Legal Implications and Ethics of Trustee Communications – When Talk is NOT Cheap

NCPERS UNIVERSITY
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Trustee Communications

• Overview
• Communication at a Board Meeting
• Communication outside of a Board meeting
  – Members & Retirees
  – Vendors and Consultants
  – Staff
  – The Press and Media
• Communication with Legal Counsel
Nature of Public Retirement System Trustees

You are volunteers and may not have experience with various aspects of serving as public pension trustees:

• Member of a Board of Trustees
• Public official of governmental body
• Public meetings and open government
• Interactions with legal counsel
• Interactions with the media
• Appointed or elected official who is a fiduciary
When Talk is Not Cheap

Trustee communications in certain circumstances can give rise to legal, fiduciary, and governance issues. Examples:

• Disclosure of confidential information
• Ethics violations
• Open government implications
• Miscommunication to members and retirees
• Undue influence over staff
Good Advice?
Importance of Communication

• Your voice is important and participation on your Board is essential to satisfy your fiduciary duties.

• Don’t stop communicating...just be aware of when and how your communication might have other implications.
Communication at a Board Meeting

• Procedural Aspects
• Confidential and Sensitive Information
• Advice from Legal Counsel
• Fiduciary Concerns
Trustee Communication at a Board Meeting—Procedural Aspects

Parliamentary Procedures and Communication

- Procedures are often different for every Board.
- May have legal parameters or requirements.
- Chair or presiding officer typically governs the meeting and recognizes trustees to speak.
- Communication is typically limited to agenda topics.
Trustee Communication at a Board Meeting—Procedural Aspects

Communication and Agendas

• Open meetings laws may require posting of agenda.
• Speaking “off topic” may be legally impermissible.
• Chair or presiding officer often announces agenda item for presentation and discussion.
  • Speaking on agenda item when not presented on the floor is discouraged.
  • Items can usually be discussed out of order at discretion of Chair or presiding officer.
Trustee Communication at a Board Meeting—Procedural Aspects

Open Meeting vs. Closed Sessions

• Generally, all discussions of a public body must be held in an open meeting.
  • Requirements governed by State law
• Some States allow confidential discussions to be held in closed session for confidential communications.
• Procedural requirements often apply with closed sessions.
Trustee Communication at a Board Meeting—Confidential Information

• Inherent conflict between requirements for open government and public discussion and topics involving confidential information.

• Confidential information is information that cannot be publically disclosed under law or contract. Examples:
  • Privacy laws relating to financial information
  • HIPAA and privacy laws relating to health information
  • Information confidential under state laws
  • Information confidential under contractual obligations
Trustee Communication at a Board Meeting—Sensitive Information

- **Sensitive information** is information for which disclosure is not legally impermissible, but might be detrimental to the interests of the retirement system.

- No strict legal requirement to keep sensitive information confidential, but information may be excepted from public disclosure.

- Examples:
  - Attorney-client communications
  - Information regarding negotiations (pricing and terms of property sales, vendor contracts, etc.)
Trustee Communication at a Board Meeting—Confidential vs. Sensitive Information

- **Confidential information**: Do not disclose or discuss in open meeting!!

- **Sensitive information**: Think carefully before you discuss in public and seek advice of staff or counsel.

- Public discussion of sensitive information might be unavoidable to fulfill fiduciary duties or to comply with open government requirements.
Trustee Communication at a Board Meeting—Advice from Legal Counsel

• Trustee requests for legal advice may occur during a public meeting, and maintaining attorney-client privilege becomes a concern.

• Public discussion of item will prevent assertion of attorney-client privilege.

• If the nature of the request involves discussions where confidential communication is involved, closed or executive session may be available, depending on State laws.
Trustee Communication at a Board Meeting—
Advice from Legal Counsel

Thoughts on Attorney-Client Communication in Open Session

• General statements of the law and what it requires are ok.

• Comments like “Do you have thoughts on this?” or “What are our options?” may give rise to requests for legal advice.

• Try to prepare in advance and avoid situations for spontaneous attorney-client confidential communication.
Trustee Communication at a Board Meeting—Advice from Legal Counsel

Closed or Executive Session

• Some States allow for attorney-client communication to be held in closed or executive session.

• Communication usually limited to attorney-client communications with attorney present at the session.

