

Minutes \*

**Faculty Consultative Committee**  
**Thursday, September 23, 2010**  
**1:00 – 3:00**  
**238A Morrill Hall**

Present: Kate VandenBosch (chair), Melissa Anderson, Peter Bitterman, Thomas Brothen, Colin Campbell, Nancy Carpenter, Carol Chomsky, Chris Cramer, Shawn Curley, Nancy Ehlke, Barbara Elliott, Michael Hancher, Caroline Hayes, Jeff Kahn, Russell Luepker, Jan McCulloch, Michael Oakes, George Sheets

Absent: Elizabeth Boyle, Marti Hope Gonzales

Guests: Vice President Kathryn Brown, Lynn Zentner (Director of Compliance); Vice President Stephen Cawley, Ken Hanna, Ann Hill Duin, Bernard Gulachek (Office of Information Technology); Provost E. Thomas Sullivan, Professor Karen Miksch (co-chair, Committee on Academic Freedom and Tenure); Professor Fred Morrison, Steven Pearthree, Sarah Waldemar (Council of Academic Professionals and Administrators), Don Cavalier (Civil Service Committee)

Other: Jill Christiansen, Kathryn Stuckert (President's Office); Sharon Reich Paulsen (Office of the Provost)

[In these minutes: (1) committee business; (2) administrative conflict-of-interest policy; (3) implementation of policy on securing private data; (4) discussion with the Provost: "Troubled Waters"; (5) committee memorandum on closing meetings; (6) impact of federal health-care law on the University and its employees/the UPlan]

**1. Committee Business**

Professor VandenBosch convened the meeting at 1:00 and asked for a vote to close the meeting very briefly; the vote to do so was unanimous. The Committee discussed briefly the nature of discourse with its guests and the distribution of portions of the minutes of this meeting beyond the usual list of recipients.

**2. Administrative Conflict of Interest Policy**

Professor VandenBosch opened the meeting and welcomed Ms. Zentner to discuss the current version of the administrative conflict-of-interest policy and how Appendix A (provisions applicable only to those in the Academic Health Center doing clinical work) would be treated when the policy is brought to the University Senate on September 30. The Committee first took up a series of edits proposed by Professor Chomsky.

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\* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

Professor Chomsky said she had read through the policy for language clarifications, but said she had a couple of larger questions. First, is the requirement that adjunct faculty (exempted unless they are involved in high-risk activities) be required to report if they are involved in "medical education," as the current draft had it? Was it meant to be that broad? Ms. Zentner said that needed more thought; it perhaps should be tied to a relationship with a business entity, so that only if one has business ties and could influence the curriculum in a way that favors the business would there be a conflict. Professor Bitterman suggested that the issue is curricular control—there are many adjunct faculty who deliver the curriculum prepared by the Medical School and have no way to influence it in a way that could be a conflict of interest.

Professor Chomsky's second question had to do with whether a phrase such as "it may be appropriate" should be included. (The language refers to the use of a product for demonstration and educational purposes.) The phrase was intended to provide flexibility, Ms. Zentner said.

Vice President Brown at this point thanked all the faculty members who had been very engaged in the consultation process. She noted that the policy had been worked on for over a year and had been reviewed by a number of faculty groups several times. She said they are at a point when the Board of Regents expects an administrative policy to be adopted, and they are receiving media and government inquiries about it, so she hopes the process can be brought to a close. It has to be a living document; if changes are necessary, they can be brought forward, and the policy can be changed in light of experience with it.

In terms of Appendix A, she said she hoped the Senate meeting could be focused on the parent policy rather than the appendix. Ms. Zentner is actively talking with faculty in the Academic Health Center about Appendix A. They want to be sure there is adequate consultation and they may have a 30-day comment period. There was a sense of urgency about having a policy governing clinical care, but if it is not right, it can be improved.

