

Faculty Employment Outside of the University: Conflicts of Commitment (2004)

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I. Introduction

College and university administrations have long recognized and encouraged faculty members to engage in a wide range of activities outside the university, including:

- serving on boards of directors for outside entities;
- starting outside companies (faculty "entrepreneurs");
- maintaining an outside part-time practice, such as in law or architecture;
- holding public office; and
- serving as an elected officer of a disciplinary organization or editor of a scholarly journal.

Such outside faculty consulting builds the reputations of institutions, and can also promote the interests of both the administration and the faculty by:

- enriching the classroom experience for students by providing faculty members with current practical experience;
- providing faculty members the opportunity to engage in professional development;¹
- helping to recruit and retain faculty members by providing them with the opportunity to engage in outside interests, thereby enabling them to identify new research scholarship topics and apply their theories to "real life";²
- enabling faculty members to earn additional compensation at little or no cost to the home institution;
- creating opportunities for faculty members that may translate into employment and internship opportunities for their students;
- increasing the potential outside financial support for the institution—either directly or indirectly—through joint ventures and the activities and networking of faculty members in the larger community, including the business community; and
- contributing to the longstanding mission of the higher education community to share knowledge and learning with society at large and especially with the local community in which the institution is located.

At the same time, outside activities that involve substantial involvement by faculty may raise concerns about conflicts of commitment, that is, the amount of time spent by faculty outside their teaching, research, and service responsibility to the institution. Such a concern is not new:

Conflicts of commitment are hardly new in academe. Allowing faculty members to be affiliated with biotech firms presents the same kind of difficulty as allowing members

of the business school faculty to sit on corporate boards. The danger that the faculty member will neglect his or her duties is the same for both.

Norman E. Bowie, *Universtiy-Business Partnerships: An Assessment 75* (Rowan & Littlefield Publishers 1994).

Faculty involvement in outside activities also raises issues for professors in terms of their employment relationship with the institution, including:

- credit for professionally-related outside consulting in tenure review, post-tenure review, promotions, annual reviews?
- time to participate in shared governance, including promotion-and-tenure and curricular committees?
- ownership of intellectual property rights, particularly regarding patents and the development of distance education courses?
- relationships with departmental and disciplinary colleagues?
- teaching and mentoring relationships with undergraduate and graduate students?

This outline will focus on concerns about conflicts of commitment as they relate to faculty outside activities, particularly employment. The discussion is necessarily general because particular policies must be shaped and informed by the mission of each institution.

II. "Conflicts Of Commitment" And Faculty Outside Activities: Some Background

The broad term "conflicts of interest" is generally used to subsume two different concepts: conflicts of interest, which tend to involve private financial arrangements, and conflicts of commitment, which generally refer to time and energy. While conflicts of commitment is a distinct concept from conflicts of interest, the two often overlap and, at times, may be difficult to separate. Moreover, the concept of conflicts of commitments (or "conflicts of obligation") is the general rubric under which may fall numerous policies affecting faculty outside activities, such as intellectual property and student research.

A. Some Definitions of Conflicts of Commitment in Higher Education

The Association of American Medical Colleges (AAMC) defines conflict of commitment as follows:

The term *conflict of commitment* relates to an individual faculty member's distribution of effort between obligations to one's academic appointment (normally "full-time" in teaching, research, and/or patient care) and one's commitment to "outside" activities. . . . A conflict of commitment arises when these [outside] or professionally removed activities (e.g., outside teaching or business) come to interfere with the paramount obligations to students, colleagues, and the primary missions of the academic institution by which one is appointed and salaried. . . .

AAMC, "Guidelines for Dealing with Faculty Conflicts of Commitment and Conflicts of Interest in Research," 65 ACAD. MED. 487, 490 (1990).

The Association of Academic Health Centers (AHC) guidelines on conflicts of commitment states that

a person who accepts a full-time appointment to the faculty, or full-time research position . . . has an obligation to devote his/her primary professional effort and allegiance to the university. . . . It is inappropriate for faculty or academic staff members, without prior approval, to divert to other entities or institutions opportunities for research, education, clinical care or financial support which otherwise might flow to the university.

AHC, *Conflicts of Interests in Academic Medical Centers* 3 (1990).

B. AAUP Policy

While AAUP has no specific statement on conflicts of commitment, several existing AAUP policies speak to the issue.

AAUP's *Statement on Professional Ethics*, which many colleges and universities have incorporated into their faculty handbooks, provides: "Professors give due regard to their paramount responsibilities within their institution in determining the amount and character of work done outside it."

In a joint statement the AAUP and the American Council on Education (ACE) recommended in 1965 that universities develop guidelines and procedures "to guide the individual university staff members in governing their conduct in relation to outside interests that might raise questions of conflict of interest." AAUP, "On Preventing Conflicts of Interest in Government-Sponsored Research at Universities," 51 *AAUP Bulletin* 42, 43 (1965). The joint statement provided: "Consulting relationships between university and staff members and industry serve the interests of research and education in the university. . . . Such relationships are desirable, but certain potential hazards should be recognized." At the same time, "a system of precise time accounting is incompatible with the inherent character of the work of a faculty member since the various functions he performs are closely interrelated and do not conform to any meaningful division of a standard workweek."

C. Institutional Policies on Outside Faculty Consulting and Conflicts of Commitment

A helpful institutional definition of a conflicts of commitment policy exists at the University of Illinois:

A "conflict of commitment" exists when the external activities of an academic staff member are so substantial or demanding of the staff member's time and attention as to interfere with the individual's responsibilities to the unit to which the individual is assigned, to students, or to the University.

University of Illinois at Urbana-Champaign, "Policy on Conflicts of Commitment and Interest" (Oct. 1995);

<http://www.research.uiuc.edu/coi/policy.asp>.

Finding policies that govern outside commitments, particularly faculty consulting, in a faculty handbook can sometimes be challenging. Some policies exist under the

general rubric of "conflicts of interest." Sometimes conflicts of commitment policies exist separate from an institution's policy on "outside faculty activities"; sometimes they cross-cite to one another, sometimes not. Other times conflicts of commitment policies cover outside activities, or one serves as an appendix to the other. Prohibitions against dual full-time appointments are often stand alone policies. Intellectual property policies that address on-line education may also touch on commitment concerns, but may not be cited in commitment policies.

Other institutional policies that often speak to commitment issues include policies on: professional ethics (or "faculty standards of conduct"), publication, student participation in research, the use of institutional facilities, and leaves of absence. In summary, conflict of commitment issues run through a variety of institutional policies and activities, and so not all commitment issues may be feasibly addressed in one statement. (For example, the University of North Carolina has separate policies dealing with "Conflict of Interest and Commitment Affecting University Employment" and "External Professional Activities of Faculty and Other Professional Staff." <<http://intranet.northcarolina.edu/docs/legal/policymanual/300.2.2.pdf>> and <<http://intranet.northcarolina.edu/docs/legal/policymanual/300.6.1.pdf>> (Apr. 16, 1993).)

When institutions provide specific guidance about conflicts of commitment, they usually do so in terms of the amount of time faculty can devote to outside interests. Such guidance often requires faculty members not to accept full-time employment for compensation at another institution while a full-time faculty member at the home institution, and to not spend more than one day a week on consulting activities. Most institutions limit outside commitments (or "moonlighting") to no more than one day a week. See, AAMC, "Guidelines for Dealing with Faculty Conflicts of Commitment and Conflicts of Interest in Research" (1990) (finding that "most institutions afford their faculty one day per work week for scholarly pursuits that relate to and advance professional growth and public service"); <www.aamc.org/research/dbr/coi.htm>.

