



# CONFLICT OF INTEREST

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- I. What Is Conflict of Interest?
  - II. What Is Wrong with Conflict of Interest?
  - III. Strategies for Dealing with Conflict of Interest
  - IV. Appearances, Loyalties, Gifts, and Bribes
  - V. History of Conflict of Interest
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## GLOSSARY

- adverse interest** A private interest giving one a reason to act contrary to one's duty as agent or trustee; not necessary for a conflict of interest.
- agent** A person authorized by another person, the principal, to act in the principal's behalf and continuously subject to the principal's control.
- apparent conflict of interest** A situation in which a person does not have the conflict of interest in question but someone else would be justified in concluding that the person does.
- bias** A deflection of judgment in a determinate direction.
- conflicting interests** Same as conflict of interests; not necessarily a conflict of interest.
- conflict of commitments** A situation in which a person has at least two commitments and fulfilling one will make fulfilling the rest impractical; not necessarily a conflict of interest.
- conflict of interests** A situation in which two or more interests conflict, whether within one person or between persons; not necessarily a conflict of interest.
- conflict of roles** A situation in which satisfying the

demands of one role precludes satisfying the demands of another role that one also occupies; not necessarily a conflict of interest.

**disloyalty** The fact of acting contrary to one's duty as agent or trustee.

**fiduciary** A person having a duty to act in another's behalf. Both agents and trustees are fiduciaries.

**trustee** A person having a duty to act in another's behalf, especially with respect to property, but not subject to that other's control. Trustees are fiduciaries but not agents.

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**CONFLICT OF INTEREST** is a situation in which some interest of a person has a tendency to interfere with the proper exercise of his judgment in another's behalf. Although often financial or familial, the interest creating a conflict of interest can be friendship, enmity, or anything else having a tendency to bias judgment (without rendering it incompetent). However, mere bias or prejudice does not entail a conflict of interest. Conflict of interest is also distinguishable from conflict of commitments, conflict of roles, partiality, loss of independence or objectivity, and disloyalty. What is wrong with a conflict of interest is that it renders one's judgment less reliable than normal. Conflict of interest creates an usual risk of error. Depending on how it is handled, the conflict may also constitute negligence or betrayal of trust. Some conflicts of interest should be avoided; some, escaped; some, disclosed and managed. The term

"conflict of interest" (as used here) seems to be a recent coinage.

## I. WHAT IS CONFLICT OF INTEREST?

A conflict of interest is a situation in which some person *P* (whether an individual or corporate body) has a conflict of interest. *P* has a conflict of interest if and only if (1) *P* is in a relationship with another requiring *P* to exercise judgment in the other's behalf and (2) *P* has a (special) interest tending to interfere with the proper exercise of judgment in that relationship. The crucial terms in this definition are "relationship," "judgment," "interest," and "proper exercise."

### A. Relationship

Relationship (as used here) is quite general, including any connection between *P* and another person (or persons) justifying that other's reliance on *P* for a certain purpose. A relationship may be quite formal (as is that between a United States Senator and her constituency) or quite informal (as is that between friends). A relationship can last a long time (as familial relationships generally do) or only a minute (as when one directs a stranger to a distant address). The relationship required must, however, be fiduciary, that is, involve one person trusting (or, at least, being entitled to trust) another to do something for her—exercise judgment in her service.

### B. Judgment

Judgment (as used here) is the ability to make certain kinds of decision correctly more often than would a simple clerk with a book of rules and all, and only, the same information. Insofar as decisions do not require judgment, they are "routine," "mechanical," or "ministerial"; they have (something like) an algorithm. The decision-maker contributes nothing special. Any difference between her decision and that of someone equally well trained would mean that (at least) one of them had erred (something easily shown by examining what they did). Ordinary math problems are routine in this way.

Where judgment is required, the decision is no longer routine. Judgment brings knowledge, skill, and insight to bear in unpredictable ways. Where judgment is necessary, different decision-makers, however skilled, may disagree without either being clearly wrong. Over time, we should be able to tell that some decision-makers are better than others (indeed, that some are incompetent), but we will not, decision by decision, be able to explain differences in outcome merely by error—or even be able

to establish decisively that one decision-maker's judgment is better than another's.

