APPLYING CONFLICT OF INTEREST POLICIES TO THE ENTIRE COLLEGE COMMUNITY

Presenter:

DAVID HARPOOL, Ph.D.
President
Kendall College
Evanston, Illinois

Stetson University College of Law:

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APPLYING CONFLICT OF INTEREST
POLICIES TO THE ENTIRE COLLEGE COMMUNITY
(Trustees, Administrators, Faculty & Staff)

(Or)
What’s Good for the Goose is Good for the Gander

Presenter:
Dr. David Harpool, J.D., Ph.D.
President, Kendall College
Higher Education Legal Consultant
Evanston, Illinois

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Initial Observation
The purpose of managing conflicts of interest is not to prevent conflicts but to handle them in a manner which assures the transaction is in the best interest of the college and when possible to preclude judicial review and interference.

I. Introduction
Conflicts of interest are inevitable for governing board members and increasingly occur for faculty and staff. Administrators, faculty and staff are constantly undergoing conflict of interest scrutiny. Even in institutions that have unassailable reputations and written policies – and not all do – most trustees, administrators, faculty and staff (hereinafter members of the college community) might find their business or personal relationship with the institution is measured in shades of gray and not in black and white. The most significant change in the last few years is that conflicts of interest policies are now viewed as an institution-wide issue and not just a trustee policy. It was predictable that when trustees were exposed to heightened scrutiny, they in turn, increased scrutiny of administrators, faculty and staff.

The Profile Paradox
Part of the reason for the increased scope of scrutiny lies in the “profile paradox” that board and institutional leaders confront when selecting trustees and employing faculty and staff. Many such leaders would agree that one profile of an ideal member of the college community is a powerful and influential individual who controls significant business interests or has a national reputation in a specific discipline. The ideal person also frequently has equally prominent associates and acquaintances, can enter into transactions that benefit the organization, and will persuade others to do so. Indeed, many people are selected or employed because they fit these criteria. Colleges do, and should seek administrators, faculty and staff who have developed creative and unique approaches, are in high demand, and have a public profile. The exact profile for a strong member of a college community is also the profile of someone with greater potential for conflicted or competing interests. The paradox? Private Colleges are populated by
powerful and influential people who are and should be legally restricted in how they wield their power and influence.

II. Sources of Guidelines for Regulations
Conflict of Interests – Legally
The focus of this paper is on the type of conflicts of interest which are subject to judicial scrutiny and legal proceedings. Real conflicts of interest are, in fact, legally “regulated” conflicts. They are not merely apparent, perceived or potential conflicts, which, although they can be equally devastating to an institution, are beyond the scope of legal analysis.

1. University/College Policy.
My review of five-hundred and sixty-six private institutions indicates that 58% of private institutions have some form of a conflict of interest policy (or policies). College policies should be reviewed in terms of scope and characteristics. The policies generally attempt to define conflicts of interests, provide procedures for review and may apply to trustees, administrators, faculty or staff, or all of the above. There are usually two sections to a conflict of interest policy, procedural and substantive.

Procedural Guidelines
Four Guidelines. The first reported opinion that reviewed the obligations of trustees who serve private charitable corporations was issued in 1974 in *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries, 381 F.Supp.1003 (D.D.C. 1974) 1003* (commonly known as the Sibley Hospital case). Colleges have (and presumably the Courts will) applied similar standards to all members of the college community if either an internal policy or applicable law establishes similar fiduciary duties (care and loyalty). The ruling *Sibley Hospital* established guidelines that held trustees of nonprofit organizations, including higher education institutions, to the “corporate board standard.” It further outlined the steps a trustee or other member of the college community must take to handle a conflict of interest to fulfill his or her fiduciary duty with reasonable diligence and care. The court’s four recommendations follow:

1. *Prior Disclosure.* A trustee must disclose all real and potential conflicts to the board.
2. *Nonparticipation.* A trustee must not participate in any decision in which he or she has a conflict of interest.

3. *Disinterested Review.* The remaining trustees who do not have a self-interest in the outcome of a decision should objectively make the decision that is in the best interest of the institution.