Strict time definitions, however, can raise legal concerns. For example, hourly allocations can undermine the exempt employee status of faculty under the Fair Labor Standards Act. Patricia Friend, "Faculty and Staff Outside Activities," (NACUA, Nov. 5, 1999). Similar legal concerns may arise if administrations seek to strictly enforce a 40-hour work week for faculty. As one commentator observed:

Except in the evidence of gross neglect or abuse, time should not be a highlighted consideration. Professionals are not clock watchers and should not be regarded as such. Rare is the faculty member worth having who does not work well beyond the forty hours implicit in the eight hour day and the five day week. The desire to expand the horizons and awareness of knowledge and to better the human condition is a far tighter coupling than any that rules, regulations, reporting and monitoring can achieve. Further, the desire or need to achieve, to be recognized, and to rise in one's profession is strong in most faculty members; they are achievement motivated. Both the collective faculty and university administration are wise to keep these motivations in mind. On the other hand, highly visible cases of obvious neglect or incompetence require attention as a matter of justice and responsible use of resources.

Robert B. Howsam, Texas College and University System, "Academic Consulting in Colleges and Universities, A Report to the Coordinating Board"

14 (Spring 1985) (hereafter "Academic Consulting").

Accordingly, the University of California defines "day" as follows:

A day is defined on a case-by-case basis, using common sense and customary practice. The University recognizes and supports a framework of diverse hours and schedules to accommodate teaching, research and creative work activity, University service, and University-related public service. Accordingly, these guidelines do not provide a strict definition of a day. Faculty members and department chairs or other appropriate administrators should exercise sound professional judgment, taking into account reasonable work schedules, when determining what constitutes a day of outside activity. Upon request from the Chancellor or his or her designee(s), faculty members should be prepared to provide an explanation of the definition of "day" used in preparing the prior approval and disclosure form or the annual report form.

"Conflict of Commitment and Outside Activities of Faculty Members,"
APM-025 (July 2001).

Like definitions of conflicts of commitment, definitions of faculty consulting can also be challenging. For example, "faculty consulting" has been defined quite broadly by two scholars as:

. . . not necessarily limited to income-generation considerations. Rather, it is viewed more broadly as a natural extension and application of one's professional or scholarly expertise outside the academic institution and as an important form of public service that long has been recognized as a legitimate extension of faculty role and responsibility. Viewed in this way, faculty consulting relates directly not only to the intellectual, social, psychological, and economic well-being of the individual faculty member but also to the tripartite mission of most academic institutions (i.e., teaching, research, and service).

Carol Boyer & Darrel R. Lewis, "Faculty Consulting: Responsibility or Promiscuity," *Journal Of Higher Education* 638, 656 (Sept.-Oct. 1984) (hereafter "Faculty Consulting").

At the University of Arizona, consulting is defined as:

External, professional activities including, but not limited to, any activity that: (1) is performed on an individual contractual basis for any individual, firm or agency other than The University of Arizona; (2) is based upon one's professional knowledge, experience and abilities; and (3) is undertaken for personal gain beyond the payment of a nominal honorarium and/or reimbursement for expenses.

"Conflict of Interest & Commitment Policy" (Nov. 2, 1998);
<<http://vpr2.admin.arizona.edu/rie/COIwebs/COICPolicy.1198.pdf>>.

III. The Research On Faculty Outside Activities

No recent studies exist that clearly establish the nature and extent of faculty involvement in

"outside" activities. Moreover, there is a dearth of research on if and how these outside activities affect faculty teaching, research and publication, and student learning. Peter J. Harrington, "Faculty Conflicts of Interest in An Age of Academic Entrepreneurialism: An Analysis of the Problem, the Law and Selected University Policies," 27 J.C. & U.L. 775, 782 (Spring 2001) (hereafter "Academic Entrepreneurialism") ("The relative paucity of research . . . is probably attributable in part to the relative 'newness' of the issues as well as to the inherent difficulties in measuring 'outcomes' like faculty productivity and objectivity in research.").

A 1984 study, "Faculty Consulting: Responsibility or Promiscuity," concluded that "faculty consulting has been overestimated and under appreciated." The investigators reported that their research confirmed earlier studies that "showed faculty who consult to be more attentive to society's concerns and priorities and at least as active in their faculty roles on campuses as their non-consulting peers." Boyer & Lewis, "Faculty Consulting" at 656.

Earlier studies confirmed that outside employment of faculty members is an established part of academic life. Furthermore, concerns about faculty outside consulting may be overblown because, "[w]hatever good reason there may be to approach increased opportunities to consult with caution, it does not appear that faculty who consult are negligent with respect to other responsibilities. The balance may tip in the opposite direction." Howsam, "Academic Consulting" at 9.

A 1975 survey revealed that eighty-nine percent of all faculty members generated some kind of outside income to supplement their salaries. Robert Linnell, "Professional Activities for Additional Income: Benefits and Problems, in DOLLARS AND SCHOLARS 48 (Linnell, ed., 1982) (hereafter "Dollars and Scholars"):

- The 1975 study indicated that outside teaching was "the largest source of additional income at doctoral institutions." Id. at 48 & 51.
- The 1975 study suggested that 19% of academics reported consulting at least one-half day a week, and six percent consulted more than one day a week. Id. at 53.
- The 1975 survey revealed that 48% of the faculty at four-year college and universities received consulting fees, compared to 17% in 1961-62. Michael C. Weston, "Outside Activities of Faculty Members," 7 J.C. & U.L. 68, 77 (1980-81) (hereafter "Outside Activities").

IV. Case Law On Outside Faculty Employment (Non-Teaching) Activities

Some courts have considered challenges to institutional or statutory limitations on outside faculty consulting that do not involve dual full-time teaching appointments. Generally courts uphold such restrictions so long as they are rationally related to a legitimate state purpose and institutional goal.

A. Constitutional Concerns

Few published cases exist that directly address the permissible bounds of university conflict of commitment policies as applied to faculty. A few cases, however, touch on the issue and make clear that such policies are not allowed to infringe on the constitutional rights of faculty members.

1. Academic Freedom Cases & Controversies

Controversies have arisen in which restrictions on outside activities trigger academic freedom concerns. Limitations on outside employment should not be so restrictive so as to violate faculty academic freedom. As one academic freedom scholar opined:

The university as employer could justify a prohibition on moonlighting by professors, or limit moonlighting to work directly relevant to teaching and scholarship. Such restrictions would advance rather than impede the goals of academic freedom. Yet universities frequently allow professors the discretion to spend a certain portion of each week, typically no more than one day, on off-campus activities or on nonuniversity work on campus. As long as faculty members comply with these general rules, universities should allow them to work on sponsored research that they could not justify as part of their professorial functions. In the interest of academic freedom, however, universities should not permit moonlighting that actually interferes with scholarly work. For example, professors may have difficulty separating their nonpublishable consulting projects from their university scholarship. Restrictions imposed by sponsors of off-campus research may be so broad that they would preclude professors from pursuing many lines of scholarly inquiry. Such circumstances would justify limitations even on nonuniversity work.

David M. Rabban, "Does Academic Freedom Limit Faculty Autonomy?," 66 TEX. L. REV. 1405 (June 1998).

Trister v. University of Mississippi: Two part-time professors sued the school when it attempted to prohibit them from continuing to work with a legal services group that was representing clients who were suing the state over the segregation of the state's public schools. The court observed that the "instructional efforts [of the part-time faculty members] had not been hampered as a result" of their outside work. It held that the two part-time professors were being treated differently than other part-time faculty members and that the university's rationale for that different treatment—basically the professors' representation of unpopular clients—was impermissible under the equal protection clause of the Fourteenth Amendment. 420 F.2d 499 (5th Cir. 1969). The AAUP's Committee A on Academic Freedom and Tenure investigated this case and found that the administration had violated the academic freedom of the two professors. AAUP, "The University of Mississippi," AAUP BULLETIN 75 (Spring 1970) ("[I]t seems likely that the terminations occurred because they were accused of being engaged in civil rights activities on behalf of poor people (many of whom are black) in the local community."). The AAUP's annual meeting in 1975 voted to lift the university's censure because the academic freedom concerns were satisfactorily resolved.

