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## A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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### The Fiduciary Duty of Board and Council Members

The Board or Council of a regulator acts in the capacity of the board of directors of a non-profit corporation. As such, each Board or Council member has a fiduciary duty to the organization and its public interest mandate.

A fiduciary is a person who has an undivided duty of loyalty, good faith and diligence to act on behalf of another person or group. For example, if you hold a power of attorney over the affairs of your Aunt Bertha, you must ensure that all of your decisions about the use of her money are for her benefit and not yours. In the regulatory context, the Board or Council member's Aunt Bertha is the regulator and its public interest objects.

The fiduciary duty has the following components:

**Avoid Conflicts of Interest.** A Board or Council member must not participate in any decisions or have any relationships that would create even the appearance of a divided loyalty. While the most frequent example given by commentators is voting on a contract involving oneself or one's family;

this is hardly ever a concern for regulators. The more common issues are relationship and regulatory related. Having a leadership role in another professional organization, particularly an organization that advances the interests of the profession, is a recurring problem. So is participating in regulatory decisions (e.g., policies, programs, regulations) that affect the Board or Council member disproportionately compared to most others in the profession.

A related concept is avoiding an appearance of bias when making a decision in a member-specific matter (e.g., complaints, discipline). Any connection to the member or the issue raises concerns as to one's neutrality and impartiality.

It is, of course, best to avoid conflicts of interest and appearances of bias from the get-go. Resigning from a leadership position in other professional organizations should be a given. Board and Council members should also shun involvement in incidents that are likely to result in a complaint or an investigation (e.g., as a consultant or "fixer"). Where the issue is unavoidable, the facts should be disclosed and, where there is any doubt at all, the Board or Council member should leave the room for the entire discussion and decision-making process and

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### FOR MORE INFORMATION

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should not try to indirectly influence the decision.

**Confidentiality.** Board and Council members should treat information obtained through their involvement with the regulator the same way as they would handle the regulator's money. The information belongs to the regulator and should not be used for any purpose other than advancing the regulator's mission. Any personal use of the information is unacceptable. This duty applies not only to member-specific information, but to information related to policies, programs, personalities and even future regulatory directions. The fact that no one would be "deprived" by the use of the information is irrelevant. Just the perception of personal benefit of the Board or Council member through the use of such information would damage the organization.

**Diligence.** Board and Council members need to be conscientious in the fulfillment of their duties. This involves attending all meetings unless there are exceptional circumstances preventing their attendance. Attendance is particularly important when each member is expected to constitute part of the quorum of a committee or hearing panel. Reasonable participation in the discussions is also anticipated. Of course, neither of these means much if the Board or Council members have not done their homework, reviewing the background materials and considering the issues.

Perhaps because the absence of diligence is not generally viewed as a breach of ethics (like, say, a conflict of interest or a breach of confidentiality) and because diligence is a matter of degree (not an either/or proposition), some Board and Council members do view it seriously. However, the damage to the regulator (and the public) can

be as significant and sometimes greater by a dereliction of this duty as any other. Perhaps if the lack of attentiveness was viewed as "stealing" resources from the regulator, it would be viewed more seriously.

**Competence.** Generally the courts do not apply an objective standard to the competence of Board or Council members. People are selected to serve on the Boards and Councils of regulators for reasons other than business skills or knowledge (e.g., to offer a unique perspective, to provide diversity of backgrounds, reputation and respect in other fields). However, to the extent of their abilities, Board and Council members must provide thoughtful and prudent direction to the organization.

Diligence and competence go together. Council or Board members are expected to understand their duties (e.g., of confidentiality). Compliance cannot be accomplished if the Board or Council members do not do their orientation homework.

**Good Faith.** Board and Council members must always act honestly in their genuine view as to the best interest of the public. There are always secondary issues surrounding their activities for a regulator. These include: how each member is perceived by others (reputation), personal affirmation and other emotional needs, long-term career advancement, resume building and wishing to avoid offending others.

For example, if a Board or Council member believes that one of his or her colleagues has an undeclared conflict of interest, the Board or Council member must act. Hopefully the concern can be addressed privately, but if the colleague declines to address the issue, the

Board or Council member must raise the matter before the group.

Often these subsidiary matters would not amount to a conflict of interest. But, personal integrity requires that one applies personal insight and reflective thinking to ensure that choices are made truly for the public interest.

Good governance for a regulator requires Board and Council members to fulfill their fiduciary obligations.