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## The Fiduciary Obligations of Public Officials

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# ARTICLE

*Vincent R. Johnson*

## The Fiduciary Obligations of Public Officials

**Abstract.** At various levels of government, the conduct of public officials is often regulated by ethical standards laid down by legislative enactments, such as federal or state statutes or municipal ordinances. These rules of government ethics are important landmarks in the field of law that defines the legal and ethical obligations of public officials. Such provisions can form the basis for the kinds of government ethics training that helps to minimize wrongful conduct by public servants and reduces the risk that the performance of official duties will be clouded by appearances of impropriety. Codified government ethics rules also frequently provide mechanisms for the investigation of charges of misconduct, and for the enforcement of ethical standards through criminal penalties and other sanctions. However, codified government ethics rules vary widely in quality and scope. Such provisions are often incomplete, poorly drafted, and weakened by legislative compromises made during the adoption process.

This article argues that, notwithstanding the proliferation and usefulness of government ethics codes, common law fiduciary-duty principles continue to play an important role in shaping the law of government ethics. Regardless of whether specific rules of government ethics have been adopted, public officials have a broad fiduciary duty to carry out their responsibilities in a manner that is faithful to the public trust that has been reposed in them. The duties of public officials may extend beyond minimal compliance with codified ethics rules. Even if no ethics code has been adopted, or if no code provision is on point, public officials must act in a manner that comports with their common law fiduciary-duty obligations. Government ethics laws, criminal provisions,

and other legislative enactments should be interpreted and applied in light of the demanding loyalty obligations that are imposed on public officials as fiduciaries.

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### I. ARE PUBLIC OFFICIALS FIDUCIARIES?

The question is more poignant than ever: Are public officials fiduciaries?<sup>1</sup> If so, to whom are their duties owed, and how far do those duties extend?

America has a complex scheme of government. There are dual national and state sovereigns, multiple types of local government (e.g., cities,<sup>2</sup> counties, school districts, and public authorities<sup>3</sup>), and various kinds of

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1. One indication that the fiduciary obligations of public officials are widely misunderstood or disregarded is the fact that serious ethics charges have been raised against numerous campaign and administration officials during the first two years of the Donald Trump presidency. See Larry Buchanan & Karen Yourish, *From Criminal Convictions to Ethical Lapses: The Range of Misconduct in Trump's Orbit*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/interactive/2018/09/01/us/politics/trump-officials-crimes-and-ethical-violations.html> [perma.cc/M8PR-Q9X7] (depicting graphically criminal and ethical charges or issues relating to fifteen persons tied to the Trump Administration); Dan Mangan, *Trump's Cabinet Has Been Rocked by a Number of Ethics Scandals—Here's a Complete Guide*, CNBC (Feb. 16, 2018, 6:00 AM) <https://www.cnbc.com/2018/02/15/trump-cabinet-officials-in-ethics-scandals.html> [perma.cc/E6SW-JBDC] (“Most of the officials who have faced scrutiny had been the target of complaints about their travel practices.”); *Trump Team's Conflicts and Scandals: An Interactive Guide*, BLOOMBERG, <https://www.bloomberg.com/graphics/trump-administration-conflicts/> [perma.cc/LWF9-5C4G] (last updated Mar. 14, 2019, 2:00 PM) (“Donald Trump . . . has surrounded himself with family members, appointees and advisers who’ve been accused of conflicts of interest, misuse of public funds, influence peddling, self-enrichment, working for foreign governments, failure to disclose information and violating ethics rules. Some are under investigation or facing lawsuits, others have resigned and five have either been convicted or pleaded guilty, including three for lying to government officials.”).

2. See Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 365 (1999) (“The emergence and rapid spread of business improvement districts (“BIDs”) is one of the most important recent developments in American cities. BIDs have been controversial, with both supporters and proponents viewing the districts as part of a trend toward the privatization of the public sector.”).

3. See Adam Paul Gordon, *Turning the Lights on: An Analysis of the Fiduciary Duty Provisions of the New York State Public Authority Reform Act*, 56 N.Y. L. SCH. L. REV. 1567, 1570 (2012) (“Public

public officials (e.g., elected and appointed, full-time and part-time, remunerated and unpaid). Perhaps because of this complexity the answers to questions about the fiduciary obligations of public officials have never been entirely clear.

Recent news reports detail an abundance of ethics charges against the President,<sup>4</sup> persons in his Administration,<sup>5</sup> Members of Congress,<sup>6</sup> and other public officials.<sup>7</sup> The stories suggest that there is widespread

authorities are state-chartered public benefit corporations created ‘to finance, build, manage, or improve capital assets and further public works.’ . . . These entities, which are usually overseen by a board of directors, typically issue bonds to fund important public projects such as transportation infrastructure, housing, and hospitals.” (footnote omitted) (quoting IRA M. MILLSTEIN ET AL., NEW YORK STATE COMMISSION ON PUBLIC AUTHORITY REFORM REPORT (2006), <https://www.abo.ny.gov/commissionPublicAuth/FinalReport.pdf> [<https://perma.cc/V7EZ-X36M>])).

4. See Karen Yourish & Larry Buchanan, *Trump Still Makes Money from His Properties. Is This Constitutional?*, N.Y. TIMES (Dec. 17, 2018), [https://www.nytimes.com/interactive/2018/12/17/us/politics/trump-emoluments-money.html?rref=collection%2Fbyline%2Fkaren-yourish&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=3&pgtype=collection](https://www.nytimes.com/interactive/2018/12/17/us/politics/trump-emoluments-money.html?rref=collection%2Fbyline%2Fkaren-yourish&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection) [[perma.cc/2VBH-V4NV](https://perma.cc/2VBH-V4NV)] (“The Constitution prohibits the president from accepting payments from foreign and domestic governments. . . . Two lawsuits accuse Mr. Trump of violating the foreign and domestic emoluments clauses of the Constitution . . .”).

5. See Buchanan & Yourish, *supra* note 1 (“Since President Trump’s inauguration, numerous campaign and administration officials have been convicted of or pleaded guilty to crimes. Others were found to have violated federal ethics rules, or were forced to resign over security clearance issues.”); Editorial Board, Opinion, *Ryan Zinke, Into the Sunset*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/opinion/ryan-zinke-interior-resigns-trump.html> [[perma.cc/E8QB-4UPP](https://perma.cc/E8QB-4UPP)] (“The secretary of the Interior departs under a cascade of ethics investigations. . . . At last count, his leadership had spurred some [fifteen] inquiries into a colorful array of purported misbehavior ranging from conflicts of interest to the misuse of taxpayer funds to violating the Hatch Act . . .”).

6. See Press Release, U.S. House of Representatives Comm. on Ethics, Statement of the Chairwoman & Ranking Member of the Comm. on Ethics Regarding Representative Thomas Garrett (Jan. 5, 2019), <https://ethics.house.gov/press-release/statement-chairwoman-and-ranking-member-committee-ethics-regarding-representative-29> [<https://perma.cc/YY6T-MN48>] (discussing an investigation into whether Congressman Thomas Garrett “may have improperly required, requested, or allowed members of his official staff to perform unofficial tasks for his and/or his wife’s personal benefit”).

7. See Emma Brown & Beth Reinhard, *Corruption Probe Looms Over Democrat’s Historic Campaign for Florida Governor*, WASH. POST (Aug. 31, 2018), [https://www.washingtonpost.com/investigations/corruption-probe-looms-over-democrats-historic-campaign-for-florida-governor/2018/08/31/623594b6-ac4a-11e8-8f4b-ae063e14538\\_story.html?noredirect=on&utm\\_term=.4c772232fc76](https://www.washingtonpost.com/investigations/corruption-probe-looms-over-democrats-historic-campaign-for-florida-governor/2018/08/31/623594b6-ac4a-11e8-8f4b-ae063e14538_story.html?noredirect=on&utm_term=.4c772232fc76) [[perma.cc/U64U-952R](https://perma.cc/U64U-952R)] (discussing issues related to the Democratic nominee for governor of Florida and “[t]hree people who claimed to be out-of-town developers or business executives who cozied up to public officials for more than a year”); see also Editorial Board, *Editorial: Corrupt Illinois Politicians? Here’s How to Make Sure Fleeced Taxpayers Never Forget Them*, CHI. TRIB. (July 5, 2018, 2:25 PM), <https://www.chicagotribune.com/news/opinion/editorials/ct-edit-corruption-park-chicago-ukraine->

ignorance or disregard of fiduciary principles at many levels of government. If the charges have merit, more needs to be done to understand, promote, and enforce high standards of conduct in public service.

#### A. *Loyalty Versus Independence*

In Anglo-American law, legal efforts to promote ethics in government can be traced back more than eight centuries to the provisions of the Magna Carta.

[T]he 1215 Magna Carta contained a trove of anti-corruption provisions. Though framed in terms of addressing the realities of life in early thirteenth century England, those provisions were driven by the same types of concerns that inspire modern champions of the Rule of Law to fight official corruption eight centuries later.<sup>8</sup>

Virtually all government ethics laws are based on the idea that public officials, in many circumstances, must adhere to standards of conduct that far exceed “the morals of the market place.”<sup>9</sup> Thus, ethics codes often state

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20180626-story.html [perma.cc/8MV4-RJQG] (opining that Illinois should have a permanent “Corruption Park” to “display the baubles that come from bribes and other crimes” involving public officials); Editorial Board, *Editorial: The End of Camelot at CPS*, CHI. TRIB., (July 31, 2018, 5:20 PM), <https://www.chicagotribune.com/news/opinion/editorials/ct-edit-chicago-schools-corruption-scandal-20180731-story.html> [perma.cc/5Y5F-734A] (discussing scandals involving corruption in the Chicago Public Schools); Michael Tarm, *Powerful Chicago Council Member Charged in Federal Probe*, AP NEWS (Jan. 3, 2019), <https://apnews.com/ed26ca6602ab4a5f94bb1c16cbf99baf> [perma.cc/W537-66XQ] (“Alderman Ed Burke, [seventy-five], is charged with one count of attempted extortion for conveying to company executives in 2017 that they’d get the permits only if they signed on as clients at Burke’s private property-tax law firm in Chicago . . . .”); Todd Wallack, *Charges Against Boston Officer Disappear After Private Court Hearing*, BOS. GLOBE (Dec. 8, 2018), <https://www.bostonglobe.com/metro/2018/12/07/charges-against-boston-police-officer-disappear-after-private-court-hearing/BzDUiCcGPd9kdpaoJcu2XN/story.html> [perma.cc/BY3B-4XVN] (“A long list of state troopers . . . arraigned over the past year on charges they stole thousands of dollars in overtime. . . . have become powerful symbols of public corruption.”).

8. Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY’S L.J. 1, 23 (2015) [hereinafter Johnson, *Ancient Magna Carta*]; see also Parts VI(A) and VI(B) of this article, which discuss the relevant provisions from the Magna Carta. In general, the Rule of Law demands: (1) decisions based on legal principles, (2) notice of what the law requires, (3) fair procedures and due process in resolving disputes, (4) equal treatment of all persons, and (5) rules and institutions that demonstrate integrity and respect for human dignity. See Vincent R. Johnson & Stephen C. Loomis, *The Rule of Law in China and the Prosecution of Li Zhuang*, 1 CHINESE J. COMP. L. 66, 76 (2013) (discussing the demands of the Rule of Law).

9. “As Justice [Benjamin] Cardozo observed, ‘[a fiduciary] is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.’” *Lopez v. Muñoz*, Hockema & Reed, L.L.P., 22 S.W.3d 857, 866 (Tex.

that in the performance of their duties public officials must set the interests of the public ahead of their own, as well as ahead of the interests of their families, friends, political compatriots, and business associates.<sup>10</sup>

On the other hand, public officials, in some instances, are permitted to advance their own views about what actions and policies are, or are not, in the public interest (such as regulation, free trade, or progressive taxation).

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2000) (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. Ct. App. 1928)); *see also* PAUL H. DOUGLAS, *ETHICS IN GOVERNMENT* 24, 25 (1953) (noting “we expect higher standards in government than in private life” and “the abuses which have been exposed and properly denounced in the field of government are quite widespread practices in private business”).

10. *See* RICHARD W. PAINTER, *GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE* xi (2009) (“[G]overnment ethics law . . . is supposed to assure that government employees . . . are independent from conflicts created by their own financial and other personal interests.”). Section 2-43 of the San Antonio, Texas Code of Ethics provides:

Sec. 2-43. Conflicts of interest.