Hoover v. Morales (Texas A&M University System): Robert Hoover, a marketing professor, had been hired as an expert witness for the defense in the state's lawsuit against various tobacco companies. The

university policy prohibited employees from serving as expert witnesses "when doing so would create a conflict with the interests of the State." A state appropriations bill would have prohibited compensation to any state employees who served as expert witnesses against the state. These policies were challenged by the Texas Faculty Association and several individual faculty members. A federal appellate court found these restrictions to be antithetical to the First Amendment, under which public employees may speak about matters of public concern so long as their speech does not interfere with the efficient operations of their employers. Acknowledging that "the specific testimony to be offered by the faculty member-plaintiffs may be highly esoteric and of little interest to the public," the court nevertheless found that such testimony can bear on important matters of public concern, such as the addictive nature of nicotine, its health consequences, and resulting public costs. The court went on to say that the state failed to demonstrate an adverse impact on the delivery of educational services by the institutions in which these faculty members served. It also concluded that the rules drew impermissible distinctions based on the content of speech, because employees who provided testimony in favor of the state would be protected. In sum, the state's "amorphous interest" in "preventing state employees from speaking in a manner contrary to state's interests" was not compelling enough to outweigh faculty members' First Amendment rights: "The notion that the State may silence the testimony of state employees simply because that testimony is contrary to the interests of the State in litigation or otherwise, is antithetical to the protection extended by the First Amendment." 164 F.3d 221 (5th Cir. 1998).

Medical University of South Carolina: In 1996 Mary Faith Marshall, an assistant professor and director of the university hospital's program in bioethics, was retained by the Center for Reproductive Rights to be an expert witness in a case challenging MUSC's hospital policy, which tested pregnant women suspected of abusing illegal drugs under the threat of criminal sanctions. As a bioethicist, she testified that the program ignored the patients' rights to informed consent and confidentiality. In 1997 Dr. Marshall was up for promotion from assistant to associate professor. Her promotion was stalled, according to a letter by the college president, because of her "involvement in the recent lawsuit known locally as the 'cocaine baby case'," which had displeased the college trustees. Marshall was prepared to initiate litigation, contending that her lag in promotion was an academic freedom violation. The board of trustees eventually approved her promotion. "Medical University of South Carolina Backs Down," *Academe* (Jul.-Aug. 1999). (The U.S. Supreme Court ruled in the case in which Marshall served as an expert witness, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), holding that the public hospital policy constituted an unconstitutional police search.)

At the same time, not all cases raise academic freedom concerns, despite assertions to the contrary.

Day v. University of Nebraska: Victor Day was a tenured professor in

the chemistry department at the university, and his school laboratory was housed in his home. He also used his lab for his private company, Crystalytics. Dr. Day sued the school, arguing that he was not "given credit in his merit evaluations for research conducted at the Crystalytics laboratory in his home." He claimed that the university violated his right to free speech because the institution "'punished him' by refusing to give him credit for research at his home when salary increases were determined." The court rejected his First Amendment claim: "The denial of credit was based on Dr. Day's absence from the chemistry department and not the content of the research which he published." The court concluded that the university had a "legitimate interest in requiring Dr. Day to conduct his research and publishing activities at his place of work-the UNL campus. . . . [H]e was restricted in salary increases not for what he did off campus, but rather for what he failed to do on campus." 911 F. Supp. 1228 (D. Neb. 1995), *aff'd*, 83 F.3d 1040 (8th Cir. 1996).

2. Other Constitutional Challenges

Courts have found some outside consulting limitations unreasonable when laws create irrational distinctions between categories of faculty.

Atkinson v. Board of Trustees of the University of Arkansas: The court considered a challenge to a state law that prohibited the outside practice by professors, associate professors or instructors in the law school. In the legislature's categorization of different titles, it excluded from the prohibition assistant professors, even though the parties had stipulated that no differences existed in teaching duties, assignments and loads among all faculty members. The state supreme court found the law to promote unreasonable and, therefore, unconstitutional because it barred professors and associate professors, but not assistant professors, from outside practice. 559 S.W.2d 473 (Ark. 1977).

However, most courts have held that restrictions on the outside employment of faculty do not rise to constitutional violations.

Kaufman v. Board of Trustees: Nine tenured faculty members at the City Colleges of Chicago sued the board, seeking a declaration that a rule prohibiting "concurrent full-time" outside employment in the collective bargaining agreement (CBA) was unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. The board's stated rationale was to ensure undivided "loyalty, attention, and devotion" to the primary institution. The board judged that the "physical or mental strain" of holding down two full-time appointments "will likely reduce the quality of the teaching provided by such faculty members." The court rejected the professor's claim that the term "full-time" was vague or overbroad, and found the campus policy rationally related "to maintain or improve the quality of instruction in public institutions," despite the professors contention that "a faculty member with outside employment may be a better teacher because he or she can use the experience gained outside the classroom to complement and enhance the classroom experience." The

court opined, "[L]imitations on outside employment or income have been held to be rationally related to the legitimate interest in assuring that public employees devote their primary energies to their full-time public employment." The court also rejected the faculty's equal protection argument that the rule created an irrational distinction between self-employment and otherwise employed faculty, and that the rule failed to apply to non-faculty. 552 F. Supp. 1143 (N.D. Ill. 1982).

3. Legal Challenges by Medical School Faculty

A number of cases by professors in medical schools and teaching hospitals have challenged limitations on outside consulting income, specifically outside practice income. Again, courts tend to reject constitutional challenges to restrictions on outside consulting.

Adamsons v. Wharton (Downstate Medical Center College of Medicine of SUNY): The federal appellate court ruled that a state medical school can reasonably restrict the income earned by its full-time faculty in private practice. A doctor and full-time professor, Ronald J. Adamsons, sued his medical college, alleging that the school policy, which limited the extent of professors' income from private practice, would result in an unconstitutional "taking" of his outside income, violate his right to equal protection, and infringe upon his associational rights. The appellate court, upholding the lower court, rejected the professor's claims as "farfetched at best." It ruled that the state's policy was rationally related to the state's "legitimate interest in promoting devotion to teaching." 771 F.2d 41 (2d Cir. 1985); *see also Kountz v. State University of New York*, 87 A.D.2d 605 (N.Y. App. Div. 1983) (holding medical school professor had no constitutional right to unlimited private practice revenue).

Gross v. University of Tennessee: Two medical school professors challenged their dismissals, arguing that the university violated their constitutional due process rights by not allowing them to engage in the unlimited practice of medicine outside their teaching duties. The university policy provided that full-time medical faculty enter into a "medical practice income agreement" that collected outside medical earnings above a certain level. The Sixth Circuit ruled that the "unfettered practice of medicine" was not "a fundamental right," and found as legitimate the state's interest in "limit[ing] the faculty's outside private practice and thus [fostering] greater devotion to teaching responsibilities." The court also rejected the professors' argument that "their courses are an offshoot of their private practice and that a reduced private practice would indeed impair the quality of their teaching," because "it is reasonable for the administration to conclude whether or not it is always true that an outside practice would interfere with some teaching duties." 620 F.2d 109 (6th Cir. 1980); *but see Wadsworth v. State of Montana*, 911 P.2d 1165 (Mont. 1996), (holding that Montana State Constitution protects as fundamental right the "opportunity to pursue employment").

B. Breach of Contract Challenges

At least one direct legal challenge arising under a conflicts of commitment policy is pending.

Chichilnisky v. Trustees of Columbia University, Civ. No. 600994/00 (Supreme Court of New York State) (pending): A female professor is suing Columbia University for a number of claims. In its counterclaim, filed in February 2003, the university alleges that the professor violated the university conflicts-of-commitment policy by serving as chair and chief executive of an outside organization, Cross Border Exchange, a private company "in the business of electronic facilitation of global securities trading." The university handbook provides that "[t]he primary professional obligations of full-time faculty are to the University," and testimony provided that professors "are permitted to engage in outside consulting activity up to an average of one day a week." The university argues that the professor's CEO position "creates the appearance of competing demands on plaintiff's time and energies and, therefore, constitutes a conflict of commitment . . . [and that her] full-time position violated the one day per week rule." The professor claims that she "cannot be held responsible for complying with an undefined procedure" and that it is unclear whether the one-day "calculation is based on a five day week or a seven day week" or "whether a day is eight hours, 12 hours, [or] 24 hours." The professor is quoted as saying that she was "no more than a consultant to Cross Border," and serves currently as "non-executive Chairman," which is permissible under university policy." Piper Fogg, "A Lone Woman Takes on Columbia," *The Chronicle of Higher Education* A10 (Oct. 17, 2003). The New York state trial court has not yet issued a decision.

