Consulting or Related Service Agreements Contracted Through Harvard

Reason for Policy

Schools, centers, groups of faculty, and individual faculty members are on occasion approached by external entities, governments and corporations and asked to undertake, often but not always for hire, defined activities that may closely resemble service, or "research for hire" arrangements. In these situations, the external entity often seeks services that are branded as "Harvard services," and not simply the personal consulting services of a Harvard-affiliated professor or staff member. In that way, these external entities likely hope not only to receive high quality services, but also to enjoy, on some level, the use of the Harvard name as some apparent institutional approval or endorsement of the work products.*

On occasion, Harvard faculty members themselves seek to perform such services through agreements between an external entity and Harvard, rather than contracting privately with the external entity as an independent consultant. This may occur when, for example, the faculty member wants to be able to use Harvard facilities, resources, staff or students to assist in performing services. The use of students and staff for these purposes raises significant issues that are noted below.

Examples of faculty services requested be contracted through Harvard include:

- A request from a government agency that faculty and staff assess the organizational structure of a prominent or controversial not-for-profit entity;
- A request from the government of a developing country that Harvard faculty negotiate on behalf of that country in regard to a significant international policy issue;
- A request from a city government that Harvard faculty assist in its urban planning; and
- A request from a for-profit company that a faculty member assign students in an academic course to a consulting project on which both the faculty member and his or students work, as a "practical" course exercise.
Often the proposed agreements involve high-profile and challenging projects that, if undertaken, would presumably add significantly to faculty (and student) expertise, may place faculty squarely within matters of moment that are highly relevant to their teaching and scholarship, and initiate or bolster strong institutional relationships that can serve long-term University and school interests. Thus, there is much to recommend the pursuit of these arrangements, especially where there is a substantial potential to advance scholarship, but these arrangements also raise many potential difficulties and complications.

Harvard, as an educational and research institution, is not a purveyor of consulting or other professional services. It has no infrastructure to assure the quality of services provided. Harvard, as the contracting party in these arrangements, risks liability for non-performance or poor performance of agreed-upon tasks, and for unsatisfactory contract "deliverables," which often take the form of reports or "white papers." The liability here may reach beyond the service fees paid to Harvard, and could include consequential damages from poor performance. These engagements also are more complicated for the University to manage than sponsored research agreements. For example, if Harvard were to undertake to assess and oversee performance of faculty under these engagements, it would risk being accused of violating academic freedom, interfering with faculty consulting privileges, and even interfering in research and scholarship. Unlike in federal or foundation research grants, or other types of true sponsored research arrangements, in which the sponsor may be presumed to be committed to the principles of objective science, "clients" in service arrangements may care less about objective findings than in obtaining specific "results" from the services they have purchased from Harvard. As a consequence, conflicts of interest may arise for the researchers, and institutional integrity may be compromised.

The use of Harvard students, post doctoral candidates, and staff to assist in these projects raises other unique policy issues. Harvard has a fiduciary duty to students and post doctoral fellows, and should assign them to engage in specific activities only when such engagements clearly advance their education. Even if students and post docs volunteer for these duties, care must be taken to assure that in doing so, students are not responding to subtle pressures; understand that they will be assisting in performing "work for hire"; and appreciate that their educational and career opportunities will not be negatively affected by declining to participate. Harvard non-faculty staff members themselves have job descriptions, and were hired to perform their defined employment; the demands of Harvard "service projects," therefore, should not interfere with their ability to perform their regular and defined duties as Harvard employees.

The interests of faculty and the institution must be safeguarded in the negotiation of such arrangements. Entities seeking these services predictably would seek - and indeed have sought - that IP (most often, copyrights) created in these engagements belong fully and completely to that entity, and often, as proposed, would not allow Harvard even a royalty-free, non-exclusive license for Harvard's use of Harvard's own faculty's work. They may also seek very restrictive confidentiality clauses that prohibit communications about the requested work products, counter to the faculty members' aim of enriching their own research and teaching through these "consulting activities." Similarly, if applied to students engaged in these activities, such confidentiality clauses imperil the ability of students to use and publicize their own work, or even to present that work in wider Harvard settings.
Also of note are the potential implications of these activities for Harvard's tax-exempt status as a not-for-profit (501(c)(3)) institution. As such, Harvard is afforded the privilege of issuing debt at federally-subsidized interest rates, but in return it must maintain compliance with complex IRS regulations. In particular, activities occurring in academic facilities that were constructed or renovated using tax-exempt debt must substantially support the University's academic mission. Even relatively modest levels of industry-sponsored research and other non-core-mission activities could threaten adherence to these standards; potential consequences for noncompliance include financial and reputational losses associated with the revocation of Harvard's tax-exempt status. Proposed agreements that fall under this policy must be scrutinized for these reasons as well.

