

Report of APC on Conflicts of Interest in Faculty-Authored Course Materials
April 3, 2008

REPORT of the ACADEMIC POLICY COUNCIL
to the UNIVERSITY of FLORIDA FACULTY SENATE
on CONFLICTS OF INTEREST in the ASSIGNMENT OF COURSE MATERIAL
DATED April 3, 2008

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REPORT

I. Charge to the Council:

On May 25, 2007, the Academic Policy Council (APC or Council) was charged by the Chair of the Faculty Senate with:

1. Reviewing the UF Conflict of Interest policy (see Appendix B) in regard to the assignment of faculty-authored¹ course materials, and
2. offering recommendations on how the current policy should be updated to address electronic course materials and electronic publishing.

In doing so, we were to seek input and assistance from faculty, the Provost's Office, the General Counsel's Office, student government, the UF Libraries, and the Office of Academic Technology. We were also to review how other institutions across the country address this situation and what the most appropriate practices would be for UF. We were asked to consider availability of free materials and how students opting to use those free materials could participate fully in all course opportunities (including extra credit). We were also to address specifically policies for handling royalty income that faculty authors may generate for materials used at UF, while assuring that faculty retain their right under academic freedom to select the instructional materials they will use in their courses (see Charge in Appendix A).

II. Proceedings of the Council:

The Council held monthly meetings to discuss the issue. It reviewed the policies at other AAU institutions (see Appendix G) and the guidelines provided by the University Counsel's office on Conflicts of Interest (see Appendix C). The Council also met with many colleagues and reviewed memoranda submitted by the following:

- Bob Jerry, Dean of the College of Law (see Appendix D)
- Martin McMahon, Professor of Law (see Appendix E)
- Paul Ciesielski, Associate Professor of Geology (see Appendix F)

We met with Dean Russell and other members of the Library faculty about the issues of access. A small subset of the Council initially met with Interim Associate Provost Angel Kwolek-Folland and Jamie Lewis Keith and Barbara Wingo of the General Counsel's office to draft a preliminary report for the Council's consideration. The Council also considered the position being taken by the United Faculty of Florida in its collective bargaining negotiations currently underway (see Appendix H and Appendix I).

In drafting its final recommendation, the Council was guided by two important considerations:

1. A commitment to affirm and respect the integrity and professionalism of the faculty and its academic freedom, and

¹ Although we use the term "faculty-authored" course material, we recognize that the University Regulation uses the term employee in its conflict of interest policy. We intend by the use of the term faculty to include any employee engaged in teaching, such as graduate students, instructors, administrators, or other employees having a non-faculty title.

2. A desire to not overreact to unsubstantiated rumors of abuses or craft a new policy that imposes unfair burdens on faculty because of perceived problems with a small minority of classes.

The Council also considered at length three different options. One was to adopt a policy like that in the University of California system that would declare there was no conflict inherent in the assignment of course materials for which a faculty member had a financial incentive and therefore no disclosure requirement. This was deemed problematic for a number of reasons, not least of which was Florida state law that requires disclosure in situations like those considered here. The second was to continue with our current policy, which prohibits receiving royalties for materials developed solely for use at UF, but allows, with disclosure, receipt of royalties for assignment of course materials when those materials are published by a national publisher. This latter caveat is an unwritten rule of thumb that provides very little guidance in the current market. The third, as detailed below, was to continue the current policy that faculty may not benefit from course materials developed solely for use at UF, but to create a clear bright line rule for which royalties may be appropriately received with no real questions asked (when 50% of the royalties come from non-UF sources). Disclosure and decanal or chair approval is all that is required in this second category. The Council then recommends that for faculty whose course materials fall between the two bright-line rules (solely UF and 50% outside UF), royalties may be received with appropriate disclosure and approval but more oversight is offered at this level.

Additionally, the Council recognized that its discussion of royalties and financial interests was often tied to ancillary issues around bundling of exams and syllabi with course materials, new electronic delivery formats, unique problems with large classes and web-based teaching methods, and other factors that dovetailed with some of the issues raised with conflicts of interest. Thus, the Council makes a few recommendations in regard to these matters.

Finally, the Council felt that it was important that faculty be brought into the process for evaluating whether course materials were assigned for academic or financial reasons and for assisting administrators with guidelines for interpreting appropriate levels of outside activities by UF faculty that might create conflicts of interest. To that end the Council recommends the creation of a faculty/student/administration committee to provide guidance on these matters when requested by faculty or administrators.

As a final note, the current disclosure form is being changed by the General Counsel's office and the Provost's office to allow for better classification and more accurate disclosure of outside activities.

III. Council's Recommendation

The Council hereby recommends the following policies for adoption by the Faculty Senate.

In choosing any course materials, whether the employee has a financial interest in their assignment or not, the Council recommends that the Senate:

- **Reiterate that the University is committed to academic freedom in the choice of course materials as reflected in our current policy.**

- **Recommend that faculty consider price and availability in relation to reasonable access for students in financial need in choosing or making available course materials.**

Where an faculty member has a financial interest in the choice of particular course materials, the Council recommends that the University:

- **Continue to require that financial interests of a faculty member² in assigned course materials be disclosed to the chair/dean/director for their approval as per our current policy. This would be done on an updated and clarified disclosure form that is being developed independently by the General Counsel's office in consultation with the Provost.**
- **Require that all disclosure of financial interests in assigned course materials be reported to the provost's office and, in cases as provided below, approved by the provost.**
- **Require that faculty with financial interests in assigned course materials disclose that interest to students in standard language on the course syllabus, which language is to be set forth in the revised regulation.**
- **Create a faculty/student/administration advisory board to offer advice and guidance to the chair/dean/director/provost when requested on a particular case. The board will advise on the existence of, and ways to resolve, such conflicts. The board will be advisory. Disagreements about applications of the policies, or particular grievances will proceed through the appropriate grievance procedure. Decisions regarding the implementation of the conflict of interest policy shall rest solely with the provost.**

With regard to course materials authored by University faculty, or materials in which the faculty member has a financial interest, the Council suggests creating three categories with different rules for each:

1. **Faculty whose materials are developed solely for courses at UF and are not adopted at any other institution may not receive financial remuneration for those materials.**
2. **Faculty whose materials generate royalties, a majority of which comes from outside UF, shall disclose that financial interest to, and obtain prior approval by, their chair/dean/director and shall disclose their interest to the students in standard language provided in the regulation. Where jointly authored materials are involved, this rule will apply when a majority of royalties come from outside UF and all other institutions with which any of the authors have their primary academic appointment.**

² Consistent with the current policy, we recognize that conflicts of interest may arise when the faculty member's relatives or perhaps even close friends benefit from the assignment of particular course materials. For purposes of this report we simply refer to the faculty member or employee, but it should be understood to include relatives or others consistent with the rest of our regulations.

- 3. Faculty who are developing materials for a wider audience, but do not meet the criteria of number 2 above, may receive financial remuneration only upon disclosure to students and disclosure and prior approval by their chair/dean/director and approval by the provost. They must show a reasonable likelihood of success in achieving a wider audience in the foreseeable future (no more than two years). For the provost's consideration, evidence should be provided regarding the likelihood of reaching the targeted "50% outside UF" threshold, and evidence like the following could be helpful:**
 - **Evidence that the material has been reviewed by academic peers and determined to be satisfactory in both academic quality and fairness of price, taking into account other available material, and**
 - **Proof that the employee has no financial interest in the publishing company (a letter from the publisher can serve to meet this requirement).**

In dealing with some of the special problems associated with electronic delivery of course materials:

- **The APC recommends that where syllabi, exams, quizzes, required or extra credit assignments, and other general course information and evaluative materials are included or bundled into electronic or printed formats that are purchased by students, these general informative and evaluative components must be made available free of charge to students, in the same format as that provided at cost.**
- **We also recommend that syllabi be provided free of charge to all students and potential students with an accurate description of the course materials required for the course as well as details about exams and other assignments, how grades will be assigned, and any attendance policy.**

Respectfully submitted this 3rd day of April, 2008

APPENDIX A
CHARGE TO THE COMMITTEE

Date: May 25, 2007

Memo to: Carol Murphy, Chair, Senate Policy Council on Academic Policy

From: Rick Yost, Chair, Faculty Senate

Re: Request to Review and Provide Advice Regarding Faculty-authored Course Materials

Over the course of the last year, your Council has identified a review of the University of Florida's longstanding conflict of interest policy concerning faculty-authored course materials as one of its priorities for the coming year.

I charge your Council to continue to review this policy, and to report at the next Faculty Senate meeting, on August 23. In reviewing this policy, I would ask that your Council invite input and assistance from other faculty, either as contributors to the Council, or through the formation of an ad hoc committee or task force, as appropriate. I also request that you solicit input from others around campus, including representatives of the Provost's Office, the General Counsel's Office, student government, the UF Libraries, and the Office of Academic Technology.

In your deliberations, I would ask that you review how other institutions across the country address this situation and what the most appropriate practices would be for UF. I also solicit your recommendations on how the current policy should be updated to address electronic course materials and electronic publishing.

While your Council is undertaking this review, I have asked that the Provost, Deans, and Chairs support your efforts by ensuring that the current policy is implemented as carefully as possible. Deans and Chairs have been asked to forward a description of best practices to the Provost's Office to be shared with the Council in its deliberations.

Some issues that your Council should include in your review are procedures to verify that (1) faculty-authored course materials are made available to students in adequate quantities for free in the library, via the internet, or through other convenient means, and (2) that students who choose to use the free materials will be able to participate fully in all course opportunities (including extra credit). You should also address specifically rules for handling royalty income that faculty authors may generate for materials used at UF, while assuring that faculty retain their right under academic freedom to select the instructional materials they will use in their courses.

I appreciate your willingness to address this important issue. Please keep me informed of what support you need to fulfill this charge. The Senate will await your report.

APPENDIX B
CURRENT RULES on the SELECTION and USE of INSTRUCTIONAL
MATERIALS in which the EMPLOYEE has a FINANCIAL INTEREST

RULES OF
UNIVERSITY OF FLORIDA

6C1-1.011 University of Florida; Disclosure and Regulation of Outside Activities and Financial Interests.

(1) General Requirements.

(a) The faculty and staff members of the University of Florida must be committed to the University's goals of teaching, research, and service and recognize that their primary professional responsibility is to the University. Employees of the University may also engage in outside employment, consulting, and other similar activities. These activities may further the dissemination and use of the knowledge and expertise developed at the University and may also advance the professional competence and reputation of the faculty and staff members. Thus, participation in outside activities often serves the mission of the University in addition to benefiting individual employees. Such activities and the financial interests of faculty and staff members are, however, of concern to the University if they result in conflicts with the employees' duties and responsibilities to the institution. It is the policy of the University that faculty and staff members may participate in outside activities and hold financial interests as long as the activities and interests do not conflict with their duties and responsibilities.

(b) All University employees, which includes Academic Personnel (AP), Technical, Executive, Administrative, and Managerial Support (TEAMS) employees, University Support Personnel System (USPS) employees, and Other Personnel Services (OPS) employees, are responsible for the full and faithful performance of their professional or institutional responsibilities and obligations.

(c) All University employees are bound to observe, in all official acts, the highest standards of ethics consistent with the code of ethics of the State of Florida (Chapter 112, Part III, Florida Statutes), the advisory opinions rendered with respect thereto, and the rules of the University of Florida.

(d) No employee shall solicit or accept anything of value that is based upon an understanding that the official action or judgment of the employee would be influenced thereby.

(e) No employee shall have an employment or contractual relationship or engage in a business or personal activity that will create a continuing or frequently recurring conflict between that employee's private interest and the performance of the employee's official duties.

(f) An employee engaging in an outside activity must take reasonable precautions to ensure that the outside employer or other recipient of services understands that the employee is engaging in such outside activity as a private citizen and not as an employee, agent, or spokesperson of the University.

(2) Definitions.

(a) "Outside activity" shall mean any private practice, private consulting, employment, teaching, research, business (including managerial interests or positions), or other activity, compensated or uncompensated, which is not part of the employee's assigned duties and for which the University provides no compensation.

(b) "Conflict of interest," shall mean:

1. any conflict between the private interests of the employee and the public interests of the University of Florida or the State of Florida, including conflicts of interest specified under Florida Statutes; or

2. any outside activity or financial interest which interferes with the full and faithful performance of the employee's professional or institutional responsibilities or obligations.

(3) Activities and Financial Interests To Be Reported.

(a) The following outside activities and financial interests must be reported prior to engaging in the activity:

1. Outside activities in which there is more than an incidental use of University facilities, equipment, and/or services.

2. Outside activities in which a University student or other University employee is directly or indirectly supervised by the employee if the employee in any way supervises or evaluates the student or other employee at the University.