Breach-of-contract actions by faculty members challenging institutional policies governing outside employment also exist.

Graf v. West Virginia University: The West Virginia Supreme Court upheld the lower court, ruling that David Graf, a tenured full-time faculty member at the WVU Medical School, had the right to "moonlight." However, the court overruled the lower court's holding that the grievance board did not have the authority to award damages, and remanded the case to the board to determine the professor's lost wages. Graf was practicing emergency medicine during his off-duty hours, and the dean of the medical school ordered Graf to cease his outside activities or his appointment would be terminated under the hospital's moonlighting prohibition. Graf gave up his outside employment, and filed a grievance. The court upheld the grievance committee's substantive finding that Graf had the right to moonlight under the faculty manual. The court noted that his outside activity did not affect his "ability to teach, nor . . . his ability to render service at WVU hospital." The court also observed that Graf's outside emergency room practice "benefited his students by allowing him to broaden the students' knowledge of emergency room medicine." The court found that the hospital's bylaws were trumped by the university's policies, since the hospital was "conducting the University's business." Moreover, the particular faculty handbook provision on moonlighting was specifically incorporated into the professor's letter of appointment. 429 S.E.2d 496 (1992).

V. Case Law On Dual Full-Time Teaching Appointments

A common restriction at colleges and universities is that faculty who have full-time appointments may not accept other full-time appointments or "double dip." Courts have routinely ruled that professors holding full-time appointments at two institutions breach their contract where faculty handbooks constitute an enforceable contract and prohibit such a dual appointment arrangement.

Marks v. New York University: Janet Marks, a NYU professor, accepted a full-time appointment at Fordham University. NYU had sought to terminate Marks' appointment before the end of her contract and sought a settlement, but later revoked the settlement agreement when it discovered that Marks was teaching concurrently at Fordham. Marks sued NYU, alleging a number of claims including breach of contract. The court looked to her employment agreement with NYU, which was delineated, in part, by the faculty handbook. The manual restricted outside employment to one day per week, and provided that "it is expected that a faculty member would normally consult his or her dean, and if necessary, the Committee on Institutional Responsibility" about outside employment. The court found that Marks' employment at Fordham during her contract with NYU "constitute[d] a failure by plaintiff to duly perform the terms of her employment agreement" with NYU and, therefore, barred her claim against NYU for breach of contract. 61 F. Supp.2d 81 (S.D.N.Y. 1999).

Moshtaghi v. The Citadel: Mohammed Moshtaghi sued the Citadel, challenging the termination of his employment contract as a full-time "adjunct" professor in the business department, where he served on an annual basis starting in 1983. In 1989 Moshtaghi accepted an appointment to "teach certain courses" at the Technical College of the Low Country. The Tech contract clearly prohibited him from working for any other state agency without approval of the board. Moshtaghi reported his Tech arrangement to the Citadel and resigned from Tech. The Citadel then terminated the professor's appointment based on his dual employment and that Moshtaghi submitted false information to Tech. The professor raised a number of claims, including breach of contract, which the court rejected for a number of reasons, including that Moshtaghi's contract with the Citadel provided for only 30-day termination notice for either party. 443 S.E.2d 915 (S.C. App. 1994).

Morgan v. American University: Philip Morgan, a full-time tenure-track professor sued the university for breach of contract, claiming the university had improperly "rescinded" his teaching contract. The university rescinded his contract after it received an anonymous letter informing it that Morgan simultaneously held a full-time teaching position at Golden Gate University in Virginia. Morgan had failed to disclose this concurrent appointment to American University despite the requirement that he detail his professional activities each year for his reappointment. The university did not follow the notice and hearing requirements in its faculty handbook. Nevertheless, the jury found for the university, finding that the faculty handbook due process protections (for dismissal for cause) did not apply to concurrent appointments, and that the university established the prerequisites of rescission. 534 A.2d 323 (D.C. App. 1987).

Courts have found failure to disclose dual teaching appointments to constitute unprofessional conduct and, therefore, "just cause" to terminate a tenured appointment.

Zahavy v. University of Minnesota: The state appellate court upheld the university's

dismissal of Tzvee Zahavy, a tenured professor of classics and near eastern studies, who had attempted to hold simultaneously a full-time appointment at the University of Minnesota and a full-time appointment at the University of North Carolina at Charlotte. The court rejected his claim that his dismissal was arbitrary, breached his employment contract, and deprived him of due process. The dean at Minnesota confronted Zahavy with his UNC appointment, and he eventually resigned from the UNC appointment. The Minnesota dean then moved to terminate Zahavy's appointment; the termination was approved by his department, a faculty review committee, and the university's board.

The appellate court acknowledged that Zahavy's teaching and scholarship may not have been affected, but reasoned that the determination of fitness "need not be tied" to that criteria. The court opined that "professional fitness' may include conduct that is not directly related to the performance of one's professional duties." The court found that Zahavy

was absent for three full working days each week [from the University of Minnesota]. . . . This period of time away from the University clearly prevented him from applying himself full time to his scholarship and service at the University, which he knew he was required to do. This was a misuse of the University's resources and time that interfered with Zahavy's usefulness to the University.

The court emphasized that "a professional's fitness should be determined by those practicing in the area." Accordingly, it emphasized that "all 18 members of Zahavy's department, six members of the Senate Judiciary committee panel, and the Board of Regents unanimously and unqualifiedly determined that Zahavy's actions rendered him unfit to continue as a tenured professor. We choose not to second-guess their decision. . . ." 544 N.W.2d 32 (Minn. App.), review denied, 1996 Minn. LEXIS 342 (Minn. May 9, 1996).

VI. Some Case Law on Financial Disclosure

In addition, courts generally reject faculty challenges to the requirement that they make financial disclosures when institutions select to implement a "conflict" rule.

Cook County College Teachers Union v. Board of Trustees: A college teachers' union appealed a lower court decision that held that the administration's outside financial disclosure form did not violate the teachers' right to privacy. The CBA and the individual letters of appointment included text that prohibited outside full-time employment. The board contended that the policy was enacted "to insure primary loyalty to the City Colleges and to prevent a decrease in the quality of teaching." Pursuant to the policy, faculty were required to complete the administration issued a disclosure form that included information about the total earnings from all outside employment for the past year. The lower court granted the board's motion for summary judgment, and the union appealed. The state appellate court reasoned that based on the other questions, the information to be revealed in the challenged question was already "mathematically" available in analyzing earlier answers, and so "one can hardly assert that there is a great privacy or confidentiality interest to protect" since it is merely a "recapitulation" of information already disclosed." In the end, "[b]ecause the limits on their outside employment were known and voluntarily agreed to by the union and each faculty member, the board can reasonably require disclosure that is

sufficient to verify outside employment." The court concluded that the board had "an interest in assuring that teachers devote their energies and resources primarily to teaching," and the disclosure form was merely a tool to achieve that goal. 481 N.E.2d 40 (Ill. App. 1985).

Nevertheless, at least one court has found an administration's discipline—dismissal of a tenured professor for failing to accurately complete a financial disclosure form—too harsh.

