

When conflicts of interest are an unavoidable problem

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Over the last twenty years or so, conflicts of interest have come to be recognised as a significant problem in many professions. A recent book, *Conflict of interest in the professions*, edited by Michael Davis and Andrew Stark (2001) examined the problems that conflict of interest may cause in a wide range of professions, from law and government, through engineering, journalism, academia, the financial markets and health care. In this paper I wish to highlight certain types of situations, some specific to particular professions, others that may arise in various professions, where conflicts of interest will arise that cannot be dealt with by any of the usual means.

Conflict of interest: the standard view

In the introduction to *Conflict of interest in the professions*, Michael Davis provides what he terms ‘the standard view’ of a conflict of interest.

On the standard view, P has a conflict of interest if, and only if, (1) P is in a relationship with another requiring P to exercise judgement on the other’s behalf and (2) P has a (special) interest tending to interfere with the proper exercise of judgement in that relationship ... on the standard view, an interest is any influence, loyalty, concern, emotion, or other feature of a situation tending to make P’s judgement (in that situation) less reliable than it would normally be, without rendering P incompetent. (2001: 8–9)

That fact that a conflict of interest is a *tendency* is extremely important. Conflicts of interest do not always affect judgement, as P may be able to exercise their judgement impartially despite the special interest. A conflict of interest is thus different from mere bias, though conflicts of interest and bias are often discussed together. As Davis notes (2001: 12), a known bias can (generally) be compensated for without difficulty, since it has a predictable effect. But conflict of interest is not bias, but is rather a tendency towards bias, which means that it is both more difficult to predict the effect of conflict of interest upon judgement, and more difficult to compensate for its effect.

One major difficulty in discussing conflicts of interest arises out of the term itself. The mere fact that two interests clash in some way, that is, that the interests are in conflict, does not mean that there is actually any conflict of interest in the technical sense of the term. My interest in spending time with my children may conflict with my interest in writing this paper, but this does not constitute a conflict of interest, for I am not required to exercise judgement on another person’s behalf.

Most conflicts of interest in fact involve a conflict between a person or organisation’s duty or role and a particular interest (an example of this might be a conflict between a police officer’s role as an enforcer of the law and the officer’s interest in maintaining a

particular friendship), or between two roles (an example of this might be the conflict between a cabinet minister's role as a public official and their role as a private company director) rather than a simple conflict between two interests.

It is important to remember that conflicts of interest arise only when a person is required to exercise judgement on behalf of another. If no judgement is required in a particular situation, then there is no conflict of interest in that situation. Similarly, if I am required to exercise judgement, but only on my own behalf, and not on behalf of another person, organisation or institution, then there is no conflict of interest in that situation either.

Revising the standard view

There is a problem with the standard view, in that it seems to allow too much. Many things that we would not generally consider to be conflicts of interest seem to be conflicts of interest according to the standard view. The main difficulty here is in defining the sorts of things that might count as interests, which could conceivably come into conflict with the proper exercise of one's judgement. According to Davis' standard view, an interest is 'any influence, loyalty, concern, emotion, or other feature of a situation tending to make P's judgement (in that situation) less reliable than it would normally be, without rendering P incompetent' (2001: 8–9). But this list seems to be much too broad, for there are many things that may influence P's judgement, without making P incompetent, that we would not usually consider to be part of a conflict of interest.

Suppose that I am driving home from work, and I am struck by a car behind me. I am likely to be upset, angry with the other driver, annoyed about the inconvenience that will be caused to me while I attempt to get my car repaired, and so on. A few minutes later I arrive home, and sit down to mark a pile of student's essays. Now marking essays is an exercise of judgement,¹ and if I am still angry about the accident then this will affect my judgement, in that I am likely to be more harsh than usual in marking these essays. Yet I am not rendered incompetent. This example seems to fit Davis' standard view, yet I think few people would be willing to call this a conflict of interest.

The difficulty seems to me to be the contingent nature of the conflict. There is no inherent conflict between my anger and the exercise of sound judgement in marking these essays. For something to qualify as a genuine conflict of interest, it would seem that there needs to be some *direct* conflict between the exercise of judgement on another's behalf, and, in the terms of Davis, a particular influence, loyalty, concern, emotion, or other feature of a situation tending to make a person's judgement less reliable than normal. As Michael Pritchard puts it, the exercise of judgement, and the interest influencing that judgement, must stand in some special relationship to each other – there must be an inherent conflict between them for this to really count as a conflict of interest (2002: 8–9).