Lastly, these agreements, when they occur and are allowed, may be, on the whole, more often feasible in the social sciences and professional disciplines than in the "hard sciences" or "bench sciences," due to the complications posed in those areas by patent law, the University's IP policy, and Bayh-Dole requirements. In the bench sciences, the social sciences, and the professional disciplines, however, it is not generally feasible, or consistent with principles of higher education, for faculty to forswear use in their core academic activities of the results of their own work on such "consulting agreements."

*Note, however, that contract services in the "bench sciences" are permitted through different approval and accounting mechanisms involving the establishment of "Core Facilities." In those circumstances, the product or service is directly related to the use of technology or equipment available to Harvard, and the process that is requested is typically the processing of materials, samples of specimens, with little or no high level intellectual involvement by faculty or students. Services provided by such "Core Facilities" are not covered by the terms of this policy.

Statement of Principles

In general, because of the recurring issues identified above, the University disfavors these agreements between an external entity and Harvard under which Harvard faculty (and, on occasion, staff members and students) perform services for which Harvard itself is obligated. There may be compelling cases in which exceptions should be made, but these indeed should be exceptions, and not part of any routine practice. A presumption should be that such agreements should not be entered into, unless a compelling rationale can be offered for allowing an exception, and unless in the arrangement the University's mission and interests can be reasonably safeguarded.

The first preference is that such agreements be structured as a consulting agreement between a faculty member, in his or her private capacity, and the external entity. This would not allow the faculty to use Harvard resources (other than mere incidental use), or ordinarily to assign staff and students to perform the work, but an agreement of this type would raise none of the problems identified above, as all risk and responsibility rests with the faculty member acting in his or her private capacity.
As a second preference, if the proposed arrangement "fits" within the boundaries, scope and purpose of a sponsored research agreement, these agreements should be re-fashioned accordingly, with the external entity funding a school and specific faculty to produce identified deliverables** at the end of the project or services. If an external entity can agree to become a "sponsor" and thus abandon its role as client, then OSP, HSPH SPA, HMS SPA and/or OTD would be able to engage in their regular sponsored agreement processes. This would have two decided advantages: First, it would subject proposals for these activities (and RFP responses) to pre-submission review. Second, through the established process of Provostial review*** for projects that may lie outside the University's core mission and for those projects that may present reputational risks, a review mechanism is already fully operational by which these agreements and their implications can be considered by central administration. If, however, as may happen, the external entity refuses the sponsored research paradigm, or if that paradigm is deemed by OSP, OTD and/or OGC not to be applicable to the proposed arrangement, then Harvard is left with the issue of how procedurally to handle such an agreement.

**"Deliverables" in this context do not mean specific results or conclusions, but instead represent a category of work product, such as a report of results, a "white paper," or specified data. Harvard should, of course, never enter into an agreement by which the University or a faculty member agrees to reach specific research conclusions.

***Criteria and Procedures for Provost's Review of New Projects or Grants

Statement of Process

Consistent with the foregoing, the applicable process in these cases is as follows:

1. OSP, OTD and/or OGC should first explore with the faculty and School whether the project could be arranged, in order of preference: (1) as a consulting agreement directly between the faculty member, in his or her private capacity, and the external entity, or (2) as a sponsored research agreement. In some cases, this may require the external party to re-conceptualize the nature of the project. In other cases, this may require exploring with faculty and the School whether the project might be accomplished without committing institutional resources.

2. If these efforts fail, then Provostial review should not occur until and unless the cognizant dean has fully endorsed the exception to policy that such an agreement would represent. That endorsement should be in writing, and should indicate the institutional rationale for why this arrangement will be of significant institutional benefit and will advance the School's core academic missions. The dean should also acknowledge and address, as part of the Provostial review process, the risks to the school that such an arrangement presents, as well as the extent to which the agreement will require use of school resources, including of students and/or non-faculty staff, or will allow the hiring of students to assist. As part of this process, the dean should define
acceptable limits on use of school resources, as well as any implications for involvement of non-faculty staff and students.

3. Decanal support is a necessary condition for an agreement to proceed to execution; through Provostial review, the reputational and other risks should be assessed, feasibility analyzed, and possible risk mitigation strategies identified and then communicated back to the schools and to OGC. In the event of deadlock or serious disagreement between the dean and faculty on the one hand, and those conducting Provostial review on the other, the Provost will be called upon for his judgment and direction.

4. OGC, and not OSP or OTD, will negotiate these agreements, based on the unique risks and exceptions to policy that they represent. OGC will also undertake the UBIT (Unrelated Business Income Tax) analysis of any remuneration received for services, and will confer with the Treasurer’s Office regarding any limitations imposed by the financing of the Harvard facilities proposed for use in the project. Schools will be responsible for implementing the necessary accounting procedures that OGC recommends.

