual board members. Each has a personal responsibility to ensure that he or she is up to the task and fulfilling his or her obligations. Board members must be more than names on a masthead. They must be fully engaged. They must attend meetings, read and evaluate the materials, ask questions and get answers, honor confidentiality, avoid conflicts of interest, demonstrate loyalty, understand and uphold mission, and ensure legal and ethical compliance. Those who cannot do so must step down and allow others to take their place. The success and sustainability of the institution and the protection of board members from personal liability require nothing less.

What is a fiduciary?

A fiduciary is a person who has special duties of care, loyalty, and obedience in connection with the administration, investment, monitoring, and distribution of property.

Under state statutory and common law, officers and board members of corporations—including nonprofit corporations and public bodies that operate colleges and universities—are fiduciaries and must act in accordance with the fiduciary duties of care, loyalty, and obedience. Legally, a fiduciary relationship is one of trust or confidence between parties. A fiduciary is someone who has special responsibilities in connection with the administration, investment, monitoring, and distribution of property—in this case, the charitable or public assets of the institution. These assets include not just the buildings and grounds and endowment, but also intangibles, such as the reputation of the institution and its role in the community. A college or university board member or officer has duties to the institution under the law that a faculty member, a student, or an administrator does not.

What duties are owed by a fiduciary?

The particular duties owed by a fiduciary to the institution he or she serves are commonly known, as described above, as the fiduciary duties of care, loyalty, and obedience. Taken together, they require board members to make careful, good-faith decisions in the best interest of the institution consistent with its public or charitable mission, independent of undue influence from any party or from financial interests. These duties may be described in and imposed by a college or university's bylaws, governing board policies, standards of conduct, or code of ethics. In the case of a public institution, state law may describe or

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apply these standards of conduct differently (for example, under particular rules applicable to regents or public bodies). However, adherence to these principles remains a key governance best practice at both independent and public colleges and universities.

How are fiduciary duties held by board members?

Board members and officers must understand that while they hold fiduciary duties individually, they act collectively as a board. Absent a particular designation of authority by the board to an individual board member or officer (such as the authorization of a board chair to enter into an employment agreement with the president on behalf of the institution), no single board member or officer has authority to bind the institution or determine its course of action, even those who may be appointed by a state governor or through a political process.

What is the fiduciary duty of care?

The **duty of care** requires a board member to reasonably exercise his or her responsibilities in the best interests of his or her institution.

The **duty of care** generally requires officers and governing board members to carry out their responsibilities in good faith and to use the degree of diligence, care, and skill that 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.

Determining what is in the best interests of the institution is left to the governing board's sound judgment under the duty of care. It will necessarily involve a balancing of interests and priorities appropriate to the institution's mission and consistent with its strategic priorities. This should include explicit attention to the trade-offs inherent in achieving balance among employees' interests (maintaining quality of education and protecting the institution's assets), student interests (maintaining affordability), physical assets (buildings and grounds), fiscal assets (endowments and fund balances), consumer value of the degree (cost of degree attainment versus future job earnings), and community interests in the institution (jobs, economic development).

Under the duty of care, governing bodies of colleges and universities are responsible for both the short- and long-term financial health of the institution and the achievement of the goal of preserving the institution and its resources for future generations. At the same time, governing boards have the obligation to develop and protect the quality of the institution's academic programs and to become appropriately engaged in the oversight thereof.

What specific actions are required by the fiduciary duty of care?

There can be no single, succinct statement of specific actions required by the duty of care since different circumstances will inevitably require different acts. However, the proper exercise of the duty of care requires a board member to attend meetings regularly; to read and evaluate the meeting materials prepared for the board in advance of the meeting; to ask questions and participate actively in board discussions; and to be knowledgeable of the institution's purposes, operations, and environment.

What about the duty of care regarding confidentiality?

Also interwoven in the duty of care is the responsibility of board members to maintain the confidentiality of matters brought before the board, both during and after their board service. This is particularly the case with respect to personnel concerns and sensitive business matters. In some cases, board members may be asked to sign an oath of confidentiality or a binding agreement that sets forth their duties and responsibilities to the institution. Such instruments may be useful, but they may also seem heavy-handed to some, and the duties will apply to board members who have been duly elected and have consented to service whether or not an oath or agreement exists. At the same time, board members must balance their obligation to maintain confidentiality with the core governance principle and public policy objective of promoting transparency in board operations.

Does the duty of care require special expertise or knowledge?

Board members do not need to be experts or specialists. However, they must be reasonably well-informed concerning the business of the board.