3. Management, employment, consulting, and other contractual activities with, or ownership interest in, a business entity or state agency which does business with the University. In the case of material financial and managerial interests, the information required extends to the spouse and/or children of the employee, and for managerial interests, to relatives.

a. Material financial interest is defined as direct or indirect ownership of more than five (5) percent of the total assets or capital stock of the business entity.

b. Managerial interest includes serving as an officer, director, partner, proprietor, etc. of the business entity.

c. If the business entity or state agency with which the employee has a contractual relationship or in which the employee, the employee's spouse and/or children have an ownership interest wishes to enter into a licensing or research agreement with the University, an exemption allowing such an agreement may be approved by the President or the President's designee and the Chair of the Board of Trustees. Application for this exemption is made through the Office of Research and Graduate Programs.

d. If the employee is disclosing a material financial interest or managerial interest, the employee, if involved in the procurement process, is responsible for ensuring that written authorization by the President or designee is attached to each applicable requisition to purchase.

4. Management, employment, consulting, and other contractual activities with, or ownership interest in, a business entity which competes with the University.

5. Candidacy for or holding a public office.

6. Required use of books, supplies, or other instructional resources at the University of Florida when they are created or published by the employee or by an entity in which the employee has a financial interest.

7. Professional compensated activities, including but not limited to honoraria in excess of travel expenses, teaching at another institution, and employment as an expert witness.

8. Business activities, including service on the board of directors or other management interests or position, with regard to a business entity in the same discipline or field in which the faculty or staff member is employed.

9. Any employment, contractual relationship, or financial interests, including intellectual property rights, of the employee which may create a continuing or recurring conflict between the employee's interests and the performance of the employee's public responsibilities and obligations, including time commitments. This includes any outside activity in which the employee is required to waive rights to intellectual property.

(b) Any employee submitting a federal grant or contract proposal or conducting research or educational activities pursuant to a federal grant or contract must adhere to the applicable requirements of the funding agency, including those involving the disclosure and regulation of outside activities and financial interests. Therefore, any employee submitting a grant or contract proposal to the Public Health Service or the National Science Foundation or conducting research or educational activities pursuant to such a grant or contract as an investigator must report outside activities and financial interests (including activities and interests of the investigator's spouse and/or dependent children) that would reasonably appear to be affected by the proposed or funded research or educational activities, including interests in entities that would be so affected. An

“investigator” is defined as the principal investigator, co-principal investigator, or any other employee responsible for the design, conduct, or reporting of the proposed or funded research or educational activities. The initial report must be made at the time the proposal is submitted.

(c) Outside activities which the employee should conclude may create an actual or apparent conflict of interest, including conflict of time commitments, which are otherwise not required to be reported under paragraph (3)(a) or paragraph 3(b) of this rule must be reported as soon as practicable.

(d) The selection and use of instructional materials in which the employee has a financial interest are subject to the following guidelines.

1. Employees who are instructors are responsible for the assignment of instructional materials, such as textbooks and other academic materials, for use by their students. The selection of these materials must be made for academic reasons and not based on financial gains for the individual employee or the University.

2. An employee may not receive personal remuneration for materials created or developed exclusively for use in University of Florida courses or other University instructional activities. Examples of such materials are class notes, annotated syllabi, and course packs.

3. If an employee may financially benefit from the sale of instructional materials not created or developed exclusively for use in the employee’s classroom, the employee’s other instructional activities, or other University of Florida instructional activities, the materials are to be assigned only under the following conditions:

a. The department chair and dean or director have approved such an arrangement on the University’s Disclosure of Outside Activities and Financial Interests (form OAA-GA-L-267/rev. 04/02), submitted by the employee who may benefit financially, and

b. Sufficient numbers of copies of the instructional materials are placed on reserve in the University Libraries for use by students in the course or other instructional activity.

4. Works of a University employee may be owned by the University or by the individual. The classroom use of instructional materials owned by the University of Florida may financially benefit the employee, department, college, and the University. In such cases, in addition to the above constraints, the unit administration is advised to take any additional steps necessary to ensure that the selection and use of these materials are based on appropriate academic grounds.

(e) The reporting requirements of this rule shall apply to full-time and part-time employees. Unless otherwise required under federal grant regulations, the reporting requirements shall not apply to activities performed wholly during an interval of the year in which the employee is assigned no professional or institutional responsibilities and obligations by the University.

(4) Disclosure and Approval Procedures for all University employees.

(a) The University's form OAA-GA-L-267/Rev. 04/02 entitled, "Disclosure of Outside Activities and Financial Interests " shall be filed with the President or designee, who shall normally be a dean, director, or vice president. The form (OAA-GA-L-267/rev. 04/02), which is incorporated by reference, may be obtained in the college or unit administrative offices. The form must be completed and filed at the beginning of the contractual year of employment, prior to such time as the outside activity or financial interest begins, or at such time as disclosure is required under applicable federal grant requirements. If a material change in the information presented occurs during the contractual year, a new form must be submitted. The following information is required as to each outside activity or financial interest reported:

1. Name of employing entity, person, client or other recipient of services, or name of entity in which the financial interest is held, and nature of its business. In the

case of service as an expert witness or representation of a party in a lawsuit, the party represented or employing the expert must be identified along with all other parties involved in the matter.

2. Source of compensation, including client fees.
3. Involvement of students and other employees in the activity, employing entity, or entity in which the financial interest is held.
4. Nature or type of activity or financial interest (description of equity interest or intellectual property), including time spent if an activity is involved (estimated hours per week including travel).
5. Location and anticipated dates of activity.
6. Any conditions of the activity which involve waiving or impairing the employee's or University's right to intellectual property.
7. Use of University equipment, facilities, or services in connection with the activity.
8. Number of outside activities and financial interests filed for the current contractual year.
9. Prior approval of the activity or financial interest in the previous contractual year, if applicable.
 - (b) If there are any questions regarding a potential conflict of interest, the employee should discuss the activity or financial interest with his/her chairperson or immediate supervisor.
 - (c) In the event the proposed outside activity or financial interest is deemed by the immediate supervisor or chairperson to represent a potential conflict of interest the matter shall be discussed with the Dean or Director, as the Presidential designee.
 - (d) If the Dean or Director finds that the proposed outside activity or financial interest is a conflict of interest, the employee shall be notified promptly of the decision that he or she may not engage in the proposed activity while employed at the University

or of the conditions under which the outside activity or financial interest may be permitted.

(e) Authorization for an outside activity or financial interests is granted for a specific period of time, not to exceed one year ending June 30th. If the outside activity is to extend beyond June 30th, a new Disclosure of Outside Activities and Financial Interests must be submitted prior to July 1 of each year for the new fiscal-year period. If the outside activity or financial interest is permitted with conditions, the employee is required to adhere to the conditions during the period that the activity or financial interest is authorized.

(f) Academic Personnel and exempt TEAMS employees are required to indicate on the annual employment contract or notice of appointment whether they are involved in outside activities or have financial interests required to be reported under this rule. USPS and non-exempt TEAMS employees are required to indicate on their annual Performance Evaluation form whether they are involved in outside activities or have a financial interest required to be reported under this rule. OPS employees shall follow the reporting procedure as outlined in this rule. If the answer is affirmative, the employee may attach the Disclosure of Outside Activities and Financial Interests to the contract, notice of appointment, or performance appraisal form or submit the report(s) through the appropriate administrative channels.

(5) Disclosure and Approval Procedures for Additional University Employment and Employment by a State Agency. Any employee who wishes to engage in outside employment by an agency of the State of Florida or another state university must submit a Request for Approval of Additional University Employment and State of Florida Employment (form HR-600-10/02), which is incorporated by reference, to the appropriate administrative officials and obtain approval prior to engaging in such activity. A copy of this form may be obtained in the college or unit administrative offices. No “Disclosure of Outside Activities and Financial Interests” need be filed for the activity as

the completion of the “Request for Approval of Additional University Employment and State of Florida Employment” form fulfills the employee’s obligation to report. The same procedure is used for those employees who are employed in excess of one full-time equivalent position at the University or who receive compensation as a University employee simultaneously from any appropriation other than appropriations for salaries. An exception to this procedure is employment by the University Press of Florida (UPF). Approval of UPF employment is granted by the President or designee, and such approval, which is submitted by the UPF to the Office of the Provost, fulfills the employee’s obligation to report the activity.

(6) Procedure for Requesting Use of University Resources. If an employee has the University's approval to engage in outside activity, the employee may request approval for the use of University equipment, facilities, or services in connection with the outside activity. The University must approve the use in advance. The employee must request such approval by completing and submitting the University's form OAA-GA-L-268/10-2002 entitled Request to Use University Equipment, Facilities, and Services in Conjunction with Non-University Outside Activity, which is incorporated by reference, and may be obtained in the college or unit administrative offices. The forms should be attached to the Disclosure of Outside Activities and Financial Interests . The use of any of these resources will be allowed only on a non-interference basis, and there may be a charge for such use.

Specific Authority 1001.74(4) FS.

Law Implemented 112.313, 112.3185, 1001.74(6), (19), 1001.75(3) FS.

History--New 5-28-80, Formerly 6C1-7.391, Amended 3-6-85, Formerly 6C1-1.11, Amended 3-2-87, 5-21-89, 7-11-94, 4-30-95, 12-12-95, 6-28-98, 6-21-00, 5-22-01, 1-7-03, 7-5-04.

APPENDIX C
**Overview of Requirements concerning Instructional Materials in which an
Instructor and/or the University have a Financial Interest**

A. Conflict of Interest Principles and Law

1) What is a “conflict of interest”?

A “conflict of interest” occurs in any situation in which a person serves or represents two distinct entities (or persons) with differing interests or any situation in which a person must choose between two conflicting interests. A “conflict of interest” in the traditional sense does not encompass only those situations in which a person has actually neglected or breached his or her duty to one entity to the benefit of another entity, nor only to those situations in which a person has used his or her position with one entity to advance personal gain or the gain of another entity. It does involve choosing between two differing interests.

It should be noted that conflicts of interest are not necessarily “bad.” Conflicts of interest confront most people at various times because most people have personal, business, or professional loyalties that may be in conflict. Some conflicts, however, present such a potential for the breach of one’s duty to a particular employer, person, or entity that they must either be prohibited altogether or permitted with conditions, including review and oversight by other institutional representatives.

2) A conflict of interest is defined in University of Florida Reg. 1.011(2)(b) and the Collective Bargaining Agreement, Article 19, as:

- (a) any conflict between the private interests of the employee and the public interests of the university, the Board of Governors, or the State of Florida, including conflicts of interest specified under Florida Statutes; or
- (b) any activity which interferes with the full performance of the employee’s professional or institutional responsibilities or obligations.

3) Section 112.313(7), Fla. Stat., provides that a state employee may not have an employment or contractual relationship “that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.”

4) The potential conflict of interest presented by the assignment of materials in which the faculty member has a financial interest is that between a private interest (financial return from the sale of the materials) and the public interest of the university (provision of appropriate educational materials to students). Assigning to students in the faculty member’s classroom materials in which the faculty member has a financial interest

may also interfere with the full performance of the faculty member's professional and institutional responsibilities.

B. Specific Provisions:

- 1) *Disclosure:* The "required use of books, supplies, or other instructional resources at the University of Florida when they are created or published by the employee or by an entity in which the employee has a financial interest" must be reported prior to such required use. Reg. 1.011(3)(a)6. This reporting requirement is reiterated in the instructions for the "Disclosure of Outside Activities and Financial Interest Form" (item 1f). The disclosure should be made under items 2(a), (b), and (c) of the form.
- 2) *If an instructor has a financial interest:*
 - a) "The selection of these materials must be made for academic reasons and not based on financial gains for the individual instructor or the University." Reg. 1.011((3)(d)1.
 - b) Instructor may receive no personal remuneration "for materials created or developed exclusively for use in the instructor's classroom or other instructional activities."
 - c) Instructor may benefit financially from the sale of instructional materials not created or developed exclusively for use in the instructor's classroom or other instructional activities, under the following conditions:
 - i. The department chair and dean must approve the arrangement on the Outside Activities and Financial Interests form, and
 - ii. "Sufficient numbers of copies of the instructional materials are placed on reserve in the University Libraries for use by students in the course or other instructional activity." Reg. 1.001(3)(d)3.
- 3) *If the University (department, college, etc.) has a financial interest:*
 - a) "The selection of these materials must be made for academic reasons and not based on financial gains for the individual instructor or the University." Reg. 1.011(3)(d)1. The "unit administration is advised to take any additional steps necessary to ensure that the selection and use of these materials are based on appropriate academic grounds." Reg. 1.011(3)(d)4.
 - b) The department chair and dean or director must approve the arrangement.

- c) Sufficient numbers of copies of the instructional materials must be placed on reserve in the University Libraries for use by students in the course.

