

BUTTERMORE AND FOLTZ  
ATTORNEYS AT LAW

**General Durable Power of Attorney's Duty of Loyalty**

An individual who accepts the position of Power of Attorney acts as an Agent for the individual executing the Power. Agency is the fiduciary relation which results from the manifestation of consent by the principal to the agent that the agent shall act on the principal's behalf and subject to the principal's control, and consent by the agent so to act. The agreement to act on behalf of the principal causes the agent to be a fiduciary. This fiduciary duty includes the duty not to act as, or on account of, an adverse party without the principal's consent. See Restatement (Second) of Agency §13.

The agency has a duty to act solely for the benefit of the principal in all matters connected to the agency. See Restatement (Second) of Agency §387. The confidence which the principal places in the agent does not permit the agent to appropriate to himself the principal's assets, or to give them to others. “No power, unless it contains very clear language on the subject, should be construed as having invested the attorney with authority to appropriate to himself his principal's assets or give them away.” Manna v. Pirozzi, 44 N.J. Super. 227, 230 (1957), citing Von Wedel v. McGrath, 180 F. 716, 718 (3<sup>rd</sup> cir. 1950)(citing Restatement of Agency §37).

The agent's duty is not only to act solely for the benefit of the principal, but also to take no unfair advantage of his position in the use of information or because of the opportunities which his position affords. See Restatement (Second) of Agency § 387 cmt b. Whether or not the agent is paid is irrelevant. See Restatement (Second) of Agency § 387 cmt c.

An agent is always held to a duty of fairness when self-dealing, even when he acts with consent of the principal. The burden of proof is on the agent to show that he has satisfied all the duties required by the rules. See Restatement (Second) of Agency §390, cmt g.

The fiduciary duty under a power of attorney should be compared to the fiduciary duty of an attorney at law. Courts of Equity have willingly intervened upon consideration of public policy to compel fidelity in performance of fiduciary duty by attorneys. See Dwyer v. Anderson, 113 N.J. Eq. 210, 214 (1933) citing Proff v. Shirvanian, 110 N.J. Eq. 639, 643 (1932). “Relief will be afforded in equity in all transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed.” (citation omitted).

The fiduciary duty under a power of attorney can also be compared to the fiduciary duty of a broker. The broker cannot permit his interest to interfere with those of his principal. The broker must show perfect good faith and openness of dealing. The same rule applies to trustees. Thompson Realty Co v. Hoagland, 100 N.J. Super. 478,483 (1968) citing Young v. Hughes, 32 N.J. Eq. 372, 384 (E & A 1880). “*The rule was not intended to be remedial of actual wrong done alone, but also to be preventative of the possibility of it.*” (italics in original) citing Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 553 (1967). “In this context, the principal is entitled to be informed of any circumstance that might reasonably be expected to influence the complete loyalty of the agent to the principal.” Thompson at 484, citing McGregor v. Florida Real Estate Commission, 99 So. 709, 712 (Fl. Sup. Ct. 1958).