4. *Documentation.* The board secretary should keep accurate minutes that (a) report that a conflict was disclosed and (b) that the conflicted trustee did not participate in a vote.

The minutes also should reflect that the remaining board members without self-interest reviewed the decision and approved it, believing it was in the best interest of the institution. Most colleges use conflicts of interest “disclosure statements” and documentation to implement procedural regulations. It can be argued that faculty and staff do not have the same fiduciary duty to the college that a trustee has. My analysis is that it is a matter of degree. I can not fathom of a Court that would conclude that faculty and staff have no fiduciary duty to their college. Most college policy manuals expressly create a fiduciary duty for faculty and staff.

**Substantive Definitions of Conflicts of Interest.**

What is a Conflict of Interest? Written policies usually contain at least one of four approaches in defining trustee conflicts of interest: independent judgment clauses, fiduciary responsibility clauses, threshold clauses, and conflict-listing clauses.

*Independent-Judgment Clauses.* These often contain two provisions. First is a statement that defines a conflict of interest as a personal interest of a college community member that “might impair or reasonably appear to impair” their “independent, unbiased judgment” in discharge of his or her institutional responsibilities. The second provision defines a potential conflict as one in which a family member or close associate of the trustee has an interest (usually financial) that would impair the college community member’s independent, unbiased judgment.
The following policies (culled from my research) are typical examples of independent judgment clauses. The first example addresses the individual and family interest of the college community member; the second focuses on the college community member’s personal interest.

**Example 1:** College community members shall be considered to have a conflict of interest if (a) they have existing or potential financial or other interest that impairs their independent, unbiased judgment in the discharge of their responsibilities to the college, or (b) they are aware that a member of their family (a spouse, parent, sibling, child or any relative residing in the same household) or any organization in which the college community member (or family member) is an officer, director, employee, member, partner, trustee, or controlling stockholder has such existing or potential financial or other interest.

**Example 2:** The policy, simply stated, is that all real conflicts of interest are to be avoided. Without attempting to cover every possible conflicting relationship that should be avoided, an individual will be considered to have a conflict of interest when he or she (a) has an existing or potential financial or other interest that impairs or might impair the individual’s independence of judgment in the discharge of his or her responsibilities to the college or (b) may receive financial or other benefit from knowledge of information that the college has not made public.

**Fiduciary Responsibility Clauses.** This approach to defining conflicts of interest simply informs members of their “fiduciary responsibilities” and leaves to the entire board or a board committee the responsibility for determining conflicts of interest on a case-by-case basis. These clauses usually set a standard for trustee decision making, based on the premise that all decisions of the college should be made solely on the basis of the best interest of the institution. The policy requires annual disclosure.
Various policies specify significantly different procedures to follow once a conflict of interest has been determined. An example of a typical fiduciary responsibility clause follows:

*Example:* Members of the board, officers, and employees of the university serve the public trust and have a clear obligation to fulfill their responsibilities in a manner consistent with this fact. All decisions of the board, institutional officers, and faculty must be based on promoting the best interest of the institution and the public good. The university’s integrity must be protected and advanced at all times. Men and women of substance inevitably are involved in the affairs of other institutions and organizations; consequently, effective board, administration, and faculty cannot consist of individuals entirely free from at least perceived conflicts of interest. Although most such potential conflicts are inconsequential, everyone has the responsibility to ensure the board is made aware of situations that involve personal, familial, or business relationships that could be troublesome for the university.

This approach sometimes is combined with the threshold approach (a description of which follows), so the thresholds stated in the policy serve as a guide as to whether a non-institutional interest violates his or her fiduciary responsibilities. For this approach to be effective, the bylaws or policy manual must include a statement specifying the general duties of a college community member. However, managing conflicts of interest becomes exceedingly difficult if policies only refer to a trustee’s general common-law duties. A specific conflict-of-interest policy is much more effective than the vague language typical of this approach.