The duty of care does not require professional expertise, extensive consideration, or full knowledge of the matter at hand by every board member. Instead, the duty generally requires board members to be reasonably well-informed of the relevant issues. Officers and board members may rely upon expert advice in making their determinations. For example, a board member may rely upon information, opinions, reports, or statements—including financial statements and other financial data—that are prepared or presented by

- a) one or more officers or employees of the institution whom the board reasonably believes to be reliable and competent in the matters presented;
- b) legal counsel, public accountants, or other persons as to matters the board reasonably believes are within the person's professional or expert competence; or
- c) a committee of the governing board of which he or she is not a member if the board member reasonably believes the committee's report merits confidence.

Any reliance on information provided by others must be reasonable under the circumstances, considering such factors as the source from which the information was obtained, whether the information relied upon is a brief summary or an extensive analysis, whether the matter is routine or exceptional, and the time frame in which a decision must be made.

What is the fiduciary duty of loyalty?

The duty of loyalty requires that board members consider only the good of their institutions in performing their duties, not their own interests or those of other individuals or organizations.

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. The requirement that officers and board members discharge their duties in good faith is a subjective one that will vary depending on facts and circumstances.

Under this duty, a college or university board member must be loyal to the institution and not use the position of authority to obtain, directly or indirectly, a benefit for him or herself or for another organization in which the board member has an interest. Accordingly, when evaluating a board member's conduct, the duty of loyalty considers both a board member's financial interests and the governance or leadership positions he or she holds with other organizations.

How does the duty of loyalty define board member independence?

An independent board member is one who does not work for, does not do business with, and does not stand to materially gain in any other way from association with his or her institution.

Board member independence is increasingly sought after by regulators and key stakeholders to ensure adherence to the duty of loyalty. In this context, independence means that the board member is not employed by and does not do material business with the college or university. This information is reported on IRS Form 990 and in other public record filings. In addition, the board member acts independently of any personal relationship he or she may have with the president or senior leaders of the college or university or with other board members. It is not required that every member of the board be independent (for example, some ex officio board members may not be), but ideally, a majority of the board members should be independent.

In addition, it is incumbent on board members to retain their independence from external and internal stakeholders in the conduct of their oversight and policy responsibilities. This applies to boards of independent institutions and especially to public boards whose members are most often selected for their service through some form of political appointment. It also applies in cases in which board members are appointed or elected by internal constituent groups such as faculty or staff. Public and internally appointed board members may be respectful of the views of appointing authorities, but they must not allow such influence to be determinative of board action. Governing board members of public institutions, while serving the public interest, must still adhere to the fiduciary duty of loyalty to the institution and, in so doing, must prioritize the interests of the institution over any other. It is essential that board members avoid a conflict of loyalty in meeting their fiduciary responsibilities to act on behalf of the institution(s) they hold in trust.

What is the most critical implementation of the fiduciary duty of loyalty?

The most critical implementation of the duty of loyalty comes in a college or university's conflict-of-interest policy. Such a policy, when adhering to state law and best governance practices, requires that board members fully disclose financial interests and dual organizational relationships ("dualities of interest") that may affect their decision making on behalf of the institution. The policy will prohibit board members from participating in or unduly influencing decisions in which they have a material financial conflict of interest or an adverse duality of interest ("recusal") and may require the board member to eliminate the duality of interest.

What is the fiduciary duty of obedience?

The duty of obedience requires board members to ensure that their institutions operate according to stated purposes and according to the law.

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. The board should also periodically reevaluate its purposes and mission and must be prepared to amend or change them when it is necessary and appropriate to do so under the law and the institution's governing documents. A governing body of a college or university must make reasonable efforts to ensure that the institution is both legally and ethically compliant with the law and applicable internal and external rules (for example, accreditation, environmental, research, labor, or athletics requirements) and that it has instituted effective internal controls to achieve compliance and to identify and address problems.

To whom are fiduciary duties owed?

Fiduciary duties are owed by law to the institution. They may be extended by custom, circumstance, or necessity to a range of other stakeholders.

By law, the duties of care, loyalty, and obedience are owed to the institution by governing body members and officers. However, in the court of political and public opinion, fiduciary duties are commonly extended (erroneously) to other beneficiaries: students (and those who may pay the tuition for them), faculty, alumni, donors, and the community at large, particularly where the institution has a direct and material impact on the livelihood of its community and the beneficiaries of its research and scholarship. In a given case, governing board members may comply faithfully and with integrity with their legal fiduciary duties in overseeing their institutions and yet still run afoul of regulators, politicians, and stakeholders who believe a different result should ensue. It may even cost a board member his or her seat. Still, fidelity by board members and officers to their legal fiduciary duties is the essence of good governance.

May boards share fiduciary duties?

In the American higher education system of shared governance, governing boards share governance duties with the president and the faculty while respecting academic freedom and soliciting input from a broad campus constituency. However, under the law, only governing board members and officers hold fiduciary responsibility. Nevertheless, the governance principles ingrained in the fiduciary duties discussed here have clear application to the efforts of the administration and faculty as well. All participants in the system of shared governance would do well to adhere to these principles and practices.

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