Anyone sufficiently adept in the exercise of judgment of a certain kind is competent in the corresponding field. Each profession is defined in part by a distinct kind of judgment. Accountants are especially adept at evaluating procedures for reporting finances; civil engineers, especially adept at predicting the likely serviceability of physical structures; teachers, especially adept at judging academic progress; and so on.

Judgment is not only an attribute of professions. Any agent, trustee, or other fiduciary may exercise judgment. One may even exercise judgment in a relationship as mundane as watching a neighbor's children while he answers the phone. But not every relationship, not even every relationship of trust or responsibility, requires judgment. I may, for example, be asked to hold a great sum of money in my safe until the owner returns. I have a great trust. I am a fiduciary upon whom the owner may be relying for her future happiness. But I need not exercise judgment to do what I should. My duties are entirely routine (however much the money tempts me). I need only put the money in the safe and leave it there until the owner returns and asks for it.

### C. Interest

An interest is any influence, loyalty, concern, emotion, or other feature of a situation tending to make *P*'s judgment (in that situation) less reliable than it would normally be (without rendering *P* incompetent). Financial interests and family connections are the most common interests discussed in this context, but love, prior statements, gratitude, and other "subjective" tugs on judgment can also be interests (in this sense). So, for example, a judge has an interest in a case if one of the parties is a friend or an enemy, just as he would if the party were his spouse or a company in which he owned a large share. Friendship or enmity can threaten judgment as easily as can financial or family entanglements.

### D. Proper Exercise

What constitutes proper exercise of judgment is generally a question of social fact including what people ordinarily expect, what *P* or the group *P* belongs to invites others to expect, and what various laws, professional codes, or other regulations require. Because what constitutes proper exercise of judgment is a social fact, it may change over time and, at any time, may have a disputed boundary. For example, physicians in the United States today (probably) are expected to give substantial weight to considerations of cost when decid-

ing what to prescribe, something not within the proper exercise of their judgment in 1960.

What is proper exercise of judgment also varies from one profession to another. For example, a lawyer who resolves every reasonable doubt in favor of an employer when presenting the employer's case in court exercises her professional judgment properly; an industrial chemist who does the same when presenting research at a conference does not. Chemists are supposed to serve their employer by serving the truth (not, like lawyers, to serve the truth by serving their employer).

What is proper exercise of judgment may also vary from one employer to another. For example, one company may leave its employees free to choose their flight even though the company is paying for it; another may require employees to choose the least expensive flight consistent with arriving on time. Because employees are agents having a general duty not to waste their employer's resources, and because choosing among flights generally involves judgment, the employees of the second company will have less room for conflict of interest than employees of the first. They will have less room for conflict of interest because their employer has restricted the domain of proper judgment more than the first did.

## II. WHAT IS WRONG WITH CONFLICT OF INTEREST?

A conflict of interest is like dirt in a sensitive gauge. All gauges contain some dirt, the omnipresent particles that float in the air. Such dirt, being omnipresent, will be taken into account in the gauge's design. Such dirt does not affect the gauge's reliability. But dirt that is not omnipresent, the unusual bit of grease or sand, can affect reliability, the ability of this gauge to do what gauges of its kind should (and generally do) do. Such "special" dirt might, for example, cause the gauge to stick unpredictably. Insofar as dirt affects a gauge's reliability, it corresponds to the interests that create conflicts of interest. So, a conflict of interest can be objectionable for at least one of three reasons:

First, *P* may be negligent in not responding to the conflict of interest. We expect those who undertake to act in another's behalf to know the limits of their judgment when the limits are obvious. Conflicts of interest are obvious; one cannot have an interest without knowing it, although one can easily misjudge how much it might affect one's judgment. Indeed, people with a conflict of interest often esteem too highly their own reliability (much as might a dirty gauge used to check

itself). Insofar as *P* is unaware of her conflict of interest, she has failed to exercise reasonable care in acting in another's behalf. Insofar as she has failed to exercise reasonable care, she is negligent. Insofar as she is negligent, her conduct is morally objectionable.

Second, if those justifiably relying on *P* for a certain judgment do not know of *P*'s conflict of interest but *P* knows (or should know) that they do not, *P* is allowing them to believe that she is more reliable than she is. She is, in effect, deceiving them. Insofar as she is deceiving them, she is betraying their (properly placed) trust. Insofar as she betrays their trust, her conduct is morally objectionable.