APPENDIX D
Memo from Dean Robert Jerry, College of Law



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To: Professor Carol Murphy
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Professor Rick Yost
Chair, Faculty Senate

Cc: Janie Fouke, Provost
Angel Kwolek-Folland, Associate Provost

From: Bob Jerry
Dean, Levin College of Law

Re: *University Policy on Faculty-Authored Course Materials*¹

Date: September 4, 2007

The Levin College of Law is, of course, fully implementing the instructions in Dr. Fouke's May 31, 2007 memorandum titled "Faculty Authored Course Materials." In working with our faculty to ensure compliance with UF Rule 6C1-1.011(3)(d), I have come to the conclusion that this policy should be revised.²

I. The Current Regulation

UF Rule 6C1-1.011(3)(d) provides:

(d) The selection and use of instructional materials in which the employee has a financial interest are subject to the following guidelines.

1. Employees who are instructors are responsible for the assignment of instructional materials, such as textbooks and other academic materials, for use by their students. The selection of these materials must be made for academic reasons and not based on financial gains for the individual employee or the University.

2. An employee may not receive personal remuneration for materials created or developed exclusively for use in University of Florida courses or other University instructional activities. Examples of such materials are class notes, annotated syllabi, and course packs.

¹ This is a revised, updated version of my August 20, 2007 memo on this topic.

² This memorandum speaks only for me. I have not vetted these ideas with any faculty committee or with the faculty of the college as a whole.

The Foundation for The Gator Nation

An Equal Opportunity Institution

3. If an employee may financially benefit from the sale of instructional materials not created or developed exclusively for use in the employee's classroom, the employee's other instructional activities, or other University of Florida instructional activities, the materials are to be assigned only under the following conditions:
 - a. The department chair and dean or director have approved such an arrangement on the University's Disclosure of Outside Activities and Financial Interests (form OAA-GA-L-267/rev. 04/02), submitted by the employee who may benefit financially, and
 - b. Sufficient numbers of copies of the instructional materials are placed on reserve in the University Libraries for use by students in the course or other instructional activity.

The essence of the regulation is set forth in subsection (d)(1), which makes clear that the assignment of faculty-authored materials must be for "academic reasons" and not for personal or institutional financial gain. The core idea is that when a faculty member has an interest that is potentially in conflict with the faculty member's duties to the institution, the faculty member may not follow a course that compromises his or her fulfillment of institutional obligations. The impropriety to be avoided involves the faculty member selecting and assigning course materials because of financial considerations rather than the best interests of the students. Yet whenever two interests are "potentially" conflicting, it does not necessarily follow that the interests are "actually" in conflict. Thus, with respect to faculty-authored materials, it may be that a particular assignment of a faculty-authored text is, in fact, based on academic reasons and furthers the best interests of the students' course of study, notwithstanding the fact that the faculty member receives collateral financial benefit.

Thus, under the foregoing construct, the impropriety is not the receipt of royalties that occurs when a faculty member assigns his or her own textbook to his or her own students. Rather, the impropriety involves a faculty member sacrificing academic considerations and the welfare of his or her students for his or her own (or the institution's) financial gain. If those ultimately accountable for the academic enterprise are satisfied that the academic interests of students have not been compromised by the assignment and that the assignment of faculty-authored materials has occurred for sound academic reasons, no impropriety has occurred, and no further regulatory action or response is needed.

This, however, is not how the UF regulation is structured. Subsection (d)(2), which applies to materials prepared by a faculty member exclusively for use in his or her UF course, states that the faculty member may not receive *any* financial remuneration. In my view, this is a reasonable regulatory policy. Subsection (d)(2)

articulates a bright-line rule for a particular category of materials appropriately to be considered part of the instructor's duty, for which the faculty member is already being compensated, in delivering the course.

The difficulty arises in subsection (d)(3), which involves the situation where faculty members assign materials not created exclusively for use in UF courses or instructional activities. Preparing nationally marketed materials is not a part of a faculty member's routine instructional duties and is not a part of the assignment to teach the course for which the faculty member is directly compensated. Examples in the law school involve several members of the law faculty, including me, who are authors of casebooks (the most common kind of teaching material used in law schools), treatises, and other teaching materials published by well-known national and international companies. These books are marketed nationally and in some cases internationally. Under subsection (d)(3), such materials may be assigned to a faculty member's own students only if (a) the requisite approvals have been obtained from the department chair and dean or director, and (b) "[s]ufficient numbers of copies of the instructional materials are placed on reserve in the University Libraries for use by students in the course or other instructional activity."

Subsection (d)(3) essentially states that the mere fact of assigning faculty-authored materials to one's own students is so likely to reflect the faculty member's sacrifice of academic considerations and the welfare of his or her students for his or her own financial economic gain that -- in addition to the requisite approvals of the department chair and dean or director -- free access to the instructional materials should be provided to students. I agree that it is appropriate for the university to confirm through review by the department chair, director, or dean whether the assignment in a course of a faculty member's own nationally marketed materials has been made for legitimate academic reasons. But once the chair, director, or dean makes that confirmation, no further regulatory action should be required, including royalty disgorgement or providing free access to students for the books in such courses.³

³ Stated otherwise, the current regulation assumes that the appropriate way to remove the risk that academic considerations will be sacrificed to a faculty member's desire for personal financial gain is to provide the students with free books or free access to books. But if the problem is the elevation of personal financial gain over sound academic reasons for the assignment, the response should be to address the royalties issue; letting students have free access to books is more than what is needed to eliminate the risk of impropriety, putting aside the reality that students have no inherent right or entitlement to obtain books for free or at a discount (or to get free access) simply because the faculty member happens to be the author. When the drafters of the regulation thought that giving students free access to books written by faculty was the right answer, they were probably thinking of courses where one reads materials before class and listens to a lecture during class -- meaning that it is not necessary to have one book on reserve for each student in a class. That, however, is not how law school classes operate, as explained more fully later in this memo.

Last but not least, it is important to recognize that the subsection (d)(3) applies only if the faculty member “may financially benefit from the sale of instructional materials” This seems to say that if there is a *potential* that a faculty member will benefit from the sale of materials, (d)(3) applies. It would seem, then, that if the faculty member has worked out an arrangement whereby he or she will not receive any remuneration, then no approval of the arrangement is required under (d)(3)(a) and the “free access” provision in (d)(3)(b) is inapplicable as well. Thus, situations where the faculty member assigns his or her own materials but receives no royalties are outside the rule. Furthermore, it would seem that a faculty member who receives royalties but gives them away (presumably to a charity or the university) has not received “financial benefit” from the assignment and therefore is not subject to the requirements in (d)(3)(a) and (d)(3)(b), although this is less clear because the faculty member arguably “benefits” before that benefit is disgorged. Although taking these situations outside the approval process and “free access” obligation seems to be the intent of the rule, greater clarity that this is the intention could be obtained through the rule’s redrafting.

II. The “Free Access” Requirement

How subsection (3)(b) is meant to be implemented is not clear from the text of the rule. The heart of the problem is that what constitutes a “sufficient number” of copies to be placed on reserve is not defined. Regardless, subsection (3)(b) does not make sense when applied to the assignment of a faculty member’s own law school casebook or similar teaching materials. I suspect that this problem is present in some other programs on the campus as well. Law school pedagogy requires students to have the assigned cases, statutes, and other materials physically present before them for review and analysis in and during the class. Much of what happens in the classroom involves close inspection and discussion of text, and it is not sufficient for a student to read a case or statute before class and then try to participate in the class without having the case or statute with the student in the classroom.

It would not be appropriate to say that such books should be on reserve so that students can photocopy the assigned pages and bring the photocopies to class. That practice would violate the publisher’s copyright, and acquiescing in violations of federal copyright law is not a tenable solution.

In addition, I would argue that prohibiting faculty from requiring students to have in their possession materials deemed by the faculty member to be necessary to and the most appropriate for the students’ classroom learning infringes upon the faculty member’s academic freedom. If that argument is correct, then requiring casebooks to be put on reserve for law courses becomes a superfluous requirement that will be costly to either the faculty member or the university, depending on who is expected to buy the books placed on reserve.

Further, as noted above, there is the uncertain question of “how many books are enough” to have on reserve. If free access to faculty-authored materials is to be *guaranteed to all students* in a law course and if the faculty member’s minimum requirement is one book per student in the classroom, it arguably follows that the text of the rule requires that one book be placed on reserve (and available for checkout) for each member of the class. In such circumstances, faculty would be unwilling to assign their own books for their courses -- which would then mean that our own internal rules have the effect of deterring faculty from assigning materials they have written. This would be ironic given that we encourage faculty to create such materials and receive national recognition for doing so and that we compensate faculty for doing such work as part of their assigned responsibilities. I do not believe extended discussion is required to refute the suggestion that a faculty member (or the university) should be required to purchase casebooks for all students in the instructor’s class so that the students will have free access to them during the course. As noted above, I also believe that such a requirement is unnecessary in the context of the problem that the regulation seeks to address: making sure that a faculty member assigns his or her own book for academic reasons, and not for personal financial gain.

III. Disgorgement of Royalties

The risk that a faculty member might compromise academic considerations when assigning his or her own materials requires some kind of regulation. Some universities follow an approach that requires royalties earned by faculty members through the assignment of materials to their own students to be assigned to the university, an entity mutually agreed upon by the university and the faculty member, a fund that benefits students, a scholarship fund, a charity, or some other entity.⁴ Some other universities require that the assignment of faculty-authored materials be approved by, for example, the department chair, dean, university president, board of regents, or other authority, with no further requirement that royalties be disgorged.⁵

In my opinion, disgorgement of royalties is not essential in order to have an adequate regulatory mechanism that responds fully to the potential conflict of interest issue presented by faculty members assigning their own materials. As discussed above, if an appropriate university official has reviewed the assignment and has made a determination that academic interests have not been compromised in the assignment of a faculty-authored text, no further regulatory response is necessary. Many universities have this rule, and I believe it is sound, even if it may be difficult to implement in some situations. It is important to recognize that in circumstances where state statutory law is broadly

⁴ Examples of universities with, or at least which have recently had, such policies include Akron, Iowa State, Iowa, Kansas, Missouri-Columbia, Penn State, and Northern Illinois.

⁵ Examples of universities with, or which have recently had, such policies include Arizona, Maryland, Minnesota, Texas, Boise State, Louisiana Tech, and Memphis. Some universities default the policy to guidelines required to be established at the college or unit level. Examples include Michigan and Ohio State.

drafted to prohibit a public employee from accepting or receiving any item of value that might influence that employee's performance of his or her job, a royalties disgorgement policy would be necessary. I am unaware of a Florida conflict of interest statute that is structured this way, but I have not undertaken research on this point sufficient to have confidence that such a statute does not exist in Florida.

In addition, it is worth noting that a disgorgement of royalties rule has significant (although not insurmountable) implementation problems. The existence of the used book market makes it difficult to know how many new books (the only books on which royalties will be paid) are purchased by students in a professor's course. One might have a rule that supports a faculty member's good faith estimate of royalties received, which estimate will not be disturbed unless clear evidence is produced that the estimate is arbitrary, capricious, and an abuse of the faculty member's discretion, but such a rule concedes that the match between profit and disgorgement will be rough at best. In addition, requiring faculty to return royalties to students (as opposed to the university or department for a use that would benefit students) presents substantial administrative problems. For example, there are myriad difficulties, including how to determine with accuracy which students have new books and which purchased used books. Because students have no inherent entitlement to purchase faculty-authored books and casebooks at discounted prices, it is reasonable to suggest, as I argue above, that a disgorgement policy is not necessary if the faculty member has sought approval of the decision to assign his or her own materials and a department chair or dean has granted it.⁶

IV. Suggestions for a Revised Regulation

To summarize, I do not believe that the substance of subsections (d)(1) or (d)(2) should be changed. It may be necessary to amplify subsection (d)(2) to address issues involving the new generation of electronic materials.

With regard to subsection (d)(3), I recommend that the university move toward a policy that allows faculty who write casebooks and other teaching materials marketed by national publishers (a category very distinct from material prepared for the particular course, such as PowerPoint slides, classroom handouts, etc.) to be excepted from the requirement that the books be placed on reserve. Under such an approach, it would be reasonable to require a college to generate a list of publishers who meet the "national" or "international" requirement; for law, this standard might include presumptively all publishers who have been exhibitors at the Associate of American Law Schools Annual

⁶ Disgorgement does remove, however, the appearance of a conflict in such circumstances. So does the university purchasing books and giving them to all students if the faculty member assigns his or her own text. The key point is that such a cure is not required in order to address the conflict. In my opinion, a less intrusive rule is adequate. For the record, my own personal, voluntary practice (which I have followed at other universities as well) has been to donate to the Levin College of Law my best estimate of royalties earned on the assignment of my own materials to my students, with the understanding or explicit direction that these donated funds will be used for the benefit of students. In the absence of a broadly worded state conflict-of-interest statute, as discussed in the text, I do not believe that this donation should be required.