Professor VandenBosch said that the Committee has had a discussion about bifurcating the discussion on the policy and the appendix. Professor Cramer provided copies of an amendment to the Senate motion bringing the policy forward; the amendment would avoid discussion of Appendix A at this time—so that the discussion of the broader policy is not derailed by concerns about Appendix A. Appendix A can be treated as a work in progress, he said; insofar as it applies to the Academic Health Center, it can be treated as a unit-specific codicil, which the policy allows for. The amendment indicates there is ongoing discussion, that Appendix A will be fully consulted, and that if it becomes University-wide, covering clinical activity no matter the location at the institution, then it would be brought to the University Senate for approval. That may take awhile, but having it in place and something to work with will help the process. Professor Bitterman agreed that all references to Appendix A in the parent document should be expunged. Professor Cramer repeated the point that Appendix A is a unit-specific policy and is expressly allowed by the parent policy. There can be general statements about any additional requirements a unit may adopt.

Professor Bitterman expressed confusion about Group B individuals, those engaged in higher-risk activities. Must they be engaged in them now? Or are they in Group B if they have EVER engaged in such activities? Many faculty members will engage in the activities covered by the policy from time to time; how do they decide if they are in Group A or Group B? That is why he objects to the creation of groups, which leads to confusion.

The aim of the policy is to create a culture of compliance, Vice President Brown said. It is not intended to be a rule of law. The document is intended to help start the inquiry, to help faculty do their work, and to address issues in an appropriate way so that both the faculty member and the University can move forward. This is not a "gotcha" policy; it allows people to raise questions. That is not clear to the faculty, Professor Bitterman said, and if the policy lacks clarity, it will lack validity. Does the policy mean "ever"? When a question arises, Vice President Brown responded, there should be a dialogue. With whom, Professor Bitterman asked? Ms. Zentner and college administrators are possibilities, Ms. Brown said. Professor Oakes said that "ever" and "currently" would invite game-playing; the generality of the language is its strength.

Professor VandenBosch thanked Vice President Brown and Ms. Zentner for joining the meeting.

### **3. Implementation of Policy on Securing Private Data**

Professor VandenBosch now welcomed Vice President Cawley, Chief Information Officer, and his colleagues Ann Hill Duin, Bernard Gulachek, and Kenneth Hanna, to discuss the policy on Securing Private Data, Computers, and Other Electronic Devices and to provide an update on Google. The policy went into effect in July; members of this Committee reviewed the policy last spring and had no problem with it, but there were concerns about how it would be implemented.

Mr. Cawley explained that the policy is being phased in and that colleges have 12 months to implement it. The University has had a policy in place on securing private data ever since there were networks, but it had become very complex, so they overhauled it and made it simpler. They also addressed compliance with regulations (e.g., covering credit cards, HIPPA, etc.) as well as increased security threats. The policy was reviewed by the Senate Committee on Information Technologies twice last year; they received robust feedback. It was also reviewed by college IT directors and some department heads in order that they (Mr. Cawley's office) could understand problems in implementation.

The most robust faculty feedback came in response to the requirement that all University computers must be in managed active directory. That allows the University efficiently to manage security settings, to protect computers, and to patch computers quickly so that they can respond to immediate threats. The second area that received a lot of feedback came in response to the requirement that one not routinely run a computer as the "administrator" so that one is not using the computer with administrative rights—so if a virus attacks, it cannot usually get in. He said they would like to limit administrative rights (a higher percentage of faculty need them than other groups of employees). He said they would like the colleges to develop procedures on granting administrative rights.

Mr. Hanna noted that Committee member questions revolved around the use of home computers. Legally-private data must be stored on University-owned computers, not those that are personally-owned. Mr. Cawley said there has been confusion about what's to happen if someone sends private data to a personally-owned computer; the policy calls for it to be deleted as soon as reasonable. Those cases will happen, he said, and people just have to eliminate the data as soon as they can.

Professor Oakes said he was concerned about the role of Mr. Cawley's office (OIT). He is teaching a course with a computer lab; they have been functionally disabled by OIT and make it impossible to teach his course. He said he is concerned about implementation of the policy without

consultation with faculty teaching a course. The rule about active directory is smart but it is not clear where to draw the line. Mr. Cawley said that a management system may have been put in inappropriately and can be changed. Professor Oakes said that some things appear to be draconian action without consultation of those doing the teaching. Mr. Cawley agreed and said that the policy rollout is to be locally-managed.

