

## Conflict of Interest Revisited

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Just over a decade ago, in these pages, I published a short article entitled "Conflict of Interest."<sup>1</sup> It did not claim to offer an original analysis of conflict of interest; rather, it generalized for use in all of business and professional ethics the analysis then standard in legal ethics.<sup>2</sup> I summarized the analysis in this way:

A person has a conflict of interest if a) he is in a relationship with another requiring him to exercise judgment in that other's service and b) he has an interest tending to interfere with the proper exercise of judgment in that relationship.<sup>3</sup>

I used "judgment" to refer to that aspect of intelligent activity requiring more than mechanical rule-following, and "interest" for any special influence, loyalty, or other concern capable of biasing otherwise competent judgment (under the circumstances in question).

The analysis has since become, more or less, standard in business and professional ethics.<sup>4</sup> One sign of its success is that two learned writers recently published sustained criticism of it.<sup>5</sup> Neil Luebke has argued that my conception of interest makes the analysis too broad. John Boatright has argued that my emphasis on judgment makes the analysis too narrow, excluding from the category of conflict of interest many improper practices businesses often forbid as "conflicts of interest."<sup>6</sup> Both argued that the analysis underrated the moral dimension of conflict of interest (the importance of trust or obligation).<sup>6</sup> Their careful arguments are not feathers to bush off. If a philosopher is to be judged by the quality of the criticism he receives, these two have honored me.

They have also forced me to revisit my analysis—with two results. First, I have concluded that what divides us are primarily issues of

method, important in themselves, but more or less independent of the issue of conflict of interest as such. Second, I have concluded nonetheless that showing our division to have this source will shed light on what a conflict of interest is. While my critics would deserve a response even if the response did not have this methodological dimension, because it does it may interest some who have no interest in conflict of interest as such.

### I. Luebke: Ethics as Law?

Luebke's article begins with a brief history of the concept of "conflict of interest." The term is of surprisingly recent origin. Luebke could find no use of it before the 1930s, no use in a court case before 1949 (though "conflicting interests" was used as early as 1941), no reference in a dictionary of English until 1971, and no reference in a legal dictionary until 1979. All "early" references emphasize "governmental use of the term to the virtual exclusion of the private sector," but by 1949 a federal judge was using the term while considering whether to disqualify a fiduciary in a bankruptcy proceeding.<sup>7</sup> The term seems to combine under one heading ideas, scattered until then, about "interests" ("adverse," "pecuniary," and so on) that should disqualify an official, trustee, counsel, or other fiduciary from performing what otherwise would be sworn duties.

Luebke also investigated the history of "interest." The results were less surprising. Unlike "conflict of interest," "interest" is an old word. Until the nineteenth century, it referred only to "objective" interests. (If someone had an interest in this sense, she would have a right to or claim for property, income, or service.) Only in the last two hundred years did the "subjective" sense of "interest" appear. Only then could an interest be an emotional attachment or concern. For the law, "conflict of law" is still largely a matter of objective interests, that is, of material gain or loss, whether to oneself, one's family, or some business associate.<sup>8</sup>

What lesson should we draw from this history? Luebke's answer is that we should understand "conflict of interest" solely as a matter of objective interests rather than, as my analysis does, allow for subjective

interests as well. Luebke offers two arguments for using "interest" in his way instead of mine.

First, since the law understands "conflict of interest" narrowly, the "expansion of 'interest' [to include subjective interest is] contrary to the legal literature Davis claims to represent."<sup>9</sup> My analysis is (according to Luebke) not a mere generalization of the lawyer's analysis but a radical departure from it.

Second, the subjective sense of "interest" makes "the category of [conflict of interest] far larger than the bounds of standard or effective usage."<sup>10</sup> For example, a father's postponing a child's needed medical attention out of a desire to take a weekend trip "might" count as a conflict of interest under my analysis because (on my analysis) the desire is an interest (a special influence on the decision). This (Luebke seems to think) is a conclusion absurd enough to discredit my use of "interest."<sup>11</sup>

Luebke's two arguments seem to rest on two mistakes, one concerning what the *standard* of standard usage is, the other concerning what its *status* is. While I would like to deal with these mistakes separately, they are in fact so closely related that I cannot.

What usage is standard for purposes of evaluating an analysis of conflict of interest? My analysis began *not* with court opinions (the "legal literature" to which Luebke refers) but with the lawyers' code of ethics. I do not regret that. Law, even judge-made law, is not necessarily appropriate to ethics, even to the ethics of lawyers. A lawyer judging herself ordinarily has access to information courts do not—for example, to her sense of her own motivation. This difference in evidence might well justify different uses of the term "interest" (and so, of "conflict of interest") in legal ethics than in law. Since other professionals, even ordinary people exercising judgment in the service of others, are, in respect of information about themselves, more often in the lawyer's position than in the judge's, it seems to me that the lawyers' analysis rather than the judges' is the proper place to start an analysis of conflict of interest suitable for business and professional ethics. Consider again the example which (according to Luebke) reveals the absurdity of my analysis.