*Threshold Clauses.* Approaches to defining “conflict of interest” that rely on these clauses acknowledge that members of the community often have a duality of interest. The policies determine whether a conflict of interest exists on the basis of the degree of interest a community member has in an entity or relationship outside of the institution. Threshold clauses almost always conclude that a conflict of interest occurs when a college community member is a director or officer or owns a requisite percentage of
another entity doing business with the institution, or when a college community member gains financially from a transaction between the institution and an outside entity. Examples follow:

*Example 1:* For the purpose of this policy, a conflict is determined to exist if a college community member or officer or a member of the family (a) is an officer, director, trustee, partner, employee, or agent of an organization doing business or competing with the institution; or (b) is either the actual or beneficial owner of more than 5 percent of the voting stock or controlling interest of an organization; or (c) has any other direct or indirect dealings with an organization from which he or she knowingly benefited materially.

*Example 2:* "Material financial interests" (thus a conflict of interest) are direct or indirect ownership interests by a college community member or his or her family of more than 1 percent of the business or proprietary interest in the entity or of any class of outstanding securities of a firm or corporation or more than 10 percent interest in a partnership or association.

*Example 3:* A substantial benefit will be deemed derived (a conflict exists) in the event a college community member or family member (a) is the actual or beneficial owner of more than 5 percent of the voting stock or controlling interest of an organization that does substantial business with the university or (b) has other direct or indirect dealings with the university from which such persons benefit directly, indirectly, or potentially from cash or property receipts totaling $10,000 or more annually.

*Conflict-Listing Clauses.* These clauses attempt to define when a conflict of interest occurs, usually by citing examples. They typically contain language that disclaims the list as representative, not exhaustive. Further, they often refer to the same conflicts that are included in threshold and independent-judgment clauses. The following potential
conflicts of interest are mentioned most often in institutional policies. A conflict of interest exists when a college community member or family member:

1. conducts business with the institution,
2. uses institutional resources to promote his or her individual or family’s financial or other interests, (especially of interest in research institutions and with the development of on-line courses)
3. uses confidential information about the institution to promote his or her individual or family interest,
4. has a relationship with a competing institution, (moonlighting as an adjunct faculty)
5. gains financially from an institutional transaction,
6. assists an outside entity to benefit financially or otherwise from the institution in ways not available to that entity’s competitors, (favorable, but unjustified endorsement or approval of a product or service)
7. lends or borrows money or property from an entity or person who conducts business with the institution,
8. receives gifts from an individual or entity who conducts business with the institution,
9. accepts gifts or perquisites from the institution not readily available to other members of the institutional community,
10. participates in or permits the approval of policies not in the institution’s best interest,
11. participates in or permits the rejection of policies that are in the institution’s best interest,
12. promotes or participates in social or political agenda or campaigns that could have a detrimental effect on the institution, (1st-amendment and academic freedom issues), and
13. employment or advancement of a family member or associate (really never a good idea).

Specific language varies among institutions, of course, but these broad statements reflect most conflicts expressly prohibited in the policies reviewed in the study. One shortcoming of such policies is that they often are perceived as comprehensive or only signify the “real bad” conflicts, thus implying others are less onerous.
2. Case Law

When a college handbook bylaws or guidelines are silent concerning conflicts of interest, statutory or case law standards apply. Most states have statutory authority to regulate conflicts of interest at non-profit institutions, although with the exception of Massachusetts, few state Attorney Generals have exercised the authority over private colleges. Statutory provisions are discussed below.

Challenges to such self-dealing and mismanagement are governed in case law by a standard of care applied to the two trustee obligations; duty of care and duty of loyalty. A duty of care requires college community members to exercise reasonable judgment on activities taken on behalf of, in relation with, or impacting the college. The duty of loyalty requires college community members to place their allegiance to the college first and thereby refrain from entering into unfair, undisclosed conflict situations or self-dealing ventures. Again, it is unclear whether courts will apply the same duty of loyalty and care to faculty and staff as they do for trustees and officers. However, it is unlikely courts would not impose some level of responsibility. Faculty and staff policies should impose both duties on all college community members. A recent approach is to refer to the duty of loyalty as applied to faculty and staff as the duty of commitment. Courts have not yet adopted this language.