Third, even if *P* informs those justifiably relying on her that she has a conflict of interest, her judgment will be less reliable than it ordinarily is. She will still be less competent than usual—and perhaps appear less competent than members of her profession, occupation, or avocation should be. Conflict of interest can remain a technical problem even after it has ceased to be a moral problem. Even as a technical problem, conflict of interest can harm the reputation of the profession, occupation, avocation, or individual in question.

### A. Not Bias

Conflict of interest is not mere bias. *Bias* (in a person) is a deflection of judgment in a certain direction. Bias, whether conscious or unconscious, is relatively easy to correct for. For example: If a gauge has a bias, we need only add or subtract a set amount to compensate. The gauge is otherwise still reliable. If a person is biased, we can simply discount for the bias ("take it with a grain of salt," as we say).

Conflict of interest is not bias but a *tendency* toward bias. Correcting for a tendency is much harder than correcting for a bias. Consider our gauge again: Because of the special dirt in it, it has a tendency to stick. How do we correct for that tendency? Do we accept the first reading, strike the gauge once and then accept the new reading, strike it several times before accepting a reading, average all the readings, or what? How are we to know when we have what we would have had were the gauge as reliable as it should be?

### B. Not Conflict of Commitments or Conflict of Roles

A conflict of interest is not a conflict within one's commitments or between one's roles but between some (special) interest and the proper exercise of competent judgment in accordance with some commitment or role.

So, for example, I do not have a conflict of interest just because (in a fit of absentmindedness) I promised to give a talk today after promising to attend my son's soccer game scheduled for the same time. That conflict of commitments or roles does not threaten my judgment (although I must decide between them).

I would, however, have a conflict of interest if I had to referee at my son's soccer game. I would find it harder than a stranger to judge accurately when my son had committed a foul. (After all, part of being a good father is having a *tendency* to favor one's own child.) I honestly do not know whether I would be harder on him than an impartial referee would be, easier, or just the same. What I do know is that, like the dirty gauge, I could not be as reliable as a "clean gauge" would be.

The same would be true even if I refereed for a game in which my son did not play but I had a strong dislike for several players on one team. Would I call more fouls against that team, fewer (because I was "bending over backward to be fair"), or the same as a similarly qualified referee who did not share my dislike? Again, I do not know. What I do know is that an interest, my dislike of those players, is sufficient to make me less reliable in the role of referee than I would otherwise be. Conflict of interest does not require a clash of roles; one role (referee) and one interest (a dislike of some players) is enough for a conflict of interest.

### C. Impartiality, Independence, and Objectivity

We often describe an inability to judge as someone less involved would as a loss of "impartiality," "independence," or "objectivity." Such descriptions often pick out a conflict of interest, but just as often they do not. One can, for example, fail to be impartial, independent, or objective because one is biased or under another's control.

## III. STRATEGIES FOR DEALING WITH CONFLICT OF INTEREST

Virtually all professional codes, and many corporate codes of ethics as well, provide some guidance on how to deal with conflicts of interest. Unfortunately, many say no more than "avoid all conflicts of interest." Such a flat prohibition probably rests on at least one of two mistakes.

One mistake is assuming that conflicts of interest can always be avoided. Some certainly can. For example,

a public prosecutor might, upon taking office, put his assets in a blind trust. He would then not know what special effect his official decisions would have on his finances. His "objective interest" could not affect his judgment. He would have avoided all conflicts of interest arising from his investments. He cannot, however, avoid all conflicts of interest in that way. He cannot put all his interests, including his family and friendships, into a blind trust. The prosecutor may not, for example, be able to avoid having a case in which a member of his family is the defendant's attorney, a witness, or even the defendant.

The other mistake upon which a flat prohibition of conflicts of interest may rest is the assumption that having a conflict of interest is always wrong. Having a conflict of interest is not like stealing money or taking a bribe. One can have a conflict of interest without doing anything wrong. To have a conflict of interest is to have a moral problem. What will be morally right or wrong, or at least morally good or bad, is how one resolves that problem. There are two approaches to the problem (apart from trying to avoid those conflicts that should be avoided).

### A. Escape

One approach to the problem posed by a conflict of interest is *escape*. One way to escape a conflict of interest is to redefine the underlying relationship. So, for example, a prosecutor foreseeing certain conflicts of interest might "recuse" himself, that is, establish procedures so that all litigation involving his assets, family, and the like that pass through his office bypass him. Another way to escape a conflict of interest is to divest oneself of the interest creating the conflict. If, for example, the conflict is created by ownership of stock in a certain corporation, one can sell the stock before making any official decision affecting it (and have nothing to do with the stock for a decent interval thereafter).