It has been suggested to me that even limiting the standard view of conflicts of interest in this way still leaves the definition too broad. Consider another example.² Suppose that we have a police officer who is receiving illicit payments from an organised crime boss. That police officer pulls over a vehicle for a traffic offence, and then discovers that the vehicle is being driven by that crime boss. Does the police officer have a

conflict of interest? It is certainly tempting to say that there is no conflict of interest here, that the police officer should not have been accepting the payments in the first place, and that there is no question about what is the right thing for the police officer to do in this situation. A possible way to get around this problem with the standard view of conflicts of interest would be to limit oneself to only legitimate influences on judgement as being a part of a conflict of interest.

However, I think this response is too hasty and that the police officer in this example *does* face a conflict of interest, albeit an illicit one, and a conflict entirely of the officer's own making. The officer is required to exercise judgement (for an officer does have discretion in how they deal with a traffic offence), the judgement is being exercised on another's behalf (in this case on behalf of the police service, or of society, or perhaps even of 'the law'), and there is an influence upon that judgement that makes the exercise of judgment less reliable in that particular situation than it would normally be. To say that there is no question about what the officer ought to do is equivalent to dismissing the general problem of conflict of interest entirely. For one could say that in *any* case where someone faces a conflict of interest that there is no question about what they ought to do: they ought to exercise their judgement normally, and act as if there was no other influence acting upon their judgement. The problem is that this is, in practice, difficult to do (for one's judgement may be affected without one even realising it) and, even if I am able to exclude the influence from the exercise of judgement, it may not appear, to an impartial observer, that this is actually the case – and when the person who is exercising the judgement is in a position of public trust, the appearance can be very important.

So, in returning to our example of the police officer who is accepting payments from the organised crime boss, I would suggest that they do face a conflict of interest when they pull that crime boss over for a traffic offence. Granted it is a problem of their own making, granted it is unlikely (!) that they will discuss this particular conflict of interest with a superior officer in order to determine the best way to resolve the conflict, but I believe that this still does represent a conflict of interest situation, and thus the standard view does require further modification.

So to restate what we might call the revised standard view: P has a conflict of interest if, (1) P is in a relationship with another requiring P to exercise judgement on the other's behalf and (2) P has a (special) interest tending to interfere with the proper exercise of judgement in that relationship, where an interest is any influence, loyalty, concern, emotion or other feature of a situation tending to make P's judgement (in that situation) less reliable than it would normally be, without rendering P incompetent and (3) there is an inherent, rather than a merely contingent, conflict between the exercise of judgement and the influence on that judgement.

What is wrong with having a conflict of interest?

It is important to note that the mere fact that a person has a conflict of interest in a particular situation does not generally mean that they have done anything wrong. Conflicts of interest are common in most professions – in fact I will argue later in this paper that for some professionals conflicts of interest are inevitable. The issue with

conflicts of interest is not that they are wrong in themselves, but rather the problems that they can cause if they are not properly dealt with.

Conflicts of interest can cause problems in three main ways:

1. The exercise of good judgement is an integral part of the role of any professional. Since conflicts of interest tend to affect the judgement of those in the conflict of interest situation, they are thus a problem for professionals.
2. A person whose judgement is clouded by a conflict of interest may be led into inappropriate or even illegal conduct.
3. The existence of a conflict of interest tends to create the appearance of bias even if the person with the conflict of interest acts completely impartially. If the person with a conflict of interest is the holder of a position of public trust, then the mere appearance of bias is a problem, since any holder of the public trust ought to appear to be (and indeed ought to *actually be*) strictly impartial in the discharge of their duties to the community.

For those in positions of public trust, problem (3) is particularly significant, since it exists not only in all cases of actual or potential conflict of interest, but also in all cases where there is a perceived conflict of interest, whether that perception is actually accurate or not. In fact, problem (3) is doubly significant, since it will apply in situations where either (1) or (2) also applies: if a person's judgement is actually affected due to the conflict of interest, or if a person is led into inappropriate conduct, these things will also have the effect of creating an impression of bias (which would, in these cases, be justified).