5. In negotiating these agreements, OGC will assure at least the following:

- Harvard will give no indemnity or warranties as to the quality of the work product to the external entity;

- Harvard will allow the external entity to own the copyrights generated in the course of the services, but Harvard faculty and staff will be allowed, at a minimum, a royalty-free license to use the work product for teaching and research, after a defined reasonable interval, most often limited to no more than 12 months;

- Harvard will agree to confidentiality of information derived directly from performance of the services, but faculty and staff will gain, after a reasonable interval, most often limited to 12 months and preferably a shorter period, the ability to use that information (if feasible, properly anonymized) for teaching and research purposes. Exceptions could be made for defined, demonstrably sensitive information, such as human resources records, identifiable employee personal health or financial information, corporate or enterprise financial information, trade secrets of the external entity, or other private commercial information that may become known to Harvard faculty, students or staff in the course of providing services, but that has no significance to the academic or scholarly work of these individuals.

- Faculty will sign assignments of copyright to Harvard in order for Harvard to grant the rights to the external entity party that seeks the services, and all personnel working on the project will sign confidentiality agreements reflecting any obligations listed in 5. b and c, above.

6. When OGC identifies important institutional interests that may be compromised by contract demands of the external entity, OGC should call upon the following parties as appropriate, for advice and direction on proposed contract terms: interested faculty members, Dean, Provost’s office, OSP, OTD. Issues relating to projects with significant international activities should also be referred to the Vice Provost for International Affairs.
7. Once negotiations have concluded, the contract should be signed according to the standard sponsored agreement process. Agreements of this type in the "bench sciences" should be signed and processed by OTD, after OGC has negotiated the agreement; agreements in all other academic areas should be signed and processed by OSP. Because OSP and/or OTD will sign these agreements, OGC consultation with OSP and OTD is essential before and during contract negotiation. For similar reasons, it will not be appropriate for OGC, OSP or OTD to be presented by faculty or a school with an agreement whose material terms have already been agreed upon; the interests of the University and schools cannot be adequately protected if this process if not followed closely.

8. During the provision of services pursuant to an agreement approved under this process, the Provost's office, OSP and OTD may inquire into the status of the project and consult with faculty about any difficulties encountered. The dean and the lead project faculty or staff members should promptly inform the Provost's office and OSP of any significant difficulties that arise during the engagement, including disagreements with the external party about performance of the agreed-upon services.

9. The dean and faculty involved must submit a brief written report to the Provost's office and OSP or OTD at the conclusion of the engagement, indicating the services provided, any difficulties encountered, and the benefits gained for the school and faculty. This will be preserved in GMAS to build institutional memory and to be consulted, as needed, in future similar situations.

Definitions

**Bayh-Dole Act** or **University and Small Business Patent Procedures Act** -- United States legislation dealing with intellectual property arising from federal government-funded research. Adopted in 1980, Bayh-Dole is codified in 35 U.S.C. § 200-212[1], and implemented by 37 C.F.R. 401[2]. Among other things, it gave U.S. universities, small businesses and non-profits intellectual property control of their inventions and other intellectual property that resulted from such funding. The Act, sponsored by two senators, Birch Bayh of Indiana and Bob Dole of Kansas, was enacted by the United States Congress on December 12, 1980. Bayh-Dole permits a university, small business, or non-profit institution to elect to pursue ownership of an invention in preference to the government.

**Bond covenant**-- An agreement between the issuer and holder of a bond, requiring or forbidding certain actions of the issuer. Positive covenants require actions while negative covenants forbid them. The exact terms of a bond covenant must be written in the bond indenture.

**Consulting** -- a professional activity related to a person's field or discipline, where a fee-for-service or equivalent relationship with a third party exists.

**Unrelated Business Income Tax (UBIT)** - Section 513 of the Internal Revenue Code defines an "unrelated business" as an activity which is regularly conducted and not substantially related to the purpose for which the nonprofit organization was granted its exempt status. Subject to certain statutory exclusions and modifications,
any income from such unrelated business income activity that exceeds its allowable deductible expenses is subject to unrelated business income tax. Annually, the University is required to report and remit any UBIT to the IRS.

Related Policies

Conflicts of Interest Policy  
Statement on Outside Activities of Holders of Academic Appointments  
Publication Policy  
OTD Consulting Guidance  
Harvard University Employee Manual  
Criteria and Procedures for Provost's Review of New Projects or Grants  
Statement of Principles Governing Commercial Activities of Harvard University, with application to Partnerships between the University and Outside Organizations  
Statement on Outside Activities of Holders of Academic Appointments

Related Documents

Faculty of Arts and Sciences Dean's Approval  
The Grey Book

Contacts and Subject Matter Experts

The Office for Sponsored Programs; Grants and Contracts Specialists, Sponsored Program Officers & Team Managers  
HMS/SPA  
HSPH/OFS  
Provost Office

Key subject matter experts who provided input in the development of this policy were the University's three submitting offices, as well as the Sponsored Administration Leadership Committee, including the Vice Provost for Research and the University Director of Sponsored Research.

Revision History