UNIVERSITY OF OREGON
School of Law

R. Linton, Vice President for Research and Graduate Studies
R. Tomlin, Senior Vice Provost for Academic Affairs
P. van Donkelaar, President of the UO Senate
P. Gilkey, Chair, Ad Hoc Conflicts Committee

January 21, 2009

Dear Drs. Linton, Tomlin, van Donkelaar, and Gilkey,

We are grateful to have an opportunity to provide a few observations and suggestions about the Conflict of Interest & Conflict of Commitment policy changes being considered by the University of Oregon. We write in our capacities as Dean and Associate Dean of the College of Law because we think it is important that the voices of those charged with leading our academic units be included in these deliberations. We regret that each of us has a prior commitment that makes it impossible for us to attend the meeting on January 21. We would be happy to discuss these issues with you another time, if you would find that helpful.

Many members of the faculty have provided detailed and thoughtful commentary on many aspects of the current draft policy. We are heartened by the understanding that the next draft of the policy will reflect their concerns and suggestions. And we are grateful for the care with which many of them have been considering these policies.

Although we have each spent hours going over the relevant documents, and although each of us has training as lawyers (and at least in theory, should have some skill at parsing the documents' meaning), we are left feeling inadequately prepared to comment on every aspect of the current draft policy.

We offer, therefore, only four relatively modest suggestions and observations at this time:

1. We support wholeheartedly the idea that Conflicts of Interest are different from Conflicts of Commitment, and ought to be treated separately.

Our understanding is that this distinction is already being drawn by those charged with re-drafting these policies. We, therefore, will not repeat the many persuasive arguments calling for this line to be drawn. We simply want to indicate our strong support for the maintenance of that distinction.

2. We urge strongly that the process by which this policy is drafted be deliberative, consultative, and thorough.

Two questions remain unclear to us, as we have reviewed the documents supporting the original re-draft of the policy. We're entirely open to the possibility that we have missed something, but on our reading of the materials, we wonder:

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A. Why do we need to change the policy currently in place? Perhaps the answer is simply that some have concluded that a different policy would better protect us against accusations of institutional impropriety. Or that a different policy would lead to better decision-making on the part of faculty members. Or that there has been a change in the relevant laws related to our funding or our governance. Or maybe there has been some horrible scandal of which we are unaware, that has caused the need for us to revise this policy – a policy which has the potential to affect centrally the academic freedom, the civic and professional engagement, and the privacy of our faculty members. We are open to learning more about why our current policy must be changed. But nothing in what we have read thus far has persuaded us, leaving us in a poor position to explain the need to others who share our confusion.

B. Why do we need to make a change immediately? These policies raise enormously complicated questions, in spite of the apparently simplicity of the forms in question. (To the extent fourteen pages can be declared "simple.") We have tried to stay informed and engaged, but the demands of our jobs have made it essentially impossible for us to digest all of the various issues raised, both by the original drafters and by those who have explored and responded to these documents in detail. To be candid, we are concerned that we will not be able to engage these questions in a responsible way in time to affect what we perceive to be considerable momentum toward speedy resolution. We would urge greater caution and greater consultation in advance of final decision-making.

3. We urge the university to require only those disclosures and practices the law requires.

We are mindful that our stewardship of public dollars is among the foremost of our charges as administrators of a state institution. We should assure that our schools and our faculties comply with all of the relevant conflict policies governing our institutions.

At the same time, we are charged with attracting, retaining, and encouraging world-class faculty members to engage fully and broadly with their disciplines and with the world. Some of the factors affecting our ability to do this are beyond our immediate control (our school's location, our school's allocation of state resources, etc.). Other factors—the scope and nature of our conflicts policy, for example—are at least partially within our control. Where we can make it easier to fulfill our academic mission, we should.

No one wants to spend time filling out and reviewing forms, reviewing forms, or (heaven forbid) having more meetings. Some measure of that may be inevitable, of course. And if a particular type of disclosure is required by law, if a particular form of approval is required by law, or if a particular activity is prohibited by law, then by all means, we should be implementing those laws faithfully. What we should not do is require more than the law requires or prohibit more than the law prohibits. The policy we adopt should make our jobs no harder than they have to be.

4. Virtually every aspect of the policies underlying this effort would be better addressed at the college or school level.

We want faculty members to understand the relevant conflict of interest and conflict of commitment policies. We want faculty members to comply with those policies.

The best way to accomplish those goals is to place the responsibility for the design and implementation of disclosure and consent processes at the lowest possible level.

For example, the two of us understand well the legal academy, the law school's place within the university, law professors' place within public and private enterprises, and the nature of the various demands of being responsible law professors. Humility demands that we admit that don't know the first thing about other disciplines' answers to these questions. We have a hard time, therefore, understanding what benefit would accrue from placing primary responsibility for any of this with a centralized office which, as a function of its limited size, would necessarily share our ignorance of most disciplines' appropriate norms and boundaries.

We are mindful that the risks of conflicts of interest and conflicts of commitment are real. As we suspect is true with many disciplines, law faculty members have a set of skills that often have visible application in contexts outside of the academy. We deal often with these questions, and even more often, we call upon our faculty members to exercise careful, professional judgment about the same questions.

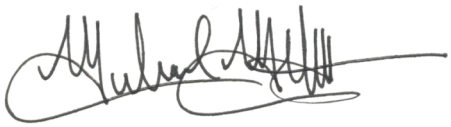
To be candid, we think our job would be made harder, rather than easier, if the proposed disclosure policy were adopted. The forms ask questions in ways that we believe would be unfamiliar and potentially confusing to our faculty. (Our evidence to support this proposition is that each of us had a hard time understanding some aspects of the form, and we have the same training as our faculty.) The forms ask questions that are irrelevant to our faculty. The forms ask questions that do not provide the information the two of us would need to have confidence that we are making the best possible decisions. In short, the forms' standardized format may make them easier for a centralized office to process. But for those of us on the front lines, the standardization is a weakness—one that jeopardizes the quality of compliance, the quality of decision-making, and the appropriate use of faculty time and resources.

And our jobs would be made almost unmanageable if some aspects of the conflict of interest policy, itself, were adopted. For example, the language in section 4.6 declares as "inappropriate" a set of behaviors (including authoring textbooks) that we in the legal academy view as central to the life of a scholar. Indeed, for many, being invited to author or co-author a legal textbook is viewed among the highest compliments for an accomplished legal scholar. Perhaps the opposite is true in other disciplines. As we note above, we can't speak to their expectations and norms. Our point is not to quibble with the inclusion of this language in section 4.6. We are confident that we would be able to

explain why, within the ranks of the law school at least, we must continue to encourage faculty members to write textbooks, and we must provide them whatever resources we can to facilitate these undertakings. Our point, instead, is to illustrate one of the ways in which centralization threatens the integrity of our shared undertaking.

Let us be clear, we do not relish the idea of being watchdogs. We simply think we would see better compliance with a reasonable COI/COC policy if the policy provides for local implementation of both the disclosure processes and the application of the appropriate conflict policies' provisions.

Thank you for taking our perspective into consideration as you contemplate a re-draft of these policies.



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