Suppose that the decision to postpone my child's medical care is complex enough to require judgment; suppose too that I think my

desire to take a weekend trip makes it hard for me to give due weight to my child's interest: my judgment, ordinarily to be trusted in making my child's health decisions, no longer looks trustworthy. If I can, I probably should give the decision to someone else—a physician or spouse. Though perhaps no court would say I had a conflict of interest, why should we not say it? Where is the absurdity? Indeed, does not so describing my situation (or, at least, using the terms specific to a conflict of interest analysis) help us to see something troubling about the situation hard to express in other terms?

What might Luebke respond? Perhaps he would object that my usage, though illuminating in some ways, is still not "standard." That objection must fail. Thanks to Luebke's own research, we know that the term "conflict of interest" goes back only sixty years, that it evolved slowly, not reaching business cases until 1949, and that even today dictionaries have not caught up. What the standard use of "conflict of interest" is is still unsettled. Indeed, its unsettled state may explain why philosophers find it interesting.

Since Luebke and I are not lexicographers, discovering the actual use of the term is, at best, preliminary to our task of finding the best (or, as Luebke puts it, "effective") way to use the term. Our disagreement is not so much about what people say (or *think* they should say) as about what they *should* say (what their standards should be). Of course, there is a close relationship between what people say and what they should say, but the relationship is certainly not identity.

That brings me to Luebke's second mistake—that concerning the status of the usage he considers standard. While arguing that "the main moral concern regarding [conflict of interest] is the destruction of the fiduciary relationship and the milieu of other current and future fiduciary relationships,"<sup>12</sup> Luebke never considers whether any interests that the courts refuse to recognize as creating a conflict of interest in fact raise the same *moral* concerns as those the courts do recognize—that is, whether the courts might be mistaken in recognizing only "objective" interests.

The courts limit "conflicts of interest" to conflicts involving "objective interests" because they worry about being able to distinguish subjective interests that do exist from subjective interests that do not. Luebke accepts this worry uncritically. We should not. Common-law

courts have worried about proof of subjective states of all sorts for more than two centuries now. They have also experimented—usually successfully—with allowing more evidence of "subjective" matters, for example, of what a defendant actually believed when he shot in what he claims to be self-defense.<sup>13</sup> These experiments seem to be part of a wider cultural trend—represented in Luebke's history of "interest"—toward recognizing subjective states as open to rational study, public understanding, and proof. So, by itself, the current practice of courts is hardly decisive even concerning what *their* practice should be.<sup>14</sup>

In sum, Luebke relies too heavily and too uncritically on what courts do. His arguments in fact give no reason for discussions of business and professional ethics to exclude subjective interests from interests capable of producing a conflict of interest.

## *II. Boatright: Conflict of Interest without Judgment?*

Boatright claims to be concerned not with conflict of interest in general, or conflict of interest in law, but only with conflict of interest in business.<sup>15</sup> His examination of business codes of ethics, and of what business people say, leads him to conclude (correctly) that some businesses proscribe certain actions on grounds that they involve conflicts of interest, while my analysis would not count them as conflicts of interest. Of course, alone such evidence may only show that—as in many other matters—business usage is not the best. The question would remain whether we should accept such usage or instead seek to reform it.

But Boatright does not allow his evidence to stand alone. He offers it in defense of his own "agency" analysis of conflict of interest, arguing that his analysis should be adopted (in large part) because it does a better job than mine of explaining business usage. I will examine his analysis in Sec. III. For now, I simply want to show that my analysis does a better job than his even with the three examples of business usage that he claims my analysis cannot handle.

To do a better job is, of course, not necessarily to identify the situations in question as conflicts of interest. Getting a situation into the "right" pigeon hole is not as important as helping us to understand

the situation better than we would otherwise. Philosophical analysis is about understanding, not pigeon-holing.

How are we to know when we understand a situation better? Unfortunately, there is no simple answer. In practice, we have many tests, none decisive in itself. Among the tests are: 1) Does the analysis cover a wider domain than alternatives? 2) Does it rely on fewer controversial assumptions? 3) Is it easier to use? 4) Is it more reliable (that is, are different users more likely to get the same result given the same circumstances)? 5) Does the analysis bring out more useful information than alternatives? Usually, at some point (but, not necessarily the same point) each of us decides that we do understand the situation better or that we do not. An argument is decisive when we all agree (and remains decisive only while we agree).