When a person is in a position of public trust, the public perception of any situation will be extremely important. Since it is virtually impossible to explain to all members of the public why in a particular situation, where there was a perceived conflict of interest, there was not an *actual* conflict of interest, the only realistic way to deal with perceived conflicts of interest (whether the perception is accurate or not) is to treat them as if they were actual conflicts of interest. Take, for example, members of the criminal justice system. The mere appearance of bias or impropriety within this system tends to undermine public confidence in the fair administration of justice. Thus it is important for all holders of the public trust to learn to deal properly with conflicts of interest, whether these conflicts of interest are perceived conflicts, potential conflicts or actual conflicts.

How can a conflict of interest be dealt with?

There are three usual methods of dealing with a conflict of interest:

1. declare the conflict of interest (also known as disclosing the conflict)
2. remove the conflict of interest (also known as disposing of the conflict)
3. avoid the conflict of interest (also known as distancing oneself from the conflict).

Declaring a conflict of interest simply involves informing the relevant parties of the existence of the conflict. Removing a conflict of interest involves eliminating the

interest or interests that have, or are likely to, come into conflict with one's professional or public role. For example, a public official who must make decisions that are likely to have an effect on the value of industrial shares might sell off all shares that may be affected by those decisions before taking up the position, and thus divesting themselves of the financial interests that are the cause of the conflict. Avoiding a conflict of interest involves ensuring that one is not required to exercise judgement on behalf of another in a situation where one has an interest that will tend to influence that judgement. For example, a magistrate might (and of course ought to) decline to hear a case in which their spouse is the defendant.

In many professions, recognising the existence of a conflict of interest, and declaring that conflict of interest to the relevant involved parties, may be sufficient to deal with the problems that the conflict of interest raises, such as when a financial planner discloses to their clients the nature and extent of any commission that they may receive for 'selling' certain financial products. In other professions however, while recognising and declaring a conflict of interest is an essential first step in dealing with the conflict, it does not actually solve the problem. For example, it would not be sufficient for a judge to simply disclose that they have a conflict of interest in a case over which they are about to preside. Since the very nature of the justice system requires that court proceedings are conducted in a fair and impartial manner, the mere perception of judicial bias within the process is problematic and is generally taken to be grounds for an appeal.³ In fact I would argue that, for any person in a position of public trust, mere disclosure of the conflict of interest will not be a satisfactory solution, and thus any conflicts of interest will need to be dealt with in another way.

Unavoidable conflict of interest

Under what sorts of circumstances could an unresolvable conflict of interest arise for a professional? For this to happen declaring the conflict of interest would have to be insufficient to resolve the problem, and also it must be impossible to remove the conflict of interest. It seems likely that the main time that unavoidable conflicts of interest will occur is in emergency situations, for example if an emergency room doctor is forced to treat a seriously injured relative or close friend since there is no other doctor available and the patient's condition is serious enough that it would be dangerous to wait until another doctor was available. Police officers are especially likely to run into unavoidable conflicts of interest of this type.

However, on closer examination it seems that some aspects of the professional role itself, or of the relationship between the professional and those on whose behalf that professional is acting, may in fact lead to unavoidable conflicts of interest. Such conflicts of interest are likely to be far more common and widespread than those encountered in emergency situations, and so it is these conflicts to which I shall devote most of my attention in the remaining part of this paper.

Intrinsic conflicts of interest in the professions

In the concluding chapter of *Conflict of interest in the professions*, Andrew Stark (2001) notes that discussion of conflicts of interest cases has, in the past, tended to focus on

conflicts extrinsic to the professional role, what we might call ‘personal’ conflicts of interest. These sorts of cases involve examination of the effect that factors extrinsic to one’s professional role, things like ownership of shares, acceptance of gifts, personal relationships, and so on, may have on the exercise of one’s professional duties. However, more recent discussions have often examined those conflicts of interest that are intrinsic to the professional role, what might be termed ‘professional’ conflicts of interest. These sorts of conflicts tend to arise in two ways (Stark 2001: 336):

- A. the professional occupies more than one role with respect to the same principal,
or
- B. the professional occupies the same role with respect to more than one principal.

There are two sub-types of situation A, where the professional occupies more than one role with respect to the same principal:

- 1. the professional occupies roles of both buyer for and seller to the same principal, which Stark (2001: 337) refers to as a conflict of diagnosis and service provision, or
- 2. the professional occupies both an impartial and a partial role with respect to that principal, which Stark (2001: 337) refers to as a conflict of judging and advocacy.