Board of Trustees v. McKinley: Ronald McKinley served as a tenured full-time faculty member in radiology at Malcolm X College. His annual employment contract barred him from holding a concurrent full-time position while he served as a full-time instructor. The CBA contained the same prohibition. During his tenure, he worked in the radiology department of a local hospital, and failed to disclose that outside activity. The administration sought to terminate McKinley's appointment, and he appealed. The grievance officer found that McKinley "had falsified his outside employment disclosure statements but concluded that discharge was too harsh a punishment." The lower court found that McKinley's due process rights had been violated, and that "his punishment by discharge was too severe." The board appealed to the state appellate court, which reversed the lower court's finding that McKinley's due process rights had been violated. However, it upheld the hearing officer's findings that the punishment was too severe as neither arbitrary nor unreasonable. 513 N.E.2d 951 (Ill. App. 1987).

VII. State Laws Regarding Outside Employment

In addition to common law and constitutional law, many public institutions are subject to state ethics laws and other state constitutional or statutory provisions governing public employees and conflicts of interest. *See generally* 63 AM. JUR. 2d, Public Officers and Employees, §§ 322-325 (2003); William Kaplin & Barbara Lee, *The Law Of Higher Education* 961-63 (3d ed. 1995 & 2000 Supp.).

A. The Application of Ethics and Conflict-of-Interest Laws to Faculty

Some courts narrowly interpret conflicts-of-interest laws that apply to faculty because of academic freedom concerns.

New Jersey: In re Determination of Executive Commission on Ethical Standards re: Appearance of Rutgers Attorneys: The New Jersey Supreme Court weighed "whether a Rutgers law professor conducting a clinical teaching program is to be regarded as a 'State employee'" under state law (N.J. Stat. Ann. Sec. 52:13D-16). A Rutgers law professor supervised third-year law students and recent graduates in representing clients before the Council on Affordable Housing, a state administrative agency. The AAUP filed an *amicus* brief in this case, arguing that the lower court's interpretation of the conflicts-of-interest law clashed with the constitutionally protected academic freedom of the Rutgers faculty to choose their own course materials. The court agreed, ruling "that a Rutgers University professor in a teaching clinic . . . is not to be regarded as a State employee for purposes of the conflicts-of-interest law." In so ruling, the court reasoned that "the absorption of Rutgers University within the framework of State-supported education has been marked by an overriding concerns for the academic freedom of one of the nation's

oldest and greatest universities." 561 A.2d 542 (N.J. 1989); *see also Arthur v. Nyquist*, 426 F. Supp. 194 (W.D.N.Y. 1977) (holding state conflicts law inapplicable to the ability of professor of law at SUNY Buffalo to be compensated for serving as plaintiff's counsel in school desegregation case brought in federal court in which the state was defendant); *Gilbert v. State*, 711 N.Y.S.2d 279, 282 (Ct. Cl. 2000) (strictly construing New York conflicts law and denying its application to a non-full-time SUNY faculty member: "state employees are not barred by this provision to testify as an expert witness for compensation against the interest of the state in any other court").

B. Faculty Members As State Legislators

By state statute, state constitution or the common law doctrine of "incompatibility," public officers, which some courts have interpreted to include university professors at state-supported institutions, may be barred from receiving compensation for serving as state legislators while appointed as a professor at a state institution. *See generally* James A. Rapp, Education Law § 3.04[5][d] (2003).

AAUP's *Statement on Professors and Political Activity* speaks to this issue:

Many kinds of political activity (e.g., holding part-time office in a political party, seeking election to any office under circumstances that do not require extensive campaigning, or serving by appointment or election in a part-time political office) are consistent with effective service as members of a faculty. Other kinds of political activity (e.g., intensive campaigning for elective office, serving in a state legislature, or serving a limited term in a full-time position) will often require that professors seek a leave of absence from their college or university. . . . In recognition of the legitimacy and social importance of political activity by professors, universities and colleges should provide institutional arrangements to permit it, similar to those applicable to other public or private extramural service. Such arrangements may include the reduction of the faculty member's workload or a leave of absence for the duration of an election campaign or a term of office, accompanied by equitable adjustment of compensation when necessary. . . . Faculty members seeking leaves should recognize that they have a primary obligation to their institution and to their growth as educators and scholars; they should be mindful of the problem which a leave of absence can create for their administration, their colleagues, and their students; and they should not abuse the privilege by too frequent or too late application or too extended a leave. If adjustments in their favor are made, such as reduction of workload, they should expect the adjustments to be limited to a reasonable period. . . . Such a leave should not affect unfavorably the tenure status of a faculty member, except that time spent on such leave from academic duties need not count as probationary service. The terms of a leave and its effect on the professor's status should be set forth in writing.

The AAUP, *Policy Documents & Reports* 33 (9th ed., 2001).

Some states totally prohibit faculty members from serving as state officials, reasoning that state employees are barred from receiving dual compensation from the state. Accordingly, faculty are required to resign their teaching positions to serve in a

public office.

Pitts v. Larson: Carol Pitts, a legislator in the South Dakota House of Representatives and who also served as a nutrition, health and food safety specialist in the cooperative extension program of the University of South Dakota, sued the state for payment for her services. The state contended that her employment at the university as a member of the state legislature violated the South Dakota Constitution, which prohibits legislators from having any interest, direct or indirect, in a contract with the state authorized by any law enacted during the legislator's term or one year after. The state supreme court held that the state legislator's employment with the state university was an unconstitutional conflict of interest and, therefore, her contract with void. 2001 WL 1658279 (S.D. Dec. 26, 2001).

See also Stolbert v. Members of Bd. Of Trustees for State Colleges, 541 F.2d 890 (Conn.), cert. denied, 429 U.S. 897 (1976) (ruling that state representative had to resign teaching position because faculty member at state institution is part of executive branch of government); *Galer v. Board of Regents of the University System*, 236 S.E.2d 617 (Ga. 1977) (ruling that state representative was required to resign from teaching position); , 472 N.W.2d 403 (Neb. 1991) (holding that assistant professor at state college holds public office in executive branch and thus was prohibited from concurrently serving as member of state legislature; his removal from assistant professor was proper).

Some states do not bar such dual roles, but restrict the receipt of compensation by faculty members who also serve on state legislators. *See, e.g.*, Illinois State Constitution (stating that "No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity for the time during which he is in attendance as a member of the General Assembly"). Institutional policies sometimes require professors to take leaves of absence from their faculty positions while serving in public office. *See* Scott Jaschik, "Alabama Practice of College Officials' Serving in Legislature Draws Fire," *The Chronicle of Higher Education* A30 (Apr. 12, 1988).

VIII. Some Specific Institutional Concerns: On-Line Teaching And Faculty-Study Relationship

Two particular institutional (administration and faculty) concerns arise when dealing with outside faculty employment: faculty development of on-line courses for outside entities, and the exploitation of students when faculty are engaged in outside employment.

A. Outside On-Line Teaching: "Electronic Moonlighting"

How conflicts of commitment policies apply to on-line education raises a number of issues in terms of teaching mission, intellectual property, and faculty academic freedom. Faculty are paid for teaching web-based courses on behalf of other not-for-profit and for-profit schools as well as private corporations. Existing institutional policies tend to address obligations that are time and location/geographic specific. Faculty members can create distance education courses quite quickly and often without the assistance of significant university resources. Since faculty members are often encouraged by the institution to engage in outside consulting interests,

institutions that enjoy the benefits of that outside activity must also be prepared to accept that some of their intellectual property claims may be weakened.

1. The Arthur Miller Controversy

Arthur Miller, a well-know professor at Harvard Law School, became involved in a controversy with Harvard University after he provided videotaped lectures for the Concord University School of Law, an on-line law school, without Harvard's permission. The controversy clearly raised intellectual property concerns. As Miller posed the query, "How much of Arthur Miller does Harvard own?"

It also raised the issue of how conflicts-of-commitment policies apply to online education or "electronic moonlighting." Miller argued that he was not "teaching" at another institution, because he neither met with students nor graded them. Rather, just like his television lectures, he was merely providing information, which he had done quite frequently in the past with no prior approval required by the administration. A. Marcus, "Seeing Crimson," WALL ST. J. A16 (Nov. 22, 1999). As one commentator noted: "[A]pplication of these general [conflicts of commitment] policies in the Internet era is not . . . straightforward. Why, for example, would the videotaping of a series of lectures for an online institution interfere with one's teaching and research responsibilities, if giving a series of off-campus lectures would not?" Jonathan R. Alger, "A. Miller's Tale: Free-Agent Faculty," *Academe: Bulletin of the American Association of University Professors* (May/June 2000).