Boatright claims, in effect, that each of us, upon examination of his examples, will agree that they are counter-examples to my analysis of conflict of interest—or, at least, that each of us will agree that we now have more reason to wonder how much understanding my analysis imparts. Let's see.

Boatright distinguishes three situations businesses sometimes call "conflict of interest" even though my analysis does not: A) competing with one's employer; B) misuse of information; and C) abuse of position. Though Boatright claims to build his analysis on agency law (citing the appropriate legal sources), he is *not* simply engaged in an "ethical restatement" of the law of agency. The canonical *Restatement of Agency* treats each of these "conflicts of interest" as a breach of "loyalty" (that is, as a violation of the agent's duty "to act solely for the benefit of the principal in all matters connected with his agency").<sup>16</sup> The term "conflict of interest" does not appear. If Boatright nonetheless claims that competing with an employer, misusing information, and abuse of position are, in fact, better analyzed as conflicts of interest than as mere breaches of loyalty, it cannot be because he is uncritically following the traditional (judge-made) law of agency. In this respect, Boatright's approach is clearly distinguishable from Luebke's. We must now consider Boatright's three real-life examples of business usage.

A. *Competing with one's Employer.* Xerox gives this as an example of conflict of interest: The wife of a technical representative (or "TR") opens a copy shop, using her own name and money, in a

suburb outside his territory. She leases equipment and supplies from Xerox on standard terms but TR helps her reduce costs by maintaining her equipment himself, doing for her—without pay after hours or on weekends—what Xerox trained him to do and pays him to do during ordinary working hours. While his job performance at Xerox remains as good as before, some of his wife's competitors, also Xerox lessees, complain. Does TR have a conflict of interest?

My answer is that (on these facts) he does not. The example seems better described as involving a simple breach of loyalty. TR is providing free of charge services that Xerox would otherwise sell to his wife. She is saving money at Xerox's expense. That harms Xerox. Further, because his wife is saving money at Xerox's expense, some Xerox lessees are at a competitive disadvantage and, in consequence, angry. That too harms Xerox. Angry lessees are more likely than happy ones to look for an alternative source of equipment.<sup>17</sup>

So, Xerox has good reason to want TR to stop helping his wife (in the way he has). Xerox would even be justified in describing the situation as one in which Xerox's interest in making money and treating all its lessees fairly conflicts with TR's interest in helping his wife. But what, apart from the confusing use of a popular (and potent) term, does Xerox get by adding that TR has a conflict of interest?<sup>18</sup>

Boatright has, it seems, given us an example not of a good use of "conflict of interest" but of a bad use. A business would be well advised to say nothing about conflict of interest here but instead explain its objection in some such way as this: "We do not object to a TR's spouse being one of our lessees or to a TR working in the spouse's business after hours. But we do object to a TR using our training to our disadvantage, whether directly, by taking away business from us, or indirectly, by treating one of our lessees better than the rest when our policy is to treat them all equally well." Businesses could, it seems, speak more exactly (and therefore more effectively) if they saved the term "conflict of interest" for conflict of interest in my sense—where, for example, TR's wife is in his territory and he must exercise judgment in determining whose work to give priority.

I conclude that Boatright's first example provides evidence for, rather than against, my analysis of conflict of interest.

**B. Misuse of Information.** In Boatright's second case, R. Foster Winans, who wrote the column "Heard on the Street" for *The Wall Street Journal*, used information gained as a columnist to trade stocks before the information was published. This is a classic "inside trading" case.<sup>19</sup> The newspaper's conflict of interest policy prohibited such conduct in this way:

It is not enough to be incorruptible and act with honest motives. It is equally important to use good judgment and conduct one's outside activities so that no one—management, our editors, an SEC investigator with power of subpoena, or a political critic of the company—has any grounds for even raising the suspicion that an employee misused a position with the company.<sup>20</sup>

What is wrong with what Winans did is, it seems, that (without his employer's consent) he took information given to him for one purpose (publication in the *Journal's* "Heard on the Street") and used it for another (his private profit). The *Journal* has good reason to object to this, even if it only raises the suspicion that he—note the *Journal's* terminology here—"misused [his] position." Winans's sources, the *Journal's* sources, might be less free with that sort of information if they thought the reporter would also use it before publication. The less free sources are with information, the less interesting a newspaper the *Journal* will be—and so, the less competitive.

There are, of course, other ways in which Winans's conduct could harm his employer, but—the way Boatright states the case—none that would require the distinctive terminology of "conflict of interest" (rather than the older terminology of misuse of information or abuse of position). Winans has, it is true, an interest conflicting with those of his employer (the interest in making money in addition to his salary). But that interest is not special (and so, neither Boatright nor I would suppose it to be enough to give Winans a conflict of interest).<sup>21</sup> Since it is an interest almost everyone has, the employer would know of it. Indeed, a company policy against use of inside information for personal gain is a reasonable response to such knowledge.