• Watch for discussions “swerving” into realm that does not involve legal advice or legal implications.
Trustee Communication at a Board Meeting—Fiduciary Concerns

• Communications during a Board meeting may create fiduciary concerns:
  • “We don’t have enough information to make this decision.”
  • “I was elected by the members of the System, and I’m going to do what is best for them.”
  • “This topic was presented to us at the last minute, and I’m not prepared to vote on this.”
Trustee Communication at a Board Meeting—Fiduciary Concerns

• Expressing your concerns regarding a Board action is of course critical to your fiduciary duties.

• Recognize that public expression of your concerns may have fiduciary implications.

• How to prevent these communications?
  
  • Be prepared for meetings.
  
  • Address concerns with staff or Board chair before a public meeting.
Don’t let this be your daughter!
Trustee Communication Outside of a Meeting

- Members & Retirees
- Vendors and Consultants
- Staff
- The Press and Media
- Legal Counsel
Trustee Communication Outside of a Meeting—Members and Retirees

• Requests by members and retirees for information from trustees is not uncommon.

• Important concerns and considerations exist in communicating with members and retirees:

  • Miscommunications and reasonable reliance
  • Disclosure and receipt of confidential information
  • Governance and speaking with “one voice” as a Board
Trustee Communication Outside of a Meeting—Members and Retirees

Miscommunications and reasonable reliance

• Members and retirees may request general or personal benefit information or assistance with a particular outcome.

• If you provide such information or promise an outcome, and the member or retiree reasonably relies upon such communication, a member or retiree might have a claim against the fund.

• Best practice is to refer such requests for information or assistance to staff.
Trustee Communication Outside of a Meeting—Vendors and Consultants

- Communication with vendors and consultants may occur at conferences or other social gatherings.
- Procurement laws and procedures or ethics policies may have specific prohibitions relating to these communications in connection with a search process (aka “black-out period”).
- Addressing consultant or vendor requests by individual trustees may give rise to misrepresentations or create governance issues.
Trustee Communication Outside of a Meeting—Communications with Staff

• Trustees should and are encouraged to reach out to staff for information needed to satisfy fiduciary duties.

• However, trustees must keep in mind that they hold a position that gives rise to potential “undue influence” with respect to staff.

• Undue Influence—your position of authority makes a staff member do something that he or she would not normally do.
Trustee Communication Outside of a Meeting—Communications with Staff

Limiting Potential Undue Influence

• Be mindful of Board governance and any relevant policies.
• Communicate with Executive Director first to be referred to appropriate staff member.
• Consider whether requests for information are necessary and appropriate in connection with your duties.
• Pass along requests from members, retirees and vendors, but do not advocate or encourage a particular result.
Trustee Communication Outside of a Meeting—The Press and Media

• The most critical issue with the press and media often revolves around fiduciary and governance concerns when asked for personal views on an issue facing the Board.

• Fiduciary duties demand that you act in the best interest of the retirement system or fund, and working against Board action or initiatives through the press is counter to such duties.

• Speaking with “one voice” through a designated representative of the Board avoids these issues.

• If personal views are expressed, they should be clearly identified as personal views and not presented in a manner that works against the Board’s actions.
Trustee Communication Outside of a Meeting—with Legal Counsel

- When a trustee communicates directly with legal counsel regarding a legal issue, both trustee and legal counsel must be aware that legal counsel represents the System and not the individual trustee.

- Advice to an individual trustee on general legal issues facing the System may be consistent with representation of System as a whole.

- That said, governance issues should be considered if you are directly communicating with legal counsel, especially if your request involves significant System resources.
Trustee Communication Outside of a Meeting—with Legal Counsel

However, if you are communicating with legal counsel regarding a personal interest potentially adverse to interests of the System:

• Such communication is not privileged.

• Legal counsel may have an obligation to disclose the matter to the appropriate party (Board Chair, Executive Director, etc.).
Trustee Communication Outside of a Meeting—with Legal Counsel

Thoughts on individual communications between trustees and legal counsels

• Despite potential pitfalls, trustees are not discouraged from seeking counsel.
• In many instances, issues facing an individual trustee are consistent with representation of the System, but if any question, be sure and clarify.
• Have a policy in place, even if informal, on who can initiate a project with legal counsel.
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