

# General Overview

## Guidance and Advice for Faculty Who Engage in Outside Consulting

**Introduction:** The University of Rochester supports and encourages outside consulting relationships as they often provide both valuable experience to the faculty in their research and teaching activities and public benefit to the community. Some faculty who engage in consulting are unclear about their obligations to the University regarding intellectual property they develop and conflicts of interest, and are uncertain about the general terms and conditions of a consulting arrangement.

This General Overview is offered to provide some helpful advice and guidelines for faculty regarding some of the key aspects of their consulting arrangements. While the University has an interest in ensuring that faculty members adhere to University policies in consulting arrangements, the consulting relationship between the consultant and the outside entity is a personal agreement to which the University is not a party. We hope you find this Guidance helpful, but it is ultimately the responsibility of the consultant to ensure that University policies are being complied with and that he or she understands and complies with the terms and conditions of the consulting arrangement.

### **Guidance and Advice related to Relationship between Faculty Member and University in Outside Consulting**

1. Relevant Policies. Faculty members are responsible for complying with University of Rochester policies. Policies typically implicated in outside consulting include:
    - a. Faculty Policy on Consulting Arrangements:  
<http://www.rochester.edu/provost/FacultyHandbook/FacultyPolicies/External/Introduction.html>  
This policy sets general limitation on outside consulting arrangements. Under this policy, faculty are generally permitted to consult for up to one day per week on average.
    - b. Conflict of Interest policy:  
<http://www.rochester.edu/ORPA/policies/index.html#Conflict%20of%20Interest%20and%20Misconduct>  
This policy establishes the procedures to be following when a faculty member has a potential conflict of interest between his consulting role and his university role. The policy outlines the disclosure responsibilities of the faculty member relating to his/her consulting relationship.
- Please be aware that the conflict of interest issues that may present themselves increase in complexity where the faculty member's consulting role is coupled with sponsored research by the company at the University (especially the conduct of a clinical trial), the consultant's equity ownership in the company, a management position held by the consultant in the company or other similar additional "layers" or "roles".

c. Intellectual Property policy:

<http://www.cc.rochester.edu/ott/policies/>

Consulting agreements must not convey to the company any rights to any intellectual property developed using University facilities or developed under grants or contracts awarded to the University or conceived or first reduced to practice while working for the University.

2. The general scope and time requirements of your outside consulting arrangement should be discussed with your department chair prior to the engagement and periodically throughout the engagement, especially if your consulting role changes.
3. Faculty members may not use facilities, equipment, materials, funds, personnel or similar resources of the University in the consulting activities. The faculty member may not engage or employ students, post-doctoral fellows or similar researchers to provide services under the consulting arrangement without the prior consent of the department chair.
4. The consulting agreement is a private agreement between the faculty member and the company. The University has no liability or responsibility for the terms of the agreement or the performance by the faculty member of the consulting services.
5. Neither the faculty member nor the company for which he/she consults may use the University's name or logo in connection with the consulting services, except that the faculty member may use the University's name in describing his/her credentials or title.
6. The faculty member may not disclose to the company information that is proprietary to the University and not generally available to the public, such as unpublished research results or similar data.

### **Guidance and Advice related to Relationship between Faculty Member and Company in Outside Consulting**

1. We strongly recommend that faculty seek review of any proposed arrangement by your personal legal and tax advisors because the faculty member will have personal liability for whatever agreement is signed. The Office of Technology Transfer and/or the General Counsel's Office will be happy to review the consulting agreement to ensure it complies with University policies.
2. Potential Issues in Consulting Agreement Terms
  - a. General Overview. The issues outlined below are common ones University personnel have seen in the past. It is not an exhaustive list of issues that can arise. The information contained in this Guidance is not intended to constitute legal or other advice on the contractual terms between the faculty/researcher and third parties. Rather, it is intended to highlight issues that could arise in the course of a specific consulting arrangement that might be of concern or interest to the consultant.