To say that, on the facts as given, we do not have a profitable use for "conflict of interest" is, of course, not to say that Winans did not

have a conflict of interest (in my sense). We need only change the facts slightly—or rather, bring out something implicit—to find such a use.

Columnists usually know far more than they write, more even than they tell their editors. Editors necessarily depend on columnists to keep them informed about which topics might deserve an assignment. Columnists must exercise judgment to sort out the important from the unimportant in the large amount of information they pick up most days; their editors do not want to be told "everything."

Suppose, then, that Winans owned \$10,000 worth of stock in a company about which he received information Sunday morning, information suggesting sale as soon as possible (that is, Monday morning). If he immediately tells his editor what he knows, the editor might want to run the story in Monday's *Journal* (which would be read before the markets opened). Monday's opening price would then (probably) take account of the bad news. Winans could not sell in time. In such circumstances (and supposing Winans is allowed to use inside information for his personal profit), could Winans be sure he would give his editor the same information at the same time he would have given it had he not owned the stock? Because the answer seems to be no, Winans would—given this restatement of the facts—clearly be failing his employer without misusing information or abusing his position. Here the distinctive language of conflict of interest adds something to our understanding of Winans's case that the older language of agency does not.

Because this way of failing his employer is implicit even as Boatright states the case, we may conclude that we have explained why the *Journal* thought Winans had a "conflict of interest." So, Boatright's second example, like his first, seems to support my analysis rather than threaten it.

**C. Abuse of Position.** Boatright's third example also comes from Xerox. A supervisor makes a point of introducing his wife, a real estate agent, to all new subordinates coming from out of state, suggesting that she can help them find a house. Since a supervisor's suggestion generally carries weight an ordinary employee's would not, the supervisor is using his position to steer business to his wife. Since (we may assume) this is done for the wife's benefit, not for Xerox's, the supervisor is abusing his position.<sup>22</sup>

But why does Boatright think the supervisor has no conflict of interest in my sense? Even if we focus only on the moment when the suggestion is made, we can see such a conflict of interest: From time to time, a supervisor will have a subordinate coming to town who will ask for advice on how to find a house. Ordinarily, the supervisor would answer only with Xerox's (and the subordinate's) best interests in view. But, with a wife looking for leads from him, he must find it far harder to decide where Xerox's interests lie. His wife's availability as a real estate agent puts him in a position fully justifying Xerox's description of it as a conflict of interest (in my sense).<sup>23</sup>

I conclude that this third example, like the first two, seems to support my analysis rather than threaten it.

### *III. Trust and Judgment*

These results invite the question, "What went wrong?" What could have led Boatright to suppose that his three examples constituted evidence against my analysis when, instead, the reverse seems to be true? There are at least two possibilities.

One possibility is that Boatright shares a mistake with Luebke. Boatright tried to tell us what usage is ("the way the concept of conflict of interest is actually used in the world of business"), not what it should be.<sup>24</sup>

Another possibility is that Boatright has failed to digest the import of Luebke's history of "conflict of interest."<sup>25</sup> The very newness of the term "conflict of interest," its origin outside business, and its late arrival in business together at least suggest that it adds something lacking in traditional agency analysis (indeed, something generally lacking both in the law and outside). Any method which, like Boatright's, emphasizes what analysis in terms of conflict of interest has in common with earlier analyses is bound to obscure what makes conflict of interest interesting. Whatever explains Boatright's interpretation of his three cases, the fact remains that they are not clear counter-examples to my analysis. Their status is at best ambiguous (and, at worst, favorable to my analysis *rather than* to his). An analysis capable of so misleading its chief proponent would seem quite unreliable. That itself is one reason to reject it. There is another. Though Boatright offers the three

"counter-examples" in defense of his agency analysis, part of their force derives from the existence of his analysis as an alternative to mine. If, as I shall now argue, that analysis is controversial for at least one reason quite independent of the business usage on which his three counter-examples rely, we will have one more reason to reject the analysis).

Boatright ostensibly built his analysis of conflict of interest on the legal concept of agency (or, as he says, "the agency relation"). The term "agent," though in common speech more or less equivalent to "representative" or even "active party," has a much narrower meaning in law. The legal relation of agency has two poles: a principal who consents to another acting in his behalf and subject to his control;<sup>26</sup> and the agent, who must act in the principal's behalf and subject to his control.<sup>26</sup> What distinguishes an agent from others who act for another is that an agent is subject to the *will* of the principal, with respect to physical conduct if the agent is a "servant" (such as an ordinary employee), or with respect to abstract powers if the agent is a "nonservant agent" (such as a manager or attorney). Guardians, executors, receivers, and other "fiduciaries" who act for others but not under their control, are *not* agents.<sup>27</sup>

Boatright knows that the agency relation is not co-extensive with all relations in which one person acts for another. So, for example, he explicitly notes that a "public servant" (for example, a governor, senator, or judge) is not, as such, an agent (whether of the government, the people, or the state).<sup>28</sup> What Boatright does not say is that at least one important business relation, that between stockholders and directors, is also not an agency relation. A board of directors, while obliged to act for the benefit of stockholders (within certain limits), is not subject to the stockholder's control (as the corporate officers *are* subject to the board's control).<sup>29</sup> Like public officials, directors are "representatives" rather than "agents."