Harvard University later enacted a policy that prohibits its faculty from teaching on-line courses for other institutions unless they are first granted permission.

Harvard University: Persons holding full-time academic appointments at Harvard should devote their teaching efforts primarily to the education of Harvard students. Faculty members may not hold a regular faculty appointment at another institution, except in connection with a Harvard-sponsored joint program with that institution, or similar arrangement as approved by their Dean. They should not teach a course, or a substantial portion of a course, at or for another institution or organization without the advance permission of their Dean and the Corporation. This policy should be followed regardless of whether the activity is conducted in person or through some form of electronic communication.

"Statement On Outside Activities of Holders of Academic Appointments" (Feb. 1998); www.provost.harvard.edu/policies_guidelines/academic_appointments.php.

2. Other Institutional Responses

Other institutions have adopted similar policies to avoid "Miller-like" situations:

Columbia University: Full-time faculty may not create courses, substantial parts of courses or courseware for, or accept teaching assignments from either a non-profit institution or a commercial enterprise, unless specifically authorized in advance by the Provost on the recommendation of the appropriate dean or vice president. This policy applies equally to courses taught in person, or via the Internet or some other method of electronic transmittal. This policy is not intended to prevent faculty members from giving guest lectures at another institution or engaging in similar activities. However, faculty should be sensitive to the fact that the distinction between occasional lectures, which are a normal part of academic life, and a teaching assignment for another university, which requires prior approval, is not always clear cut. When there is any question as to whether an outside engagement falls within the range of allowable activities, a faculty member should first consult with the appropriate dean or vice president. Prior provost approval is also required to hold full-time positions outside of the University or to be the principal investigator on an externally funded award that is administered by another institution.

"Outside Interests and Employment," The Faculty Handbook 153 (2000 ed.).

University of Illinois: University policy allows faculty, with prior approval, to consult one day per week. However, teaching is not consulting and not subject, on this basis, to the one day per week privilege. . . . With the exception of occasional guest lectures or seminars, teaching for another entity while employed as a full-time faculty member at the University of Illinois represents a potential conflict of commitment and interest unless such teaching is part of a faculty member's teaching load. Such teaching is prohibited without prior written approval of the unit executive officer. . . . Outside teaching, whether in the classroom or on the Internet, is governed by common principles.

"Policy Clarification Conflicts of Commitment and Interest in Teaching" (3/24/98);
<www.vpaa.uillinois.edu/policies/conflict_clarification.asp>.

Duke University: Conflicts of interest or commitment will be addressed generally in accordance with the terms of the University Policy on Conflicts of Interest. A conflict of interest or commitment will be presumed to arise: a) when an individual proposes to teach a non-Duke internet course substantially equivalent to a conventional course he or she is regularly assigned to teach at Duke; b) when an individual proposes to teach a non-Duke internet course in circumstances likely to be directly competitive with an existing or proposed Duke internet course which he or she has been offered an opportunity to teach; c) when an individual proposed to participate in teaching a non-Duke internet course in circumstances likely to confuse or mislead the public with respect to his or her primary obligations or allegiance as a member of the Duke Faculty; or d) when an individual

proposes to participate in teaching a non-Duke internet course in circumstances likely to impair the continuing performance of his or her primary responsibilities at Duke.

Duke University Policy on Intellectual Property Rights, The Faculty Handbook (July 1, 2000).

Given the variety of online education options in which faculty may get involved, including those that are not traditional semester-length programs and that are not necessarily offered for academic credit, questions arise that should be considered when developing conflict-of-commitment policies that apply to distance education:

- Are on-line materials similar or different from occasional off-campus lectures or books or articles on topics within a professor's expertise and, if they are, how so?
- Should policies be targeted to those educational institutions that are "competitors"? How does one define such competitors? Was Concord School of Law competing for the same student market as Harvard Law School? Would the situation be different if the primary institution is providing distance education in the same subject area and marketed to a competing market?
- How should such policies apply to appointments that are not year-round, e.g., nine-month contracts, part-time, or adjunct? Under the Columbia University policy, for example, why couldn't a professor on a nine-month contract owe her primary obligation to the school and during the summer teach for an on-line institution? Or what if she prepared and "taped" the lectures during the summer, but they were offered as part of a course during the academic year?

B. Faculty-Student Relationships: Avoiding Outside Employment Exploitation

Another issue of concern for faculty and administration is student relations with faculty members who are active in outside consulting. On the one hand, participation of students in outside interests of a faculty member can be beneficial to students. They are engaged in "real life" work; they are establishing an employment arrangement that will strengthen their CVs and building networks for future employment; they are putting their learning into practice. On the other hand, student employment in faculty outside ventures necessarily complicates the teaching relationship.

- What if the student performs less well in class because of the time devoted to working for the professor's outside consulting entity?
- How does one ensure that students not involved in the faculty member's outside interests are not treated differently in the classroom or laboratory?
- What if the student must be laid off from the outside project-for just cause or financial reasons?
- What if the faculty member-student employment relationship turns bad; will that affect the student's grades? Letters of recommendation? Ph.D. exams?
- If the student's work in the faculty member's outside interest is the

same as that of their academic work, will the student be restricted by the outside entity from including all the materials required under institutional policies regulating dissertations?

Some have recommended that institutional policies should absolutely prohibit student employment in a faculty outside entity if the professor has any role in the student's academic work. See Robert Varrin & Diane Kukich, "Guidelines for Industry-Sponsored Research at Universities," *27 Science* 385, 387 (1985) (recommending ban on professors hiring graduate students in their outside interests). Perhaps a more realistic (and less paternalistic) avenue to pursue, at least for graduate students, is an employment agreement that clearly spells out the following: (1) the employment between a faculty member's outside consulting interests is at-will and can be terminated by either party, including the student; (2) the student's employment is separate from any academic work; and (3) the student's school work is covered by the institution's policies, not that of the outside entity.

Institutions generally do not prohibit all student employment in such outside faculty activities.

Penn State University: The involvement of students and staff in faculty consulting activities should be undertaken with caution. Faculty may not involve students or staff in consulting activities within the scope of the student's or staff member's University duties. Faculty may hire students or staff to assist with faculty consulting activities outside the scope of the student's or staff member's University duties. Such arrangements require the full knowledge and approval of University administrators and must be codified in a Memorandum of Understanding. Safeguards must be instituted on a case-by-case basis to ensure that the performance of University duties and the scholarly mission of the University are not compromised. In particular, faculty must avoid even the appearance of directing students into research activities that serve their own personal interests at the expense of scholarly achievement.

"Guidelines for Faculty Consulting Agreements";
<www.research.psu.edu/ipo/faculty_staff/Guidelines_for_faculty_consulting_agreements.html>.

Oregon State University: Part-time involvement of graduate or undergraduate students in the commercial activities of faculty may, under certain conditions, offer the potential for substantial benefits to the education of the student. In each case of such employment, however, approval should be given explicitly by the department head/chair or immediate supervisor after thorough discussion with the faculty member and student. In considering such arrangements, faculty should be guided by the need to avoid conflicts of interest and to avoid infringement of the student's academic duties and rights. For example, if the outside work is related to the student's thesis, special care always must be taken to avoid conflicts such as hindering the student's progress, or acceptance of his/her thesis, and changing standards during the conduct of exams.

"Outside Professional Activities";
<<http://oregonstate.edu/research/RegulatoryCompliance/outside.html>>.