(a) General rule. To avoid the appearance and risk of impropriety, a City official or employee shall not take any official action that he or she knows is likely to affect the economic interests of:

- (1) The official or employee;
- (2) His or her parent, child, spouse, or other family member within the second degree of consanguinity or affinity;
- (3) His or her outside client;
- (4) A member of his or her household;
- (5) The outside employer of the official or employee or of his or her parent, child (unless the child is a minor), spouse, or member of the household (unless member of household is a minor);
- (6) An entity in which the official or employee knows that any of the persons listed in subsections (a)(1) or (a)(2) holds an economic interest as that term is defined in section 2-42;
- (7) An entity which the official or employee knows is an affiliated or partner of an entity in which any of the persons listed in subsections (a)(1) or (a)(2) holds an economic interest as defined in section 2-42;
- (8) a. An entity for which the City official or employee serves as an officer or director or in any other policy making position; or b. A non-profit board to which the official or employee is appointed by the City Council or City management to represent the best interests of the City, if the action by the City official or employee as a member of the board is related to an item pertaining to the City, and the City official or employee would be involved in the negotiation, development or implementation of that item on behalf of the City; or
- (9) A person or entity with whom, within the past twelve (12) months: a. The official or employee, or his or her spouse, directly or indirectly has: 1. Solicited an offer of employment for which the application is still pending; 2. Received an offer of employment which has not been rejected; or 3. Accepted an offer of employment; or b. The official or employee, or his or her spouse, directly or indirectly engaged in negotiations pertaining to business opportunities, where such negotiations are pending or not terminated.

San Antonio, Tex., Code of Ethics § 2-43(a) (2018) [hereinafter San Antonio Ethics Code], *available at* <https://www.sanantonio.gov/Ethics/About/Ethics-Code> [perma.cc/SLP5-RJKZ].

They may do so without fear of being found to have breached their fiduciary obligations merely because others think that such actions or policies are unwise. Public officials are also often allowed to protect their own interests, such as by litigating *pro se*<sup>11</sup> legal claims against the governmental entities they serve.<sup>12</sup> Thus, questions arise as to when private interests outweigh obligations to promote the common good.

This article explores the issues suggested above. Part I(B) clarifies the scope of this article by identifying certain related issues that are not dealt with in this work. Part II addresses who qualifies as a public official. Part III discusses the nature and meaning of fiduciary duty, in particular, when such obligations arise, the demanding requirements they impose, and the legal mechanisms for redressing breaches of fiduciary duty. Part IV considers the application of fiduciary principles to public officials, as well as the persons or entities to which such duties run and the relationship of common law fiduciary duties to the codified standards of conduct that are sometimes applicable to public officials. Part V examines what basic principles of the law of agency say about the fiduciary obligations of public officials. Part VI discusses certain issues of recurring importance on which consensuses have emerged about the fiduciary duties of public officials. Those issues include: use of official power for improper economic benefit; misuse of government assets or information; representation of private interests adverse to the government; and conflicting outside employment. Part VII offers concluding thoughts.

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11. "Pro se" means "[o]ne who represents oneself in a court proceeding without the assistance of a lawyer." *Pro se*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. Section 2-47 of the San Antonio Ethics Code provides in part:

(d) Representation in litigation adverse to the City.

(1) Officials and employees (other than board members). A City official or employee, other than a person who is classified as an official only because he or she is an appointed member of a board or other City body, shall not represent any person, group, or entity, *other than himself or herself, or his or her spouse or minor children*, in any litigation to which the City is a party, if the interests of that person, group, or entity are adverse to the interests of the City.

(2) Board members. A person who is classified as a City official only because he or she is an appointed member of a board or other City body shall not represent any person, group, or entity, *other than himself or herself, or his or her spouse or minor children*, in any litigation to which the City is a party, if the interests of that person, group, or entity are adverse to interests of the City and the matter is substantially related to the official's duties to the City.

San Antonio Ethics Code, *supra* note 10, § 2-47(d)(1)–(2) (emphasis added); *see also id.* § 2-47(b)(1) ("A City official or employee shall not represent for compensation any person, group, or entity, *other than himself or herself, or his or her spouse or minor children*, before the City." (emphasis added)).



### B. *Public Officials, Public Employees, and Private Contractors*

There are two matters closely related to the fiduciary obligations of public officials that are not dealt with in this article, but which should be noted. First, the article draws a distinction between “public officials” and ordinary “public employees” who do not qualify as public officials, usually because their responsibilities are essentially ministerial. The public employee category includes a large number of rank and file workers in government offices and departments who carry out, rather than make, governmental policy. While ordinary public employees owe many fiduciary obligations to the governmental entities for which they work,<sup>13</sup> an exploration of the full extent of those duties is beyond the scope of this article. The focus here is on public officials.

Second, special issues arise when the functions of government are outsourced to private contractors.<sup>14</sup> In particular, there are questions about whether and to what extent the fiduciary obligations that are imposed on public officials should be imposed on outside contractors who are engaged to perform similar duties.<sup>15</sup> That issue is also beyond the scope of this work.

## II. PUBLIC OFFICIALS DEFINED

Many governmental entities have adopted legislation which makes clear who qualifies as a public official—at least for purposes of government ethics laws.<sup>16</sup> In the absence of such legislation, a reasonably useful working

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13. See Kathleen Clark, *Fiduciary-Based Standards for Bailout Contractors: What the Treasury Got Right and Wrong in TARP*, 95 MINN. L. REV. 1614, 1630 (2011) [hereinafter Clark, *Fiduciary-Based Standards*] (“An extensive array of ethics statutes and rules regulate the ethics of government employees, and these restrictions largely reflect employees’ fiduciary duties. They restrict employees’ financial interests, acceptance of gifts, outside activities, use of government resources (including information), and the kinds of work permissible after leaving the government. These restrictions generally help to ensure that employees make decisions in the interest of the government rather than a private interest.” (footnotes omitted)).

14. See generally Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest In and Out of Government*, 62 ALA. L. REV. 961, 961 (2011) (discussing the disparity between the strict regulation of government employees and the lax regulation of government contractor personnel).

15. See Clark, *Fiduciary-Based Standards*, *supra* note 13, at 1615 (“[T]he Treasury Department . . . delegated primary responsibility for implementing the bailout to outsiders, and . . . imposed fiduciary-based ethics standards on these outsiders . . . . [T]he Treasury’s actual experience with bailout contractors should be studied more closely to assess the costs and benefits of imposing ethics standards on outsiders who do the government’s work.”).

16. Section 2-42 of the San Antonio Ethics Code stipulates:

definition may be drawn from the United States Supreme Court decisions holding that “public officials” must meet a higher burden of proof when suing for defamation.<sup>17</sup> According to the Supreme Court:

[The test for determining if a governmental actor is a public official is whether the] position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees . . . .<sup>18</sup>

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Except in division 5 (Lobbyists), the term “official” or “City official” includes the following persons: The Mayor; Members of the City Council; The City Manager; Deputy City Manager; Assistant City Managers; Assistants to the City Manager; City Clerk; Deputy City Clerk; Assistant City Clerk; Municipal Court Presiding Judge; Municipal Court Judges and Magistrates; Municipal Court Clerk; Senior Deputy Court Clerk; Deputy Court Clerk; Chief Financial Officer; City Attorney; First Assistant City Attorney; All department directors and assistant/deputy department directors; Chief Executive Officer - Pre-K 4 SA; Chief Executive Officer - Tricentennial; Assistant to the Director; Internal Auditor and all Assistant Internal Auditors; Information Technology Auditor; Compliance Auditor; Assistant to City Council; Assistant to Mayor; Mayor Chief of Staff; Fire Chief; Deputy Fire Chief; District Fire Chief; Police Chief; Deputy Police Chief; Assistant Police Director; Police Captain; Chief Equity Officer; Grants Administrator; Senior Executive Secretary; Executive secretary; and Members of all boards, commissions (except the Youth Commission whose members are minors), committees, and other bodies created by the City Council pursuant to federal or state law or City ordinance, including entities that may be advisory only in nature, who are appointed by the Mayor, the City Council, or who are designated in the by-laws or organization papers of the entity to serve on behalf of the City; and board members of any entity who are appointed by the Mayor or City Council to such board membership.

This list is updated annually by the Human Resources Department. All updates are incorporated into this Code without further action by the City Council. The Human Resources staff shall provide the list annually to the City Clerk. The City Clerk shall promptly post it on the City's ethics webpage.

San Antonio Ethics Code, *supra* note 10, § 2-42(v).

17. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (“[T]he Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. . . . [T]he rule requiring proof of actual malice [meaning knowledge of falsity or reckless disregard for the truth] is applicable.”).

18. *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966); *see also id.* at 85 (“It is clear . . . that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”). For example, the term “public official” may apply to the executive director of a housing authority, *see Ortego v. Hickerson*, 989 So. 2d 777, 783 (La. Ct. App. 2008), or of a lottery, *see Cloud v. McKinney*, 228 S.W.3d 326, 340 (Tex. App.—Austin 2007, no pet.).

Under this definition, police officers are routinely classified as “public officials” because of the power they exercise.<sup>19</sup> The term “public official” does not apply to every defamation plaintiff who is on the government payroll. Nevertheless, “Depending on the facts, lower echelon employees, such as a county surveyor, a teacher who is also the school’s athletic director, a state university’s director of the Office of Community Standards, or a child protective services specialist, may all be deemed to be public officials.”<sup>20</sup> Policymakers, such as city council members, undoubtedly rank as public officials.<sup>21</sup>

### III. THE NATURE AND MEANING OF FIDUCIARY DUTY

#### A. *Two Kinds of Fiduciary Relationships*

Fiduciary duty is the highest duty known to the law.<sup>22</sup> Consequently, courts are reluctant to impose fiduciary obligations.<sup>23</sup>

19. See *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000) (“[B]ecause of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers’ high visibility within and impact on a community, . . . police officers, even patrol-level police officers . . . , are ‘public officials’ for purposes of defamation.”); *Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 860 (Tex. App.—Texarkana 1996, no writ) (stating “[l]aw enforcement personnel are almost universally held to be ‘public officials’” and citing more than 50 libel or slander actions involving police officers or personnel involved with law enforcement).

20. VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 217 (2d ed. 2014) (footnotes omitted).

21. Cf. *Chi. Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 185 (Ill. 1980) (“There can be no doubt that . . . [the] alderman . . . occupied a fiduciary relationship to the City.” (citing *City of Chicago ex rel. Cohen v. Keane*, 357 N.E.2d 452, 455–56 (Ill. 1976); *County of Cook v. Barrett*, 344 N.E.2d 540, 544–45 (Ill. 1975); Flaum & Carr, *The Equitable Bill of Accounting—A Viable Remedy for Combatting Official Misconduct*, 62 Ill. B.J. 622, 624 (1974))).

22. See *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 819–20 (Pa. 2017) (“A fiduciary duty is the highest duty implied by law. A fiduciary duty requires a party to act with the utmost good faith in furthering and advancing the other person’s interests, including a duty to disclose all relevant information.” (first citing *Miller v. Keystone Ins. Co.*, 636 A.2d 1109, 1116 (Pa. 1994) (Cappy, J., dissenting); then citing *Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1120 (Pa. 2000); *Young v. Kaye*, 279 A.2d 759, 763 (Pa. 1971); *Sylvester v. Beck*, 178 A.2d 755, 757 (Pa. 1962); *McCown v. Fraser*, 192 A. 674, 676–77 (Pa. 1937); *In re Null’s Estate*, 153 A. 137 (Pa. 1930))).

23. See also *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997) (“In order to give full force to contracts, we do not create . . . [a fiduciary] relationship lightly. . . . Accordingly, while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from, the agreement made the basis of the suit.” (first citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); then citing *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995))); VINCENT R. JOHNSON & CHENGLIN LIU, *STUDIES IN AMERICAN TORT LAW* 1051 (6th ed. 2018) (“[B]ecause

Nevertheless, judges often conclude that a fiduciary relationship exists. Fiduciary obligations have been imposed, for example, on real estate agents,<sup>24</sup> listing salespersons,<sup>25</sup> corporate officers and directors,<sup>26</sup> spouses,<sup>27</sup> partners,<sup>28</sup> law firm associates,<sup>29</sup> trustees,<sup>30</sup> executors,<sup>31</sup>

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the law of fiduciary obligations is demanding, courts are reluctant to characterize a non-professional relationship as fiduciary.”).

24. See *Green Mut. Prop. & Inv. Co. v. Wilshire Bank*, B275613, 2018 WL 6303971, at \*8 (Cal. Ct. App. Dec. 3, 2018) (“[F]iduciary duty . . . require[s] ‘the highest good faith and undivided service and loyalty.’” (quoting *William L. Lyon & Assocs., Inc. v. Super. Ct.*, 139 Cal. Rptr. 3d 670, 683 (Cal. Ct. App. 2012))); see also Clark, *Fiduciary-Based Standards*, *supra* note 13, at 1617 (“[F]inancial agents are agents in the eyes of the law. They stand in a principal-agent relationship with the government. By reason of their status as agents, they owe fiduciary duties to the government.” (footnote omitted)).

25. See *Horiike v. Coldwell Banker Residential Brokerage Co.*, 383 P.3d 1094, 1104 (Cal. 2016) (holding a real estate listing salesperson owed a fiduciary duty to the purchaser).

26. See *Integrated Pharms., Inc. v. Chatterjee (In re Chatterjee)*, 594 B.R. 15, 26 (Bankr. D. Mass. 2018) (“[Defendant], as an officer, director, employee, and investor of Integrated, owed the company a fiduciary duty . . . .”); *Landon v. S & H Mktg. Group, Inc.*, 82 S.W.3d 666, 672 (Tex. App.—Eastland 2002, no pet.) (finding a corporate president owed fiduciary obligations).