Professor Oakes asked whether, if his computer never has private data, he has to cede administrator control of it. Mr. Cawley said that individuals can have administrator rights, but they ask that people use active directory so OIT can patch them as needed. Mr. Hanna said that the nature and sophistication of the malware has increased over time, and people are now making money by attaching malware through Adobe, Flash, and so on. What is the risk to the University if his computer never has private data and is wireless, Professor Oakes asked? Mr. Hanna said that the computer is connected to the Internet and part of the network, so any malware on his computer can attack others' computers. Keyloggers that steal any subsequent passwords entered are common in malware, too. He said even if one does not deal with a lot of private data one does not know when he might receive it. Professor Oakes said he applauded OIT's efforts but that they undermine his efficiency in doing his job.

Mr. Cawley provided the Committee with data on the magnitude of the problem of securing data. The monitoring tools are constantly adjusted and in many cases they can get a machine off the network within an hour and investigate any problem. They did so over 9,000 times last year. It is in everyone's best interest to adhere to the policy because the threat is huge. They understand, as IT professionals, that there needs to be as much flexibility as possible so people can do their jobs. Their instructions to IT support staff are to be as flexible as possible so faculty can do their jobs, and that includes not shutting down a computer lab. He concluded that 80-85% of computers are or will soon be compliant with the policy.

Professor Hancher noted that a lot of faculty member work on their own computers for something related to course grades, which are private. He said he was sure that many faculty members do not know how to access currently-available options; he recommended they develop a tutorial on how to do so. Mr. Cawley said it was a good suggestion; they are revamping their training and that is a module they should have.

Professor Curley first reiterated Professor Oakes's point: For example, he often tests various software for class. To have to wait for an OK and for others to do it for him would not work well. He also suggested that, since many are not knowledgeable about digital issues, it is recommended that in the FAQs there be specific examples of what is meant by "private data." And how to store it, Professor Hancher added.

Professor Oakes said that a faculty friend could not do what he wanted with a University computer, so bought his own and is running a shadow system.

What are the implications for running a web server, Professor Cramer asked? One might have a grant that includes buying a machine that runs a website. If private data are not involved, it is not a problem, Mr. Hanna said; this policy is about efficient management of security of desktops and servers storing private data. If the website includes private data, the risk increases and then there are requirements that must be met. Even if one has a laptop with no private data, Professor Cramer said, it is part of the University's ecology; the same is true of a server. There are rules about servers, Mr. Cawley

said, and they are monitored constantly to be sure they are patched. They also have guidance about using external websites and outside services; if the site will include private data, the University must have a contract with the company.

Professor Chomsky suggested they identify who one can talk to if one is getting a runaround and provide information about what one cannot do if one does not have administrator status. What it means basically is that one cannot install software or upgrades on the computer, Mr. Cawley said.

Professor Anderson reported that the Office of International Programs has issues with encrypted computers around the world; in some places encryption is forbidden. Some departments provide computers without encryption to faculty who travel. Is there a problem with that practice? They basically only have word-processing software on them. There is not a problem, Mr. Hanna said. If there are no private data, that is the best solution. The problem is not just elsewhere in the world; it can be a problem with U.S. customs as well. It is best not to take one's own computer and better to take a clean laptop. This becomes more difficult when one is attending something like a medical conference where one needs encryption.

Mr. Cawley next reported that the Google rollout is proceeding and 23,000 people have migrated. The colleges outside the Academic Health Center have been transitioning since May; the focus is now on central administration and the coordinate campuses. There have been a few technical snafus, but the general sense is that once one has moved mail, it is a positive experience. They are receiving good feedback from users.

What is the status of the Academic Health Center, Professor Oakes asked? They will have a transition plan by the end of the year, Mr. Cawley said. They want to be sure not to move existing bad business practices into Google (such as scheduling surgery on UMCAL or emails with PI information). The vast majority of the AHC colleges have good practices, he added.

Professor VandenBosch said that she has heard a little concern about security with Google and asked Mr. Cawley to say more on that subject. Mr. Cawley said there have been no problems. They did due diligence: They reviewed Google's internal security audits, which are done every 18 months, and reviewed the findings with the University auditors, and found that Google is extremely secure. Since last spring, the federal government has certified Google for FISMA (Federal Information Security Management Act), which in many ways goes beyond HIPPA, etc. The Berkeley National Lab has migrated to Google. He said he is very comfortable with their security and the University has all the same controls it had before.