Escape can be costly. So—to continue our example—recusing gives up the public advantage of having the prosecutor contribute to certain official decisions. The prosecutor will not even hear of matters he would ordinarily decide. Divesting avoids that cost, but perhaps only by imposing a substantial personal loss (because, say, the prosecutor would have to sell a stock when its price was depressed). If the prosecutor cannot afford divestment, and recusal is impractical, he may have to choose a third way of escape, withdrawal from the underlying relationship: he may have to resign his office.

## B. Disclosure

The other approach to resolving the moral problem posed by a conflict of interest is to *disclose* the conflict to those relying on one's judgment. Disclosure, if sufficiently complete (and understood), prevents deception. Often disclosure also allows those relying on one to adjust their reliance accordingly (for example, by seeking a "second opinion") or by redefining the relationship (for example, by requiring recusal for a certain range of decisions). But, unlike escape, disclosure as such does not end the conflict of interest; it merely avoids negligence and betrayal of trust.

Procedures for disclosure can be quite elaborate. For example, the city of Chicago now requires every employee of the executive branch with significant responsibilities to fill out annually a two-page form disclosing close relatives, business partners, and sources of outside income. The forms are open to public inspection.

Disclosure may itself generate problems of privacy and confidentiality. For example, if a condition of holding a certain public office is that the official list everyone with whom she has a business relation, she may have to provide significant information about people who, having nothing to do with government, thought they could avoid having their business relations put into a public record.

## C. The Best Approach

What should be done about a conflict of interest depends on all the circumstances, including the relative importance of the decision in question, the alternatives available, the wishes of the principal, client, employer, or the like, the law, and any relevant code of ethics, professional or institutional. Some conflicts should be avoided; others escaped; and others disclosed.

Generally, conflicts of interest are easier to tolerate when they are "potential" rather than "actual." A conflict of interest is *potential* if and only if *P* has a conflict of interest with respect to a certain judgment but is not yet in a situation where he must make that judgment. Potential conflicts of interest, like time bombs, may or may not go off. A conflict of interest is *actual* if and only if *P* has a conflict of interest with respect to a certain judgment and is in a situation where he must make that judgment.

In a friendly divorce, for example, the parties may prefer a less-expensive proceeding in which they share a lawyer to a more-expensive one in which each party

has its own. The lawyer who undertakes to represent both parties in such a divorce can, of course, foresee that a dispute about the house, car, savings account, or dog may turn ugly. From the beginning, the lawyer would be risking a moment when trying to put her professional judgment at the disposal of one party while trying to do the same for the other would affect the judgment in ways hard to predict. She would, that is, have a potential conflict of interest as soon as she agreed to represent both parties. But, while the divorce remained friendly, she would have no actual conflict of interest.

The lawyer should, of course, be sure that the parties understand the risks, as well as the benefits, of sharing a lawyer before she agrees to such an arrangement. Among the risks is her precipitous withdrawal from the proceeding should the divorce turn ugly. She would have to withdraw if the divorce turned ugly because an actual conflict of interest would make it impossible for her to serve her clients as her profession wants lawyers to serve clients. The profession's code takes precedence over the clients' wishes.

## IV. APPEARANCES, LOYALTIES, GIFTS, AND BRIBES

### A. The Appearance of Conflict of Interest

Many potential or actual conflicts of interests are, out of politeness or timidity, misdescribed as "apparent conflicts of interest" or "merely apparent conflicts of interest." The term "apparent conflict of interest" should not be wasted in this way. A conflict of interest is (merely) *apparent* if and only if *P* does not have the conflict of interest (actual or potential), but someone other than *P* would be justified in concluding (however tentatively) that *P* does. Apparent conflicts of interest (strictly so called) are no more conflicts of interest than counterfeit money is money.

An apparent conflict of interest is nonetheless objectionable—for the same reason that any merely apparent wrongdoing is objectionable. It misleads people about their security, inviting unnecessary anxiety and precaution. Apparent conflicts should be resolved as soon as possible. An apparent conflict of interest is resolved by making available enough information to show that there is no actual or potential conflict. One might, for example, answer a charge of financial interest by showing that one does not own the property in question. Where one cannot make such a showing, the conflict of interest is actual or potential, *not* (merely) apparent.