When Sibley Hospital was decided in 1974, the decision renewed debate concerning the appropriate standard of conduct for a trustee in a nonprofit organization. The vast majority of court decisions, the American Association of Governing Boards ("AGB"), and the American Bar Association ("ABA"), through the Revised Model Non-Profit Corporate Act (RMNCA) in 1988, all adopted some version of the Sibley Hospital approach. Sibley Hospital itself adopted the corporate board member standards.

The application of corporate rather than trust law was re-affirmed in 1988, when the Georgia Supreme Court followed Sibley Hospital by applying the corporate standard in deciding whether the trustees of Mercer University fulfilled their fiduciary duties. In Corporation of Mercer University v. Smith, 371 S.E.2d 858 (Ga. 1998), like Sibley
Hospital, the court held that formalities of trust law are inappropriate to the administration of colleges and universities which, in this era, operate as businesses.

In Kenney Presbyterian Home v. State, the Washington Supreme Court applied a de facto corporate standard and permitted trustees to sell fire insurance and serve as agents for the purchase of a mortgage. In Fowle Memorial Hospital v. Nicholson, the Supreme Court of North Carolina applied the corporate standard of care:

“When an officer or director of a corporation purchases or leases its property, the transaction is voidable, not void, and will be sustained only when openly and fairly made for an adequate consideration. The presumption is against the validity of such contract, and when it is attacked the purchaser or lessee must show that it is fair and free from oppression, imposition, and actual or constructive fraud”.

The most recent conflicts of interest case is Jarvis Christian College v. National Union Fire Insurance Company, 1999 U.S. App. Lexis 31999. In Jarvis, a trustee failed to disclose his interest in a company into which he persuaded the college to invest $2 million (15%) of its endowment. The court found the trustee breached his duty of care and loyalty. The remainder of the opinion is the college’s attempt to recover its loss under an insurance policy.

3. Statutory Approaches
Many states have adopted their own corporate or nonprofit corporation statutes which they apply to colleges. Some have codified Sibley Hospital. For the purposes of this article, two statutory approaches are presented: the Revised Model Non-Profit Corporate Act (RMNCA), and the modern proprietary approach of the Revised Model Business Corporation Act (“RMBCA”).

The Revised Model Nonprofit Corporation Act / Results-Oriented Approach
The primary difference between the Sibley Hospital approach and the RMNCA is that the RMNCA provides that even non-disclosed transactions may be valid if the board ratifies
the act after the fact, finding it in the interest of the institution. Some commentators have labeled this approach the “results-oriented” approach.

Permitting subsequent approval of undisclosed conflicts of interest is bad policy. While prior disclosure is not always necessary to avoid liability, it is often necessary to avoid the appearance of an improper transaction. The RMNCA, adopted by the ABA in 1987, attempts to end the ambiguity of when trustees should be bound by trust or corporate norms. While the RMNCA is not an absolute adoption of the standards set forth in *Sibley Hospital*, it does mirror many of the requirements applicable to board members of public benefit, nonprofit corporations. Further, the RMNCA cites *Sibley Hospital* as authority that board members of nonprofit corporations are bound by the corporate, not the trust, standard of care. The RMNCA states that all directors of nonprofit corporations shall discharge their duties
1. in good faith;
2. with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
3. in a manner the director reasonably believes to be in the best interest of the corporation.

With the general guideline that directors should act in good faith in a manner that they believe to be in the best interest of the corporation, the RMNCA discussed the duty of loyalty in sections 8.31-8.33. The act specifically rejects the strict trustee standard and sets forth standards under which courts should resolve duty of loyalty questions. Section 8.31 states:

(a) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair at the time it was entered into or is approved as provided in subsections (b) or (c).

(b) A transaction in which the director of a public benefit or religious corporation has a conflict of interest may be approved:
(1) in advance by the vote of the board of directors or a committee of the board if:
   (i) the material facts of the transaction and the director's interest are disclosed or are known by the board or committee of the board; and
   (ii) the directors approving the transaction in good faith reasonably believe that the transaction was fair to the corporation or
(2) before or after it was consummated by obtaining approval of the:
   (i) attorney general; or
   (ii) (describe or name) court in an action in which the attorney general is joined as a party...