27. See *Ditta v. Conte*, 298 S.W.3d 187, 191 (Tex. 2009) (“[T]he marital relationship between spouses is a fiduciary relationship.” (citing *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998))); *In re Marriage of Robert P. McClesky & Kathy A. McCleskey*, No. 77393–3–I, 2018 WL 6181735, at \*5 (Wash. Ct. App. Nov. 26, 2018) (“Spouses owe each other the highest fiduciary duty.” (citing *In re Marriage of Lutz*, 873 P.2d 566, 573 (Wash. Ct. App. 1994))).

28. See *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548, 555 (Cal. 2018) (“That lawyers sometimes have reason to switch firms does not diminish the importance of certain fiduciary duties that facilitate the existence of any firm.”); *In re Thelen LLP*, 20 N.E.3d 264, 270 (N.Y. 2014) (“[B]ecause departing partners owe a fiduciary duty to the dissolved firm and their former partners to account for benefits obtained from use of partnership property in winding up the partnership’s business, they may not be separately compensated.”); cf. *Schlumberger*, 959 S.W.2d at 175 (recognizing that “a partner selling his interest to another partner has a fiduciary duty requiring full disclosure of all important information about the value of the interest,” but finding there was no evidence of a partnership (citing *Johnson v. Peckham*, 120 S.W.2d 786, 788 (Tex. 1938))).

29. See *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 197 (Tex. 2002) (“[A]n associate owes a fiduciary duty to his or her employer . . . .”).

30. See *Ditta*, 298 S.W.3d at 191 (“High fiduciary standards are imposed upon trustees, who must handle trust property solely for the beneficiaries’ benefit. A fiduciary ‘occupies a position of peculiar confidence towards another.’” (first citing *Humane Soc’y of Austin & Travis Cty v. Austin Nat’l Bank*, 531 S.W.2d 574, 577 (Tex. 1975); then citing TEX. PROP. CODE § 111.004(4); then citing *Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942))).

31. See *Johnson*, 73 S.W.3d at 199 (“Our courts have long recognized that . . . fiduciary duties are owed . . . [by] an executor.” (citing *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996))).

agents,<sup>32</sup> insurance brokers,<sup>33</sup> and class representatives.<sup>34</sup> However, on certain facts, courts have refused to find that there was a fiduciary relationship requiring observance of heightened obligations by debtors,<sup>35</sup> employers,<sup>36</sup> universities,<sup>37</sup> financial advisors,<sup>38</sup> homeowner associations,<sup>39</sup> and joint ventures.<sup>40</sup>

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32. See *Alford v. Shelton (In re Estate of Shelton)*, 89 N.E.3d 391, 397 (Ill. 2017) (“[A]n agent appointed under a power of attorney has a common-law fiduciary duty to the principal.” (citing *Spring Valley Nursing Ctr., L.P. v. Allen*, 977 N.E.2d 1230, 1233 (Ill. Ct. App. 2012))); *Johnson*, 73 S.W.3d at 200 (“The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” (quoting RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a (AM. LAW INST. 1958))).

33. See *Am. Family Mut. Ins. Co. v. Krop*, No. 122556, 2018 WL 5077145, at \*4 (Ill. Oct. 18, 2018) (finding “insurance brokers owed customers a fiduciary duty” (citing *Broadnax v. Morrow*, 762 N.E.2d 1152 (Ill. Ct. App. 2002); *Perelman v. Fisher*, 700 N.E.2d 189 (Ill. Ct. App. 1998))).

34. See *Hernandez v. Restoration Hardware, Inc.*, 409 P.3d 281, 285 (Cal. 2018) (“Case law imposes fiduciary duties on the trial courts, class counsel, and class representatives, who must ensure the action proceeds in the class members’ best interest.”).

35. See *Ievoli v. Del. State Hous. Auth.*, No. CV N18C-05-254 CLS, 2018 WL 5839937, at \*3 (Del. Super. Ct. Nov. 7, 2018) (“[I]here is no fiduciary duty relationship between a debtor and a creditor . . .” (quoting *Diehl-Guerrero v. Hardy Boys Constr., LLC.*, 2017 WL 886786, at \*2 (Del. Super. Ct. Feb. 28, 2017), *appeal refused sub nom.*, *Diehl-Guerrero v. Wells Fargo Home Mortg., Inc.*, 159 A.3d 302 (Del. 2017))).

36. See *Wilson v. Dantas*, 80 N.E.3d 1032, 1040 (N.Y. 2017) (“An employment relationship, no matter how lengthy the tenure, in itself does not create a fiduciary relationship.” (citing *Rather v. CBS Corp.*, 886 N.Y.S.2d 121, 125 (N.Y. App. Div. 2009))).

37. See *Brzica v. Trs. of Dartmouth Coll.*, 791 A.2d 990, 990, 995, 1001 (N.H. 2002) (finding there was no fiduciary relationship between college trustees and alumni requiring the trustees to disclose their intent to use alumni donations to eliminate single-sex fraternities and sororities); see also *Swenson v. Bender*, 764 N.W.2d 596, 596, 605 (Minn. Ct. App. 2009) (finding no fiduciary relationship between a doctoral candidate and the online university academic advisor who allegedly stole her ideas); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 672, 692, 673 (Tex. App.—Amarillo 1998, pet. denied) (holding there is no fiduciary relationship between students and professors as a matter of law, no such relationship arose on the facts of the case, and a professor did not have an affirmative duty to tell a student that she would not obtain her doctoral degree if she failed part of the oral dissertation).

38. See *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 822 (Pa. 2017) (“Fiduciary duties do not arise ‘merely because one party relies on and pays for the specialized skill of the other party.’” (citing *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 23 (Pa. Super. Ct. 2002))).

39. See *La Ventana Ranch Owners’ Ass’n, Inc. v. Davis*, 363 S.W.3d 632, 632, 646 (Tex. App.—Austin 2011, pet. denied) (finding no fiduciary relationship between homeowners and members of a homeowners’ association architectural committee).

40. See *Pellegrini v. Cliffwood-Blue Moon Joint Venture, Inc.*, 115 S.W.3d 577, 578, 581 (Tex. App.—Beaumont 2003, no pet.) (showing a relationship between a geophysicist contractor and a joint venture was an arm’s-length transaction, and therefore, the joint venture was under no duty to disclose that a particular oil well was not part of the contract and that the geophysicist would earn no royalties therefrom).

Fiduciary relationships arise in either of two ways. First, some relationships are fiduciary *as a matter of law* because of “their special nature.”<sup>41</sup> “Principal and agent, trustee and *cestui que trust*, attorney and client, guardian and ward, and partners are recognized examples.”<sup>42</sup> Thus, a lawyer always owes fiduciary obligations to a client,<sup>43</sup> and those duties extend as far as the scope of the representation.<sup>44</sup>

Second, other relationships are fiduciary *as a matter of fact*. Where there is a close and trusting relationship between two parties,<sup>45</sup> a fiduciary relationship may be found to exist. Thus, on particular facts, a close friend of a family may be treated as a fiduciary,<sup>46</sup> although that is not always the

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41. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002) (“[I]t applies to any person who occupies a position of peculiar confidence towards another.” (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942))).

42. *Yenchi*, 161 A.3d at 820 (quoting *McCown v. Fraser*, 192 A. 674, 676–77 (Pa. 1937); citing *Young v. Kaye*, 279 A.2d 759, 763 (Pa. 1971)); *see also Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (“In certain formal relationships, such as an attorney-client or trustee relationship, a fiduciary duty arises as a matter of law.” (citing *Johnson*, 73 S.W.3d at 199; *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998))).

43. *See Susan Saab Fortney & Vincent R. Johnson, Breach of Fiduciary Duty, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY AND THE LEGAL PROFESSION* § 5-3.1 (2018) (“[T]he lawyer-client relationship is not a mere arms-length transaction, but rather a relationship of trust and confidence. As a matter of law, the lawyer serves as the client’s fiduciary. This means that lawyers must always act with clients’ interests in mind, and those interests must come first.”).

44. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159 (Tex. 2004) (“Generally, a lawyer’s fiduciary duties to a client, although extremely important, ‘extend[] only to dealings within the scope of the underlying relationship of the parties.’” (citing *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977); *Joseph v. State*, 3 S.W.3d 627, 639 (Tex. App.—Houston [14th Dist.] 1999, no pet.)); *see also Fortney & Johnson, supra* note 43, § 5-3.3(c) (“A lawyer is generally under no duty to disclose facts outside the scope of the representation.”).

45. *See Am. Fam. Mut. Ins. Co. v. Krop*, No. 122556, 2018 WL 5077145, at \*4 (Ill. Oct. 18, 2018) (“This duty exists in certain relationships where ‘one party places trust in another so that the latter gains superiority and influence over the former.’” (quoting *Prime Leasing, Inc. v. Kendig*, 773 N.E.2d 84 (Ill. 2004))); *Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980) (“[T]he term ‘fiduciary’ is derived from the civil law and contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. Further, that the term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.” (citing *Kinzbach Tool Co.*, 160 S.W.2d at 513)).

46. *See Curl v. Key*, 316 S.E.2d 272, 274 (N.C. 1984) (finding “the evidence tended to show that a confidential or fiduciary relationship did exist between the plaintiffs and [their father’s best friend]” where the defendant, who was referred to as “uncle” by the plaintiffs, and who was the best friend of their deceased father, secured the plaintiffs’ signatures on a document which was purportedly a “peace paper” that would prevent other relatives from harassing the plaintiffs, but which secretly deeded the property to the defendant).

case.<sup>47</sup> If a relationship of trust and confidence is found to exist, the party in the superior position may be held to owe fiduciary duties to the one in the subordinate position. According to the Pennsylvania Supreme Court:

Where no fiduciary duty exists as a matter of law, Pennsylvania courts have nevertheless long recognized the existence of confidential relationships in circumstances where equity compels that we do so. Our courts have found fiduciary duties in circumstances where the relative position of the parties is such that the one has the power and means to take advantage of, or exercise undue influence over, the other. The circumstances in which confidential relationships have been recognized are fact specific and cannot be reduced to a particular set of facts or circumstances. . . .

. . . This Court has recognized that while disease or advancing age “do not by themselves create a confidential relationship with another,” such limitations “may support an inference of confidentiality” if they bear on a party’s “capacity to understand the nature of the transaction in question.” Family relationships or close personal friendships, while also not dispositive of the existence of a confidential relationship, have also often played significant roles in particular determinations.<sup>48</sup>

In addition:

The superior knowledge or expertise of a party does not impose a fiduciary duty on that party or otherwise convert an arm’s-length transaction into a confidential relationship. . . . A fiduciary duty may arise in the context of consumer transactions only if one *party cedes decision-making control to the other party*.<sup>49</sup>

If a relationship is not fiduciary as a matter of law, the decision as to whether it is fiduciary as a matter of fact requires a careful assessment of the

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47. See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997) (“An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one. But not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship.” (first citing *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951); then citing *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992))).

48. *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 820–21 (Pa. 2017) (first citing *Darlington’s Appeal*, 86 Pa. 512 (1878); then citing *In re Scott*, 316 A.2d 883, 885–86 (Pa. 1974); and then citing *Silver v. Silver*, 219 A.2d 659, 662 (Pa. 1966)).

49. *Id.* at 823.

evidence. In a proposed class action, the Supreme Court of Pennsylvania held that certification of the class was not appropriate because whether a confidential relationship existed between various clients and a tax return preparation company required individualized evaluation of the facts.<sup>50</sup>

#### B. *Loyalty and Its Demanding Requirements*

The essence of fiduciary duty is loyalty—loyalty to the interests of the person who is the beneficiary of the relationship. The fiduciary must place the interests of the beneficiary first.<sup>51</sup> The duties of the fiduciary are often articulated in sweeping terms. Thus, courts discussing the fiduciary duties owed by lawyers to clients say that a lawyer must act with the utmost good faith, complete fair dealing, and full disclosure<sup>52</sup> so exacting that it sometimes demands “absolute and perfect candor.”<sup>53</sup> Courts have used similarly broad language in other contexts to describe fiduciary obligations. A Delaware court, quoting Black’s Law Dictionary, stated:

A fiduciary duty is “a duty of utmost good faith, trust[,] confidence, and candor owed by a fiduciary to the beneficiary; a duty to act with the highest

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50. *Basile v. H & R Block, Inc.*, 52 A.3d 1202, 1211–12 (Pa. 2012).

51. *See, e.g., Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 867 (Tex. 2000) (“[A] lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client’s best interest in mind.”).

52. *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 230 (Tex. 2015) (“A fiduciary relationship gives rise to a duty of full disclosure of all material facts.” (citing *Keck, Mahin & Cate v. Nat’l Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex. 2000))).