Any analysis of conflict of interest in business which must, on principle, exclude from its purview corporate directors, both severally and as a body, seems to me to stand condemned. If, in addition, it has a rival (like my analysis) which suffers neither from that disability nor from any other nearly so serious, what appeal can it have?

How could Boatright respond? Perhaps he would respond by dropping "agent" and adopting the more general "fiduciary." Indeed, there are at least two independent reasons to expect that response. One is that Boatright describes Luebke's approach as "similar" to his own when, if his analysis really depended on agency, it would be quite different.<sup>30</sup> The other reason to expect Boatright to fall back on the fiduciary relation is that he in fact offers the following as "a preliminary definition:"

[a "conflict of interest" exists in any situation in which] a personal interest interferes with a person's acting so as to promote the interest of another *when the person has an obligation to act in that other person's interest.*<sup>31</sup>

The italics are Boatright's. They mark off a clause which, for lawyers, identifies the person in question as—by definition—a fiduciary, whether or not he is an agent.

Should I then join Luebke—and Boatright—in thinking of conflict of interest as a violation of the fiduciary relation? I think not. Unlike the agency relation, the fiduciary relation is not so much a category as a catch basin. Vermin multiply beneath the murky water. So, for example, Luebke's definition of "fiduciary" is even broader than Boatright's "preliminary definition." For Luebke, a fiduciary is "any party [to a voluntary relationship] in whom trust or reliance is reposed for the purpose of advising, aiding, acting on behalf of, or protecting the interests of another party."<sup>32</sup>

Joining Luebke in talking of "fiduciary relation" (in something like this sense) has the advantage of assuring that all conflict of interest situations in my sense would be properly pigeon-holed. But the cost would be high, blurring the concept so much that we might have to count as conflict of interest many situations more helpfully described in other terms.<sup>33</sup> Much better, it seems, would be to drop the term "fiduciary" altogether and offer in its place a more precise analysis. That is just what I did. My analysis identifies the crucial relation as one in which one party is to exercise judgment in the other's service. This is certainly more precise than Luebke's "fiduciary." Of course, even precision can be bought at the cost of usefulness. But, as I hope I have sufficiently shown already, that is not so here.

At this point Luebke would be justified in asking how my analysis could pick out fiduciary relations when it does not mention trust?<sup>34</sup> My answer is: "Easily." There are more ways to get trust into a relationship than by mention—for example, by inference, either direct or aided by additional facts or principles. Here I need only point out that, if I invite you to believe that I am both competent and ready to exercise my judgment in your behalf, I have given you reason (pretty good reason, all else equal) to trust me (or, at least, to rely on me) to exercise my judgment in your behalf within the range of my competence, a trust which (being justified by that invitation) must (all else equal) impose on me a moral obligation to remain trustworthy as long as I do not withdraw the invitation and you continue to trust in it.<sup>35</sup>

"Okay," Luebke might respond, "I will concede that, after all, trust is implicit in your analysis of conflict of interest in the way you just indicated. I still do not understand why you want to limit talk of conflict of interest to situations in which the fiduciary is exercising judgment. Why not include, as well, other forms of action, such as advising, aiding, acting on behalf of, or protecting another?"

My answer is that, where judgment is not at issue, advising, aiding, acting on behalf of, or protecting do not seem to involve conflicts of interest in any interesting sense. If Luebke, Boatright, or anyone else thinks otherwise, let them produce a case. I am willing to change my mind. But, as I have tried to show here, Luebke and Boatright have yet to meet that challenge. I see no reason to give up a useful analysis until they, or someone else, does meet the challenge.<sup>36</sup>

Here Boatright might respond that he has indeed met the challenge, if not in the examples already discussed, then in one drawn from legal ethics. Conflicts of interest can, he notes, "occur even after a person is no longer in a role that calls for judgment on behalf of another."<sup>37</sup> So, for example, Rule 1.9 ("Conflict of Interest: Former Client") of the American Bar Association's *Model Rules of Professional Conduct* forbids a lawyer who formerly represented person A (a) to represent B in the same or substantially related matter if B's interests are materially adverse to A's (and A has not consented) and (b) to use information derived from the representation to A's disadvantage (when A has not consented to such a use). Any analysis which, like mine, makes judgment in the service of another a necessary condition for

having a conflict of interest must, he concludes, fail when confronted with cases in which there is conflict of interest concerning A's affairs but no judgment to exercise in A's service.