The RMNCA states that a conflict of interest transaction is “authorized, approved or ratified, if it receives the affirmative vote of a majority of the directors on the board or on the committee, who have no direct or indirect interest in the transaction.” The RMNCA does not preclude judicial review. But prior disclosure of trustee conflicts and trustee approval with knowledge of the conflict significantly increases the chance that the conflicted transaction will be upheld by a reviewing court.

A basic assumption of the Act is that if you shed the light of day on what is occurring, inappropriate acts will be less likely to happen. Another assumption is that most directors are honest and are trying to benefit their nonprofit corporations. Therefore, if the transaction is approved in advance by the board of directors, then- in lay terms- unless it looks particularly outrageous, it will be upheld after the fact.

The RMNCA has become the common compromise between those uncertain with application of the trust standards and those wanting to apply a for-profit standard.

Revised Model Business Corporation Act / Safe Harbor Approach
The RMBCA approach (also known as the “safe harbor” approach) goes one step further than the RMNCA in protecting most corporate director conflicts of interest from judicial
scrutiny. The ABA has adopted a new Model Director Conflict of Interest Statute based on bright-line definitions of conflicts of interest and a rigid preclusion of judicial review. The ABA’s stated purpose in adopting the new director conflict of interest statutes was to eliminate uncertainty in conflict of interest law. However, the effect of the model act is to provide corporate directors with a “safe harbor” in which to conduct conflict of interest transactions without risking court scrutiny:

The preclusion of judicial review (section 8.61) declares that the courts may not review, on the grounds of a director conflict of interest, transactions that do not meet the statutory definitions. This section also denies the courts power to attack, enjoin, or award damages for transactions that meet the definitions if either
1. disinterested directors approved the transaction
2. shareholders approved the transaction, or
3. the transaction is fair to the corporation when the transaction is entered into.

To preclude judicial review of the transactions, the director approval section requires an affirmative vote by a majority of the corporation’s “qualified directors”, after the interested director has provided the required disclosure.

Under the RMBCA, unless a transaction contains all the elements to be classified as a conflict of interest, the court is precluded form reviewing the transaction. The RMBCA description of conflicts of interest is obviously written with the for-profit corporate boards in mind. Essentially, the RMBCA contemplates a conflict of interest occurring anytime a board director has a significant financial interest in a transaction which he fails to disclose and which, in hindsight, was unfair to the corporation at the time the board approved the transaction. Most states have adopted at least the general framework of the RMBCA. However, only a few states have adopted the judicial preclusion provisions as stated in the RMBCA.
Other Approaches
Several additional approaches for handling conflicts of interest among nonprofit directors (in most higher education institutions a college community member) can be identified:
1. The private foundation tax standard whose narrow purpose is to protect tax-exempt status.
2. The historical legal trusts approach bans all conflicted transactions.
4. The administrative control approach lets senior officers determine the appropriateness of transactions.

These alternative approaches are rarely used (less than 1% according to the results of my study) as the basis of a private institution’s conflict of interest policy.

4. Professional Organization Recommendations
The Association of Governing Boards (AGB), in its *Illustrative Bylaws of Independent Academic Institution*, provides a model conflict of interest statement, which has incorporated *Sibley Hospital*. The relevant provisions are:

1. Disclosure: All trustees shall disclose to the board any possible conflict of interest at the earliest practical time.

2. Non-participation: Furthermore the trustee shall absent himself or herself from discussions of, and abstain from voting on, such matters under consideration by the Board of Trustees or its committees.

3. Trustee Review: Any trustee who is uncertain whether a conflict of interest may exist in any matter may request the Board or committee to resolve the question in his or her absence by a majority vote.

4. Documentation: The Minutes of such meeting shall reflect that a disclosure was made and that the trustee having a conflict or possible conflict abstained from voting.... Each trustee shall complete and sign a disclosure form.... The AGB does not comment or
suggest this approach for a college-wide policy, but it does state the legally correct procedural guidelines.

**Emerging Applications**

Increasingly colleges are adopting conflicts of interest policies applicable to all members of the college community.