53. *See Vincent R. Johnson, “Absolute and Perfect Candor” to Clients*, 34 ST. MARY’S L.J. 737, 771–72 (2003) (“[T]he duty of ‘absolute and perfect candor’ applies most forcefully in instances where the interests of the attorney and client are adverse, as in the case of a business transaction between them. Although cases involving these types of facts generally have not used the phrase ‘absolute and perfect candor,’ they frequently speak of ‘uberrima fides,’ which . . . is defined by *Black’s Law Dictionary* as requiring ‘absolute and perfect candor.’”(footnotes omitted)); *see also Chic. Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 185 (Ill. 1980) (“[I]t is the prevailing rule that, as between persons sustaining a fiduciary or trust or other confidential relationship toward each other, the person occupying the relation of fiduciary or of confidence is under a duty to reveal the facts to the plaintiff (the other party), and that his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud at law as an actual affirmative false representation or act; and that mere silence on his part as to a cause of action, the facts giving rise to which it was his duty to disclose, amounts to a fraudulent concealment.” (first quoting *What Constitutes Concealment Which Will Prevent Running of Statute of Limitation*, 173 A.L.R. 576 (1948); then citing *Vigus v. O’Bannon*, 8 N.E. 778 (Ill. 1886); *Cook County v. Barrett*, 344 N.E.2d 540 (Ill. App. Ct. 1975))).



degree of honesty and loyalty toward another person and in the best interests of the other person.”<sup>54</sup>

The demands of fiduciary duty are the greatest when the interests of the fiduciary and the beneficiary are at odds. Consequently, the Texas Supreme Court has written:

[W]e hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney contracts with his or her client or otherwise takes a position adverse to his or her client’s interests.<sup>55</sup>

### C. Remedies for Breach of Fiduciary Duty

A “profiting fiduciary [has] the burden of showing the fairness of the transactions” made with a person to whom fiduciary duties are owed.<sup>56</sup> Thus, business transactions between a fiduciary and beneficiary are often treated as presumptively fraudulent on the part of the fiduciary.<sup>57</sup> Aside from liability for damages in an action for fraud, fiduciary obligations are enforced in numerous ways:

Where a breach of the fiduciary obligation exists, the law may allow the imposition of a constructive trust on the fiduciary’s profits, rescission of any agreements affected by the fiduciary’s breach, an injunction to prevent further breach, or the recoupment of any fees or salary that the beneficiary paid to the fiduciary. Further, the beneficiary may recover damages even if it cannot show that it was injured in any particular way. The remedies for breach of a fiduciary obligation seek to deprive the fiduciary of any benefit from the

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54. *Ievoli v. Del. State Hous. Auth.*, No. N18C-05-254 CLS, 2018 WL 5839937, at \*3 (Del. Super. Ct. Nov. 7, 2018) (quoting *Fiduciary Duty*, BLACK’S LAW DICTIONARY (8th ed. 2005)).

55. *Lopez*, 22 S.W.3d at 866 (citing *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964)).

56. *Tex. Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980).

57. *See Peters v. Thedford*, No. 94-60250, 1995 WL 413016, at \*2 (5th Cir. June 13, 1995) (“It is a well-established rule in Texas that, when an attorney enters into a contract with a client, the contract is presumptively fraudulent, and the burden of showing its fairness is on the attorney.” (citing *Robinson v. Garcia*, 804 S.W.2d 238 (Tex. App.—Corpus Christi 1991, writ denied)); *see also* *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 820 (Pa. 2017) (“Transactions between persons occupying a confidential relationship are voidable, and the party seeking to benefit from such a transaction must demonstrate that his or her actions were at all times ‘fair, conscientious, and beyond the reach of suspicion.” (quoting *Young v. Kaye*, 279 A.2d 759, 766 (Pa. 1971); *In re Estate of Evasew*, 584 A.2d 910, 913 (Pa. 1990))).

breach, not just to compensate the beneficiary for any injury from the breach.<sup>58</sup>

Well-established legal principles<sup>59</sup> support the idea that an unfaithful fiduciary, and those who aid the fiduciary's breach,<sup>60</sup> can be forced to forfeit part or all of what he or she was paid to perform services that were disloyally rendered.<sup>61</sup> In a Texas case resulting from the misappropriation of church funds, it was stated:

[A] person in a trust relationship who does not provide the loyalty bargained for fails to fulfill his agreement and is not entitled to be paid in full. Therefore, when considering an appropriate remedy for a fiduciary's breach of loyalty, the "agent's breach of fiduciary duty should be deterred even when the principal is not damaged." "It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation." Pragmatically, fee forfeiture also serves as a deterrent. The central purpose of this remedy "is not to compensate an injured principal, even though it may have that effect." "Rather, the central purpose of the

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58. Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 72–73 [hereinafter Clark, *Ethics in Government*] (footnotes omitted).

59. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 (AM. LAW INST. 2011) ("A person who obtains a benefit (a) in breach of a fiduciary duty, . . . is liable in restitution to the person to whom the duty is owed.").

60. See *Chic. Park Dist. v. Kenroy, Inc.*, 402 N.E.2d 181, 186 (Ill. 1980) ("[I]t is here a fair inference . . . that the defendants intentionally and deliberately induced [Alderman] Wigoda's breach of fiduciary duty by means of bribery, and that they actively participated in the fraudulent concealment of the City's alleged cause of action . . . . Under these circumstances, the defendants are in a position no better than Wigoda to use the statute of limitations to protect their allegedly ill-gotten gains."); RESTATEMENT (FIRST) OF THE LAW: RESTITUTION § 138(2) (AM. LAW INST. 1937) ("A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary.").

61. "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned." *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (citing RESTATEMENT (SECOND) OF AGENCY § 469 (AM. LAW INST. 1958)); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (AM. LAW INST. 2000) ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.").

equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty."<sup>62</sup>

Other penalties for breach of fiduciary duty may be imposed by statutes. In some states, "public employees can lose their pensions if they are convicted of crimes related to their jobs."<sup>63</sup> Such crimes may involve breaches of fiduciary duties by public officials related to their government positions.

#### IV. PUBLIC OFFICIALS AS FIDUCIARIES

In public life, fiduciary principles require public officials to act for the good of others rather than for themselves or other private interests.<sup>64</sup> This is true even if the public official serves only on a part-time basis and is uncompensated.<sup>65</sup> As the United States Court of Appeals for the Eleventh Circuit explained:

Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. . . . "[I]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated."<sup>66</sup>

Many other courts have echoed these views.<sup>67</sup>

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62. First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 221 (Tex. 2017) (quoting *Burrow*, 997 S.W.2d at 238, 240).

63. Wallack, *supra* note 7.

64. See *Chic. Park Dist.*, 402 N.E.2d at 186 ("It is well established that a public officer occupies a fiduciary relationship to the political entity on whose behalf he serves."); Michael Tomasky, *Remembering Robert Nordhaus, and When Public Servants Gave a Damn About the Public*, DAILY BEAST (Mar. 27, 2017 1:00 AM), <https://www.thedailybeast.com/remembering-robert-nordhaus-and-when-public-servants-gave-a-damn-about-the-public> [perma.cc/6PSW-QJRF] (arguing "our founders believed they were creating a federal government that was not just simply representative of various constituencies").

65. See *United States v. Nelson*, 712 F.3d 498, 509 (11th Cir. 2013) (holding a public official owed a fiduciary duty "to make governmental decisions in the public's best interest," even though the official was not paid and worked only part time).

66. *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (first citing *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997); then quoting *United States v. Jain*, 93 F.3d 436, (11th Cir. 1996)).

67. See, e.g., *Nelson*, 712 F.3d at 509 (quoting *DeVegter* with approval); see also *United States v. Langford*, 647 F.3d 1309, 1321 (11th Cir. 2011) ("Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. . . . [I]n a democracy, citizens elect public officials to act for the common good." (quoting *DeVegter*, 198 F.3d at 1328)); *United States v.*

If public officials are fiduciaries, to whom do their duties run? Judicial opinions and commentators<sup>68</sup> have variously stated that public officials owe fiduciary duties either to the public in general, to the government as a whole, or to the office they hold. The cases addressing such questions have arisen from a broad spectrum of legal issues, including matters related to criminal law. In particular, many decisions have involved prosecutions for honest services fraud.<sup>69</sup> The United States Supreme Court, in *Skilling v. United States*,<sup>70</sup> ultimately held that a public official or private employee's breach of fiduciary duties, by itself, does not amount to a criminal offense.<sup>71</sup> Rather,

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Sorich, 523 F.3d 702, 712 (7th Cir. 2008) ("It may well be that merely by virtue of being public officials the defendants inherently owed the public a fiduciary duty to discharge their offices in the public's best interest." (citing *DeVegeter*, 198 F.3d at 1328)).

68. See Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways That Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 103 (1997) ("A government official occupies a fiduciary position.").

69. See, e.g., Sec. & Exch. Comm'n v. Langford, No. 2:08-cv-761-AKK, 2011 WL 13228240, at \*5 (N.D. Ala. Aug. 8, 2011) (finding the president of a county commission "flagrantly disregarded his 'fiduciary duty to the public to make governmental decisions in the public's best interest,' and instead defrauded the public by 'secretly mak[ing] his decision based on his own personal interests,' i.e., awarding the County financial business based on bribes" (quoting *DeVegeter*, 198 F.3d at 1328)).

70. *Skilling v. United States*, 561 U.S. 358 (2010).

71. *Id.* at 409. The history of this branch of the law is complex. In *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), the court broadly interpreted the federal mail fraud statute to encompass fraud intended to deprive citizens of their intangible, non-property right to the honest services of their public officials. As explained by the First Circuit:

In 1987, the United States Supreme Court held, contrary to every circuit court that had decided the issue, that the mail fraud statute did not prohibit schemes to defraud citizens of their intangible, non-property right to honest and impartial government. Congress quickly reacted to the *McNally* decision by enacting 18 U.S.C. § 1346, which provides that, for the purposes of, *inter alia*, the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." We have recognized that § 1346 was intended to overturn *McNally* and reinstate the reasoning of pre-*McNally* case law holding that the mail fraud statute reached schemes to defraud individuals of the intangible right to honest services of government officials.

*Sawyer*, 85 F.3d at 723–24 (citation omitted) (first citing *McNally v. United States*, 483 U.S. 350, 359 (1987); *United States v. Ochs*, 842 F.2d 515, 521 (1st Cir. 1988); then citing *United States v. Grandmaison*, 77 F.3d 555, 565–66 (1st Cir. 1996)). Ultimately, the United States Supreme Court narrowly interpreted honest services fraud. See *Skilling*, 561 U.S. at 408–09 ("[T]here is no doubt that Congress intended § 1346 to reach at least bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct . . . would raise the due process concerns underlying the vagueness doctrine. . . . [W]e now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." (footnotes omitted)); see generally Judge Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY'S L.J. 645, 647 (2011) ("By limiting honest services fraud under § 1346 to bribes and kickbacks, the Court in *Skilling* fashioned elements to provide clearer notice as to criminal conduct. Not every ethical lapse is a crime.").

the relevant statute applies only to breaches of fiduciary duty that involve bribery or kickbacks.

The *Skilling* case did not involve a public official, but rather an employee of a private corporation. The Court did not say in *Skilling* that public officials are not fiduciaries. Indeed, a footnote to the majority opinion by Justice Ruth Bader Ginsburg suggests that the existence of a fiduciary relationship between a public official and the public is beyond dispute.<sup>72</sup> The Supreme Court simply held that fiduciary breaches not involving bribes or kickbacks are not actionable as fraudulent deprivation of honest services under the federal mail fraud and wire fraud statutes.<sup>73</sup>

#### A. *Duty to the Public*

It is often said that the fiduciary obligations of public officials are owed to the public in general<sup>74</sup> or the electorate.<sup>75</sup> This makes sense because the performance of the duties of public office involves a “public trust.”<sup>76</sup> Trust,

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72. See *Skilling*, 561 U.S. at 407 n.41 (“Justice Scalia emphasizes divisions in the Courts of Appeals regarding the source and scope of fiduciary duties. But these debates were rare in bribe and kickback cases. The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute; examples include public official-public . . .” (citations omitted)).

73. See *id.* at 368; see also *United States v. Bauer*, No. 00 CR 81, 2000 WL 1720245, at \*6 (N.D. Ill. Nov. 16, 2000) (“While it is commonly accepted that public officials owe a fiduciary duty to the public, not every breach of a fiduciary duty is a criminal violation.” (citing *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998))).

74. See PAINTER, *supra* note 10, at 3 (“[D]espite ambiguities . . . the general principle is that officials in all branches of government owe a fiduciary obligation ‘to the public,’ whatever the relevant definition of the public is in a particular instance.”). Some cases have held that *governmental entities* (as distinguished from public officials) have fiduciary duties to the public in general. For example, in holding that state parks and forests had to be managed in a manner consistent with Pennsylvania trust law, the Supreme Court of Pennsylvania noted that Pennsylvania had a “constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, *inter alia*, preventing and remedying the degradation, diminution and depletion of our public natural resources.” *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 (Pa. 2017) (citing *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 957 (Pa. 2013)).