- b. Scope of Work. The consultant should ensure that the scope of work defined in the consulting agreement is as closely tailored to the work that the consultant expects to perform as possible. For instance, a definition of services to be performed stating “the consultant shall provide such services as may be requested by the company from time to time” or “the consultant shall provide services to the company in the area of cancer research” is too broad and will not protect the consultant in the event the company may claim intellectual property rights in research (see below).
- c. Intellectual Property Ownership. Often outside consulting agreement have a provision that requires assignment of inventions and other intellectual property to the company. Apart from a potential conflict with the University’s IP Policy (see above), faculty should consider whether he/she would want to retain ownership of the intellectual property he/she created so that he/she can use it in the future. In addition, faculty should review the language to ensure that it does not jeopardize future University research programs in which the faculty member participates. For instance, companies may seek rights to future inventions related to the consulting activity which might interfere with the University’s ability to give rights to other companies that sponsor University research or from complying with the requirements of the Bayh-Dole Act.

Faculty members should note that the University’s Intellectual Property policy requires that disclosure of all inventions conceived by the faculty member be given to the University, even if the faculty member believes they should be owned by the company.

- d. Confidentiality and Right to Publish. Typically, a company will want to disclose proprietary information to the consultant and will want assurances that this information will be kept confidential. Please be sure that you understand precisely what information is confidential, and what your obligations are to protect the information from disclosure. It would be prudent to require any information the company wants to be kept confidential to be clearly marked to indicate that it is confidential. Faculty should also ensure that they retain broad rights to publish. The company can retain the right to review so that company confidential information can be redacted or to allow for the filing of a patent prior to publication.
- e. Indemnification (“Hold Harmless”) and Limitation of Liability.

General Comments on Liability. Please be aware that consulting work for a company is a private matter between the consultant and the company. As a result, the University’s general insurance coverage, which is available to faculty in the role of an employee of the University, is NOT available to cover consulting work. If the consultant believes there is potential for a claim by the company against him/her for his/her consulting work, the consultant should check his/her personal liability policies (homeowners policy, etc.) to see what kind of protection it may afford you in the event of such a claim.

Indemnification. The company should be asked to indemnify (or “hold harmless”) the faculty member for any third party action or similar claim related to the consulting services. For example, if a third party feels it is injured due to the company’s product or service, and that product or service is related to the consultant’s consulting activity, it is possible that the consultant will be sued in addition to the company. An indemnification obligation by the company is an obligation to pay the consultant’s defense costs and perhaps any resulting liability in such an event.

Limitation of Liability. In a consulting role, the consultant will be providing advice and other services to the company that may or may not be used. The consultant will likely have little or no control over how such advice or service is incorporated into the company’s business or products. It would be advisable to include a provision in the consulting agreement that the consultant’s liability is limited to his/her [gross] negligence or willful misconduct. The agreement should expressly disclaim any liability of the consultant for any product produced by the company.

- f. Exclusivity or Non-Compete Provisions. The consultant should be aware of any provision that attempts to restrict him/her from providing advice to other companies or organizations or that would restrict him/her from any work within the University. If there are any restrictions that limit what the consultant can do on research, the consultant should make sure he/she understands them and that they are consistent with University policy.
- g. Tax Issues. Since the consultant is an independent consultant for the company, he/she will NOT be paid as typical employees are paid. Specifically, there will be no income tax or social security tax (FICA) withheld from the consulting fee. The consultant will receive a tax document referred to as a Form 1099 that is used to report the consultant’s income to the government. The consultant is responsible for ensuring that he/she pays any taxes that are owed on that income. In some cases, the consultant may be required to pay taxes quarterly. The consultant should consult with a tax advisor to ensure he/she understands his/her financial responsibilities for taxes.

If you still have questions after reviewing this Guidance, you should first consult with your Department Chair or equivalent supervisor. If the supervisor is unable to answer your question, you may be referred to the appropriate University office (OTT, ORPA, Office of Counsel).

Faculty members are encouraged to rely upon the University’s policies set forth above rather than a detailed review of the proposed agreement by University personnel. Faculty may, however, request review of a proposed consulting agreement solely for compliance with applicable University policies. The review provided will not constitute legal or other advice on the contractual terms of the consulting agreement. University personnel do not negotiate consulting terms on behalf of faculty members because of potential conflict that could exist between the University and the faculty member concerning the outside consulting arrangement.