**Example 1:**

Employees of the University must be aware that outside obligations, financial interest or other employment may result in a conflict of interest or commitment and could therefore affect the objectivity of employees' decisions and the effectiveness of their performance. It is the purpose of the Policy to set forth the principles for identifying potential conflicts and the procedures for reviewing and addressing conflicts that occur. **This Policy covers all University employees.**

**The Conflict of Interest v. Academic Freedom Balance (my observation)**

Nothing in this Policy restricts faculty members from choosing the subject matter of their research, scholarly work or other activities, subject to budgetary and programmatic constraints of the unit and the University in any given year. Similarly, this Policy is not intended to limit the types of external activities or business transactions of University employees as long as those activities do not present conflicts of interest and commitment.

**Conflict of Interest Defined by University Policy**

A conflict of interest exists when an employee is in a position to influence any University business transaction, research activity or other decisions in ways that could lead to any manner or form of personal gain for the employee, or for his/her family members, other than salary from the University, regardless of source.

**Conflict of Commitment Defined**

A conflict of commitment is an activity that interferes with an employee’s ability to carry out his/her duties effectively. External employment, or self-employment employee’s is
permitted where there is not a conflict of interest or commitment. Employees on full-time appointment are compensated for full-time employment and outside or dual employment or other activity, whether compensated or not, that in any way interferes with the performance of an employee's university duties and responsibilities is a conflict of commitment and as such is not permitted.

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.

**Reporting Potential or Actual Conflicts**

The Disclosure Form must be completed and submitted any time an employee or the employee's relative: (1) is or may be involved in an activity covered in Section VI; (2) has or may have a substantial interest as defined in this Policy; or, (3) is involved in any actual or potential conflict of commitment or interest which involves remunerative, part-time or full-time employment, self-employment, consulting or advising, whether or not done on University premises or during University business hours and even if for a not-for-profit or government entity.

**Procedures**

There are three types of transactions:

1. *Business Transactions* involving and contracts not based on a sponsored activity.
2. *Personal Transactions* concerning appointment, retention, promotion or compensation of a relative or responsibility for managing or evaluating the work of a relative.
3. *Sponsored Transactions* cover participation by an employee in sponsored activities which includes but is not limited to research, training, testing, clinical trials, patient care or services provided to the University in connection with sponsored activities in the form of: grants, contracts, and gifts from any government agency or unit, for profit, or not-for-profit entity.
Disclosures for any of the above transactions will be routed as follows depending upon the employment status of the employee:

1. Classified staff members will submit Disclosure Forms to the Associate Vice President for Business Affairs.
2. Faculty, Appointed Personnel, and students will submit Disclosure Forms to the Associate Vice President for Research.

Example 2:
Historically university missions have focused on the areas of teaching, research, and public service. However, the university and its employees are asked increasingly to engage in consulting relationships, to assist in a broad range of economic development activities, to work on project that involve support form the government and the commercial sector, and to engage in other outside activities related to the teaching, research, and public service missions of the university. Generally, such outside activities enhance professional development, scholarship, and teaching and are strongly encouraged.

Along with these benefits, the arrangements between external enterprises and the university, its employees, and students, create new possibilities for conflicts of interest. There is increasing public concern regarding the appropriateness of some arrangements and activities.

Public trust in the university and in the legitimacy of its significant role in society requires openness to public scrutiny. The confidence of the public is based on the following two premises:
1. the vast majority of administrators, faculty, staff, and students are honest and ethical and conduct their activities with the highest standards and integrity, and
2. for the vast majority of situations, self-regulating structures and processes in the university are effective.
A university must consider both the individual’s right to apply his or her intellect, expertise, and capabilities, and the public’s and institution’s right to be aware of the extent of any potential conflicts resulting from such activities. Having explicit guidelines, standards, and procedures in place strengthens the credibility of the university with the public and gives the university the ability to state that there is reasonable expectation that its employees have no significant conflicts of interests.

The purpose of this statement is to clarify the limits that exist on certain kinds of activities and arrangements which have the potential for, appearance of, or actual involvement in a conflict of interest and to ensure that such situations are adequately reviewed. If necessary, these activities will be monitored, modified, or discontinued. These guidelines should be viewed as complementary to existing university policies and practices.