75. See *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (“Elected officials generally owe a fiduciary duty to the electorate.” (citing *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941))); see also *Castro v. United States*, 248 F. Supp. 2d 1170, 1189 (S.D. Fla. 2003) (quoting *Lopez-Lukis*).

76. See Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (Apr. 12, 1989) (“Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.”).

and the loyalty that it demands,<sup>77</sup> is the essence of public service.

As the United States Court of Appeals for the First Circuit explained, “[A] public official ‘acts as “trustee for the citizens and the [s]tate . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty” to them.’”<sup>78</sup> Amplifying that idea, the court concluded that “[w]hen the conduct of a government official is involved, ‘the affirmative duty to disclose material information arises out of [the] official’s fiduciary relationship to [the public].’”<sup>79</sup>

A public official’s breach of fiduciary duties owed to the public gives all citizens a right to complain. In the American political system, that right to voice disapproval is both cherished and frequently exercised.<sup>80</sup> Indeed, the American system of government, and its “exceptional”<sup>81</sup> commitment to free speech, is designed so that the discussion of the conduct of public officials will be “uninhibited, robust, and wide-open.”<sup>82</sup> Americans are right to protest public corruption—the most venal form of official breach of fiduciary duty—because corrupt practices are both a violation of human

77. *Cf.* *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (noting “the duty of loyalty and fidelity to purpose required of public officials,” and observing that “such a strict duty of loyalty ordinarily is not part of private sector relationships”).

78. *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) (quoting *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987)).

79. *Id.* at 732 (alteration in original) (quoting *Silvano*, 812 F.2d at 758).

80. *Cf.* Vincent R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. MIAMI INTL. & COMP. L. REV. 1, 21–22 (2016) [hereinafter Johnson, *Comparative Defamation Law*] (“In contrast to England, the United States has decided—in a wide range of cases involving matters of public interest—that free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood. . . . In the field of libel and slander, ‘[d]ozens of rules conspire to favor defamation defendants . . . [which] means that victims of false and defamatory statements are often left without effective remedies.’” (quoting VINCENT R. JOHNSON, *ADVANCED TORT LAW: A PROBLEM APPROACH* 163 (2d ed. 2014))).

81. Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL’Y 415, 415 (2008) (“It is hardly an exaggeration to describe the United States as exceptional in its commitment to free speech as a right.”).

82. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (explaining the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials” (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937))); *see also* Johnson, *Comparative Defamation Law*, *supra* note 80, at 54 (“[T]he American imposition of the burden of proof and heightened culpability requirements on the plaintiff is more likely than the English public interest defense to invite robust discussion of matters of public interest and to deny remedies for defamatory falsehood to those injured by such discussions.”).

rights<sup>83</sup> and a threat to a society's economic welfare.<sup>84</sup>

However, as Professor Richard Painter correctly states: "Fiduciary law does not provide citizens with broad equitable remedies against government officials for breach of trust; citizens can vote a politician out of office[] but cannot sue for breach of fiduciary duty."<sup>85</sup>

A public official who breaches his or her fiduciary duties is sometimes subject to criminal prosecution.<sup>86</sup> However, even if a public official is

83. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 28 (Dec. 10, 1948) ("Everyone is entitled to a social and international order in which the [civil, political, economic, social, and cultural] rights and freedoms set forth in this Declaration can be fully realized."); C. Raj Kumar, *Corruption in India: A Violation of Human Rights*, 49 U.C. DAVIS L. REV. 742, 790 (2015) ("The problem of corruption when examined as a human rights issue produces an entirely new and . . . important approach to ensure that good governance remains the goal of public administration . . .").

84. Cf. NIAL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSON FOR GLOBAL POWER* 307 (2002) ("The economic historian David Landes recently drew up a list of measures which 'the ideal growth-and-development government would adopt . . . [which included] 'secure rights of personal liberty . . . against both the abuses of tyranny . . . crime and corruption.'").

85. PAINTER, *supra* note 10, at 3. In this regard, the fiduciary rules applicable to public officials share some similarities to the public duty rule in tort law. See VINCENT R. JOHNSON, *MASTERING TORTS: A STUDENT'S GUIDE TO THE LAW OF TORTS* 165 (6th ed. 2018) ("Some states hold, with regard to police and fire protection, that the government owes a duty to the public at large, but to no particular individual. Therefore, a claim for damages cannot normally be based on the government's negligent failure to provide such assistance."). However, occasionally one finds a piece of ethics legislation which invites courts to create a private right of action:

One such provision can be found in the City of San Antonio (Texas) Code of Ethics. When the code was drafted, reformers were faced with a dilemma concerning enforcement mechanisms. Cities, even large cities, have limited powers. They cannot create new tort causes of action. However, to create the possibility that the code's conflict of interest and other rules could be backed up by the imposition of civil liability, the drafters included this language in the section on sanctions (sec. 2-87(f)(2)):

This code of ethics has been enacted . . . to protect the City and any other person from any losses or increased costs incurred by the City or other person as a result of the violation of these provisions. It is the intent of the City that this ethics code can and should be recognized by a court as a proper basis for a civil cause of action for damages or injunctive relief based upon a violation of its provisions, and that such forms of redress should be available in addition to any other penalty or remedy contained in this code of ethics . . . or any other law.

Suppose that a business bidding on a city contract violates the ethics rules and there needs to be a new round of proposals. Under this language, the city and the bidders may then be able to sue the violator to recover the costs they incurred in conducting or participating in the new bidding process.

JOHNSON & LIU, *supra* note 23, at 349–50.

86. See *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (discussing liability for honest services fraud back on acceptance of kickbacks).

found guilty, he or she may be effectively insulated from the burdens of liability by laws which indemnify officials for the costs of a legal defense and an adverse judgment<sup>87</sup> or settlement.

### B. *Duty to the Office*

Sometimes it is said that public officials owe fiduciary obligations to the office they hold. Thus, it may be argued that a president has a duty to protect the presidency<sup>88</sup> or that an associate director for the Federal Bureau of Investigation (FBI) has a duty to protect the FBI from interference by other branches of government.<sup>89</sup> Within limits, the idea that an officeholder should be loyal to that office makes sense. The reason government works is often that officeholders take their responsibilities seriously. Of course, issues arise about whether one officeholder must subordinate the interests of his or her office to decisions made by other governmental actors. During the dark days of the Watergate crisis, Richard Nixon presumably wanted to protect the prestige and power of the presidency, but he eventually recognized that he had to surrender the subpoenaed tape recordings to the Watergate Special Prosecutor when the

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87. See Steve Lopez, *Coastal Officials Let Off the Hook*, L.A. TIMES, Sept. 14, 2018, 2018 WLNR 28210878 (reporting “five current and former California coastal commissioners were found guilty . . . of breaking rules designed to ensure fairness and transparency” but were indemnified for roughly a million dollars in fines and attorneys’ fees).

88. See Letter from William French Smith, Attorney General, to Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary (Feb. 22, 1985), *reprinted in* U.S. GOV’T ACCOUNTABILITY OFF., GAO-85-525, COMM. ON GOV’T OPERATIONS: CONSTITUTIONALITY OF GAO’S BID PROTEST FUNCTION 432, 434 (1985) (basing an argument for “legislative nonenforcement on President’s ‘duty to protect the Presidency from encroachment by the other branches’”); see also Curt A. Levey & Kenneth A. Klukowski, *Take Care Now: Stare Decisis and the President’s Duty to Defend Acts of Congress*, 37 HARV. J.L. & PUB. POL’Y 377, 408 (2014) (“Theodore Olson, then Assistant Attorney General in charge of the Justice Department’s Office of Legal Counsel, explained in a 1984 opinion . . . ‘the President also has a constitutional duty to protect the Presidency from encroachment by the other Branches.’”); Mark B. Stern & Alisa B. Klein, *The Government’s Litigator: Taking Clients Seriously*, 52 ADMIN. L. REV. 1409, 1419 (2000) (referring to the “President’s constitutional duty to protect the Presidency from encroachment by the legislative branch”).

89. Cf. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 WASH. U. L. REV. 1033, 1039–40 (2007) (“In the early 1970s, Mark Felt . . . was the Associate Director of the Federal Bureau of Investigation (FBI). On several occasions, Felt had provided information to Bob Woodward, an acquaintance of his who was a reporter for the Washington Post. . . . In the book chronicling the Watergate investigation, Woodward referred to Felt as ‘Deep Throat’ and credited this source with a critical role in the Post’s investigation. . . . Felt’s memoir asserts that he was motivated by a desire to protect the FBI from interference by the White House.” (footnotes omitted)).



Supreme Court so ordered.<sup>90</sup>

C. *Duty to the Governmental Entity*

Occasionally, it is said that a public official's fiduciary obligations run to the benefit of the governmental entity the official serves (rather than to the public in general or the office the official holds). This may be true in cases involving nondisclosure of material information. However, even then, judicial opinions are likely to recognize that the governmental entity acts on behalf of the public, and that therefore duties owed to the governmental entity are ultimately intended to benefit the public. For example, in *United States v. Woodward*,<sup>91</sup> the First Circuit explained that:

A public official has an affirmative duty to disclose material information *to the public employer*. When an official fails to disclose a personal interest in a matter over which she has decision-making power, *the public is deprived* of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.<sup>92</sup>

Well-established principles of law strongly suggest that a public official who breaches fiduciary obligations incumbent on the office should be forced to disgorge *to the government* improperly acquired profits. This is true even if the governmental entity has not suffered a monetary loss. As the Texas Supreme Court explained in a case involving not a public official, but rather a law firm associate:

A fiduciary cannot say to the one to whom he bears such relationship: You have sustained no loss by my misconduct in receiving a commission from a party opposite to you, and therefore you are without remedy. It would be a dangerous precedent for us to say that unless some affirmative loss can be shown, the person who has violated his fiduciary relationship with another may hold on to any secret gain or benefit he may have thereby acquired. It is the law that in such instances if the fiduciary "takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal,

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90. *See* *United States v. Nixon*, 418 U.S. 683, 707 (1974) ("Since we conclude that the legitimate needs for the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

91. *United States v. Woodward*, 149 F.3d 46 (1st Cir. 1998).

92. *Id.* at 62 (emphasis added) (quoting *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996)); *see also* *United States v. Wecht*, CRIM. 06-0026, 2008 WL 2223869, at \*6 (W.D. Pa. May 23, 2008) (quoting *Woodard*, 149 F.3d at 62).

without a full disclosure, it is a betrayal of his trust and a breach of confidence, and he *must account to his principal* for all he has received.”<sup>93</sup>

#### D. *The Relationship of Fiduciary Duties to Government Ethics Laws*

In many parts of the United States, the conduct of public officials is regulated by ethics codes, which have been enacted by Congress,<sup>94</sup> the States, or other governmental entities.<sup>95</sup> It is tempting to think that the fiduciary obligations of public officials should extend only as far as such ethics rules require. However, that would be a mistake for several reasons.

Most importantly, ethics legislation varies widely in terms of quality and comprehensiveness. At the federal level there is no set of ethics rules which applies equally to public officials in all three branches, or even to the two non-judicial branches.<sup>96</sup> In the rules that do exist, “Arguably there is too much detail and too much focus on problems that have relatively little impact on the integrity of government, while other more serious problems are underregulated or ignored.”<sup>97</sup>

93. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200–01 (Tex. 2002) (emphasis added) (quoting *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942)).

94. See U.S. OFFICE OF GOV'T ETHICS, COMPILATION OF FEDERAL ETHICS LAWS, [https://www.oge.gov/Web/oge.nsf/0/0BC1FF0EB760D84A85257E96006A9256/\\$FILE/Compilation%20of%20Federal%20Ethics%20Laws%20\(2015\).pdf](https://www.oge.gov/Web/oge.nsf/0/0BC1FF0EB760D84A85257E96006A9256/$FILE/Compilation%20of%20Federal%20Ethics%20Laws%20(2015).pdf) [<https://perma.cc/8PL9-KRGG>] (listing “all provisions signed into law through the end of the 114th Congress”). The 114th United States Congress met from January 6, 2015 to January 3, 2017. *Past Days in Session of the U.S. Congress*, CONGRESS.GOV, <https://www.congress.gov/past-days-in-session> [<https://perma.cc/Y5Q9-6ZZF>].

95. See generally Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715 (2006) [hereinafter Johnson, *Ethics in Government at the Local Level*] (citing provisions from cities throughout the United States).

96. Cf. PAINTER, *supra* note 10, at xv (“The judicial branch has a very different way of interacting with the outside world in the conduct of official business.”). The model rules of ethics for judges are exceptionally well developed and widely followed. See generally MODEL CODE JUD. CONDUCT (AM. BAR ASS'N 2018) (enumerating canons of conduct for the judiciary); Charles Gardener Geyh, *Regulating Judicial Conduct Generally—Features and Principles*, in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY AND THE LEGAL PROFESSION § 6-1.1 (2018) (“[T]he supreme courts in all fifty states and the lower federal courts have adopted Codes of Conduct based one of the three ABA Models. The United States Supreme Court is thus the only court in the United States that is not subject to a code of conduct . . .”).