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Meeting during the last two years. An alternative approach would simply authorize deans or department chairs to exempt faculty from the requirement to place books on reserve.

If the substance of the current subsection (d)(3) is left intact (an approach with which I would not agree), then I would recommend that the regulation be redrafted to clarify whether the faculty member needs to fill out a disclosure form and seek approval in circumstances where either the faculty member receives no financial remuneration or has made an arrangement to donate any royalties received so that no net financial remuneration is received (or, in the alternative, to clarify exactly what kinds of disclosures need to be made in such circumstances).

Thank you for your consideration of these ideas, and please let me know if you have any questions. I would be pleased to discuss them with you further.

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MEMORANDUM

TO: Dr. Carol Murphy, Chair, Academic Policy Council
FROM: Martin J. McMahon, Jr., Clarence J. TeSelle Professor of Law
DATE: July 10, 2007
RE: Thoughts on Textbook and Materials Adoption Conflict Rules

I have a number of thoughts regarding some of the issues with respect to the Aconflict of interest@ policy as applied to the adoption of books and / or other materials by instructors who have a financial interest in the materials that they adopt for use in their course. The first point deals with academic freedom. The second point deals with categorization of the nature of the materials and financial interest, and the need for different rules or different situations. The third point is in regard to the requirement to place copies of the materials on library reserve. The fourth point regards royalty disgorgement. With respect to this last point, I also address the tax consequences of mandatory royalty disgorgement. I finish with an observation on the law of unintended consequences.

1. ***Academic Freedom***

I understand the need for a review process to prevent instructors from Aprofiteering@ at the expense of their students. This review and approval process, however, should be limited to taking those measures necessary to assure that instructors are not making the equivalent of publisher=s profits or economic rents with respect to materials prepared principally for use in their classes at the University of Florida. However, I do not believe that the University has the power ever to Adisapprove@ the adoption by an instructor of any particular materials on any grounds. University of Florida Rule 6C1-7.018(1)(a) guarantees to the instructor the freedom to select course materials. To disapprove the use of the materials and require the use of other materials, even though the other materials are broadly identified as anything in which the instructor does not have a financial interest, would violate academic freedom. On the other hand, it would not violate academic freedom to prohibit the instructors from earning the equivalent of publisher=s profits or economic rents with respect to material prepared for use by their students at the University of Florida.

2. ***Categorization of the Nature of the Financial Interest***

The nature of the materials and the instructor=s financial interest in the sales proceeds covers a wide spectrum of situations. The rules that are appropriate for one type of publication and financial interest are not necessary appropriate, and may be inappropriate, for another type of publication and financial interest.

a. *Self-Published Materials* c At one end of the spectrum lie self-published materials designed solely for use by their own students at the University of Florida. For this purpose, Aself-published@ should refer to publication by the instructor individually, or by a related party, e.g., spouse, or a entity, e.g., a corporation, limited liability company, or partnership, in which the instructor (or the instructor=s spouse or children) have more than a *de minimis* interest. This appears to be consistent with University of Florida Rule 6C1.1-1.001(2)(b). It is not unreasonable to prohibit instructors from earning any profits with respect to this category of materials. Thus approval of use of the materials reasonably could be conditioned on the requirement that they be sold to the students at the cost of printing them. The question is more complex if the self-published materials are adopted by a an instructor other than the author. This appears to be reportable under University of Florida Rule 6C1.1-1.001(3)(a)6, but it is not readily apparent that there is necessarily a real conflict of interest in all cases.

b. *Broadly Recognized Publisher* c At the other end of the spectrum lie materials published by a broadly recognized publisher. For this purpose a broadly recognized publisher would include any nationally or internationally recognized publishing house, university press, regional publisher, or not for profit organization that meets the following requirements:

- (1) The publisher=s books or other materials are widely marketed;
- (2) The publisher=s books or materials are authored by a broad group of authors otherwise unrelated to the publisher;
- (3) The publisher has an established process for reviewing and determining whether to accept or reject for publication books or other materials submitted to it;
- (4) The publisher pays author=s royalties reasonably consistent with industry practice.

This category clearly should automatically include any publishers that exhibit at the national meeting for university faculty in any particular discipline.

Currently, adoption of such materials (among others) is always covered by University of Florida Rule 6C1.1-1.001(2)(b). I recommend that any books or materials in this category should be not be subject to any approval process, or should be approved upon nothing more than a showing that the book or materials are published by such a publisher. The instructor=s royalty interest should be irrelevant.

c. *Vanity Presses* c Vanity presses lie in the middle of the spectrum. Materials published by a vanity press in which the instructor does not have an ownership interest present more difficult problems. If a sufficient number of students at the University of Florida reasonably can be expected to purchase the materials, they very likely could be published by a vanity press even though they would not be widely marketed and likely only would be sold to University of Florida students. In this case a publication by a vanity press very closely resembles self-publication, and probably should be treated in the same manner. On the other hand, a niche book that might be adopted for use at a number of universities for small enrollment course sections very well might be rejected by broadly recognized publishers and be relegated to publication through a vanity press. If the materials are widely enough adopted, materials in this category could closely resemble publication by a broadly recognized publisher, provided that the authors financial interest is limited to an amount reasonably consistent with

industry standards for broadly recognized publishers. (The breadth of use could be based on either the number of other universities adopting the book or the sales volume at other universities, or both. For example sales at 5 or 6 other universities or sales of several hundred units at any number of other universities exceeding sales at UF might be considered to suffice.) If those conditions are met, it would be reasonable to treat these materials in the same manner as materials published by broadly recognized publishers. If, however, the author / UF instructor is earning publisher-type profits beyond a reasonable royalty, approval and conditions probably should be based on a case-by-case examination of the relevant facts.

d. *Course Packs Printed by Third party Vendors* © If there is to be complete policing of potential profiteering with respect to materials prepared for use in classes at the University of Florida, course packs printed by third party vendors also need to be subject to the rules, because there is the possibility that an instructor could receive a kick-back from the third-party vendor. To police against this abuse, every course-pack that has not been printed by the university (directly or through outsourcing over which the instructor had no influence or knowledge) and distributed by the university should be subjected to the review and approval process. At a very minimum, every instructor adopting a course-pack might be required to submit a written statement that he or she will not receive any remuneration from any person with respect to any materials sold to any University of Florida student.

3. *Copies of Materials on Library Reserve.* © As a condition of approval for the adoption by an instructor of course materials with respect to which the instructor receives a royalty, University of Florida Rule 6C1-1.011(3)(d) requires that A[s]ufficient numbers of copies of the instructional materials are placed on reserve in the University Libraries for use by students in the course or other instructional activity.© This Aone size fits all@ requirement, however, is not always practical. It should be reconsidered, and pending reconsideration, it should be waived in appropriate circumstances.

This requirement, if it makes sense at all, reasonably can be applied only to courses in which no pedagogical purpose is served by requiring students to have the course materials in class with them.¹ Thus, for example, it might be suitable for a large lecture course in which the students never are expected to refer specifically to the materials during any class session. If, however, a pedagogical purpose is served by requiring students to have the course materials in class, the requirement that copies of the instructional materials are placed on reserve in the university libraries for use by students becomes nonsensical.

In many course sections, students reasonably are and should be required to bring the text and problems to class with them in order to participate in required class discussion with reference to the detailed specifics of the course materials, particularly if the material contains matter such as excerpted primary sources, data, graphs and charts, etc., or in order to discuss detailed case study problems. In these cases, as a practical matter, every student must have his or her own course materials. In any class in which the instructional method requires constant reference to and reading of the course materials by the students during the class sessions (and probably in all instances) any prohibition of an instructor requiring all students to have a copy of the materials available for instant reference would violate academic freedom.

¹Unless all course materials are required to be on reserve in the library system, it certainly cannot be related to providing course materials for student=s too poor to afford to purchase books, and even then, the books would have to be circulating if student=s are required to bring them to class.

In these situations, the library reserve requirement is unavailing. If the materials are on reserve, students cannot check them out. Thus, if the goal of the requirement is that every student who desires to avoid purchasing the materials must be able to do so, a copy of the book for every student in the class must be required to be in the circulating collection. This is so because each check-out of a circulating book is preclusive of someone else checking out the book, and any verbatim copying of the materials by any person by any method to avoid purchasing the materials would violate the publisher's copyright. It is entirely unreasonable, however, to have a rule that requires free copies of the materials to be made available to every student, regardless of who bears the cost of providing the materials to the student, merely because the instructor chooses to use a book in which the instructor has a royalty interest rather than another book.

In any event, the University of Florida, and not the author / instructor, should bear the cost of library copies. (The publisher certainly is not going to provide free copies for this purpose.) To require author / instructors to bear the cost is in essence a penalty assessed against any instructor who adopts a book written by that instructor. Nor should the cost come out of the instructor's professional development account. Charging the instructor's professional development account shifts the cost from the instructor to the university only to the extent that the instructor (1) has a professional development account, *and* (2) fails to use the professional development account to the extent that there remains a balance that equals or exceeds the cost of the library materials. If the instructor routinely uses the full professional development account, then the instructor will either (1) cut back on other expenditures, such as research assistants, professional subscriptions, and attendance at conferences, any or all of which can have a deleterious effect on both scholarship and teaching, or (2) bear the excess costs out of the instructor's own pocket, which in effect shifts the costs of the library materials to the instructor, even if the library materials are nominally charged to the professional development account and the instructor nominally pays the other expenses. Furthermore, the application of professional development account funds for this purpose is entirely of no avail to instructors in departments that have no professional development accounts, and it is inequitable because of the differing amounts of professional developments for different instructors, whether in the same college or in different colleges and departments, some of which have meager professional development accounts relative to other departments or colleges.

4. Royalty disgorgement. I have heard it suggested that approval of instructor authored materials might be subject to royalty disgorgement requirement, even when the materials are published and marketed by a recognized publisher with a broad author base and are widely adopted outside the University of Florida. This is a particularly poor idea, both in theory and in practice.

a. *Theory* Mandatory royalty disgorgement sends a terrible message to faculty. That message is The University of Florida does not trust your integrity. The University of Florida irrebutably presumes that you have selected the textbook that you wrote in order to profiteer from the students rather than for valid pedagogical reasons.

The problem with royalty disgorgement is that it targets what is merely a *potential and largely hypothetical* conflict of interest in the selection of a textbook, while many real conflicts of interest, including conflicts of financial interest, escape unscathed because they can be easily disguised.² Most university faculty course material authors, at least

²In light of the specific reporting requirements in University of Florida Rules 6C1-1.001(3)(d), it is questionable that authoring a book or course materials in a faculty member's discipline for national distribution, whether or not royalties are earned, is an

the ones I know, write the materials because they have a vision of the best pedagogical method for teaching a course and they are seeking a national reputation, which redounds to the benefit of the University as well. They use their own course materials because they have tailored them to their vision of the optimal presentation of the substantive material. And when the materials are adopted at a number of other universities, that is evidence that the instructor / author=s perspective is accepted by other scholars and teachers in the field. When these instructor /authors adopt their own course materials, there is no real conflict of interest.

On the other hand, the selection of materials for a course by an instructor who has not authored materials frequently is influenced by a real conflict of interest. Many instructors who have not authored their own course materials select particular course materials that are inferior to many other available materials, either because the selected materials are easy to teach from, i.e., they do not challenge the students, or they are familiar with the materials, i.e., they don=t want to change their class notes, or the materials are accompanied by a good teacher=s manual, i.e., they have to spend less time figuring out how to teach the course. (I personally know many professors, mostly at other schools, who candidly confess to their peers this selection process.) All of these rationales share a common theme c they leave more time for the instructor to do things other than teach and engage in class preparation. Perhaps the other thing that the instructor does with the free time is to conduct research and produce scholarly articles. But it is also likely, more so in some departments than in others, that the instructor uses the extra time made available by adopting inferior course materials to write a book for a different market (e.g., the professional market or popular market) that will produce royalties, to consult with third parties for a fee, as is permitted under the conflict of interest rules (within limitations and with proper disclosure and consent), or in certain departments to do research that leads to a patent with respect to which the university will share royalties with the faculty member (pursuant to the university policies).