Guidelines

**Description:**

Involvement with or financial interest in commercial or professional activity outside the university should not restrict the fulfillment of an employee’s obligations to the university or of the university’s obligations to its mission.

Any real, potential, or apparent conflicts arising out of such arrangements need to be minimized, managed, or avoided in order to avert possible problems. Real conflict of interest must be avoided in all cases. Potential or apparent conflict of interest does not necessarily imply that all entrepreneurial activities must stop. Instead, the university needs to be able to evaluate possible or apparent conflict situations objectively in order to ensure that no inappropriate situations continue to exist that might improperly influence or diminish the various missions of the university. Such considerations extend to the university as an institution as well as to its various employees.

**Persons Covered:**
These guidelines and procedures apply to all employees of the university including but not limited to administrators, faculty, operating staff, supportive professional staff, and student employees. All covered persons are referred to herein a "university employee" or "employees."

Responsibility:
It is the responsibility of the employee to know the university’s published policies on conflict of interest, and if uncertainties arise, to seek advice and counsel to clarify questions. Responsibility for avoidance of conflict of interest lies primarily with the employee as does accountability for non-compliance.

Responsible behavior requires that the employee avoid or eliminate every real conflict of interest and avoid or minimize every apparent or potential conflict of interest. This may be achieved by (a) exploring circumstances to see if the employee is placed in any real, potential or only apparent conflicts of interest; (b) ascertaining, if there are potential or apparent conflicts of interest, whether any of these are real conflicts; (c) taking steps, if there are conflicts which are apparent only, so that both the employee and the university are protected against that appearance of conflict; and (d) seeking, if there are real conflicts which the employee prefers not to eliminate, official exemption or authorization (through university channels) to proceed (such authorization often being conditional); and (e) eliminating non-exempt real conflicts.

Definitions
For the purpose of these guidelines and procedures a conflict of interest occurs when some interest of an employee conflicts with an interest of the university as an employer.

Four broad categories of conflicts fall under this definition:
*conflicts regarding financial interest (which is often meant when "conflict of interest" is used (See Def. #)).
*conflicts regarding use of time ("conflict of commitment" [See Def. #5]),
*conflicts regarding diversion of grant or contract opportunities form the university to individuals or groups operating outside the university (“conflict of opportunity”[See Def. #6]), and

*conflicts regarding rights such as rights to and control of publication and intellectual property (“conflict of rights”[See Def. #7]).

1. A “conflict situation” arises when a university employee is or appears to be in a position to influence decisions regarding university business, research, or other activities that (a) lead, or appear to lead, to any form of personal gain for the employee or the employee’s family beyond payments through the university; or (b) give, or appear to give, inappropriate advantage to others to the detriment of the university.

2. A “real conflict of interest” exists when an employee is in a situation that would permit him/her to gain personally from a decision, activity, or project in a fashion that is to the detriment of the university.

3. An “apparent conflict of interest” exists when an employee’s decision, activity, or project is quite proper, but may appear to others to have been influenced, or to be open to influence, by personal factors and, thus, to be to the detriment of the university.

4. A “conflict of financial interest” exists if an employee receives significant payments related to that employee’s research or related to his/her work as an employee of the university. The point at which reporting procedures begin is reached when an employee receives or expects to receive annual income in excess of $5,000 or if the employee’s ownership share represents more than a five percent stake in any one enterprise or entity. Payment would include consulting fees, honoraria, equity interest or other ownership interest, or a share of the intellectual property rights. Payments received through the university, including from grants and contracts, are excluded. Appropriate reporting procedures must be followed if the designated limit is exceeded.

5. A “conflict of commitment” may arise when activities and undertakings that are not direct responsibilities of a university employee are so substantial or demanding of time as to interfere, or appear to interfere, with the employee’s responsibilities to his/her unit, to students, and/or to the university.
6. A “conflict of opportunity” may arise when an employee is in any situation where, whether by intent or otherwise, he/she causes an activity that could appropriately be done at or through the university to be diverted elsewhere with resultant detriment to the university.