97. PAINTER, *supra* note 10, at xix n.9; see also Johnson, *Ethics in Government at the Local Level*, *supra* note 95, at 726 n.51 (2006) (alteration in original) (“[E]ven highly skilled wordsmiths and astute students of political anthropology fail to anticipate every possible way in which creatively unscrupulous people can slide around and through the most tightly knit law.” (quoting Gerald S. Reamey, *Editorial, Ethics Code Not Hollow Words*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 1998, at 5B)).

At the state level, the situation is not much better.<sup>98</sup> Some common ethics problems—such as revolving door employment<sup>99</sup>—have attracted attention and have resulted in state legislation.<sup>100</sup> However, other problems have been neglected. The result is that state laws offer an incomplete patchwork of legislation for defining the conduct required of public officials.

At the local level, government ethics laws run the gamut from comprehensive and well-developed, on the one hand, to entirely non-existent, on the other hand. Consider the situation in South Texas. The City of San Antonio—now America’s seventh largest city<sup>101</sup>—has an extremely well-crafted ethics code that governs the city’s roughly 12,000 public officials and employees. In contrast, Bexar County, which encompasses the City of San Antonio and nearby areas, has no ethics code at all.

In addition, ethics codes should not be treated as the exclusive repository of the fiduciary duty principles that are applicable to public officials because the enactment of ethics laws is often attained by compromise at the expense of high principles,<sup>102</sup> or later weakened by ill-

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98. See John D. Feerick et al., *Municipal Ethical Standards: The Need for a New Approach*, 10 PACE L. REV. 107, 108 (1990) (describing a 1987 ethics law passed by the New York state legislature which inapplicable to more than ninety-five percent of the state’s municipalities that had populations of less than 50,000 persons).

99. See PAINTER, *supra* note 10, at xiv (“[In the federal government,] there are revolving-door restrictions on officials moving between private industry and the government. The intent of the revolving door rules is to limit the influence that prior and future private-sector employees have on a government official. The rules are quite lenient and more remarkable for what they allow than for what they do not allow.”).

100. For example, the New Jersey Local Government Ethics Law imposes certain obligations on municipal officers and employees. See N.J. STAT. ANN. § 40A:9-22.1–22 (West 2018) (“This law would establish a statutory code of ethics covering the officers and employees of most local governments and their agencies and instrumentalities.”); see also TEX. LOC. GOV’T CODE ANN. § 171.004(a) (providing, with limitations, “[i]f a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation”).

101. See *US City Populations 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/> [<https://perma.cc/A6EW-S7B4>] (listing San Antonio as the seventh largest American city with a population in 2019 of 1,565,929 persons).

102. Cf. Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 45 (2000) [hereinafter Johnson, *Virtues and Limits*] (“The effectiveness of an ethics codes can be seriously limited by compromises made in the adoption process. Not all persons who participate in such efforts are actuated by the common good. [P]rofessional codes . . . [may] be

advised amendments.<sup>103</sup> Indeed, business interests and their lobbyists often fight hard to water down ethics reform because there is often more money to be made dealing with public officials whose good favor can be bought with gifts, lavish entertainment, and another *douceur* than with officials subject to strict ethics rules.

Finally, it is important to recognize that ethics codes are sometimes badly drafted,<sup>104</sup> or have failed to anticipate problems<sup>105</sup> that could nevertheless be resolved by reference to well-established common law fiduciary-duty principles. The “imaginative power of persons who want to evade regulation”<sup>106</sup> should not be underestimated. In the words of Professor Richard Painter:

[L]aws that articulate broad fiduciary standards are needed to send a message to government fiduciaries that more is expected of them than the fulfillment of self-interest within the limits of the law.<sup>107</sup>

Even though legislatively enacted ethics codes or similar enactments should not be treated as defining the full range of the fiduciary duties of public officials, they cannot be ignored. The fiduciary obligations of public

the products of grasping and selfish motivations . . . .” (first alteration in original) (quoting CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 48 (1986)).

103. See Johnson, *Ethics in Government at the Local Level*, *supra* note 95, at 768 n.251 (citations omitted) (quoting San Antonio Ethics Code, *supra* note 10, § 2-41 (2006)), stating:

As the years pass, ethics codes sometimes become riddled with exceptions which, to serve some private purpose, are enacted into law when there is little or no public attention. When the *San Antonio Ethics Code* was passed in November 1998, it contained a rule prohibiting official action that was likely to affect substantially the economic interests of “the outside employer of the official or employee or of his or her parent, child, or spouse . . . .” At some later date, language was inserted into the code so that the provision now speaks of “the outside employer of the official or employee or of his or her parent, child (*unless the child is a minor*), spouse . . . .” Obviously, it makes no sense to be able to affect the economic interests of a child’s employer just because the child is a minor. One of the reasons that ethics codes must be periodically reviewed and revised is to detect and purge such ill-advised amendments.

104. See Clark, *Ethics in Government*, *supra* note 58, at 100 (“Over the last thirty-five years, several waves of federal ethics reform have produced innumerable detailed ethics rules that are often difficult to follow.”).

105. *Cf.* Johnson, *Virtues and Limits*, *supra* note 102, at 41 (“[N]o criticism so discredits . . . [an ethics code] as the charge that the document contains ‘loopholes.’ Such allegations, even if unwarranted, call into question not merely the substance of the enactment, but the competence of the drafters and the value of the project at all.”).

106. PAINTER, *supra* note 10, at xx.

107. *Id.* at 4.

officials should extend at least as far as such codes and enactments require, but may go further. Drawing upon common law principles, courts in the exercise of their nomothetic powers should be free to articulate the full extent of the fiduciary obligations of public officials. In some cases, the relevant legal principles will require conduct exceeding the minimum standards set by an ethics code.<sup>108</sup> The point here is not unlike the way lawyers are treated by courts in malpractice litigation. “[E]ven when no disciplinary rule is violated, lawyers have common-law fiduciary duties that prohibit disloyalty to both current and former clients.”<sup>109</sup>

#### V. DUTIES UNDER THE LAW OF AGENCY

Public officials act as agents for the government. It is therefore useful to consider the fiduciary duties imposed on agents. According to the *Restatement (Second) of Agency*:

The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking. Among the agent’s fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal’s consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them.<sup>110</sup>

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108. *Cf.* *Montgomery v. Royal Motel*, 645 P.2d 968, 970 (Nev. 1982) (“[I]he standard of conduct defined by a legislative enactment is usually a minimum standard and . . . special circumstances may support a finding of negligence, despite compliance, if a reasonable person would have taken additional precautions.”); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 16 (AM. LAW INST. 2010) (“(a) An actor’s compliance with a pertinent statute, while evidence of nonnegligence, does not preclude a finding that the actor is negligent . . . for failing to adopt precautions in addition to those mandated by the statute.”). Similarly, the duties imposed by fiduciary principles exceed the strict terms of an employment agreement between the parties. *See Clark, supra* note 14, at 979 (“These [fiduciary] relationships are governed not just by the explicit terms of any agreement between the parties, but also by additional terms imposed by the common law. The law sees these relationships as valuable and will prevent fiduciaries from abusing their positions of trust.” (footnote omitted)).

109. Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1726 (2015); *id.* at 1751 (“[C]ommon-law fiduciary duties . . . are broader than the specific fiduciary duties codified in state disciplinary rules.”).

110. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (quoting RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a (AM. LAW INST. 1958)).

Addressing such matters in slightly different terms, the *Restatement (Third) of Agency* states a general rule on fiduciary duty:

An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.<sup>111</sup>

The Third Restatement then states specific rules governing material benefits arising out of a position,<sup>112</sup> acting as or on behalf of an adverse party,<sup>113</sup> competition,<sup>114</sup> and use of the principal's property or confidential information.<sup>115</sup> Many cases have held that public officials have a fiduciary duty to disclose material information to the governmental entities they serve.<sup>116</sup>

Parties to a fiduciary relationship normally have the ability to modify the default rules supplied by the law of agency and to substitute their own agreed terms.<sup>117</sup> However, in determining whether a beneficiary's consent to such terms is valid a demanding standard of review is applied.

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111. RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

112. *See id.* § 8.02 (“An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position.”).

113. *See id.* § 8.03 (“An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.”).

114. *See id.* § 8.04 (“Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship.”).

115. *See id.* § 8.05 (“An agent has a duty . . . (1) not to use property of the principal for the agent's own purposes or those of a third party; and (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.”).

116. *See* United States v. Bolden, No. 97 C 0218, 1997 WL 473240, at \*3 (N.D. Ill. Aug. 14, 1997) (“[T]he defendant [the Commissioner of the Water Department for the City of Chicago] owed the City and its citizens a fiduciary duty not to conceal facts known to him which he has reason to believe are material to the City's conduct of its business and affairs.” (citing United States v. Bush, 522 F.2d 641, 647–48 (7th Cir. 1975))); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.11 (AM. LAW INST. 2006) (“An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.”).

117. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.07 (AM. LAW INST. 2006) (“An agent has a duty to act in accordance with the express and implied terms of any contract between the agent and the principal.”).

According to the Third Restatement:

- (1) Conduct by an agent that would otherwise constitute a breach of duty as stated in [sections] 8.01 [General Fiduciary Principle], 8.02 [Material Benefit Arising Out of Position], 8.03 [Acting as or on Behalf of an Adverse Party], 8.04 [Competition], and 8.05 [Use of Principal's Property; Use of Confidential Information] does not constitute a breach of duty if the principal consents to the conduct, provided that
  - (a) in obtaining the principal's consent, the agent
    - (i) acts in good faith,
    - (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
    - (iii) otherwise deals fairly with the principal; and
  - (b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.<sup>118</sup>

## VI. AREAS OF GENERAL AGREEMENT

The following sections discuss areas of recurring importance where there is, and in some cases has long been,<sup>119</sup> a consensus about the fiduciary duties of public officials. These areas include use of official power for

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118. *Id.* § 8.06.

119. In the late 1940s, the United States Senate Sub-Committee on Ethical Standards in Government recommended that the following practices should be deemed improper:

- (1) Engaging in any personal business transaction or private arrangement for personal profit which was based upon the official position or confidential information of the official.
- (2) Accepting any valuable gift, favor, or service either directly or indirectly from any person or organization with which the official transacted business for the government.
- (3) Discussing future employment outside the government with a person or organization with which there was pending official business.
- (4) Divulging valuable commercial or economic information of a confidential character to unauthorized persons or releasing such information in advance of its authorized release date.
- (5) Becoming unduly involved (for example, through frequent luncheons, dinners, parties, or other expensive social engagements) with persons outside the government with whom the officials did business.

DOUGLAS, *supra* note 9, at 61–62.

improper economic benefit; representation of private interests adverse to the government; use of government assets or information; and conflicting outside employment.

A. *Improper Economic Benefit*

The fiduciary-duty principle that public officials cannot use their position for improper economic benefit can be traced back at least as far as the Magna Carta:

Three . . . clauses in the 1215 Charter addressed . . . corrupt official practices. Clause 28 provides: “No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.” Clause 30 states: “No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.” [Further,] Clause 31 provides: “Neither we [the King] nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.”

These provisions were intended to address abuses related to the royal right of purveyance, the prerogative of the King to requisition supplies from the citizenry as the royal court travelled about England [but with an obligation to pay] . . .

. . . .

[T]he abuses related to the right of purveyance included not only takings to provide for the legitimate needs of the King’s household, but also requisitioning by officials for their “own personal . . . needs”. These three Clauses—28, 30, and 31—were intended to address that kind of abuse, too. In doing so, these Clauses presaged the development of a broader, fundamental principle of modern government ethics jurisprudence. That principle holds that a government official or employee may not use official power for personal economic benefit.<sup>120</sup>

Ethical problems related to improper economic benefit may arise whenever the government makes decisions that affect the economic situations of persons in the community.<sup>121</sup> Needless to say, the range of

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120. Johnson, *Ancient Magna Carta*, *supra* note 8, at 25–26 (footnotes omitted).

121. DOUGLAS, *supra* note 9, at 32. As described by Senator Paul Douglas at the middle of the twentieth century:



such impact is vast and the need for sound ethics rules is tremendous. “[W]herever there is discretion, there is [a] possible field for corruption and abuse.”<sup>122</sup>

Under fiduciary-duty principles, a public official has a duty to (a) identify a conflict arising from personal or closely related economic interests, (b) refrain from any participation in official decision making related to the matter, and (c) disclose the conflict.<sup>123</sup> The latter point—public disclosure of the conflict—enables other decisionmakers to avoid involving the conflicted official in discussions or decisions about the matter,<sup>124</sup> and

In a free market, prices are fixed impersonally by the forces of supply and demand . . . . There is little room for corruption and undue favoritism here. In contrast, when the government makes the decisions about prices, quantities produced, and what firms may enter an industry, the door is opened wide for the exercise of favoritism and corruption. . . .

. . . .

In short, where economic decisions are made by the people and parties who administer government, the decisions will not be on the lofty and abstract grounds . . . [but] will commonly be made in an atmosphere of pressure, influence, favoritism, improper deals, and corruption.