Boatright guesses that my response to this challenge would be that the lawyer nonetheless has a conflict of interest because A is still depending on the lawyer to exercise judgment in A's behalf in the use of confidential information left behind by their former relationship. This response would, he thinks, "[distort] the concept of judgment exercised in the service of another in a way that makes it dangerously vague and inclusive."<sup>38</sup> I agree.

Fortunately, Boatright has not guessed my response correctly. The lawyer's problem arises, it seems to me, because she has an obligation of confidentiality to A, an obligation which (though within A's power to waive) is not a mere creature of their relationship. She has the obligation because she is a lawyer. She can violate it (and Rule 1.9) without any conflict of interest in my sense or Boatright's, for example, by publishing the information after A's death to take revenge on his family. But she can also violate the obligation (and Rule 1.9) in ways involving a conflict of interest. Boatright has put such a case.

The problem for the lawyer in Boatright's example is not a threat to her ability to use her best judgment in A's service (since, by hypothesis, she is no longer in A's service); the problem is a threat to her ability to serve B properly while not violating (or appearing to violate) her obligation not to use confidential information gained from A against him (without his consent). On any question of judgment where B's interests are adverse to A's and A's confidences are relevant, she cannot know what she would have decided had she been ignorant of them. If she bends over backward not to use A's confidences against him, she fails to serve B as well as she would have had she never had A as a client (or as well as other lawyers might); if she does not bend over backward, she may impermissibly violate A's confidence. She has a classic conflict of interest.<sup>39</sup>

So, I have no reason to distort the concept of judgment-in-the-service-of-another to get this example in the right pigeon-hole. The conflict of interest exists because the lawyer in question cannot serve her new client as she should, not because her judgment in a former client's service is threatened.

Here, then, is another would-be counter-example that in fact fails to counter my analysis. It is also, I believe, another example in which my way of analyzing seems to bring out important factors Boatright's does not.

"But," Luebke might break in here, "your distinction between acts involving judgment and those that do not make no sense. There is no way to use it in practice. It's just your way of doing what I tried to do by distinguishing between objective and subjective interests, an attempt to save your analysis from a horde of counter-examples. So, any analysis which, like yours, relies on the concept of judgment must be rejected for just that reason."<sup>40</sup>

What is the objection here? It cannot be that a wily philosopher could come up with an example in which an act would neither clearly involve judgment nor clearly not involve it. Such an example would show only that the boundary between acts involving judgment and those not involving it is fuzzy (in other words, that some cases are open to dispute), a truth as easy to prove as it is uninteresting. Most distinctions of theory, especially those that are useful in practice, are somewhat fuzzy. Why should "judgment" be any different? The important question, the one about which Luebke is silent, is whether any alternative to my analysis is less fuzzy (without giving up something more important).

So, Luebke's objection cannot be of this theoretical sort. But it also cannot be practical. We have worked with the distinction throughout this paper without difficulty (or, at least, without any difficulty with the concept of judgment itself). That is some evidence for its practicality. There is more. For example, the distinction is an ancient workhorse of the law. Even *The Restatement of Agency* expressly distinguishes "acts . . . which involve discretion or the agent's special skill" from "mechanical and ministerial acts."<sup>41</sup> I think it evident that, for most practical purposes, we have little trouble deciding whether an activity does or does require judgment.

What then could be Luebke's objection? I have no idea.<sup>42</sup>

#### IV. Conclusion

I have so far emphasized my disagreements with Luebke and Boatright, explaining these disagreements as the result of various errors in method (for example, uncritical acceptance of ordinary usage of one sort or another). While those disagreements are important, they should not be allowed to overshadow how much we agree. We agree in rejecting analyses which attempt to understand conflict of interest as consisting merely of conflict of roles.<sup>43</sup> We agree too in rejecting attempts to understand conflict of interest as consisting merely of conflict between one interest and another, that is, of mere conflicting interests.<sup>44</sup> We even agree in trying to analyze conflict of interest as a sub-class of morally significant violations of justified expectations of another's service in one's behalf. Compared to all this, our disagreements are small. That our disagreements are so small testifies to the decade's progress in understanding conflict of interest.