These conflict of interest possibilities in selecting teaching materials are myriad and real. And the hidden conflicts in many instances might be more insidious than the merely potential conflict of interest in the adoption for a class of materials authored by the instructor. Thus, the conflict of interest argument (including the Aavoidance of the appearance of a conflict of interest@ argument) simply facilely targets one of many potential conflicts and is a Arifle-shot= rule that discriminates among faculty members by overreaching in one context while completely ignoring both real and potential conflicts of interests in other contexts. (It is impossible to ferret out and prohibit all conflicts of interest in time and effort allocation.)

b. Practice c The practical problems in any mandatory royalty disgorgement regime are insurmountable. The only precise rule is to rebate to students who purchase new materials the amount of the instructor=s royalty. This would be an administrative nightmare. Students would have to produce receipts for the materials and proof that the materials were new, and proof that the materials were the student=s. Furthermore, the price charged to the student is not the price on which the royalty is computed; the royalty is computed on the price charged to the distributor or retailer by the publisher. Ascertaining for each student the amount of royalty collected with respect to a sales price at a different level of the distribution chain, particularly when different students have purchased materials though different distribution chains, is well nigh on to

Aoutside activity,@ as defined in University of Florida Rules 6C1-1.001(2)(a), which is subject to the reporting requirements of Rule 6C1-1.001(3) by virtue of Rule 6C1-1.001(3)(c), which deals with Aapparent conflict on interests.@

impossible, because, among other reasons, some distributors get volume discounts from publishers and others do not.

Furthermore, unless, royalty disgorgement applied to all texts authored by any University of Florida faculty member sold to any University of Florida student, even if adopted for use in a section not taught by the author / instructor ◦ a rule that would be vastly overreaching ◦ there would be endless possibilities of unjust enrichment of students and over- disgorgement by faculty. Suppose, for example, Professor A writes a text that is adopted by both Professor A and Professor B. Students in Professor A=s section are entitled to a rebate on new copies of Professor A=s text, but students in Professor B=s section are not entitled to a rebate on new copies of Professor A=s text (because Professor B is not the author and Professor A is not the instructor). If a student in Professor A=s section purchased a used book and a student in Professor B=s section purchased a new book, no disgorgement would be required. However, there would be an economic incentive for the student in Professor B=s section to provide the student in Professor A=s section with the documentation of the purchase of a new book and for the two students to share the rebate. If that occurs, Professor A has been cheated out a deserved royalty, and both students have been unjustly enriched.

Further, entirely apart from the preceding problem, royalty disgorgement by refund creates both a perverse incentive in section selection by students and a perception of disparate treatment of students, if Professor A writes a text that is adopted by both Professor A and Professor B. Students in enrolled in Professor A=s class pay a lesser price for the text than do students in Professor B=s class. That creates a financial incentive to enroll in Professor A=s section. Furthermore, I doubt that students who want to, or have to, enroll in Professor B=s section will consider the differential pricing to be fair.

Disgorgement to the department, college, or university suffers from the insurmountable administrative obstacle of the inability correctly to determine with any reasonable level of confidence the amount of royalties earned by an instructor with respect to materials sold to students in that instructor=s section. Due to the used book market, the method by which new books are distributed, and the growing market share of internet vendors ◦ no one can track where the students who purchase their books from Amazon or other online vendors are enrolled ◦ there is no way to determine indirectly how many new books were purchased by students in the author / instructor=s course section or the amount of the royalties collected. (Even in the first year of a book=s publication any royalty estimate is based on the a speculative estimate of the percentage of students who purchased a book versus shared a book with another students.) First, even the publishers do not report or keep track of the new books sold at any particular school ◦ at least the ones with which I work do not. The publisher might be able to tell you how many books it sold to Follets, for example, but it doesn=t necessarily know where Follets sold them, and the publishers have no contractual obligation to ferret out this information for an author, even if they could.

The problem is compounded in a university city like Gainesville, where there are multiple institutions. Totally apart from the problem of publishers not being able to determine accurately how many copies of new materials were sold at a particular university by a multi-university bookstore concessionaire, even if a publisher could identify the number of new materials sold in a particular city, i.e., Gainesville, which itself is highly unlikely, it still cannot provide an accurate accounting of the royalties earned with respect to sales to students enrolled at any particular institution. For example, if a book is used at both UF and Santa Fe C.C., there is no way a publisher can break down royalties on sales from bookstores in Gainesville between the two. Suppose that a basic science class is taught at both UF and Santa Fe C.C. At UF 200 students are enrolled;

at Santa Fe, 300 students are enrolled. All of the Gainesville bookstores in the aggregate sold 240 new books and 260 used books. It is completely impossible actually to know how many new books were sold to UF students and how many were sold to Santa Fe students. While in some instances it is easier than in others, for example, upper division and graduate and professional course, to identify specific materials that are sold only to UF market and not to both the UF and the Santa Fe C.C. market, the other difficulties with ascertaining royalties earned with respect to new materials sold to UF students persist. Furthermore, it would be unconscionable to apply a disgorgement rule differently depending on whether an adoption was unique to UF as opposed to being in common with an adoption at Santa Fe C.C.

These examples indicate that any royalty disgorgement would be a wild guess and would be only randomly enforceable. As a guess, it metamorphoses into a penalty. Penalizing a faculty member for adopting for classroom use a text book written by that faculty member cannot be justified on any basis. Randomly penalizing only some faculty members who do so is unconscionable.

The question of who gets the benefit of the royalty disgorgement also raises serious equity questions. If royalty disgorgement applies only royalties on texts written by a faculty member and adopted by that specific faculty member for use in that faculty member's course section, the recipient of the disgorgement, whether it be the department, college, or university, has received a windfall. The royalties attributable to a book written by an instructor who adopts that book for use in that instructor's course section are transferred from that instructor to benefit other faculty members or administrators, or some group of students, who likely have only minimal overlap with the students in the instructor's course, somewhere in department, college, or university. I can think of no coherent justification for providing this windfall gain to the department, college, or university, even if it is passed through to a student organization or otherwise applied for the benefit of some group of students. Furthermore, the opposite side of the coin of a windfall gain is a casualty loss.⁶ However, since this is not an unexpected casualty loss,⁶ but was intentionally inflicted, it metamorphoses into a penalty. As noted above, such a penalty cannot be justified.

c. *Tax Consequences of Mandatory Royalty Disgorgement.* ⁶ After adequate legal research ⁶ federal income taxation being my special area of concentration ⁶ I have specific conclusions about the tax consequences of mandatory royalty disgorgement. I have concluded that a faculty member who has received royalties with respect to a text book, and who has been required by the university to disgorge the royalties earned with respect to books sold to University of Florida students, would be required to report as gross income on the faculty member's tax return the gross royalties received from the publisher, unreduced by the amount of any disgorgement. Failure to do so might subject the faculty member to penalties. Furthermore, the faculty member would not be entitled to claim a charitable contribution deduction or as a business expense on Schedule C. The faculty member could claim the disgorgement as an itemized deduction for an unreimbursed employee business on Schedule B. As an unreimbursed employee business, the deduction is a miscellaneous itemized deduction. Miscellaneous itemized deductions (a discrete subset including very few itemized deductions) are allowed only to the extent that the total exceeds 2 percent of adjusted gross income. Thus, for example, if a faculty member had adjusted gross income of \$100,000, and disgorged royalties were the only miscellaneous itemized deduction, which is likely to be true, disgorged royalties would be deductible only if (1) the faculty member itemized deductions, which many might not, and (2) only to the extent that the amount disgorged exceeded \$2,000. For example, if that faculty member were required to disgorge \$1,999 of royalties, no deduction would be allowed. Taxes still would be due on the \$1,999 royalty in the amount of \$500, if the faculty member was married and filed a joint return (or \$560 if the faculty member were single), so the faculty

member would not only sacrifice the \$1,999 royalties on materials sold to UF students, but would be out-of-pocket an additional \$500 (or \$560). Thus, there is an enhancement to the basic penalty inflicted by the before-tax disgorgement. The tax-effect enhancement can easily be viewed as a forfeiture of \$500 (or \$560) of after-tax royalties earned on materials sold to students at other institutions, or as forfeiture of \$500 (or \$560) of after-tax salary. Furthermore, because the amount of the tax penalty enhancement is dependent on the instructor's adjusted gross income and marginal income tax bracket, any ex-ante reduction in the amount of the disgorgement to compensate for the tax penalty would be imprecise. As a result, different instructors disgorge differing percentages of their royalties attributable to self-adopted textbooks. That would be highly inequitable.

In this regard, it is also important to note that for married taxpayers filing a joint return the adjusted gross income floor is applied with respect to the joint income of the husband and wife. As a result, a relatively lower-income instructor married to a high-income spouse, might have a greater tax burden on the disgorged royalties, and thus a greater penalty, than a higher-income instructor married to a low-income spouse. This potential rank reversal is indefensible and cannot be easily cured.

5. *Law of Unintended Consequences*

Whatever is done nothing should be done that results in the University of Florida's conflict of interest policy reducing UF faculty members' incentives to produce course materials for the national market. The authors of nationally known textbooks bring great credit to and enhance the reputation of their department, college and the University. But to the extent UF faculty members view the conflict of interest policy as inflicting a penalty — an empirical question to which I have no answer at this time — economic theory teaches us that such a penalty would reduce the incentives of faculty to produce textbooks for national use, and encourage them to divert time from such scholarly activities to permissible remunerative activities, such as consulting, that do not have the same positive impact on the reputation of their department, college and university. It would be unfortunate if the University of Florida conflict of interest rules worked to discourage the authoring of textbooks by its faculty. That harms the university. This is an issue that requires further careful thought.

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APPENDIX F

Memo from Associate Professor Paul Ciesielski, College of Liberal Arts and Sciences

To: Professor Carol Murphy, Senate Police Council on Academic Policy

From: Associate Professor Paul Ciesielski

Re: University Policy on Faculty-Authored Course Materials

Date: September 11th, 2007

Summary: To ensure that academic considerations are not compromised by financial interests in the assignment of faculty-authored course materials, where a potential conflict of interest arises, University policy should require a peer review of the assigned course materials themselves rather than requiring a review of the publisher of those materials. Because of the wide variety of academic publishing arrangements in use across the University, a one-size-fits-all rule regarding publishers cannot work and, moreover, misses the point, which is to guarantee the quality of assigned course materials. Peer review of the materials themselves, on the other hand, will by nature be appropriately responsive to the special conditions of each academic field.

It was a pleasure meeting with you last week. Thank you very much for listening to my concerns regarding the Academic Policy Council's review of conflict-of-interest policies regarding faculty-authored course material at the University of Florida. As per our discussion, I believe there are a number of related issues that the Policy Council could profitably consider before making any recommendations in this matter. I look forward to a further examination of some of these issues at the September 20th meeting.

I. Assignment of Self-authored Textbooks is Not a Conflict of Interest Where the Content is Solid and the Price is Fair.

Most would argue that one's teaching content, regardless of form, should not be a conflict of interest if 1.) the content is of legitimate academic quality and 2.) the price is fair in the present market. If these two criteria are met, the adoption of one's own text for a class should not be a conflict of interest for a variety of reasons:

- a. Students understand that a university education comes with certain expected costs such as tuition, supplies, and books.
- b. The University of Florida is a top tier institution with a highly talented student body with entry qualifications well above the norm. Mass-marketed textbooks are usually written for average college students to maximize market share. In many cases self-authored texts at the University of Florida are written to provide a better or more appropriate product to the student than is currently available on the market. In other cases, texts have been authored by UF faculty to provide one where none are currently available. In the case of my text, I was motivated to write "The Age of Dinosaurs" because the only text on the market was over priced, written for the mass market, not comprehensive, and almost totally lacking in illustrations of dinosaurs (How do you instruct students about dinosaurs with fewer than 10 illustrations?).

Here are some of the advantages to students of my ebook versus the printed book I used previously:

- The prior book was entirely in black and white, had only 270 pages, and had fewer than ten photographs.
- My text offers a multimedia visual experience for the modern visually oriented student. My ebook takes the student into museums and into the field.
- My text offers a more in depth and varied treatment of the “Age of Dinosaurs” than the previous text.
- I maintain a rich individualized student-learning site to assist them in their learning experience. The site offers their grade summary, terms to know, chapter learning supplements, and an instructor-student communications center.

c. I am sure we can accept the fact that to have the author of the ideas on-site to teach is an advantage for University of Florida students. Of course, because I am the author of the text, my lectures, my assignments, and the text are well integrated.

II. Confiscation of an Author's Royalties would Discourage Publishing Textbooks.

As an ethical issue, the propriety of a college or university claiming an author's royalties goes to the heart of the academic mission. If institutions are to encourage learning, then, they must nurture and promote good teaching. Textbook authoring, by its nature, contributes to good teaching. Confiscation of an author's royalties would discourage academic publishing.

Risk taking is generally rewarded in our society. Without risk taking, entrepreneurship in business and technological innovation would die. Textbook writing can involve significant risk taking, particularly for a text in a non-traditional format, requiring extensive travel and technological support. My own text required significant expense and risk. I initially sought financial support from the University but was told I could expect no more than \$3,000 under the condition that the University would own the resulting intellectual property. This small offer would not even begin to cover the expenses associated with producing a first-rate textbook. Instead I sought a publisher with both the technological experience and financial resources to help me produce the book. The expenses of production were over \$100,000, including travel and a per diem for a film crew on five separate trips of over 15,000 miles, through 15 states, 15 museums, nine dinosaurs quarries, and many remote locations. Having assumed the risk and expense of publication, I and my publisher are now entitled to royalties for the resulting work. Outlawing such royalties will discourage professors from authoring textbooks for the market. Furthermore, if the University of Florida does attempt to outlaw royalties, this institution will be handicapped in recruiting top faculty prospects.