*Id.* at 32–33.

122. *Id.* at 43.

123. In *United States v. DeVegter*, the Court stated that, “If the official instead secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services.” 198 F.3d 1324, 1328 (11th Cir. 1999) (quoting *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997)). The court further explained:

When the prosecution can prove the other elements of the wire fraud offense, taking kickbacks or benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official’s honest services because “[i]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated.” Illicit personal gain by a government official deprives the public of its intangible right to the honest services of the official.

*Id.* (footnotes omitted) (quoting *United States v. Jain*, 93 F.3d 436, 442 (8th Cir.1996)).

124. *Cf.* *United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975) (finding the Press Secretary and Director of Public Relations for the Mayor of Chicago breached his fiduciary duties by failing to disclose his interests in a proposed contract). The Seventh Circuit wrote:

Bush did more than breach his fiduciary duty; he materially misrepresented his interests.

Bush was not making his recommendation merely as a disinterested public servant. His ownership of DAAI was material to the city officials’ evaluation of Bush’s opinion of the company which he was recommending. . . . Bush’s “statement that the company was ‘reputable’ without disclosing that it was the device by which the Mayor’s Press Secretary secretly derived profits from a city contract was itself a material misrepresentation.”

makes it possible for persons in the community to monitor the conflicted official's conformance with fiduciary obligations related to the matter.<sup>125</sup>

In many governmental contexts, compliance with the stated obligations related to economic conflicts of interest is made more likely by requiring public officials to periodically disclose through official reporting processes significant economic interests and business relationships.<sup>126</sup> In some states, "Public officials wanting to avoid conflicts of interest sometimes [are allowed to] opt for blind trusts, which shield them from knowing what investments they hold."<sup>127</sup>

As the United States Court of Appeals for the First Circuit explained:

A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.<sup>128</sup>

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....

Bush was not responsible for awarding the O'Hare advertising contract, but he used his official position within the mayor's inner circle to exert the substantial influence which he had on those who were responsible for negotiating the contract.

*Id.*

125. *Cf.* PAINTER, *supra* note 10, at xix ("Transparency and accountability are guiding principles . . . [for ethics reform].").

126. *See* Johnson, *Ethics in Government at the Local Level*, *supra* note 95, at 751 ("The enforcement of ethics rules . . . may be greatly aided by imposing an obligation on some subset of high-level city decision-makers to file (and, when necessary, update) annual reports containing information relating to the various provisions of those rules. For example, reporting requirements mirroring provisions in the improper economic benefit rule may require the filer to disclose: the names of closely related persons; other household members; outside employers; businesses in which the filer (or a closely related person) holds an economic interest; other affiliated businesses; and persons from whom the filer has received or sought an offer of employment or business opportunities . . . . If the reported information is a public record available to the press and other interested parties, and if violation of the reporting rules are backed by appropriate sanctions, it is likely that accurate information will be disclosed.").

127. *See* Steve Thompson, *Ben Jealous Proposes Ethics Plan, Attacking Gov. Larry Hogan's Business Interests*, WASH. POST. (Oct. 17, 2018), [https://www.washingtonpost.com/local/md-politics/ben-jealous-proposes-ethics-plan-attacking-gov-larry-hogans-business-interests/2018/10/17/876a5638-d196-11e8-b2d2-f397227b43f0\\_story.html?noredirect=on&utm\\_term=.f65b29d4edb3](https://www.washingtonpost.com/local/md-politics/ben-jealous-proposes-ethics-plan-attacking-gov-larry-hogans-business-interests/2018/10/17/876a5638-d196-11e8-b2d2-f397227b43f0_story.html?noredirect=on&utm_term=.f65b29d4edb3) [https://perma.cc/W3DX-QEUP] (discussing Maryland law and difficulties with implementing blind trusts).

128. *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) (citing *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987)).

According to the First Circuit, with respect to legislative matters, “[I]he obligation to disclose material information inheres in the legislator’s general fiduciary duty to the public.”<sup>129</sup>

Striking a similar note, the United States Court of Appeals for the Third Circuit wrote:

[There is a] fiduciary relationship between a public servant charged with disinterested decision-making and the public he serves. Duties to disclose material information affecting an official’s impartial decision-making and to recuse himself exist within this fiduciary relationship regardless of a state or local law codifying a conflict of interest.<sup>130</sup>

As explained by a federal district court in Western Pennsylvania:

Both at common law and under Pennsylvania criminal law, [a public official has] a duty to disclose to the public material information. . . . This common law duty to disclose is codified by Pennsylvania statute, which requires public officials to file annual Statements of Financial Interest and criminalizes intentional misrepresentations in these statements.

As a matter of policy, we believe this result is justified by the central role of disclosure in a well[-]functioning representative democracy. *Critical to the health of the electoral process is the voters’ ability to judge whether their representatives are acting to further their own financial self-interest instead of the public interest.*<sup>131</sup>

Rules against improper economic benefit help to reduce the abuses of the patronage system of public employment.<sup>132</sup> They also tend to establish a

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129. *Id.* at 733 n.17 (citing *Silvano*, 812 F.2d at 758).

130. *United States v. Antico*, 275 F.3d 245, 264 (3d Cir. 2001) (citation omitted) (first citing *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987); then citing *Silvano*, 812 F.2d at 759–60).

131. *United States v. Wecht*, Criminal No. 06–0026, 2008 WL 2223869, at \*7 (W.D. Pa. May 23, 2008) (emphasis in original) (citing 65 PA. CONS. STAT. §§ 1104(a), 1105, 1109(b)).

132. See Michael L. Shakman, *Here’s How the Shakman Case Curbed Cook County Patronage*, CHI. TRIB. (Nov. 13, 2018, 5:10 PM), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-shakman-cook-county-toni-preckwinkle-patronage-federal-government-oversight-1114-story.html> [<https://perma.cc/G56B-LB77>] (“Patronage was serfdom. People who wanted to work for the government had to apply to their committeeman, not to a government hiring department. The availability of job openings was kept secret. If the committeeman sponsored the applicant, the applicant got the job. But in return the employee had to pay a part of his or her salary to the committeeman, and had to do election work for the candidates supported by the committeeman—in perpetuity. Failure to comply meant being fired.”).

“level playing field” in public life.<sup>133</sup>

B. *Misuse of Government Assets or Information*

Under well-established rules, a public official fiduciary must exercise care to safeguard<sup>134</sup> property (including funds) and confidential information belonging to the government.<sup>135</sup> The duty continues after termination of the relationship if property<sup>136</sup> or confidential information<sup>137</sup> remains in the possession of the former public official.

Concerns about fiduciary mismanagement of the property of a beneficiary, like concerns about improper economic benefit,<sup>138</sup> can be traced back in Anglo-American history more than 800 years. In the early 13th century it was common for the guardians of minor children to deplete

133. See Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 724 (1999) (“Many Americans today expect that law *can, should, and will be used* to ensure that a level playing field in public life exists by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government.”); *id.* at 725–33 (showing ethical rules limiting corruption that are “applicable to judges, lawyers, and public officials”).

134. See RESTATEMENT (THIRD) OF AGENCY § 8.12 (AM. LAW INST. 2006) (“An agent has a duty, subject to any agreement with the principal, (1) not to deal with the principal’s property so that it appears to be the agent’s property; (2) not to mingle the principal’s property with anyone else’s; and (3) to keep and render accounts to the principal of money or other property received or paid out on the principal’s account.”).

135. See *id.* § 8.05 (“An agent has a duty: (1) not to use property of the principal for the agent’s own purposes or those of a third party; and (2) not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.”); *id.* § 8.05 cmt b (“An agent who has possession of property of the principal has a duty to use it only on the principal’s behalf, unless the principal consents to such use. . . . This rule is a specific application of an agent’s basic fiduciary duty . . . .”); see also Clark, *Fiduciary-Based Standards*, *supra* note 13, at 1621 (“The conflict component of fiduciary obligation prohibits a fiduciary from . . . making a recommendation or using government property (including information) in a way that provides a benefit to herself or to others close to her rather than to the beneficiary.”).

136. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. b (AM. LAW INST. 2006) (“Termination of an agency relationship does not end an agent’s duties regarding property of the principal. A former agent who continues to possess property of a principal has a duty to return it and to comply with the management and record-keeping rules stated in § 8.12.”).

137. *Cf. id.* § 8.05 cmt. c (“An agent’s duties concerning confidential information do not end when the agency relationship terminates. An agent is not free to use or disclose a principal’s trade secrets or other confidential information whether the agent retains a physical record of them or retains them in the agent’s memory.”).

138. See Part VI(A) of this article (discussing improper economic benefit).

lands entrusted to their care.<sup>139</sup> To address that problem, Clause 4 of the 1215 Magna Carta firmly stated:

The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property.<sup>140</sup>

Clause 5 of the 1215 Magna Carta further mandated:

[A guardian] shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.<sup>141</sup>

Similar fiduciary obligations are imposed on government officials, who are required to safeguard government property. These types of issues arise in many contexts,<sup>142</sup> including the use of government aircraft for private purposes.<sup>143</sup> If the relevant governmental entity has prescribed a formula for reimbursement of costs related to personal use of government aircraft, it may be difficult to argue that a public official who has abided by those provisions has breached his or her fiduciary obligations. Still, in some situations, the reimbursement formula may be so opaque,<sup>144</sup> or the amount

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139. Guardians of the property of minors “had always strong inducements to exhaust the soil, stock, and timber, uprooting and cutting down whatever would fetch a price, and replacing nothing.” WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 125* (2d ed. 1914).

140. See *English Translation of Magna Carta*, BRIT. LIBR., <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> [<https://perma.cc/T9KW-GCRP>] (providing a full-text translation of the 1215 edition of the Magna Carta). The text is available under the Creative Commons License. *Id.*

141. *Id.*

142. Cf. Juliet Eilperin & Brady Dennis, *EPA Watchdog Closes Two Probes into Scott Pruitt’s Conduct, Citing His Resignation*, WASH. POST (Nov. 30, 2018), <https://www.washingtonpost.com/energy-environment/2018/11/29/epa-watchdog-closes-two-probes-into-scott-pruitts-conduct-citing-his-resignation/> [<https://perma.cc/UR2U-RB5K>] (discussing an investigation into a former public official’s alleged misuse of staff for personal purposes).

143. See David Nakamura, *As Always, Presidential Travel Tests the Boundaries of Policy, Politics*, WASH. POST., Jan. 19, 2018, at A08, 2018 WLNR 1896728 (discussing a presidential trip intended to promote a legislative agenda and endorse a candidate for Congress).

144. See *id.* (“By [federal] law, the political parties must pay a prorated share of the costs, under an opaque formula established in the Reagan era, while taxpayers are on the hook for the rest. The problem . . . is that it is virtually impossible for the public to know exactly how the formula is applied.”).

of reimbursement may be so inadequate, that it may be fair to criticize both the reimbursement system and those who benefit from the system's deficiencies.

The use of confidential government information for private gain sometimes means that taxpayers will pay higher prices to procure supplies and services.<sup>145</sup> If a public official misuses confidential government information to usurp a business opportunity, such conduct violates the legal principle that prohibits an agent from competing with the agent's principal.<sup>146</sup> Some government ethics laws expressly prohibit certain types of misuse of confidential information, such as acquisition of land that is likely to be affected by a pending governmental decision.<sup>147</sup> "Secret conversion of information received in a fiduciary capacity is a form of fraud against the owner of that information."<sup>148</sup>

A public official not only has a duty to refrain from misusing government assets or information, but a duty to disclose such use by others. According to the First Circuit:

[T]he affirmative duty to disclose material information arises out of a government official's fiduciary relationship to his or her employer, whether as a public or as a private employee. . . . Thus, we hold that where a person occupies a fiduciary relationship to the City . . . and is aware of material information pertaining to the expenditure of large sums of the City's monies on an unnecessary project, or one which will secretly enrich another at the

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145. See Feerick, *supra* note 98, at 125 ("Closely related to the question of appearances against the interests of the municipality is the use of confidential information by a public officer or employee to advance his or her private interests or those of any other person. . . . When it occurs, it damages public faith in government integrity and respect for those in public service, because the use of such information for private gain usually means that taxpayers will pay more than they should to procure supplies or services.")

146. See RESTATEMENT (THIRD) OF AGENCY § 8.04 (AM. LAW INST. 2006) ("Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors.")

147. Section 2-44 of the San Antonio, Texas Code of Ethics provides in part:

*Acquisition of interest in impending matters.* A City official or employee shall not acquire an interest in, or be affected by, any contract, transaction, zoning decision, or other matter, if the official or employee knows, or has reason to know, that the interest will be directly or indirectly affected by impending official action by the City.

San Antonio Ethics Code, *supra* note 10, § 2-44(b)(1).

