



Everyday Ethics for Local Officials

Fiduciary Duties and Public Service

February 2008

QUESTION

As the chief executive for a local government agency, I have seen elected officials become bogged down in the details of various ethics laws. Instead of examining the proper thing to do in a specific situation, the focus shifts to whether a certain course of action will get an official in trouble with the law.

*It occurs to me that it might be easier if those of us who care about public service ethics started speaking in broader terms. For example, what if we just spoke in terms of public servants owing a **fiduciary duty** to the public they serve? Doesn't that concept underlie most if not all ethics laws? Wouldn't that be a simpler way to look at a public servant's ethical obligations?*

ANSWER

You pose an intriguing question. There are indeed a number of parallels between ethics laws and fiduciary responsibilities. In addition, the notion of having a fiduciary duty also touches on some of the higher obligations of public service above and beyond the minimum requirements of most public service ethics laws. Thinking about the parallels between fiduciary duties and public service ethics offers a good opportunity to think broadly about the obligations of public service.

What Is a Fiduciary?

How might concepts underlying fiduciary duty relate to the public's expectations of public officials? First, let's look at the term "fiduciary." It derives from the Latin terms *fides* or *fiducia*, both of which mean trust and confidence.

Certainly when the public chooses an elected official, the public is putting its trust and confidence in him or her to act in the public's best interests. The same can be said when one becomes an employee of a public agency. The agency trusts everyone on its team to put the public's interests first. Indeed, always putting the public's interests first is the essence of public service ethics.

A fiduciary is also someone who acts for another. That is why trust and confidence are so important.

In a representative democracy, the public elects officials to act in their interests.¹ Elected officials make important decisions on behalf of the public, including how to spend taxpayer and other public monies on infrastructure and services.

Public officials also exercise the power of the collective will when they adopt and enforce regulations. Regulations intrude on individuals' prerogatives. Essentially, in a given situation, what an individual wants to do must yield to the concept of the greater good of the community.

Wielding the power of the public purse as well as the power to regulate are certainly weighty responsibilities.

Duties of a Fiduciary

Because a fiduciary has the power and obligation to act for another, the law imposes on fiduciaries strict standards of diligence, responsibility and honesty.

These are very similar to federal law standards for public officials, which impose on public officials the broad obligation to serve the public honestly. What does that mean? According to federal prosecutors, honest public service means being conscientious, loyal, faithful, disinterested and unbiased. Honest public service is performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud and corruption.² As the following discussion of fiduciary duty obligations illustrates, the standards are very similar.

Diligence: The Duty to Do a Good Job

The law speaks in terms of a fiduciary using his or her "best efforts" on behalf of those served. This typically means using all possible skill, care and diligence when acting on behalf of those served. In the case of public servants, the task is for public officials to use their best skills, care and diligence in serving the public.

That means educating oneself about the issues facing the community -- talking to the community, staff and other experts, as well as reading relevant reports and studies. It also means being diligent in preparing for and attending meetings. Ultimately, it means making decisions that reflect one's best judgment on what course of action will produce positive results for the community.

Of course, public officials sometimes face very hard decisions, with difficult trade-offs among what seem to be equally important goals. Determining what the "best" decision is

in terms of the public's interests is easier said than done. However, there are tools to help public officials sort through arduous choices.

Sometimes laws provide guidance in a given situation. For example, in some situations the law states that preserving the environment is of primary importance; in other situations, the priority may be considerations of fairness and fair processes.

Speaking of fairness, your own values provide another source of guidance. Values relevant to public service decision-making include trustworthiness, fairness, responsibility, loyalty, compassion and respect. Sometimes officials translate one or more of these values into decisions that they perceive offer the most benefits for the most people. Sometimes that approach yields when a decision would pose an unfair burden on a particular segment of the community.

Hearing directly from the public about what people believe to be in their best interests is another helpful tool for local officials. The challenge is to make sure an agency uses processes appropriate to the issue and the type of input desired. Officials who emphasize greater inclusiveness and public engagement in public service view themselves as stewards of a decision-making process as much as (or sometimes even more than) the actual decision-makers.

Responsibility and Loyalty: Putting Others' Interests First

A fiduciary is forbidden from acting in any manner adverse or contrary to the interests of those he or she serves. This means not putting one's own financial or political interests ahead of the public's. Put another way, as a public servant, your *loyalty* must be to the entity you serve and the public's interests, not your own interests.