#### Notes

1. Michael Davis, "Conflict of Interest," *Business and Professional Ethics Journal* 1 (Summer 1982): 17-27; hereafter cited as "Conflict."
  2. Since 1982, the American Bar Association's *Model Rules of Professional Conduct* has largely replaced the short-lived *Model Code of Professional Responsibility*, changing somewhat the state of legal ethics. Unlike the *Code*, the *Rules* are designed primarily for use in disciplinary hearings and other judicial proceedings. Its language is, accordingly, much more like other legal documents. Concerns about "independent judgment" are confined to its commentary. This change, though understandable, has made the *Rules* less helpful for teaching professional ethics (and reduced somewhat the value for business and
- I should like to thank John Boatright for his extensive—and helpful—comments on the first draft of this paper, and Neil Luebke, Tom Carson, and Vivian Weil for more general discussions of the issues considered here. I hope none of them will be too unhappy with the result.

3. "Conflict," p. 21. But note the fuller statement, p. 24.
4. Note, for example, Tom L. Beauchamp, "Ethical Issues in Funding and Monitoring University Research," *Business and Professional Ethics Journal* 11 (Spring-Summer 1991): 5-16, especially pp. 9-11, where he presents my analysis (more or less), apparently without feeling the need to give any reference or defense.
5. Another sign of its success is that the article has been reprinted in two important anthologies: *Ethical Theory and Business*, 3rd., edited by Tom L. Beauchamp and Norman E. Bowie (Prentice-Hall: Englewood Cliffs, NJ, 1988), pp. 482-487 (abridged and revised); and *Ethical Issues in Engineering*, edited by Deborah Johnson (Prentice-Hall: Englewood Cliffs, NJ, 1991), pp. 317-326.
6. Neil R. Luebke, "Conflict of Interest as a Moral Category," *Business and Professional Ethics Journal* 6 (Spring 1987): 66-81; John R. Boatright, "Conflict of Interest: An Agency Analysis," in *Ethics and Agency Theory: An Introduction*, edited by Norman E. Bowie and R. Edward Freeman (Oxford University Press: New York, 1992), pp. 187-203.
7. Luebke, 67.
8. Luebke, 67-68.
9. Luebke, 74.
10. Luebke, 74.
11. Boatright makes the same point, p. 192.
12. Luebke, 72.
13. Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* (West Publishing Co.: St. Paul, Minn., 1972), pp. 393-394.
14. See, for example, Judith Lichtenberg, "Truth, Neutrality, and Conflict of Interest," *Business and Professional Ethics Journal* 9 (Spring-Summer 1990): 65-78, p. 69: "the most fundamental sources of conflicts of interest [are] personal relationships, which can exert a powerful pull at odds with professional duty." From her perspective, the objective categories of the courts seem mere stand-ins for subjective interests. The subjective interests, not the objective, explain why, for example, kinship to one with adverse interests can threaten a fiduciary relationship.

15. Boatright, 187-188. While Boatright does *claim* this, his examples include a sufficient number of professionals—lawyers, journalists, and so on—that it is probably fair to conclude that he in fact believes his analysis to include most of professional ethics too. That is just as well. Practicing professionals, even when not corporate executives, are often in business, both in the sense of earning their living by sale of services and in the sense of being part of business organizations. Indeed, it is hard to imagine a substantial business without such professionals as engineers, lawyers, and accountants. The failure of ordinary business ethics to integrate (or even discuss) professional ethics is, I think, something of a scandal.

16. American Law Institute, *Restatement of the Law, Second: Agency 2d* (American Law Institute Publishers: St Paul, Minn., 1958), pp. 201-202. Note that the *Restatement* never uses the term "conflict of interest" and only rarely uses "conflict of interests."

17. Boatright, 195-196. Though TR is probably using Xerox manuals and tools without permission, we must ignore that consideration now. Such unauthorized use would constitute misuse of information or position, wrongdoing belonging to B or C below. Here the only issue is using skills, learned from an employer, in a way harming the employer.

18. Like me, Boatright clearly distinguishes conflicting interests (and competing interests) from conflict of interest. Boatright, 189-191.

19. Compare *Restatement*, 204-205, and also 217: "an agent employed to gather information for the use of the principal is under a duty to report to the principal or to use for his benefit any information relevant to the subject matter of the agency which he acquires."

20. Boatright, 197.

21. Note, for example, Boatright's observation that "a salesman who pads his expense account puts his own interests above his obligation to the firm without being in a conflict of interest situation." Boatright, 191. Compare Luebke, 77: "to sell a trade secret simply to make some under-the-table money" is a moral wrong and an instance of the vice of greed, but it is not a moral-category [conflict of interest].

But, in Luebke's case, the reason for saying Winans does not have a conflict of interest is that the interest in question (an interest in money) is subjective (rather than not special). For someone who thinks that

even such obvious interests produce conflicts of interest, see Thomas L. Carson, "Conflicts of Interest," *Journal of Business Ethics*, forthcoming.