148. United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998) (citing United States v. O'Hagan, 521 U.S. 642 (1997)) (involving a city alderman).

expense of the City, that person has an affirmative duty to disclose the information.<sup>149</sup>

### C. *Representation of Private Interests Adverse to the Government*

A public official ordinarily may not represent another individual in a matter pending before the governmental office or body in which the official serves. Thus, a member of a zoning commission may not represent another person before the zoning commission, even if the member takes no part in the decision of the matter.<sup>150</sup>

The rule stated above is a specific application of the general rule that “[a]n agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.”<sup>151</sup> “As a fiduciary, an agent has a duty to the principal to act loyally in the principal’s interest in all matters in connection with the agency relationship.”<sup>152</sup>

According to the *Restatement (Third) of Agency*, the rule prohibiting adverse representation is “formulated broadly” and applies “[s]o long as the transaction in which an agent acts as or on behalf of an adverse party is connected with the agency relationship.”<sup>153</sup> Nevertheless, in the governmental context, questions arise as to how far the prohibition extends—in particular, because some public officials owe the public only a limited range of fiduciary duties.

Suppose, for example, that a lawyer in private practice qualifies as a public official because he or she is a volunteer member of a city utilities board. It makes little sense to say that the lawyer cannot represent a client suing the

149. *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) (citations omitted) (citing *United States v. Bush*, 522 F.2d 641, 646 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986)).

150. Section 2-47 of the San Antonio, Texas Code of Ethics provides in part:

*Representation of private interests before the City by a member of the board.* A City official or employee who is a member of a board or other City body shall not represent any person, group, or entity: (1) Before that board or body; (2) Before City staff having responsibility for making recommendations to, or taking any action on behalf of, that board or body, unless the board or body is only advisory in nature; or (3) Before a board or other City body which has appellate jurisdiction over the board or body of which the City official or employee is a member, if any issue relates to the official’s or employee’s official duties.

San Antonio Ethics Code, *supra* note 10, § 2-47(a).

151. RESTATEMENT (THIRD) OF AGENCY § 8.03 (AM. LAW INST. 2006).

152. *Id.* § 8.03 cmt. b.

153. *Id.*

city for damages caused by a police cruiser involved in a high-speed chase. The damages claim, though adverse to the city, is unrelated to the business that comes before the city utilities board. In terms of the language quoted above from the *Restatement (Third) of Agency*, it would make sense to conclude the prohibition against representation did not apply because it was not “connected with the agency relationship.”<sup>154</sup> Some government ethics laws spell out limits on adverse representation in even clearer terms, such as by expressly permitting pro se<sup>155</sup> or unpaid adverse representation,<sup>156</sup> or representation by a board member before a different body of the same governmental entity.<sup>157</sup> Limiting the scope of the prohibition against adverse representation enables governments to attract talented members of the community to volunteer service on boards or commissions.

However, if a public official occupies a powerful position, it is likely that the prohibition against adverse representation should be strictly applied. A useful illustration is offered by recent events that took place in Louisville, Kentucky. The president of the Metro Council, who was a lawyer, was engaged by private clients to sue the Metro Government for millions of

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154. *Id.*

155. Section 2-47 of the San Antonio, Texas Code of Ethics provides in part:

*Representation in litigation adverse to the City.* (1) Officials and employees (other than board members). A City official or employee, other than a person who is classified as an official only because he or she is an appointed member of a board or other City body, shall not represent any person, group, or entity, *other than himself or herself, or his or her spouse or minor children*, in any litigation to which the City is a party, if the interests of that person, group, or entity are adverse to the interests of the City.

San Antonio Ethics Code, *supra* note 10, § 2-47(d)(1) (emphasis added).

156. Section 2-47 of the San Antonio, Texas Code of Ethics provides in part:

*Representation of private interests before the City by City officials and employees.* (1) General rule. A City official or employee shall not represent for compensation any person, group, or entity, *other than himself or herself, or his or her spouse or minor children*, before the City.

*Id.* § 2-47(b)(1) (emphasis added).

157. Section 2-47 of the San Antonio, Texas Code of Ethics provides in part:

*Representation in litigation adverse to the City. . . .* (2) Board members. A person who is classified as a City official only because he or she is an appointed member of a board or other City body shall not represent any person, group, or entity, other than himself or herself, or his or her spouse or minor children, in any litigation to which the City is a party, if the interests of that person, group, or entity are adverse to interests of the City *and the matter is substantially related to the official's duties to the City.*

*Id.* § 2-47(d)(2) (emphasis added).



dollars<sup>158</sup> in damages resulting from sexual abuse allegedly perpetrated by police officers while they were assisting a private youth organization. The Jefferson County attorney, who was charged with defending the sexual abuse claims, moved to disqualify the council president from representing the plaintiffs, based on conflict of interest.<sup>159</sup> The council president argued that there was no conflict of interest because he planned to recuse himself from any official action related to the matter. The judge granted the disqualification motion, noting that:

Yates [the Council president] has a duty to the Louisville Metro Government, a defendant in this action, to his constituents, and to N.C. [a plaintiff in the sexual abuse action]. These duties conflict with each other, and Yates cannot simply abstain from acting as a Metro Councilperson on a matter of this magnitude.<sup>160</sup>

Although the court cited the multiple-client conflict-of-interest rule that is applicable to attorneys in Kentucky, it also noted that expert testimony<sup>161</sup> was presented that the Council president owed fiduciary duties to the Metro Government because of his position as a prominent public official. Presumably, the Council president's representation of private clients in multi-million-dollar legal actions against the Metro Government was inconsistent with his faithful performance of those fiduciary duties.

#### D. *Conflicting Outside Employment*

May public officials engage in outside employment that arguably conflicts with their public duties? According to many ethics codes, the answer is no. Public officials are normally prohibited from engaging in contemporaneous, outside employment related to their official duties. This minimizes the risk that an outside employer will have, or will be perceived to have, an

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158. See Andrew Wolfson & Phillip M. Bailey, *County Attorney Moves to Disqualify Council President David Yates from Louisville Police Sex-Abuse Suit*, COURIER-J. (May 17, 2019, 6:48 PM), <https://www.courier-journal.com/story/news/2017/05/17/county-attorney-moves-disqualify-yates-police-sex-abuse-suit/327358001/> [<https://perma.cc/B8J3-6QJ4>] (“Yates already made a demand for \$6 million for plaintiff N.C. that was rejected by the city.”).

159. See *id.* (stating the motion alleged that “any damages awarded to his client ‘will flow from metro government, over which Mr. Yates has oversight[,]” and that “Yates ‘votes on budgets that fund the settlement of lawsuits and the payment of insurance . . . premiums”).

160. Order at 4, N.C. v. Wood, No. 17–CI–1213 (Ky. Cir. Ct. Jan. 2, 2018).

161. I testified pro bono as an expert witness in support of the disqualification motion. All of the information stated here is a matter of public record.

advantage in influencing government decisions, or accessing information related thereto. Authorities generally agree that any form of outside employment that could reasonably be expected to adversely affect a public official's independence of judgment or faithful performance of fiduciary duties should be banned.

As to potentially conflicting future employment,<sup>162</sup> the question is whether fiduciary duties survive the termination of the public official's governmental position. As a general rule, most fiduciary duties end when the fiduciary relationship ends. However, some fiduciary duties survive the conclusion of the relationship such as the duties related to property or confidential information, mentioned above.<sup>163</sup>

It is important to consider issues relating to the appearance of impropriety.<sup>164</sup> In order for government to perform effectively, it must merit the confidence of the citizenry.<sup>165</sup> Thus, both actual impropriety and *the appearance of impropriety* must be avoided in the conduct of public affairs. More specifically:

Citizens are often deeply cynical when former . . . [public] officials . . . represent private interests in dealings with the . . . government. The citizens suspect, sometimes rightly, that the former . . . [public] officials . . . are trading on their connections with those still in government service, and that the private interests they represent will have an unfair advantage in achieving the results they seek.<sup>166</sup>

To preserve confidence in government, ethics codes and other legislative enactments often address the issue of when and under what circumstances a *former* public official may represent private interests before the government. Such rules must be written with particular care. They must not be so stringent that they discourage persons from entering government service in the first place, nor demand an unrealistically high degree of

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162. See DOUGLAS, *supra* note 9, at 49–58 (discussing “the lure of past and present employment”).

163. See Part VI(B) of this article (discussing misuse of assets or government information).

164. See Christopher R. McFadden, Comment, *Integrity, Accountability, and Efficiency: Using Disclosure to Fight the Appearance of Nepotism in School Board Contracting*, 94 NW. U. L. REV. 657, 658 (2000) (opining that “[t]he appearance of impropriety—even when none exists in fact—can weaken the public’s confidence in its government”).

165. Cf. Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621, 629 (2016) (“A just legal system operates in a manner that merits the respect and confidence of the citizenry.”).

166. Johnson, *Ethics in Government at the Local Level*, *supra* note 95, at 744 (footnote omitted).

continuing “loyalty” from persons who served the government.<sup>167</sup> There is a consensus that some type of waiting period is appropriate before a

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167. In an earlier article focusing on local government, I wrote the following:

In drafting rules limiting the conduct of former city officials and employees, it is important to consider several variables. The first consideration is whether the prior government service was rendered by a person who was (a) an elected official, (b) an employee, or (c) an unpaid volunteer. Presumably, a higher degree of continuing loyalty can be expected from a former elected officeholder, or perhaps even a former paid employee, than from a mere former volunteer. One might also conclude that it is fair to impose greater obligations on former full-time employees than on former part-time employees, although apparently few codes have drawn such a distinction. A former unpaid volunteer should have a less restrictive duty of continuing loyalty than one who was previously elected to office or on the city payroll.

A second variable is the nature of the conduct in which the former city official or employee will engage after leaving government service. Thus, it is appropriate to ask whether the subsequent representation of private interests is (1) *pro se*, (2) on behalf of others, but unremunerated, or (3) on behalf of third persons who pay for the services. Self-representation may not be highly objectionable, particularly if other persons in the community have the same right. In contrast, compensated representation of private interests, particularly if it occurs frequently, may pose a great risk to public confidence in government because it may appear that the former official or employee is deriving improper economic benefit from connections to persons still in government. Unremunerated subsequent representation of private interests as a volunteer would seem to be less objectionable than compensated work, but it may still pose an appearance of impropriety . . . .

A third relevant variable is the amount of time that has elapsed since the former city official or employee was in government service. It might, for example, be highly objectionable for a former city council member to begin representing private interests to the government immediately after leaving public service. However, as the years pass, the real or perceived connections of the former public servant to those who represent the government often diminish (although that is not always true). Therefore, it may be appropriate to design a prohibition imposing limitations on post-government representation of private interests that expires after a certain number of years have elapsed. Of course, there is no easy answer to the question of whether such a prohibition should last one year, two years, five years, or seven years, as opposed to ten years, twenty years, or a lifetime. Most cities seem to impose a one- or two-year limitation. Such a brief restriction is only a small step toward preserving citizen confidence in government and may be more a reflection of what is politically feasible, than what is desirable. A rule that contains a time limitation will obviously be subject to debate on the issue of whether the period of time is too long or too short for the purpose of ensuring fairness and a level playing field in city government decision-making processes.

Finally, it may be appropriate to consider the closeness of the connection between the subject matter of the former official or employee’s prior responsibilities in government service and the subsequent representation of private interests. Presumably, the closer the connection, the greater the risk that the private party will be perceived to have (or actually will have) an unfair advantage, and the greater the justification for banning such work. A rule that focuses on the nexus between the prior government service and the subsequent representation will inevitably impose a wide range of limitations on persons who previously exercised broad authority for the city, such as a mayor or city council member, and a lesser range of limitations on persons who previously played

former public official may represent private interests before the office or body that the former official once served. However, the rules that have been enacted tend to be weak and rarely exceed a two-year waiting period.

## VII. CONCLUDING THOUGHTS

According to Professor Kathleen Clark, “[F]iduciary obligation embodies those principles that government ethics regulation ought to express[,]” and “as a practical matter, it incorporates the flexibility that ethics regulation requires.”<sup>168</sup> Consequently, fiduciary duty principles should play a central role in regulating the conduct of public officials. Government ethics laws, criminal provisions, and other legislative enactments should be interpreted in light of the demanding loyalty obligations that are imposed on fiduciaries. In addition, the processes that investigate alleged breaches of fiduciary duty must operate with sufficient transparency<sup>169</sup> and fidelity to due process<sup>170</sup> that the public can be confident that the public trust reposed in public officials is being properly discharged.

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a minor role in city affairs. That may be appropriate. State and federal laws commonly prohibit former public servants from “lobbying former agencies on matters in which the official or employee was involved.”

*Id.* at 745–47 (footnotes omitted) (quoting Mark W. Huddleston & Joseph C. Sands, *Enforcing Administrative Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 142–43 (1995)).

168. Clark, *Ethics in Government*, *supra* note 58, at 63.

169. See Wallack, *supra* note 7 (“We have a right to know who’s committing crimes in our communities, especially when it’s a police officer responsible for upholding the law . . . . Whether or not the officer should have avoided a conviction, that decision needs to be made publicly so we can monitor the court system and know that it’s operating fairly.”).

170. *Cf. id.* (discussing an “unusually secretive process” in Massachusetts that is “not replicated in any other state”).