The most egregious way a public official might put his or her own interest ahead of the public's is by engaging in graft -- the misuse of one's position to acquire personal financial gain.³ That can occur when a public official makes a decision because he or she receives a bribe to decide an issue a certain way. Another example is when an official receives payment (sometimes known as a kickback) for steering contracts to certain vendors.

The law prohibits public officials from using public resources for personal gain. The laws against embezzlement and theft are one such example. However, there are even more subtle forms of misusing public resources; for example, using public resources to enhance one's visibility in the community and, hence, chances for re-election. Such uses may well be illegal and certainly conflict with the ethical obligation to spend limited public resources in a way that benefits the public.

In our political culture, we are so sensitive to the *possibility* that decision-makers might put their financial interests ahead of those of the public that some laws are designed to

avoid even the *perception* that personal financial gain motivated a decision. Conflict-of-interest laws are an example of such laws.

The premise underlying conflict-of-interest laws is that when decision-makers are in a position where they might reasonably be *tempted* to put their own interests ahead of the public, the best course of action is for them to step aside from the decision-making process. This avoids any perception that a decision-maker's interests may have influenced his or her decision.

Do the conflict-of-interest laws have a cost? Yes. From time to time, conflict-of-interest laws prevent certain people from participating in the decision-making process. Those individuals may be smart, and they may have constituents who very much want them to participate in that decision. They were also elected to participate on the public's behalf as part of our representative democracy. They may even be motivated solely by the public's interests. Despite all this, they cannot participate. The goal is to have the balance fall so the public can be most assured its interests always come first.

This is because the law determines that the public's trust and confidence in its decision-makers is more important than the decision-makers' participation in every decision. Even the potential *appearance* of impropriety damages the public's trust and confidence enough to justify preventing a decision-maker from participating in important decisions.

Honesty: Being Open and Transparent

A person acting in a fiduciary capacity is held to a high standard of honesty and full disclosure.

When the public places power in the hands of its public officials, the public relies on officials to exercise that power prudently. Indeed, the definition of "trust" is to rely on the integrity, strength and ability of a person or thing.⁴

Former President Ronald Reagan's statement "trust but verify" resonated because, among other things, people feel most confident their trust won't be betrayed if there is a way to ensure that bad things aren't happening. President Reagan used the phrase in the context of foreign relations and weapons monitoring, but the same can be said of transparency in general.

Governmental transparency laws are an example of the public's trust-but-verify attitude toward public institutions. Such transparency laws include open meeting requirements that decision-making must occur in meetings where the public can attend and participate. Another example is the requirement that public records be open and accessible to public review.

Limits of the Fiduciary Duty Concept in Public Service

Although the concept of fiduciary duty can help public servants think through the legal and ethical obligations of public service, it's important to note that this concept has limits in the public service context. For fiduciaries, the courts are the ultimate source of accountability. Although public officials are answerable to the courts in certain situations, they must also answer to the public.

In general, the courts are more likely to second-guess the decisions of true (or formal) fiduciaries when there is a dispute over whether they met their obligations. The courts are also the ultimate enforcer of obligations for more traditional fiduciaries.

The courts play a role in enforcing the obligations of public officials, of course, by making sure public decisions and decision-making processes satisfy the requirements of various laws, including ethics-related laws. As already noted, there are laws related to graft, conflicts of interest, use of public resources, transparency and fair processes. Sometimes the law defines what types of considerations cannot enter into a decision (for example, discrimination against certain groups) or others that must be given certain weight (for example, environmental considerations or the need for affordable housing).

However, the courts will not substitute their judgment about what constitutes the public's best interests when an elected official has made his or her best judgment on what serves the public's interest. In our system of separated powers, the exercise of policy-making discretion ultimately resides with policy-makers when they are acting in a legislative capacity. Activities involved in implementing the law also involve some exercise of discretion with which the courts will not interfere. The theory is that the electorate is the ultimate check upon unwise, less than fully diligent or unethical decision-makers.

However, as federal law related to public officials' obligations to engage in "honest" services indicates, it can be a risky strategy for public officials to focus closely on the fine distinctions under specific state law that divide lawful from unlawful conduct.