III. A Policy of Limiting Royalties will Prove Impossible to Implement Fairly.

Some have suggested generally limiting royalties in some manner, but such a policy would be impossible to implement fairly due to the wide variety of publishing arrangements in use here at the University of Florida.

How would one compare royalties of authors unless they are computed on the same basis?

Some committee would have to attempt to calculate royalties on the same basis for all faculty, assuming it would have access to all faculty/publisher contracts regarding advances and royalties (which seems highly unlikely). The things the committee would have to consider include:

- Is the royalty based on the invoice price?
- Is the royalty based on the wholesale price? This book price is based upon a book buyer's discount off of the cover price.
- Is the royalty based on net receipts? This method includes a less return clause.
- Does the author have a royalty escalation clause? In this case there is not single royalty but a sliding scale, which changes as the number of sales increases.
- Has the royalty been adjusted for advances, and are the advances recoupable? In such a case the author's royalty is reduced or not paid at all until the publisher recoups the advance.
- Non-recoupable advances sometimes are not deducted from future royalties. It is entirely likely that two faculty members may have the same royalty rate but one may have had twice the publisher income if he or she had a non-recoupable advance and the other did not.
- Some publishers may report royalties to a single author based on several of the above methods to conform to different contractual arrangements with different sellers.
- Shouldn't the cap on royalties vary per individual based upon their cost to develop the text?
- If the faculty's capped royalty income is less than that derived by the university through the sale of the same book at the university bookstore, shouldn't the university also cap its income?
- Shouldn't a measure of the cap of royalties also include an evaluation of the value
- derived by use of the text and course to the University? If so, I believe it often would
- be found that the University's profit greatly exceeds that of the author. Take my text and course as an example. I have created a course with a method of delivery, which has generated much greater income than is necessary to support the course. Many of the advantages of my text to the University are not available through any other text.

My text is the only text on the market that can be used as a traditional lecture course, a technology-enhanced course, or a web course. The use of my text has delivered many advantages to the Department, College and University including:

1. Fewer TAs need to teach 1100 to 1300 students a semester. In the past I have taught the course with only two TAs (0.25 or .50 FTE). I have done a survey of other large courses and find they require 6 or more TAs.

2. All testing is provided by and through the software and publisher. Each student takes 5 exams and 32 practice quizzes. Last year ~2,750 students took 101,750 exams and quizzes at no expense to the University. If these exams were printed and an average exam or quiz is 5 pages, some 500,000 pages of copies would have to be provided by the department. A \$0.03/ page the copy expenses of exams would be \$15,000.
3. The publisher provides a reliable server for examinations. This may not seem like a big deal but it is! On more than one occasion the CLAS server has gone down during my exam (most recently this summer). Try rescheduling an exam for more than 1000 students. I never have had to because my publisher ensures that the supporting server works and has back up.
4. The publisher provides a ¾ time technical support person to give technical assistance to students.
5. The publisher gives instructors an "instructors course management system" including the ability to send messages to all students.
6. The course provides 8,000 to 9,000 credit hours to the college each year. This amounts to a tuition equivalent of some 1.4 million dollars. Practically, the only expense to the University is a portion of my salary (which is a fixed cost anyway) and 2 teaching assistants. No office staff time, other department funds, copier expenses, or technical support, is necessary.
7. The University earns eleven percent of the retail price of each textbook sold through the campus bookstores. The true measure of whether a royalty is too large is the price of the book. An excessive royalty will be reflected in the book price. If there is any problem with royalties, it is that publishers often take advantage of academic authors and pay too little.

IV. Because of the Internet, Copyright Law is Evolving Rapidly in the Field of Education, and the University must Respond Appropriately to Avoid Liability.

As you are well aware, of course, federal law and the University's own policies guarantee to an author exclusive copyright to their original expressions when fixed in a tangible medium. Such copyrights regarding a particular work spring into existence at the moment of creation and do not require registration. The owner of such copyrights, therefore, automatically enjoys the exclusive right to reproduce, distribute, perform, and display the work as well as to prepare derivative works from the original work. Such copyrights may be transferred from the author to another person or entity, in whole or part, usually through some form of licensing agreement.

My technology-enhanced textbook provides a typical example. I own the copyright to much of the material in the textbook (e.g., text and most exam material), because I created that material. My publisher owns the copyrights to some of the other material in my textbook (e.g., software), because my publisher created that material, and other material (e.g., images and original movies) is jointly owned because it was jointly produced. Finally, third parties own the copyrights to other portions of my textbook, and my publisher has entered into licensing agreements with these third parties to gain limited permission to include and distribute that material in my textbook.

I am aware of some discussion about the possibility of placing my textbook online through the University's contract with WebCT (Blackboard Co.). From the prospective of copyright, this would be equivalent to cutting up a paper textbook and scanning the contents so that the textbook is made available online. Arranging the licensing fees with all the appropriate copyright owners would prove cost prohibitive. Also, I am unsure as to whether WebCT provides adequate copyright protection in their system, which would be required by the licensing agreements. Placing copyrighted material onto WebCT without appropriate permission would, of course, be illegal. In addition, some of my licensees have prohibited such use.

It would not at all be surprising to learn of a lawsuit on this topic in the national press in the coming months. Academic publishers tend to view businesses like WebCT as "Napster" for educators; too frequently educators or their institutions exceed the limits of fair use and/or exceed the scope of limited licensing agreements and thereby distribute copyrighted material online for free (and sometimes even for profit) in violation of copyright. These issues were addressed in the music industry in the successful lawsuit against "Napster," and currently Viacom is suing Google over the distribution of copyrighted video material on YouTube. A lawsuit by academic publishers against select educational institutions of higher education may ultimately be deemed advisable in order to clarify each party's rights and responsibilities regarding copyright in the new era of electronic publishing. Such matters exceed my limited horizons but may ultimately provide a backdrop for the University's ongoing review of these issues.

Faculty members and/or administrators that infringe copyright may incur liability for the University *and* for themselves as individuals. I assume that, in the event of a lawsuit, the Office of the Vice-President and General Counsel here at the University would take the position that any violation of copyright by a University employee could not have occurred in the course of employment since such violations are expressly prohibited. The University may thus seek to avoid liability, and would likely reserve the right to refuse to defend any administrator, faculty member, student, or staff member named in a copyright lawsuit and then subsequently refuse to pay any damages awarded by a court against any such person. Those who are indirectly involved in copyright infringement may also be held liable through causes of action for contributory and vicarious infringement. Moreover, any violation of copyright law may be the basis of disciplinary action by the University.

On the other hand, a copyright plaintiff would likely seek to hold this University accountable for copyright infringement that occurs under this University's banners. In a case where the University routinely benefited from such infringement (through the collection of tuition or "distance education fees" from students, or through the collection of "donations" from faculty authors, for example), the University may well incur substantial liability. In recent years courts have awarded copyright owners significant damages as well as legal fees.

Policy considerations and the application of policy require respect of copyright by administrators, faculty, and students. In my opinion, all three groups need to be better

informed of copyright restrictions on their actions. The Faculty Senate may want to review and inform the University community of what constitutes fair and unfair use of intellectual property.

V. The University Needs a Coherent, Uniform, and Workable Policy.

The work of this Senate Committee is much appreciated by faculty such as myself who have been subjected to a succession of policies and demands, most adopted without proper rule making procedures and with little effort to apply them equally to all authors. Some rules have been changed and applied within 24 hours of the start of the semester with no realistic opportunity for compliance. Some faculty have dutifully submitted Outside Activity Reports each year while others have been allowed to neglect this obligation. Speaking from my own experience, over the course of the last year I have been subjected to seven different regimes of requirements regarding the use of my self-authored book. Meanwhile, I am aware of other faculty-authors who assign their text to their students who have not been subjected to such requirements.

VI. Peer Review for Solid Academic Content and Fair Pricing Can Avoid Conflicts of Interest and Protect the University of Florida.

The larger copyright considerations raised previously are merely background to the present policy question, which is how the University should monitor potential conflicts of interest when faculty assign their own course material for a profit. In this regard, because of the myriad possibilities for potential copyright infringement and other legal liability that any one size- fits-all blanket prohibition would engender, I strongly recommend that the University simplify the present rules regarding such conflicts of interest by simply empowering a permanent faculty committee to review potential conflict of interest on a case-by-case basis.

It seems to me that the purpose of the original policy (embodied in F. A. C. 6C1-1.001) and the purpose of the present policy review is to protect University of Florida students from being assigned poor quality materials. The original policy, and the present tendency to ask whether the material is "adopted elsewhere" both seek reassurance as to the quality of the material, on the assumption that if it is adopted elsewhere then the material must be good, which as everyone knows is often hardly the case. Where questions arise, a direct peer review of the material itself would be a far more appropriate and accurate safeguard than asking how many other institutions are using the material.

Students, of course, are not concerned about who publishes their assigned material; rather, they are concerned about the quality and affordability of that material. A small publisher may publish very solid academic work at a reasonable price. It would be a shame for students to lose the benefit of studying solid academic work simply because the publisher of that work is small or not widely known.

Judging the quality of academic material by its publisher also suppresses the development and publication of academic material by University of Florida professors. Major

publishers have little interest in publishing any material in many academic fields and subspecialties, and in other instances major publishers are only interested if the author is willing to agree to unfavorable business terms.

In many instances, seeking a larger publisher is NOT in the best interest of University of Florida students because a larger publisher means a higher retail price for the text. Since I completed my book, for example, a number of large publishers (e.g., McGraw Hill, and others) have sought to make arrangements with me to publish and distribute later editions. These negotiations were an eye-opener; these large publishers demanded unreasonable terms, including turning over copyright, giving up income at institutions where the text is already adopted, and accepting greatly reduced royalties overall.

In short, I suggest that requiring that a publication be adopted at "six other institutions," or requiring that a publication be adopted in "six other states," or requiring that a publication be published by a "national publisher," are all simply poor substitutes for requiring that the publication be of suitable academic quality. Peer review of the publication itself, perhaps similar to that process currently used for the adoption of a new course, seems to me the more reliable solution. Peer review of the publication, by nature, will also be responsive to the special concerns which attend each academic field in a way that "publisher review" can never be.

Specifically, therefore, I recommend that Florida's Administrative Code, Section 6C1-1.011 ("University of Florida; Disclosure and Regulation of Outside Activities and Financial Interests"), subsection 3(d) ("Activities and Financial Interests To Be Reported" regarding "the selection and use of instructional materials in which the employee has a financial interest") be modified to remove all reference to "materials created or developed exclusively for use in University of Florida courses or other University instructional activities" (found in subsections 2 and 3). This unfocused and poorly drafted language has not proven helpful to those charged with making these decisions.

Everyone agrees, of course, that students should not have to pay for exclusive access to syllabi or graded coursework. If "materials created or developed exclusively for use in University of Florida courses" means syllabi or graded coursework, then the present language would be acceptable. Unfortunately, the current Florida Administrative Code contains the sentence: "Examples of such materials are class notes, annotated syllabi, and course packs." I suggest striking all of that language and stating that,

"Under no circumstance may the university or any employee profit from the exclusive distribution of syllabi or graded coursework; such essential elements of a university course are considered to be included in the cost of tuition."

This language could be substituted for the present language of subsection two. Students in my class have always had multiple opportunities to access my material; alternatives to the electronic book include paper versions on reserve in the library and proctored paper exams.

Subsection 3(d)3a would embody the heart of the present policy review and update. I suggest the following changes to implement peer review (new language italicized):

If the university or an employee may financially benefit from the sale of instructional materials to University of Florida Students, the materials are to be assigned only under the following conditions:

- a. *The material has been reviewed by academic peers and determined to be satisfactory in both academic quality and fairness of price, and the department chair and dean or director have approved such an arrangement on the University's Disclosure of Outside Activities and Financial Interests (form OAA-GA-L-267/rev. 4/02), submitted by the employee who may benefit financially*

Note that this language would trigger peer review in any case where an assigned text may financially benefit the university or any employee of the university, rather than only triggering peer review when a faculty-author financially benefits from the assignment of his or her own text.

Regarding "course packs," the following language added to section 3(d) would be sufficient.

Neither the university nor any employee may profit from the sale of academic materials to University of Florida students when such materials are merely a collection of the works of others and do not include the original work of the university or of the employee.

