

GOOD SENSE GOVERNANCE

Legal Affairs & Association and MLS Governance

January 2018

FIDUCIARY DUTIES

IN A NUTSHELL

1. Pursuant to state law, individuals serving on an association's board of directors as directors or officers ("Association Leaders") owe fiduciary duties to the association.
2. Fiduciary duties are owed to the association and not to the association's members.
3. In general, fiduciary duties require Association Leaders to act in good faith, in the best interest of the association at all times, and to never make decisions based on furthering a personal or outside business interest.
4. Specifically, fiduciary duties may include the duties of care, confidentiality, loyalty, obedience, and accounting.
5. Association Leaders must avoid, disclose, and resolve any conflicts of interest prior to voting or otherwise participating in any deliberations concerning an association matter.

NUTS AND BOLTS

Fiduciary Duty is defined by Black's Law Dictionary as *"a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person."*

An Association Leader's specific fiduciary duties may include:

1. **Duty of Care** - requires Association Leaders to exhibit honesty, act in good faith, and exercise ordinary and reasonable care in the discharge of their duties. Directors must attend, thoroughly prepare for, and actively engage in deliberations during meetings, and when necessary, seek advice from third-party experts, such as attorneys or accountants.
2. **Duty of Confidentiality** - requires Association Leaders to maintain the confidentiality of board discussions and deliberations, and prohibits the disclosure of any non-public information an Association Leader may be privy to by virtue of their position. The association's best interests will be served when healthy debate, and candid conversations take place, which requires Association Leaders to have confidence that their colleagues will also uphold their duty of confidentiality.

3. **Duty of Loyalty** - requires an undivided allegiance and duty of faithfulness to the association. The best interests of the association must prevail over any individual interest, and the use of an Association Leader's position, or information gained through such position for any personal benefit is prohibited. Association Leaders must avoid, disclose, and resolve any conflicts of interest. If a conflict of interest is not resolved, the duty of loyalty may require an Association Leader to abstain from voting, participating in discussion, and potentially from hearing debate.
4. **Duty of Obedience** - requires Association Leaders to act in accordance with, and in furtherance of, the association's mission and governing documents (i.e. bylaws, rules, policies), as well as applicable laws and regulations. The duty of obedience requires Association Leaders to support, help implement, and carry out the actions taken by the association's board of directors. Association Leaders must avoid undermining a decision of the board of directors', even if the Association Leader disagrees with the action taken on a particular issue.
5. **Duty of Accounting** - requires Association Leaders to safeguard, protect, and preserve association assets by adopting, and following, proper accounting procedures and controls. Association Leaders should ensure association funds are used for lawful purposes.

Conflict of Interest for Multi-board Directors

Association Leaders should be keenly attuned to, and able to recognize, potential conflicts of interest that may hinder an Association Leader's ability to carry out their fiduciary duties. Association Leaders who serve on more than one board of directors should avoid serving for an organization whose mission or interests may be in conflict with those of the association. In the REALTOR® organization context, it is possible that an Association Leader may sit on the board of directors for their state and local REALTOR® associations. Association Leaders must be sure to avoid allowing the interests of one association influence their decision-making ability with respect to the other. When an unavoidable conflict arises, Association Leaders should disclose and attempt to resolve the conflict of interest prior to engaging in any discussion, or vote on the matter. To determine if a conflict has been resolved, an Association Leader should be able to affirmatively answer the following question: *Can I give my undivided allegiance to the association on the matter at issue?*

Breach of Fiduciary Duty

Being an Association Leader is a serious, and important responsibility. Association Leaders are entrusted with the power to direct and influence the business and affairs of the association, and a breach of an Association Leader's fiduciary duties may result in potential liability for the Association as well as the Association Leader. That said, the law does not require perfection. The "Business Judgement Rule", a manifestation of state law, will protect Association Leaders from personal liability for mistakes or bad decisions provided that at the time of the decision-making, the Association Leader acted in good faith and sought the best interests of the association.

ASSOCIATION ACTION

1. Be familiar with the fiduciary duties imposed by state law.
2. Adopt and require Association Leaders to sign a "Code of Conduct" or policy that clearly outlines an Association Leader's fiduciary duties, to whom the duties are owed, and the consequences for any violations.
3. Conduct annual training for incoming Association Leaders that includes a fiduciary duty overview.
4. Adopt a conflict of interest policy, and remind Association Leaders of the policy at each board of directors' meeting.
5. Read a fiduciary duty statement at the outset of each board of directors' meeting.