Professor Chomsky said that there have been issues raised in the Law School; they have been hearing regular grumbles from those who have migrated, so the process may not be completely smooth. The faculty have been told that they need not migrate; is that long-term or short-term? Mr. Cawley said he talked about this last spring and needs consultation on it. Initially the idea was to provide better email and a better calendar and save money. If OIT needs to keep running the legacy email systems, the University will not save money. They need to talk with units; would it be better to set a date? Or offer central service, which is not free? Or leave units on their own for a couple of years? He said he would like to see the University realize the savings.

Professor Sheets inquired about improvement of Google to include nested folders. Mr. Cawley said they are bound by a non-disclosure agreement but said that Google is constantly making improvements. They are encouraging people to use the University's gmail web-interface, not Thunderbird or other email client applications.

Professor Hancher inquired about the problem of folders that cannot be moved because of their current condition. They must do a clean-up process, Mr. Cawley said. He said he moved nothing and started fresh, and then just moves files as he needs them. Some are blocked, Professor Hancher said. When they see anomalies, a tech person must manually sort through them, Mr. Cawley said. The problem is greater with faculty, who tend never to delete emails.

Professor VandenBosch thanked Mr. Cawley and his colleagues for the report.

#### **4. Discussion with the Provost: "Troubled Waters"**

Professor VandenBosch now welcomed Provost Sullivan to the meeting to discuss the controversy over the movie "Troubled Waters." She also welcomed Professor Karen Miksch, co-chair of the Committee on Academic Freedom and Tenure. Committee members were provided with statements that had been made earlier in the week by Provost Sullivan and Dean Levine:

September 21, 2010

Dear CFANS colleagues,

As you know, there has been widespread media coverage this week related to the University's development of a film entitled "Troubled Waters." I write to you today to clarify a number of points.

First, and most importantly, the protection and defense of academic freedom is the foundation for all we do at the University of Minnesota. As Regents Policy states, this includes "the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University." I want to assure all of you that the administration of this University does not, and will not, compromise on these principles.

Dean Allen Levine has informed me that Professor Susan Weller, Director of the Bell Museum, is in the process of establishing a group of distinguished scholars and educators from the University to review this film and make recommendations to her. I understand that Regents Professor Peter Reich will chair this committee and that the work of the committee will begin soon. I have every confidence that this group of distinguished faculty colleagues will carefully, thoroughly, and fairly carry out their assigned responsibilities.

Finally, we need to be vigilant in all matters to ensure that the University's values, including academic freedom, are supported and encouraged through our processes, decisions, and actions.

Sincerely,

E. Thomas Sullivan  
Senior Vice President for Academic Affairs and Provost  
Julius E. Davis Chair in Law

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September 22, 2010

Dear CFANS colleagues,

Yesterday you received a communication from the Provost about the documentary "Troubled Waters" produced by the Bell Museum. As Provost Sullivan stated, there will be a review of the film by an esteemed panel of scientists. Following the panel's evaluation the Bell Museum will premiere the film followed by an open discussion about Troubled Waters.

Susan and I look forward to an active and productive discussion. We are excited about this opportunity to do what Universities do best, discuss complex issues in an open and free manner. As Provost Sullivan emphasized, the protection and defense of academic freedom is the foundation for all we do at the University of Minnesota.

Best wishes,

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Allen S. Levine  
Dean, College of Food, Agricultural and Natural Resource Sciences

Professor VandenBosch began by noting that there was to have been a joint session with the Committee on Academic Freedom and Tenure beginning at noon, with Professor Susan Weller, Director of the Bell Museum, and Vice President Himle, but Professor Weller was unable to attend at the last minute and Vice President Himle indicated she wished to join the Committee with Professor Weller. So she asked Provost Sullivan to devote his time with the Committee to the movie matter.

Professor VandenBosch also reported that she had been in conversations with Professor Weller and Dean Levine about the issue and that she and Professor Cramer had met earlier with the Provost on the topic as well. She said that the situation had been changing rapidly over the last few days and that some matters cannot be discussed on the record because there are potential legal issues involved. With that, she turned to Provost Sullivan.