My experiences over a little more than a year provide ample proof of the need for faculty oversight of self-authored textbook policy. Instead of the current, uneven and disjointed practice of deans and provosts reviewing the marketing efforts of publishers of faculty authored course materials, I recommend that the faculty govern themselves in this regard through a standing committee empowered to oversee peer review of the course material itself where a conflict may be present. If this faculty committee determines that assigned course material is otherwise educationally appropriate and fairly priced, then that material should be approved for use regardless of who may have a financial interest in the sale of the material. In other words, if a professor's self-authored work is of suitable academic quality and sells for a price within the normal range for such works, the faculty committee should deem that the work does not create a conflict of interest.

This policy would protect the students from abuses and also protect the copyrights of faculty authors. Furthermore, the policy rests upon the traditional guarantor of quality in academic publishing, which is peer review. A one-size-fits-all policy regarding publishers cannot function appropriately over the wide range of situations present at the University.

Finally, implementation and faculty oversight of the adopted policy is critical to fair and uniform application of policy. Even the wisest policy may become worthless if interpretation of the policy is left to individual administrative units and not subject to faculty oversight.

APPENDIX G

Report on Comparisons to the policies of other AAU and Ivy League Schools

Background

There are thirty-four public AAU schools and eight Ivy League schools (and of the Ivies, only Dartmouth is not an AAU school).

There was no information available for three schools:

1. Purdue – Website did not work.
2. Harvard – Information not available to the public via internet
3. Princeton – Information not available to the public via internet

Of the thirty-nine remaining schools:

Fourteen had explicit policies on faculty-authored course materials.

- University of Arizona
- University of Florida
- University of Iowa
- Iowa State University
- University of Kansas
- University of Maryland
- Michigan State University
- University of Minnesota
- University of Missouri
- University of Nebraska
- Ohio State University
- University of Oregon
- Penn State University
- University of Texas

One had guidelines created by an individual academic unit within the university.

- University of Wisconsin – College of Letters and Science (UW-CLS)

Two had express statements that the use of self-authored materials created no conflict and required no disclosure to the institution.

- Indiana University (disclosure may be required to the state if royalties exceed \$250)
- University of North Carolina

Additionally, Cornell listed “situations in which an individual can require others to purchase a product in which the individual has a proprietary interest and from which the individual will receive income” as a possible example of a conflict of interest, but offered no procedure by which to eliminate the conflict.

The other twenty-two schools do not appear to consider, explicitly, faculty authorship within their conflict of interests policies. It should be noted that several of these schools exempt a faculty member's receipt of royalty payments for instructional materials from their conflict of interests policies. However, it is not necessarily clear within the policies if these exemptions apply to instructional materials which the author both creates and assigns to students, or if the exemptions are more general.

By way of example, the University of Virginia exemption is as follows: an employee may be exempt from the prohibition against personal interests in a contract if that contract is

A contract between the University and a publisher of educational materials, if the employee's "personal interest" accrues to him/her solely from having authored such educational materials.

The issue has also been evaluated by the university senate of Rutgers, which recommended that faculty members who assign self-authored materials donate any royalties to the University or a not-for-profit institution. However, the University does not yet appear to have adopted the faculty senate's recommendation.

(The senate compiled an appendix of selected policies adopted by both AAU institutions and other institutions. A summary of those policies, as well as the policies mentioned by the Massachusetts State Ethics Commission and the AAUP Committee on Professional Ethics appears below in this Summary.)

Finally, the State Ethics Commission of the Commonwealth of Massachusetts has issued an opinion for professors at state institutions with the Commonwealth. It states that for a faculty member to benefit financially from self-authored and assigned textbooks, the faculty member must submit a written disclosure which includes the following:

- A description of the decision the faculty member is going to make concerning the textbooks
- The amount of royalties the faculty member will receive, or, for privately published works, the price the faculty member will charge students.

The disclosure must then be approved by the school's Vice-President for Academic Affairs/Provost, who must evaluate whether the faculty member's financial interest in the selection of the textbook is not so substantial as to affect the integrity of the faculty member's service to the Commonwealth.

Summaries of the Explicit Policies of AAU Schools

By Item

1. Administrative Approval Required

- Arizona – Dean
- Florida – Department Chair and Dean
- Maryland – Department Chair
- Minnesota – Head of Academic Unit
- Texas – President and Board of Regents

2. Printed and Copyrighted by a Publisher of Standing

- Arizona
- Nebraska
- Penn State

3. Available for Open Sale/Developed for Outside Use

- Arizona
- Florida
- Penn State
- Maryland (preferred only)

4. Reasonably Related to the Course (Express Statement)

- Florida
- Maryland
- Ohio State
- Penn State

5. Donation of Royalties

- Iowa
- Iowa State (with limited exceptions)
- Kansas
- Minnesota (encouraged only)
- Missouri
- UW-CLS (encouraged only)

6. Guidelines Set by Each Academic Unit within the University

- Michigan State
- Ohio State

7. Copies on Reserve in Libraries

- Florida
- UW-CLS (encouraged only)

8. Peer Review of Materials as part of Publishing Process

- Penn State

9. Disclosure of Royalty Payments to Students

- Penn State
- UW-CLS (encouraged only)

10. Clearly Explain how materials are chosen, how they compare with other resources, and the basis for screening and selection of those materials

- Oregon
- Penn State (encouraged only)

11. Separate Policy for Privately Published Materials

- Maryland
- Penn State

By School

1. University of Arizona

- Materials must have been printed and copyrighted by a recognized publishing house at the publisher's expense
- Materials must be available for open sale

- Materials must be approved by the Dean of the college, or, in cases where a dean is the instructor, by the Provost

2. University of Florida

- Materials must be developed for use outside the University of Florida
- Employee must submit a Disclosure of Outside Activities and Financial Interests
- Materials must be approved by the Department Chair and Dean/Director
- A sufficient number of copies must be placed on reserve in University Libraries for use by students in the course
- Materials must be selected for academic reasons and not based on financial gains (in the event that the materials are owned by the University of Florida but financially benefit the instructor, the unit administration is advised to take any additional measures necessary to ensure the academic appropriateness of the materials to the course)

3. University of Iowa

- Royalties must be either refunded to the students or other arrangements to avoid profiting from student use of the materials must be made (such as donating royalties to the University of Iowa, one of its units, or the University of Iowa Foundation)

4. Iowa State University

- Royalties must be assigned to the University or to a body mutually agreeable to the University and the faculty member

5. University of Kansas

- Royalties must be donated to the faculty member's department, school, scholarship funds, or other non-profit entity. (Does not apply to courses, presentations, or seminars no part of the regular University curriculum.)

6. University of Maryland

- Materials must be approved by Department Chair
- Commercially published materials which are in general use are expressly preferred
- In the event that the materials are published privately and are not in general use, special measures may be authorized to ensure that there are no conflicts of interests. These measures could include, without limitation, confirmation of the materials by a committee, authorizing alternative texts, or assignment of royalties to third-party educational organizations (including the University of Maryland)

7. Michigan State University

- No discouragement of the use of faculty-authored materials
- Each academic unit is charged with establishing guidelines appropriate to its circumstances to avoid the semblance of conflict

8. University of Minnesota

- Employee must explain to the head of the academic unit the choice of the materials and seek approval for their use
- Head of the academic unit must approve
- Donation of royalties to the department, college, or University is encouraged
- NB, Minnesota statutes specify that faculty-authored course materials may be used in courses taught by that faculty member without creating a conflict of interest (MINN. STAT. 15.43).

9. University of Missouri

- Self-authored instructional materials may be assigned only if the royalties are donated to the University, another educational institution, a charitable institution, or a not-for-profit foundation

10. University of Nebraska

- Materials must be published and the copyright secured from a publishing house of standing

11. Ohio State University

- No discouragement of the use of faculty-authored materials
- Materials must be chosen on their academic merit
- Each academic unit is charged with establishing guidelines appropriate to its circumstances to avoid the semblance of conflict

12. University of Oregon

- Faculty members need to identify clearly how the materials relate to course objectives, how materials compare with other available resources, and what the basis for screening and selection of those materials has been

13. Penn State University

- Course materials must represent a substantial intellectual product contribution by the faculty member. That is,
 - Materials must be able to replace a commercially available text, or
 - They could plausibly be used as supporting materials in a similar course at another institution.
- Royalty payments are presumptively reasonable if the materials:
 - Reasonably relate to the purpose of the course
 - Have been published by an academic or commercial press in which the faculty member does not hold an ownership or vested interest
 - Have been subject to peer review as part of the publishing process, and
 - Have been produced for outside sale
- In the event the materials do meet the foregoing criteria, the faculty member must submit to the Department/Division Head or peer committee (in accordance with academic unit practice) a written request for royalty payments which includes the following
 - A description of the original instructional materials
 - Identification of the course in which the materials are to be used
 - An estimate of the overall cost to students
- A written decision on this request must be rendered within one (1) month of the request. If the Department/Division Head or peer committee decides to deny or reduce requested royalty payments, the decision must include:
 - An explanation of the decision
 - A recommendation of what a reasonable royalty payment would be
- Decisions may be appealed to a committee of the faculty senate
- In the event the materials do meet the criteria to be presumptively reasonable, the faculty member is nevertheless encouraged to submit a written request to the Department/Division Head or peer committee
- The faculty member is under an ethical obligation to reveal the collection of royalty payments to all those affected, including, without limitation, the students in the course

14. University of Texas

- Materials must be approved by the President of the University and the Board of Regents

15. University of Wisconsin – College of Letters and Science (guidelines only)

- Faculty members are encouraged to confer with a department committee to establish that course materials are the best materials available to the students

- Faculty members are encouraged to place copies on reserve in the University Library or online
- Faculty members are encouraged to donate royalties to a charitable foundation or reimburse students
- Faculty members are encouraged to disclose the apparent conflict of interest to students

<u>School</u>	<u>Administrative Approval Required</u>	<u>Printed and Copyrighted by a Publisher of Standing</u>	<u>Available for Open Sale/Developed for Outside Use</u>	<u>Reasonably Related to the Course (Express Statement)</u>
Arizona	• (Dean)	•	•	
Florida	• (Dept. Chair & Dean)		•	•
Iowa				
Iowa State				
Kansas				
Maryland	• (Dept. Chair)		• (Preferred)	•
Michigan State				
Minnesota	• (Head of academic unit)			
Missouri				
Nebraska		•		
Ohio State				•
Oregon				
Penn State*		•	•	•
Texas	• (Pres. & Bd. of Rgnts.)			
Wisconsin - CLS				

<u>School</u>	<u>Donation of Royalties</u>	<u>Guidelines Set by Individual Academic Unit</u>	<u>Copies on Reserve in Libraries</u>	<u>Peer Review Required as part of Publishing</u>
Arizona				
Florida			•	
Iowa	•			
Iowa State	•			
Kansas	•			
Maryland				
Michigan State		•		
Minnesota	• (Encouraged)			
Missouri	•			
Nebraska				
Ohio State		•		
Oregon				
Penn State*				•
Texas				
Wisconsin - CLS	• (Encouraged)		• (Encouraged)	

<u>School</u>	<u>Required Disclosure of Royalty Interests to Students</u>	<u>Explanation of How Materials Are Chosen</u>	<u>Separate Policy for Privately Published Materials</u>
Arizona			

Florida			
Iowa			
Iowa State			
Kansas			
Maryland			•
Michigan State			
Minnesota			
Missouri			
Nebraska			
Ohio State			
Oregon		•	
Penn State*	•	• (Encouraged)	•
Texas			
Wisconsin - CLS	• (Encouraged)		

*Penn State has a two-prong system. Only the first prong, which includes only those materials from which it is presumptively reasonable for the faculty member to receive royalty payments, is indicated here.