7. A “conflict of rights” may arise when an employee is in any situation where publication or intellectual property rights that would normally reside with the university are lost or diverted elsewhere, with resultant detriment to the university.

8. An “inappropriate obligation, commitment, or activity” is any arrangement between a university’s missions, university’s commitments, or the employee’s obligations to the university. Activities which may restrict or impair an employee’s ability to perform generally expected activities at the university, or which result in the transfer or compromise of existing or potential university rights in intellectual property, or which utilize university resources without prior written approval of the president (or the president’s designee) are also inappropriate.

9. “Family” or “immediate family” include a person’s spouse and dependent children and any person who receives, directly or indirectly, more than one-half of his or her support form an employee, or from whom an employee receives, directly or indirectly, more than one-half or his or her support.

10. “Enterprise” is any corporation, partnership, proprietorship, firm, organization, franchise, association, trust, or other legal entity other than an individual.

11. “Associated,” when used with reference to an enterprise, means that a person or a member of a person’s immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in aggregate, at least five percent of the outstanding equity.

12. “Academic staff member” includes the faculty ranks of professor, associate professor, assistant professor, instructor (and all the foregoing whose appointments contain terms such as “research,” “adjunct,” or “visiting”), faculty assistant, lecturer, research associate, and graduate assistants and supportive professional staff in the academic division of the university.
13. "Intellectual property" means the products of the mind, frequently referring especially to those products that represent a source of real economic value (e.g., copyrights, patents, and tangible research property.)

**Procedures**

A. The University Council will create a Committee on Ethics and Professionalism (CEP), composed of five members elected to staggered two-year terms: one from administration (elected by the President’s Administrative Cabinet), three from faculty (elected by the Faculty Senate), and one from the supportive professional staff (elected by the Supportive Professional Staff Council). Elected committee members will then elect one of their members as chair of the committee. An associate legal counsel shall be the investigative officer for the CEP and shall help interpret each case brought for consideration. After consultation with the investigative officer and, if necessary, with the employee, the elected members of the committee shall render a decision. Should the employee dispute the decision, he/she may request a reconsideration, he/she may appeal to the president (or the president’s official designee) whose decision shall be final.

The members of CEP and all other university employees with whom the employee consults will conduct themselves in strict confidentiality.

B. Each university employee who is or is about to be engaged in outside activities where such activity might involve a conflict as defined in II., D., or which is covered under federal or state requirements, shall file a report with the chairperson of the CEP. Forms are available from the CEP and shall be filed.

1. annually, during September, for an on-going activity, or
2. before starting a new activity, or
3. at times when a changed situation requires it.
C. The CEP may determine the following:
1. no conflict exists,
2. a conflict situation could exist and monitoring of the situation is required, or
3. a conflict situation does exist and must either receive official exemption or be eliminated.

The recommendations of the committee, including any sanctions to be imposed, will be forwarded to the president (or the president’s designee) and the employee within two months of receipt of the report.

D. The employee may ask the CEP for a reconsideration and may request a personal appearance before the committee. The results of the reconsideration shall be forwarded to the president (or the president’s designee) and the employee.

E. The president (or the president’s designee) will make the final decision on whether and under what arrangements a reported activity may be acceptable.

F. The specific written approval of the presidents (or the president’s designee) is required for any special monitoring. When required, the president (or the president’s designee), with the consent of the CEP, will appoint an appropriate person for monitoring the approved arrangement.

(*end of example: 2*)

Increasingly, colleges have adopted specific provisions within conflict policies to manage:
1. Outside employment (public sector and at other institutions)
2. Conflict with Private Sponsor of Research (both financial and objectivity)
3. Nepotism

Most policies exempt minor conflicts which do not seriously impede the college community members duties of loyalty, commitment and performance.
Remaining Questions?

1. Will courts impose duties of loyalty and care to staff and faculty, and to what extent, absent statutory authority or university policy?

2. Can conflicts of interest policies be balanced with academic freedom in terms of outside professional activities and related business interest?

3. Who should review faculty and staff conflicts; the Administration, Board of Trustees, General Council or University Committee?

4. Does the duties of loyalty and care require college community members to report unreported conflicts of interest of other college community members?