22. Interestingly, Xerox may be entitled to the wife's profits from any resulting sales. *Restatement*, 204-205. The legal theory here would be "unjust enrichment" (restitution).

23. This is, of course, not the only way in which the supervisor's judgment could be compromised. We must also ask what reason we have to believe that he will be able to treat subordinates who take his advice (making his wife richer and happier) the same as those who do not. Note, again, how a conflict-of-interest analysis (in my sense) supplements traditional agency analysis rather than simply duplicating it.

24. Boatright, 187.

25. Boatright in fact says that Luebke's article "was published after completion of my paper, so that I was unable to take advantage of its many insights." Boatright, 203 n. 13. For those wondering why Boatright (1992) would not have seen an article apparently published in 1987, I should note that the journal in question was then several years behind schedule.

26. *Restatement*, 7.

27. *Restatement*, 60-61.

28. Boatright, 187-188.

29. *Restatement*, 61: "The directors of a corporation for profit are fiduciaries having power to affect its relations, but they are not agents of the shareholders since they have no duty to respond to the will of the shareholders as to the details of management."

30. Boatright, 204 n. 13.

31. Boatright, 191. Boatright's "personal interest" is, I believe, equivalent to my "special interest."

32. Luebke, 68-69. The legal definition is at least as murky as Luebke's version. Consider just one of the definitions of "fiduciary relation" in *Black's Law Dictionary* (West Publishing Co.: St Paul, Minn., 1968): "An expression including both technical fiduciary relations and those informal relations which exist whenever one man trusts or relies upon another." (*Black's*, 753.) This murkiness is, I think, caused by the absence of any general theory of what the obligations of a fiduciary are and of why they have them. The absence of such a

unifying theory no doubt explains why there is no *Restatement of Fiduciary Law* comparable to the *Restatement of Agency* (though there is a *Restatement of Trusts*).

33. Luebke succeeds in avoiding many obvious counter-examples by his (poorly motivated) restriction of "interest" to "objective interest."

34. Luebke, 73-75. Boatright seems to have a similar concern that my definition of "conflict of interest" contains no explicit reference to "obligation" (by which he seems to mean "moral obligation") but instead to "requiring" and "proper" (by which I mean only a standard of evaluation connected with the role, the morality of which needs further argument). Compare Boatright, 199-200.

35. Here, perhaps, is the place to respond to Luebke's claim that my analysis "[lacks] any basis for condemnation of giving the appearance of a [conflict of interest]." Luebke, 72. The basis is ordinary morality (just as it is for Luebke). Here is how I explained it (in 1988): "What is wrong with merely appearing to have a conflict of interest is what is wrong with merely appearing to engage in any form of wrongdoing. It has the same effect 'real' wrongdoing has, once discovered, justifying precautions costing time, money, the ability to maintain relationships of trust, or the like. The only difference in this respect between real conflicts of interest and merely apparent ones is that the precautions adopted because of an apparent conflict are in fact unnecessary." Beauchamp and Bowie, 485.

36. Some readers may know that I once offered an analysis of conflict of interest in which I included the parenthetical "(or to perform some other service for him or her)" after my usual "requiring you to exercise judgment on behalf of another person." Paula Wells, Hardy Jones, and Michael Davis, *Conflicts of Interest in Engineering* (Kendall/Hunt: Dubuque, Iowa, 1986), p. 19. Here then may be the place to say that the parenthetical testifies to my editors' (understandable) wish to avoid a controversial claim in a textbook rather than to any wavering in my views.

37. Boatright, 198.
38. Boatright, 199.

39. Because Rule 1.9 seems designed to avoid this sort of threat to judgment (even though it picks up other breaches of loyalty too), it may—on my analysis—properly be labeled as a rule against conflict of

interest, though (on both Boatright's analysis and mine), a fuller title would be better, one indicating that the rule forbids more than conflicts of interest involving former clients.

40. Luebke, 73. Compare Boatright, 199.

41. *Restatement*, 198-200. There is also the mathematician's distinction between decisions for which there is an algorithm (where a computer can do the work) and those for which there is none (where a computer cannot).

42. Luebke also claims that I confuse "reliability" (or "trustworthiness") with "correctness." Luebke, 74. I don't think I do, though I do think the relation between correctness and (rational) trust is close. For example, who would trust a lawyer to write a will if he was known to get things wrong far more often than he got them right (and better lawyers were available)? Conflict of interest would not be an interesting concept did it not pick out a specific (and not otherwise clearly distinguished) way in which competent judgment could be made more likely to err. Conflict of interest endangers correctness (without guaranteeing incorrectness), endangering it in a way justifying distrust even of a well-meaning and competent fiduciary.

43. See references to "Margolis." Luebke, 72; Boatright, 190.
44. Luebke, 75-76; Boatright, 189-190.