IX. Institutional Policies: Some Further Considerations

A recent survey of institutional policies (private and public) on conflicts of interest, which generally include conflicts of commitment, found basically two types of policies: those that were more "bare bones," serving more as a "statement of basic principles," and others that were "more prescriptive, . . . provid[ing] faculty with more specific guidance on the question of which kinds of situations will and will not be considered problematic." Harrington, *Academic Entrepreneurialism* at 802. He found there to be

. . . virtually unanimous agreement that institutional conflict of interest policies [including conflicts of commitment policies] need to involve at least the following *three basic elements*:

- (1) clear guidance, in the conflicts policy itself, the faculty contract, or elsewhere, about the minimum requirements of faculty positions in terms of teaching, research and institutional and other kinds of "service," about the basic academic and institutional norms to which the faculty member is expected to adhere, and about any limitations or restrictions on the faculty member's (or his or her relatives') outside activities, associations or financial interest;
- (2) requirements that faculty regularly disclose to designated university officials all of their (and their family's) potentially relevant outside activities, associations and financial interests that could reveal a conflict of interest; and
- (3) appropriate mechanisms for the review and resolution of apparent conflicts of interest.

Harrington, *Academic Entrepreneurialism* at 792.

A. Recognizing the Benefits of Outside Consulting

Policies should recognize the benefits to the institution of outside faculty consulting.

Yale University: The University encourages its faculty to seek and participate in sponsored research, to consult widely, and to engage in other activities that may benefit not only the participants but also the University itself, and the larger public. . . . It is sometimes difficult to draw the line between the responsibilities of a faculty or staff member to Yale and to external organizations. . . . The fundamental premise of this policy is that each member of the Yale community has an obligation to act in the best interest of the University, and must not let outside activities or outside financial interests interfere with that obligation.

"Policy on Conflict of Interest and Commitment" (Aug. 1995);
<<http://www.yale.edu/provost/html/coi.html>>.

University of Pennsylvania: The University recognizes that its faculty members are not employees in the usual sense, and that a precise allocation of academic time and effort is inappropriate. Their pursuit of knowledge in their areas of competence is presumed to be a lifelong commitment. A limited association of faculty members with government, professional agencies, and

public or private organizations is appropriate, especially when it may enhance their competence as scholars.

"Conflict of Interest Policy for Faculty Members" (1991);
<www.upenn.edu/assoc-provost/handbook/ii_e_10.html>.

Policies should explain why such rules can protect faculty. The policy should not be "intended to prohibit or discourage external consulting. Instead, it is intended to protect the faculty member by identifying potential problems and imposing appropriate safeguards before a problem or controversy arises." Steven A. Veazie, "Consulting and Other Outside Work for Pay by Faculty and Staff: Procedures and Guidelines for Dealing with Conflicts of Interest at the University of Illinois" at 4, 7 (NACUA, 1991). It can also serve to protect the reputation of the professor. Id.

Emory College: What are the benefits to the faculty of a conflict of interest procedure? Conflicts of interest usually arise from a well-intentioned person having two worthy objectives that conflict with one another. The university fulfills its legal obligations and the faculty member is protected when he/she reports the conflict and receives appropriate administrative approval before proceeding with a potentially conflicted situation. The conflict of interest reporting and management procedures are intended to keep the faculty aware of their conflicts of interest, and then help them to manage, reduce, or eliminate those conflicts.

"Policy on Conflict of Interest and Conflict of Commitment," (Jan. 1, 2002);
<www.emory.edu/COLLEGE/about/ECOR/COIC.pdf>.

B. Defining the Terms

The more helpful institutional policies make an effort to define of "conflicts of commitment" on their campuses. In addition to the University of Illinois policy, other examples include:

Northwestern University: A "conflict of commitment" occurs when the time devoted to external activities adversely affects a faculty member's capacity to meet University responsibilities.

"Conflict of Commitment";
<www.northwestern.edu/research/pdfs/faculty-conflictText.pdf>.

Cornell University: Assessment of a conflict of commitment is more difficult than assessment of a conflict of interest. Generally, such conflicts will be apparent in the failure of individuals to discharge fully the role and duties expected of them.

1. Commitments that involve frequent or prolonged absence from the University on non-University business.
2. Commitments that engage a substantial portion of the time a member is expected to spend in University related activities and which thereby dilutes the amount or quality of participation in the instructional, scholarly or administrative work of the University.

"Cornell University Conflicts Policy" (June 1995);
<<http://www.policy.cornell.edu>>.

The North Carolina State University: A conflict of commitment "generally occurs when the pursuit of outside activities involves an inordinate investment of time that interferes with the faculty member's obligations to students, to colleagues and to the missions of the University."

"Conflict of Interest Policy," REG01.25.1 (1995);
<www.ncsu.edu/policies/governance_admin/gov_gen/pdf/REG01.25.1.pdf>.

C. Categories of Outside Commitments?

Some institutional policies differentiate between paid and unpaid outside commitments.

Northwestern University: "Non-compensated Professional Activities" are those outside activities that extend and enhance a Faculty Member's normal institutional responsibilities of teaching, research, and service to serving public institutions, educational organizations, and professional societies. . . . "Compensated Professional/Commercial Activity," including outside consulting, refers to paid service as a technical professional adviser or practitioner. It is the use of one's professional capabilities to further the agenda of a third party for personal financial gain, whether one is on the payroll of the organization, working as an independent contractor, or serving as director or manager.

"Conflict of Commitment"
<www.northwestern.edu/research/pdfs/faculty-conflictText.pdf>. So, too, does the University of California.
<www2.ucsc.edu/ahr/policies/CAPPM/012025.htm>.

Some policies provide examples of what are or are not considered conflicts of commitment. Such examples can be helpful so long as the introductory text clearly states that the examples may raise conflicts concerns. As Harrington observes:

The policies reviewed also conspicuously avoid categorical statements concerning which particular kinds of activities will be absolutely forbidden, but many provide examples of conflicts that are "likely" to be found impermissible. This common avoidance of absolute rules and emphasis on informal problem resolution and strong due process protections is likely due to the desire of the institutions to foster collegiality and mutual respect among faculty and administrators, to encourage administrative flexibility, and to avoid the bureaucratization of the conflict resolution process.

Academic Entrepreneurialism at 812.

Some institutions clearly exclude "professional and academic activities" from conflict-of-commitment policies, since they would seem to fall within the "scope of employment" of faculty.

University of Arizona: Conflicts of interest and commitment do not include

professional and academic activities such as: site visits, academic panels, promotion and tenure activities, program reviews, recruiting, journal editing, attendance or preparations for conferences or other professional activities. Such activities are considered to be integral to the employee's professional standing and public service commitments and hence are encouraged.

"Conflict of Interest & Commitment Policy" (Nov. 2, 1998).

D. Coverage Issues

If and how should conflicts of commitment policies apply to part-time and adjunct faculty? Should institutions expect professors with no full-time permanent relationship with the school to owe them their primary obligation? A few institutional policies attempt to address this issue. *See, e.g.*, University of South Carolina, "Outside Professional Activities for Faculty" (Feb. 1995), <www.sc.edu/policies/acaf150.html>; ("The extent of any reporting requirement for part-time or adjunct faculty is a matter to be dealt with at the local unit level."); Western Carolina University, "Conflicts of Interest and Commitment" (Dec. 2003) ("This policy applies to all full and part-time faculty other than adjunct faculty . . .").

Some policies acknowledge that conflict of commitment policies apply differently to 12-month, 9-month and part-time appointments.

University of California: The conflict of commitment policy allows up to 39 days during the academic year for a 9-month appointment, and notes that "no restrictors on the number of days of compensated outside professional activity" exists "during the summer months." For part-time faculty, "the applicable time limit is prorated based on their percentage appointment at the University. . . . In addition, the faculty member could engage in additional compensated outside professional activities during the time not committed to the University."

"Conflict of Commitment and Outside Activities of Faculty Members," APM-025 (2001).