Summaries of selected non-AAU Institutions

(as reported by the Rutgers University Senate, the Massachusetts State Ethics Commission, and the AAUP Committee on Professional Ethics)

By Item

1. Administrative Approval Required

- Boise State – Department Chair
- Central Connecticut State – Panel appointed by Vice President for Academic Affairs (approval not required if royalties are donated to University or a 503c(3) entity)
- Cleveland State – Faculty Committee
- Connecticut – Faculty Committee (approval not required if royalties are donated to a scholarship fund)
- Louisiana Tech – Dean
- Memphis – Departmental Committee (must be unanimous), Department Chair, and for privately published materials, the Dean
- South Florida – Provost (only if royalties exceed \$500/year)
- Southern Utah – Department Chair and Dean
- Virginia Polytechnic – Departmental Committee, Collegiate Committee, and University Committee
- Western Washington – Dean, Chair, or Committee (approval not required if author waives royalties or donates royalties to the University and agrees to have no role in determining how the royalties are spent by the University)

2. Printed and Copyrighted by a Publisher of Standing

- Boise State

3. Available for Open Sale/Developed for Outside Use

- Boise State

4. Reasonably Related to the Course (Express Statement)

- University of South Florida (“uniquely suited” for use in the course)

5. Donation of Royalties

- North Dakota State University (encouraged only)
- University of North Texas (encouraged only)

6. Peer Review of Materials as part of Publishing Process

- Boise State

7. Separate Policy for Privately Published Materials

- Memphis

8. Provide Materials Free of Charge to Students

- Case Western Reserve University (Department of Neurology)

By School

1. Boise State University

- Materials must be approved by Department Chair
- Materials must be published by an established publishing house in which the author has no financial interest
- Materials must be peer-reviewed as part of the publishing process
- Materials must be intended for adoption and use by institutions of higher education

2. Case Western Reserve University (Department of Neurology)

- Materials must be provided free of charge to students

3. Central Connecticut State University
 - Materials must be approved by a panel appointed by the Vice President for Academic Affairs (approval is not required if royalties are donated to the University or to a 503c(3) entity)
4. Cleveland State University
 - Materials must be approved by a faculty committee
5. University of Connecticut
 - Materials must be approved by a faculty committee (approval not required if royalties are donated to a student scholarship fund)
6. Louisiana Tech University
 - Materials must be approved by the Dean
7. University of Memphis
 - Materials must be approved unanimously by a departmental committee
 - Materials must also be approved by the Department Chair
 - If the materials are privately published, they must also be approved by the Dean
8. North Dakota State University
 - Faculty members are encouraged to donate royalties unless the materials have been “independently accepted in the field”
9. University of North Texas
 - Faculty members are encouraged to donate royalties unless the materials are used by other institutions
10. University of South Florida
 - If royalties exceed \$500/year, the faculty member must inform the Provost and certify that the required text is “uniquely suited for use in the author’s class”
11. Southern Utah University

- Materials must be approved by the Department Chair and Dean

12. Virginia Polytechnic Institute and State University

- Materials must be approved by the appropriate departmental, collegiate, and university-level committees

13. Western Washington University

- Materials must be approved by either the Dean, Chair, or Committee (approval not required if author waives royalties or donates royalties to the University and agrees to have no role in determining how the royalties will be spent by the University)

Composite Summary

1. Administrative Approval Required (15 schools)

- Arizona
- Boise State
- Central Connecticut State
- Cleveland State
- Connecticut
- Florida
- Louisiana Tech
- Maryland
- Memphis
- Minnesota
- South Florida
- Southern Utah
- Texas
- Virginia Polytechnic
- Western Washington

2. Printed and Copyrighted by a Publisher of Standing (4 schools)

- Arizona
- Boise State
- Nebraska
- Penn State

3. Available for Outside Sale/Developed for Outside Use (5 schools)

- Arizona
- Boise State
- Florida
- Penn State
- Maryland (preferred)

4. Reasonably Related to the Course (Express Statement) (5 schools)

- Florida
- Maryland
- Ohio State
- Penn State
- South Florida

5. Donation of Royalties (8 schools)

- Iowa
- Iowa State
- Kansas
- Minnesota (encouraged only)
- Missouri
- North Dakota State (encouraged only)
- North Texas (encouraged only)
- UW-CLS (encouraged only)

6. Guidelines Set by Each Academic Unit within the University (2 schools)

- Michigan State
- Ohio State

7. Copies on Reserve in Libraries (2 schools)

- Florida
- UW-CLS (encouraged only)

8. Peer Review of Materials as part of Publishing Process (2 schools)

- Boise State
- Penn State

9. Disclosure of Royalty Payments to Students (2 schools)

- Penn State
- UW-CLS (encouraged only)

10. Clearly Explain How Materials are Chosen (2 schools)

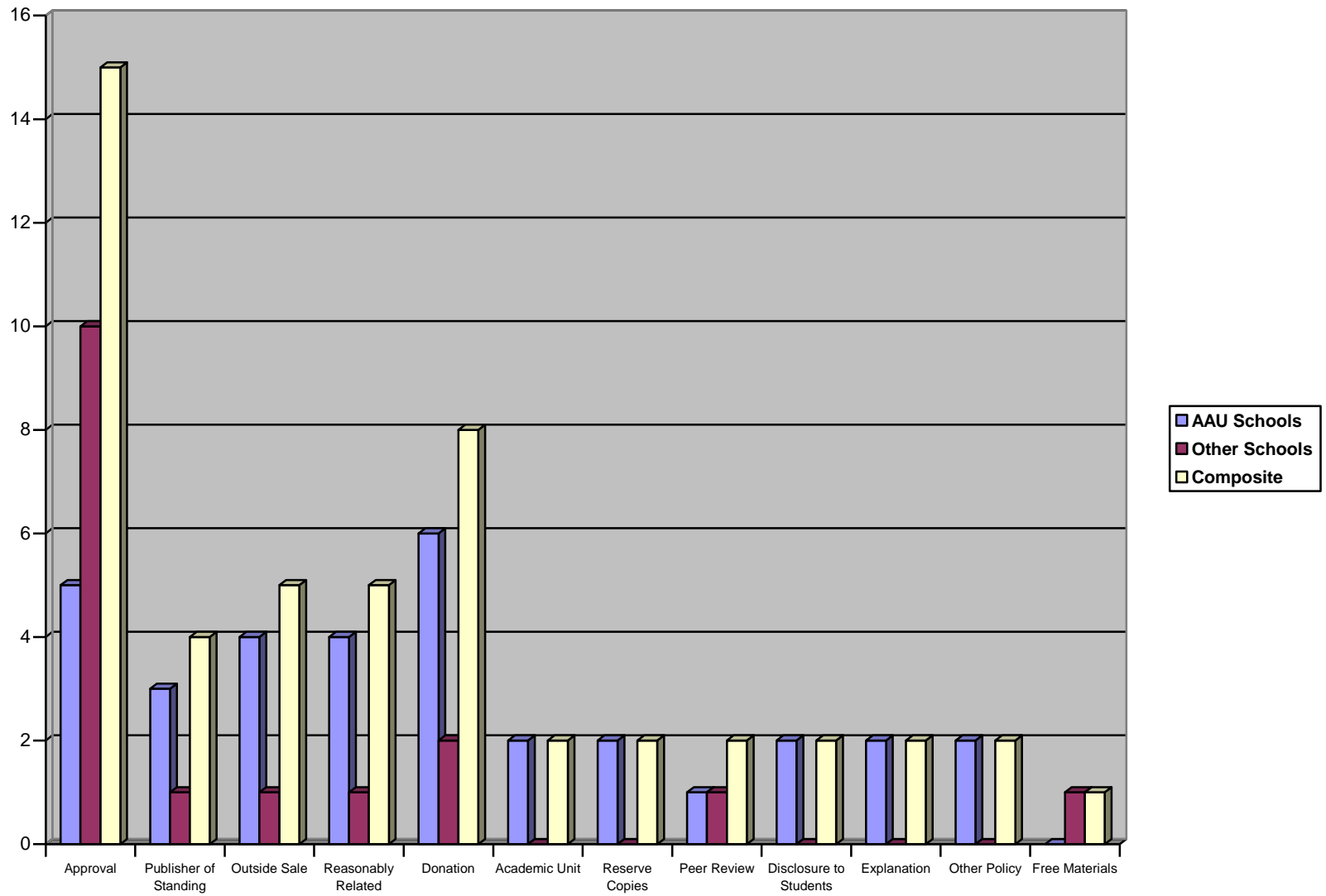
- Oregon
- Penn State (encouraged only)

11. Separate Policy for Privately Published Materials (3 schools)

- Maryland
- Memphis
- Penn State

12. Provide Materials Free of Charge to Students (1 school)

- Case Western Reserve University (Department of Neurology)



APPENDIX H
Letter and Attachments from Professor John Biro,
president of the United Faculty of Florida

UNITED FACULTY OF FLORIDA
UNIVERSITY OF FLORIDA CHAPTER

238 Norman Hall

Gainesville, FL 32611

352-392-0274

Professor Carol Murphy
Academic Policy Council

10 December 2007

Dear Carol,

It has come to my attention that the Academic Policy Council has been discussing possible rule changes for faculty-authored course materials but has not been informed about the faculty union's position on this matter, despite the participation in your meetings of members of the Administration's bargaining team and despite the fact that the Collective Bargaining Contract, not University regulations, will govern faculty-authored course materials for almost all of the faculty members whose courses have been the focus of your attention.

Although the faculty union is by law the exclusive representative for all bargaining-unit faculty, the union recognizes and fully supports the APC's right to recommend different rules for faculty outside the bargaining unit. Since the APC may want to know what rules are being anticipated for everyone else, I have attached, for your information, the proposal that the union formally presented to the administration's bargaining team in October.

As you have no doubt discovered, the large majority of top-ranked universities have chosen not to create restrictions on faculty-authored course materials. I have also attached the relevant regulations of University of California system, which is among

the universities that exempt assigned course materials from being considered as involving a conflict of interest, even if the faculty member receives royalties from those assigned materials. The full texts of these UC policy documents are available at (among other sites):

<http://www.ucop.edu/ogc/coi/info.html>

<http://www.ucop.edu/ogc/coi/text.html>;

<http://www.ucop.edu/acadadv/acadpers/apm/apm-025-07-01.pdf>

The implicit assumption in them is that faculty are honorable professionals and that academic freedom and intellectual property rights must not be compromised.

The attached UFF-UF proposal tracks the UC system's conflict-of-interest regulations. As you will see in Section 29.5 (pages 4–5), the union has addressed the concerns recently raised on this campus in a manner that is still fully consistent with the view of top-ranked universities that academic freedom and faculty intellectual property rights must be strongly protected. The APC can find the agreement the Trustees and the UFF already reached on academic freedom at

<http://www.uffacultycontract.org/new/tentagreements.shtml>

(first entry listed).

I hope these documents may be of assistance to the Academic Policy Council as it considers whether to alter rules for faculty in the Health Sciences Center, the College of Agriculture and Life Sciences, and the Law School. If the APC has any questions, the union will be happy to try to answer them.

Sincerely,

John Biro
President, UFF-UF

APPENDIX I
Response of Barbara Wingo, Associate General Counsel,
to letter from Professor John Biro



Office of the Vice President and General Counsel

123 Tigert Hall
PO Box 113125
Gainesville, FL 32611-3125
352-392-1358
352-392-4387 Fax

January 14, 2008

Professor John Biro
President, UFF-UF
238 Norman Hall
CAMPUS

Dear Professor Biro:

Chair of the Faculty Senate, Professor Rick Yost, asked me to respond to your letter of December 2007 to Professor Carol Murphy, because your letter raises a question about the jurisdiction of the Faculty Senate.

In the letter you note that the Academic Policy Council has been discussing possible changes in the principles guiding the University's management of conflicts of interest respecting faculty-authored course materials. Your letter indicates that the Academic Policy Council may make recommendations concerning University regulations that apply to faculty in the Health Center, IFAS, and the College of Law, but not concerning the regulations that apply to faculty in the collective bargaining unit.

Article 1 of the University Constitution explicitly recognizes that the University's joint governance structure, as set out in the constitution and implemented through the Faculty Senate, is subordinate to certain superceding legal obligations. These include legal requirements established in laws and regulations, as well as those established in the collective bargaining agreement for faculty in the bargaining unit. The Administration of the University recognizes its legal obligation to bargain the terms and conditions of employment for those faculty and to adhere to the collective bargaining agreement.

At the same time, the Faculty Senate is a body representing all faculty of the university and plays an important role for all faculty in the joint governance of the University. Each faculty member, whether or not in the bargaining unit, has the right to participate in shared governance through the Faculty Senate and its councils. Collective bargaining does not take away these faculty rights. Further, Faculty Senate processes do not impinge on the collective bargaining process.

The Foundation for The Gator Nation
An Equal Opportunity Institution

January 14, 2008

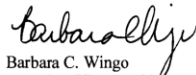
Page 2

The Faculty Senate and its councils focus on proposing principles and values of the faculty, rather than detailed regulation or contract provisions. This is the approach that the Academic Policy Council has been advised by the Office of the Vice President and General Counsel to take with respect to faculty authored course materials, and this is the approach the APC is, in fact, taking.

When changes in the manner in which the University handles a matter, in the form of principles and values, are suggested and preliminarily accepted by the Senate, their implementation is subject to other appropriate procedures. All changes to University regulations must go through the University's regulation-making procedures. The subject of those regulations that affect the terms and conditions of employment must be bargained through the collective bargaining process. If a regulation affecting the terms and conditions of employment were to be inconsistent with the collective bargaining agreement, the bargained provision would apply to faculty in the bargaining unit.

Any recommendations that arise from the work of the Academic Policy Council and the Faculty Senate concerning faculty authored course materials will be treated consistently with these rights and requirements, as has been the practice of the Faculty Senate. I hope this letter reassures you that the Faculty Senate has not and will not affect collective bargaining obligations and also clarifies that the Faculty Senate's jurisdiction applies to all faculty.

Sincerely,



Barbara C. Wingo
Associate Vice President and
Deputy General Counsel

cc: Professor Rick Yost
Professor Carol Murphy