The Provost began with prepared remarks:

Early this week I began to be informed about the unfolding story with regard to the film.

Shortly after I began to hear about the concerns expressed, I felt an obligation to go on record regarding the values underlying the University's commitment to academic freedom. On

Tuesday, I sent a message to the CFANS community about the importance of our vigilance in all matters at the University in supporting and encouraging academic freedom.

As I said in my message to the CFANS community, academic freedom is a core, fundamental value on which we will not compromise. As you may know, I worked closely with the faculty and the Academic Freedom and Tenure Committee last year on strengthening our Academic Freedom policy—one that we can all be very proud of and one that was passed unanimously by the Board of Regents with my urging. It has received much national press on its "progressiveness" and "forwardness." Indeed, it has been said to be a model for other universities.

As more information came to me in the last several days, I became more concerned with this issue, even though I had the utmost confidence in the group of academic scholars and researchers with whom Professor Susan Weller was communicating with regarding a Bell Museum review.

As you know, President Bruininks is out of the country this week. After further discussions with Dean Levine and Professor Weller, this morning I contacted President Bruininks and recommended that the film be immediately released to the University community and beyond. He has accepted that recommendation and the film will be released today. This action is also consistent with Dean Al Levine's desire to host as soon as possible an opportunity for the University community and the public to view the film and to have a discussion following the viewing, as he expressed in his own memorandum to the CFANS community yesterday (Wednesday). The viewing and discussion is now scheduled for October 3, which is the date the film was originally to be shown by the Bell.

With the release of the film today, there is no longer any need for the review that was being assembled within the College and the Bell Museum.

As more information came to light Monday through Wednesday, I was informed that Professor Weller was receiving and reviewing documents indicating that an internal review by the Bell Museum had been done. These communications and reviews were physically presented to Professor Weller this week, including up through at least last night. Given this new information received by Professor Weller, it is her judgment that the film should be released and that further consideration by a review panel before its release is now not necessary.

So, on reflection, we should ask: "How did we get here?" As I understand from information gathered this week, after completion of the film, officials within CFANS were able to review it. Concerns about the film led to it being shared with University Relations for advice and assistance with potential public relations issues. Vice President Karen Himle called TPT to discuss a postponement until such time that there could be further review.

Based upon information that I received this morning from Professor Weller, I concluded that in the interest of the principles of academic freedom, I would make a recommendation to the President to release the film immediately. He agreed with my recommendation.

I think I can say that all of us are unhappy with the path that this event has taken. Importantly, it gives us an opportunity, to at this point in time, to reaffirm the important bedrock, fundamental principles that underlie academic freedom. My own view is that, while this is a complicated factual matter, when issues like this lie in a gray area of policy and law, where there are ambiguities of this kind they should tilt in favor of the fundamental principle of academic freedom. This is the basis of my recommendation to the President.

Upon the return of President Bruininks next week, he and I and the General Counsel of the University will continue to review roles, responsibilities, and processes with respect to such matters. We need to be vigilant in supporting and encouraging, through all of our processes, decisions, and actions, the important values of academic freedom.

Professor Sheets said the statement was well done and that he was relieved at the decision and the President's endorsement of it. Professor Oakes thanked the Provost for his statement. Professor VandenBosch also expressed appreciation, especially in light of the fact that the Provost was off campus last week at meetings of the Association of American Universities while the story emerged and the President is out of the country.

Professor Cramer expressed his appreciation as well. He said one could ask how the University got in this situation, but more importantly, how to avoid it in the future and how review of contracted work is to take place. Provost Sullivan responded that he, the President, and General Counsel Mark Rotenberg will meet to conduct a thorough review of the roles, responsibilities, and processes with regard to these kinds of cases. In the spectrum of cases, 99% of them are clear: Academic freedom principles apply. Perhaps 1% of the cases fall in a gray area, and there is a need to draw lines between work-for-hire and traditional academic work. When a case falls in the gray area, the facts become very important, and it has taken awhile to get at the facts this week. But the presumption must be in favor of academic freedom. He, the President, and Mr. Rotenberg will review what they have learned, how these cases might arise, and will look at roles and responsibilities. With respect to matters of academic issues, education, and research, the Office of the Provost must play the primary role.