And so, the university's "question and answer" document states: "For example, a 50 percent academic year appointee would be allowed 19.5 days (39 x .50) compensated outside activities during the academic year. During the 50 percent time not committed to the University, the faculty member could engage in other compensated activities." "Implementation of APM 025: Questions and Answers"; <www2.ucsc.edu/ahr/policies/CAPPM/012025QA.htm>.

E. Disclosure

Most policies provide for some kind of disclosure, either on an annual basis or as potential conflicts arise. *See* Harrington, *Academic Entrepreneurialism* at 809-810. Such disclosures may be triggered by different thresholds, e.g., amount of time, outside income generated, and so on. *See, e.g.*, Cornell University ("Full-time faculty members must inform their department chairpersons of all plans to do private consulting for which they are compensated.").

F. Leave Options?

Some institutional policies provide faculty with the option of temporarily reducing a full-time appointment to a part-time one.

Northwestern University: Arrangements for part-time status to accommodate professional or commercial activities must be approved by the appropriate administrator . . . and should normally be of limited duration. Depending on the needs of the school and department and/or center, as well as to protect the University's interests, it may be necessary to deny some requests for such arrangements.

See also University of California ("A faculty member may be permitted to go on full- or part-time leave in order to pursue certain compensated outside professional activities.").

G. Impact on Tenure and Promotion

If there is any affect—positive or negative—from outside employment on consulting on tenure or post tenure review, such implications should be fully disclosed. *See, e.g., "Conflicts of Commitment,"* <www.hopkinsmedicine.org/faculty_staff/policies/facultypolicies/conflict_commitment> ("[F]aculty members at ranks below full professor must consider the impact of secondary commitments on their ability to fulfill the criteria for promotion."); *Boise v. New York University*, 2003 WL 22390792, at *6 (Oct. 21, 2003) (rejecting business professor's claim that reduction in course schedule was adverse employment action, but noting that reducing professor's course load was within discretion of administration because, in part, the professor "does not serve any active role in outside organizations").

Some policies even address concerns that "relations between senior and junior faculty should not be influenced adversely by interactions with private sector":

Oregon State University: The involvement of junior members of the faculty with commercial enterprise may or may not be important to their professional development. Senior faculty may be able to assist junior faculty in developing such activities by offering potential opportunities to them and by giving them advice with respect to both technical and ethical issues. *It is essential, however, that participation in commercial ventures not lead to loss of the senior faculty's objectivity in judging junior faculty in issues of promotion and tenure.* Objectivity could be compromised by collaboration between junior and senior faculty in commercial enterprise activities or by expectations that junior faculty should or should not participate in such activities.

(Emphasis added.)

H. Peer Review and Appeals

Informal resolution should be encouraged. According to Harrington's survey of institutional policies, "All of the policies reviewed . . . require that attempts be made to informally resolve conflicts issues by mutual agreement with the faculty member. . . ." Harrington, *Academic Entrepreneurialism* at 810.

As always, peer review is an important component to an appeals process. There

should be a process in place by which faculty who have been denied the opportunity to engage in outside consulting may grieve to a panel of peers.

George Washington University: Faculty members may bring complaints to a "Conflicts Consultation Committee," which is "composed of at least five faculty members of the school, elected, ordinarily annually, by the faculty of the school." The committee makes a recommendation to the vice-president and the vice-president makes a formal decision, which can be appealed to the "University Conflicts Resolution Panel." The panel is "composed of five faculty members nominated by the Faculty Senate Executive Committee in consultation with the Vice-President and elected by the Faculty Senate. Members of the Panel should ordinarily serve for staggered three-year terms." The panel makes a recommendation to the administration for a final decision.

<http://www.gwu.edu/~facsen/faculty_senate/pdf/AmendedCOI.pdf>.

Faculty should not only help to draft initial and revised policies involving conflicts of commitment, but they should be involved in the enforcement of such policies. Depending on the local campus, such faculty implementation efforts could take place at the department or division level. *See* Pajaro Dunes Conference Draft Statement (1982), *reprinted* in 9 J.C. & U.L. 533, 538 (1982-83) ("Different rules and procedures [on conflicts of interest] may well be appropriate to suit the special circumstances and traditions of different institutions."). For example, academic administrators, such as chairs, should have a faculty panel with which they consult. As one commentator recognized, "no policy on outside activities can simply be administratively propounded. The faculty must be involved—it must, in fact, take a lead role—in identifying the reasons for such a policy and in setting the guidelines." *Outside Activities* at 77. Attempts should be made to integrate the conflict of commitment procedure with the existing grievance and disciplinary procedures that involve faculty.

I. Indemnification

Some institutional policies categorically exclude indemnification coverage for all outside activities of faculty members. Such absolutes, however, may not recognize that outside consulting, especially work devoted to disciplinary organizations or directly related to a professor's scholarship, may, depending on the facts and circumstances, fall within faculty's "scope of employment." *See* AAUP, "Institutional Responsibility for Legal Demands on Faculty" (1998). (The "legal representation and indemnification for . . . faculties . . . should ensure [coverage] . . . for any faculty member . . . arising from an act or omission in the discharge of institutional or related professional duties . . ."). Some policies leave the possibility open that indemnification might be available for unpaid consulting, for example.

University of Pittsburgh: [T]his policy may, at the University's sole discretion, also be extended to: . . . professional activities, including public service, that are unambiguously related to the employee's function as a representative of the University, that add to the employee's professional knowledge and experience and that contribute to the general society, even though not carried out at the University's direction or under its control, provided such activities are not compensated by any other person or entity (other than for reasonable expenses or by honoraria no higher than the level

paid by the federal government), e.g., service on accrediting commissions and on governmental advisory boards, and attendance at professional conferences. . . The protection in this policy shall not, among other things, extend to consulting or other outside professional or business activities for which the employee or an entity with which he or she is affiliated is entitled to receive compensation exceeding reasonable expenses.

"Faculty and Staff Indemnification" (May 2002)
<www.pitt.edu/HOME/PP/policies/07/07-06-06.html>.

J. Additional Suggestions

- Provide for the regular dissemination of the policies governing conflicts of commitment and the opportunity for discussion, such as at faculty senate meetings or faculty orientation or department chair sessions.
- Clearly identify the contact person for conflict of commitment queries from faculty. Some institutions have also established hotlines for such queries.
- Create a matrix or be sure to cross-cite to all relevant institutional policies that affect outside commitments of faculty, which may include policies on conflicts of commitment, faculty outside consulting, conflicts of interest, and intellectual property.
- Inform faculty candidates of any and all restrictions on their outside consulting activities so as to avoid unpleasant surprises.

X. Conclusion

Derek Bok has recently written about how institutions can best respond to the commercialization of the academy. His guidance resonates in our discussion on how to best manage conflicts of commitment on campus: "[I]nvolve faculty in developing and enforcing all rules that protect academic values. . . . [T]he essential fact remains that faculty members have the greatest stake in preserving academic values - and hence have a critical role to play in making sure that the quest for revenue does not impair the basic intellectual standards of the institution." "Academic Values and the Lure of Profit," *The Chronicle of Higher Education* (Apr. 4, 2003).

Endnotes:

1. Faculty members in certain disciplines may be required or strongly encouraged by disciplinary associations, licensing bodies, or institutional missions to engage in practical experience, such as in departments of business, engineering, and the performing arts. *See, e.g.*, Katherine S. Mangan, "The Ethics of Business Schools: Corporate Scandals Put Spotlight on Relationships Between Professors and Companies," *The Chronicle of Higher Education* (Sept. 20, 2002) (noting that Harvard Business School encourages its professors to serve on boards so as to write case studies, and quoting the business school dean as finding "it . . . extraordinarily useful for faculty to have firsthand experience"). Back to text.

2. As one commentator observed, "[A] professor who carefully controls selective outside consulting can engage in potentially superb scholarship through, for example, brief writing. Professor Laurence Tribe personifies the tremendous synergy possible among teaching, practice, and scholarship." David L. Gregory, "Essay: The Assault on Scholarship," 32 *Wm.*

& Mary L. Rev. 993, 993 n. 4 (Summer 1991). Back to text.

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