The role of the auditor serves as an illustration of the diagnosis/service provider conflict (A1). As a diagnostician, it is the role of the auditor to assess the financial health of the company being audited, and to recommend a course of action to deal with any shortcomings that are detected. As a financial services provider, the auditor may well be in a position to offer services to deal with the detected shortcomings. In such a situation the auditor would be acting as both the buyer of services for, and the seller of services to, the company.

The role of a show business agent serves as an illustration of the judging/advocacy conflict (A2). Suppose we have an agent who represents the star of a television show, and is also a producer of that show. In their role as the star’s agent, they have an obligation as an advocate to promote the star’s interests. In their role as a producer of the television show, they have an obligation to judge what is best for the programme and its investors. This places the agent in the situation of simultaneously advocating for the star and judging their performance.

A stockbroker is a good example of a professional who may face a ‘professional’ conflict of interest of the other major type mentioned earlier, (B) that of acting in the same role for many principals. Few (if any) brokers manage accounts for only one client; most represent a substantial number of clients at the same time. In cases where they are required to determine who will receive an allocation of a share issue that is in short supply, a broker can easily find themselves in the position of representing two clients who are in competition with each other for the same shares – a situation in which it may be difficult, if not impossible, for the broker to adequately fulfil their obligation to both of their clients.

Many conflicts of interest intrinsic to the professional role can be dealt with through the strategies as extrinsic conflicts of interest, through declaration, avoidance or removal.

The auditor, for example, can ensure that they fulfil only one of the professional roles for a particular client, acting either as diagnostician or as service provider, but not both at the same time. Thus if the auditor made it clear before the commencement of the audit that they were acting only in the role of a diagnostician, and would not provide any services after the audit, should such services be found to be required, then any conflict of interest problems would be avoided. Similarly the show business agent can avoid conflict of interest problems by acting in only one capacity with regard to any particular client. Thus if the agent is a producer of a television show, then they ought not to represent any actor involved with that show, thus keeping separate their advocacy and judging roles. However, not all intrinsic conflicts of interest are amenable to such simple solutions.

Unavoidable intrinsic conflicts of interest

Many professionals operate under a fee-for-service structure, where the client makes an appointment to consult with the professional in question and pays a fee (often based upon some sort of standard scale) for the service that they receive. What has tended to go unnoticed is that such a system often involves an unavoidable conflict of interest for the professional. Consider the case of the ordinary self-employed general practitioner in medicine. Patients come to the GP seeking both diagnosis and treatment. Since medicine, like the other professions, is a specialised field, the patient relies on the expertise of the doctor to determine what treatment is appropriate, which means that the GP is effectively acting as the agent of the patient in buying medical services, services that the GP is also selling. Such a case is a perfect example of a professional conflict of interest of the diagnosis/service provision type (A1). As long as a fee-for-service system exists for professional consultations, in other professions as well as in medicine, such conflicts are unavoidable in any situation where professional advice (as opposed to simple professional service) is sought from a self-employed professional.⁴ It is interesting that physicians may face criticism for over-servicing if, for example, they refer patients requiring tests to a facility in which the physician has a financial interest. Instances of medical over-servicing of this type have been noted and condemned in the past, but it is not generally recognised that there is no in principle difference between the conflict of interest involved in such referrals and the conflict of interest intrinsic to the fee-for-service payment structure.

Other payment systems can involve even more serious conflict of interest issues. Consider the case of a lawyer who agrees to act for a client on a 'no win, no fee' basis (which is quite common in areas like personal injury law). Since the lawyer will receive no remuneration and will also forfeit any expenses already undertaken if the client does not win or settles the case, the financial interests of the lawyer may well come into conflict with those of their client. Suppose, for example, that the lawyer thinks that there is little to no prospect of winning at trial, but their client wishes to proceed anyway because they feel the principle is important. Just before the trial is to commence, the defendant offers a small settlement, which the lawyer knows their client will want to reject. In such a situation the interests of the client are clearly at odds with the interests of the lawyer representing them, and the lawyer faces a conflict between their duty to the client and their own financial interests.