## B. Disloyalty

Disloyalty is neither necessary nor sufficient for conflict of interest. Disloyalty and conflict of interest are only loosely connected.

You can, of course, be loyal and have a conflict of interest. A loyal agent who cannot reasonably avoid or escape a conflict of interest respecting some affair on which her judgment is to be deployed would disclose the conflict to her principal. Having fully disclosed it and received the principal's informed consent to continue as before, she may continue, even though her judgment remains less reliable than it would otherwise be. There is no disloyalty in that; yet, the conflict of interest remains.

One can also be disloyal without having a conflict of interest. For example: If, being too greedy, you embezzle money from your employer, you are disloyal. You consciously fail to act as a faithful agent of your employer. Although your greed is certainly an interest conflicting with your employer's interests, conflict of interest does not explain why you took the money or what was wrong with taking it. You did not need to exercise judgment on your employer's behalf to know that you should not embezzle your employer's money. There is a conflict of interests here, that is, a conflict between one of your interests and one of your employer's, but no conflict of interest.

## C. Gifts and Bribes

Gifts are an important subject in any discussion of conflict of interest. Gifts are a way of recognizing and reinforcing friendship. Because gifts have this function, they can also establish bonds of interest where none should exist, for example, between a judge and a litigant or between a company's head of purchasing and the company's most ambitious supplier. For that reason, many governments, businesses, and other institutions have policies limiting business gifts to mere tokens. Some forbid such gifts altogether.

A "gift" *demanded* is a bribe (or "grease payment"), not a gift (strictly speaking). Bribes as such do not create a conflict of interest. A *bribe* is a payment (or promise of payment) in return for doing (or promising to do) something one should not do (or, at least, should not do for that reason). Where bribes affect judgment (as they often do), they affect it in a definite way, that is, in the direction promised. Affecting judgment in a definite direction creates a bias, not a conflict of interest.

Bribe offers, however, often do create a conflict of interest. I may, for example, be so enraged by your

offering me a bribe that I can no longer reliably judge your skill.

## V. HISTORY OF CONFLICT OF INTEREST

Too frequently, discussions of conflict of interest begin with the biblical quotation, "Can a man have two masters? Can a man serve both God and Mammon?" This is the wrong way to begin. The reason one cannot have two masters is that a master is someone to whom one owes complete loyalty, and complete loyalty to one excludes any loyalty to another. Having only one master is a strategy for avoiding all conflict of interest, but a strategy making the concept of conflict of interest uninteresting. We must worry about conflict of interest only when having two or more masters—or, to say it without paradox, having none—is normal. Conflict of interest is an interesting concept only where loyalties are regularly and legitimately divided.

Beginning a discussion of conflict of interest with that biblical quotation makes conflict of interest seem an idea as old as the bible. In fact, the term—and, apparently, the idea—are barely half a century old. The first court case to use the term in something like our sense was decided in 1949 (*In re Equitable Office Bldg. Corp.*, D.C.N.Y., 83 F. Supp. 531). The *Index of Legal Periodicals* had no heading for "conflict of interest" until 1967; *Black's Law Dictionary* had none until 1979. No ordinary dictionary of English seems to have had an entry for "conflict of interest" before 1971. The first philosophical discussions of the term also date from about that time.

"Conflict of interest" seems to have begun as a mere synonym for "conflicting interests." This older term designated a clash between a *public* interest (say, impartiality in a receiver or trustee) and some *private* "beneficial" or "pecuniary" interest (say, a receiver's hope of buying property at a bankruptcy sale he administers). The private interest was often said to be "adverse" (that is, opposed) to the public interest. Only in the late 1960s did lawyers begin explicitly to connect the term "conflict of interest" with judgment.

The term "conflict of interest" began to appear in codes of ethics in the 1970s. Today the term is so common that we would find it hard to do without it. Yet, if "conflict of interest," both the term and the concept, are as new as they seem to be, we are bound to ask, "Why now?" So far, we have no authoritative answer. The history of "conflict of interest" has yet to be written.

## Also See the Following Articles

BUSINESS ETHICS, OVERVIEW • CORPORATIONS, ETHICS  
IN • LEGAL ETHICS, OVERVIEW

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