Public officials should develop the habit of asking whether their outside interests, duties or affiliations actually detract or appear to detract from their ability to exercise an undivided duty of loyalty to the public's interest and the organization they serve. This standard gets to the core of the issue and prevents nitpicking over close calls or loopholes in imperfectly written laws.

This strategy also goes beyond the minimum requirements of the law by focusing on the public's trust and confidence in the decision-making process, and encourages public officials to avoid conduct that may be, strictly speaking, legal but not ethical.

Conclusion

Does the concept of public officials owing a type of fiduciary duty to the public help simplify what public service ethics is about? Simplification is frequently in the eye of the beholder, so we will let our readers be the judge. Certainly the core concept of acting for the benefit of others as opposed to oneself is equally important to both public service ethics and fiduciary obligations.

Perhaps something like the Marine Corps motto of *Semper Fi* or "Always Faithful" (*Semper Fidelis*) can simplify the way one thinks about public service ethics. Public officials, however, must be faithful to the concept of all actions being about the public's interests. *Semper pro Populus* means "Always for the Public" -- the core message of both a fiduciary approach to public service and the concept underlying public service ethics laws.

Special Cases: Investing Money and Public Pension Boards

In some situations, the nature of public officials' fiduciary obligations is more explicit.

Investing Money: California law⁵ specifically says that local governing bodies are fiduciaries when it comes to investing public money. This means officials have a legal duty to invest according to the "prudent investor" standard, which generally requires public officials to make investment decisions with care, skill, prudence and diligence. The statute goes on to specify that preserving the value of the funds invested must be the primary objective of such investments.⁶ Liquidity and return on investment must be the second and third objectives, respectively.

Public Pension Plans: Pension boards for public pension plans are another variation on the fiduciary duty theme. Such pension board members are fiduciaries, and the duty they owe is to pension plan participants⁷ -- not the public as a whole. This means decisions must be in the plan participants' best interests. Pension board members also have a duty to invest pension plan monies in the interests of plan participants, using care, diligence and skill.

Some public agency counsel also believe that failure to accurately and completely report pension fund obligations under the new General Accounting Board Standards (known as GASB 43 and 45) may also violate fiduciary responsibilities if the plan is underfunded.

Loyalty to the Entity You Serve

When you join an organization's governing board, typically your role includes an obligation to act with the organization's best interests in mind. As noted in the June 2004 "Everyday Ethics" column, this can create conflicting loyalties when you serve on a regional body and your city's or county's interests conflict with what's best for the region.

A variation on that theme occurs when what's best for the city or county as a whole conflicts with what your supporters want you to do or what's best for your district. As an ethical matter, when you become a member of a governing board, you take on the responsibility to do what's generally best for the jurisdiction as a whole. You can argue for measures that mitigate unfair burdens on sub-areas of the city or county or spread burdens more equitably (since fairness is another ethical value), but pursuing parochial interests at the expense of the general welfare of the organization as a whole conflicts with your ethical duties to the organization.

This piece originally ran in *Western City Magazine* and is a service of the Institute for Local Government (ILG) Ethics Project, which offers resources on public service ethics for local officials. For more information, visit www.ca-ilg.org/trust.

ILG thanks the following individuals for their contributions to this article: Buck Delventhal, San Francisco City Attorney's Office; Joe Pannone, Aleshire and Wynder; Richard P. Shanahan, Bartkiewicz, Kronick & Shanahan; and Louis Leone, Stubbs & Leone.

Endnotes:

¹ *U.S. v. Randall Harold Cunningham*, No. 05cr2137 LAB (filed Nov. 28, 2005) page 4 (available at <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/crim/uscnnghm112805cinf.pdf>).

² graft. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. <http://dictionary.reference.com/browse/graft> (accessed: Nov. 11, 2007).

³ trust. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. <http://dictionary.reference.com/browse/trust> (accessed: Nov. 11, 2007).

⁴ See Cal. Gov't Code §53600.3.

⁵ See Cal. Gov't Code §53600.5.

⁶ See *Hittle v. Santa Barbara County Employees Retirement*, 39 Cal.3d 374, 392-93, 216 Cal. Rptr. 733, 743-44 (1985) (noting the fiduciary relationship between plan boards and participants).

⁷ See, for example, Cal. Corp. Code § 7231(a) (fiduciary obligations of nonprofit mutual benefit corporation directors).