The case, mentioned earlier, of the stockbroker who represents two clients who are in competition for the same shares is another situation where a professional faces an unavoidable conflict of interest, intrinsic to their role, due to the fact that they occupy the same role for more than one principal. Many professionals involved in financial services can find themselves in positions where they represent both the buyer and the seller in the same transaction, which actually brings about two professional conflicts of interest simultaneously: that of serving more than one principal and of diagnosis/service provision.

Such cases of conflict of interest that are intrinsic to the professional role are often unrecognised, but exist nonetheless. For many professions some intrinsic conflicts of interest are likely to be unavoidable, though many can be dealt with through thought and good management.

Conflict of interest in university lecturing

I wish to end this discussion by considering issues of conflict of interest for university lecturers. I believe that there are conflict of interest problems for university lecturers, both extrinsic and intrinsic to their professional role, that have until now generally passed unrecognised. However, given the direction in which university teaching in Australia is moving, such issues are likely to become more and more important.

Outside the university sector, many skills-based courses are taught and assessed using a model of competency-based training. So if, for example, a person needed to obtain a certificate showing that they were competent to use a chainsaw, then they would enrol in a course in chainsaw operations. At the end of the course they would be assessed, and if they were found to be competent to use the chainsaw safely, then they would be granted certification. For the purposes of this discussion, the important thing about competency-based training, as practiced in this country, is its assessment regulations. A person cannot be assessed for competency by anyone directly involved in the teaching of the course in which they were enrolled, nor can they be assessed by anyone with whom they have a significant personal or financial relationship. These regulations are designed to ensure the integrity of the competency assessment, and to guard against problems arising from conflicts of interest.

In most cases, university subjects are assessed in a manner totally unlike competency-based training courses. Students are usually assessed by the same person or persons who taught them, which can lead to conflict of interest problems in several ways. Friendships can and do develop between university lecturers and the students that they teach, particularly in higher level subjects that tend to have smaller enrolments. These relationships have the potential to influence assessment, since they can have an effect on the impartiality of the lecturer. In cases where postgraduate students seek the lecturer's help in securing employment by acting as a referee lecturers can also find themselves in the roles of both judge of and advocate for that same student. The fact that university lecturers usually assess the courses that they teach can also bring about a conflict of interest as the teaching competence of academics comes under more and more scrutiny. If a high failure rate in a subject is seen as a reflection of the poor standard of teaching in that subject, then lecturers may be tempted to pass some students who on objective standards should fail, lest the lecturer's teaching come under scrutiny.

Some recent, well publicised cases regarding the standards required of international students also raise issues of conflict of interest. If an increase in the number of full-fee-paying students is required in order to secure the financial health of the department or of the university, and possibly even to ensure the continued employment of the lecturer, then a lecturer's role as a teacher may well come into conflict with their role as a university administrator, not to mention the lecturer's personal financial well-being.

While some of these conflicts are avoidable, others do not seem to be. One of the reasons that it is possible to insist on independent assessors in competency-based training is that the skills are both widely known and able to be simply and objectively assessed: either this person can use a chainsaw in a recognisably safe manner, or they cannot. Most university assessment is not like this, since there are often no clear right or wrong answers, and there may be subtle nuances that must be properly understood. While it may be possible in some subjects for students to be assessed by people not involved in teaching the subject, this will not always be the case. At higher levels, subjects may well be taught by the only people within the university qualified to assess the subject, making it practically difficult for the students to be assessed by people not involved in the teaching of the subject.

Conclusions

Conflicts of interest arise in every profession. Most conflicts of interest can be resolved through the strategies of declaration, removal or avoidance, but situations can arise in many professions where conflicts of interest are unavoidable, particularly when the conflict of interest is intrinsic to the professional role. Thus understanding conflicts of interest will be extremely important for all professionals.

References

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¹ On behalf of the university that offered the subject for which these essays were submitted as assessment.

² This example was suggested to me by Andrew Alexandra.

³ It should also be noted that any perception of conflict of interest would be sufficient for a person to be disbarred from acting as a juror on a particular case, or, if the trial has already commenced, then a juror's apparent conflict of interest would usually be sufficient to ensure a mistrial.

⁴ The same problem arises for professionals who are not self-employed if their payment arrangements are in any way based upon the number of clients they deal with or the number of consultations the client has. In any case where more consultations equals more money for the professional, diagnosis/service provision conflicts are unavoidable. Professionals whose

remuneration does not vary whatever the number of consultations do not face the same conflict of interest problems (though they may be thought to have less incentive to be hard working).