Professor Miksch thanked the Provost. She commented that the idea that there is a presumption in favor of academic freedom is an excellent place to start. She said she was concerned about the chilling effect the case could have for people who are doing publicly-engaged research. She has heard the word "censorship" used in connection with these events. She said she was looking for ideas about how this Committee and the Committee on Academic Freedom and Tenure can move forward actively to ensure that there is a presumption in favor of academic freedom, even in the gray areas.

Provost Sullivan agreed and said that that was why he issued the statement he did on Tuesday, to reinforce that academic freedom is principle number one.

Professor Anderson observed that there had been a plan for a review panel; that panel is now not needed. Is there still a plan for a premier of the film at the Bell Museum in advance of a showing on public television? The film is being released publicly this afternoon, Provost Sullivan said. There will be a showing at the Bell Museum on October 3, as originally scheduled, with a discussion session following. Whether TPT airs the film is a decision TPT will make. But there will be no impediment to them doing so, Professor VandenBosch asked? There will not, the Provost said, consistent with TPT's discretion and processes.

Professor Chomsky agreed that academic freedom is critical to the University, but because this was not an issue of "can faculty say or teach what they want," it seems to go beyond concerns of academic freedom. This may be as much a First-Amendment-type issue about encouraging free and robust conversation, and a question of values. Provost Sullivan said that there are three general areas implicated: First Amendment rights; second, University policy rights (under the Regents' policy on Academic Freedom and Responsibility); and there is a third area, much broader, along the lines that Professor Miksch mentioned. He said he accepted her invitation to work with the committees to look at hypotheticals and "what if?" situations, and if they fall in a gray area, how they should be handled.

Professor Chomsky suggested that the Committee on Academic Freedom and Tenure might wish to revisit the report of the Task Force on Academic Freedom, which spoke broadly about the nature of academic freedom and recommended a broader conversation about that, including what should happen when these kinds of events occur. The task force suggested the need for more conversations more regularly, and this could be one of those events. Provost Sullivan agreed and noted again the language of the Regents' policy.

Professor Chomsky said that this case also triggers the academic-responsibility language of the Regents' policy ("the faithful performance of professional duties and obligations [and] the recognition of the demands of the scholarly enterprise"), which could be seen as being triggered in this instance.

It is important that the University community now take a breath, Professor Cramer said. He agreed that there are gray areas. After all, if the University had set out with intent to generate a piece that was purely advocacy, that is, unbalanced in favor of a single viewpoint, it would have been just as roundly criticized for "thought-control" as it was here for perceived censorship. Thus, it seems that there is a broadly held consensus that "balance" is a laudable goal in these kinds of projects, referring in particular to those that go beyond individual scholarly activities and carry the imprimatur of the University in general (the copyright holder of the film is the Board of Regents). Of course, defining "balance" is not a cut-and-dried process, but presumably subject matter experts have the ability to know it when they see it, and in the future it will be important to ensure that there are adequate opportunities for exchanges of views between contractors and qualified University researchers on the subject of balance throughout a given project. While the specifics of what happened and when in this particular case remain obscure, setting a well defined framework for the future should help to avoid last-minute controversy.

Professor McCulloch asked, knowing the controversy that has occurred in the short term, what the Provost sees as the University's plan for response. What is his role in it? Will the University move on or will there be more? Provost Sullivan said there are three pieces: (1) dissemination of the film this afternoon and the October 3 showing and discussion; (2) his meeting with the President and General Counsel about roles, responsibilities, and processes; and (3) a conversation with the relevant faculty committees to look at the gray areas and consider hypotheticals and to discuss where lines can be drawn.

Professor Hancher said he believed release of the film will help to repair the damage to the University. He said he was concerned about TPT; was there a contract? Is it voided? Is TPT uncertain how to proceed? He said he did not know the facts but worried about the public attention to this aspect of the controversy. Provost Sullivan said it is his understanding—and one must be careful about the facts, he cautioned—that there was no automatic contract to show the film and that TPT had the right to decide whether it would do so. It had been scheduled, Professor VandenBosch pointed out. Provost Sullivan

said he understood that TPT had the independent right to make a decision about showing it. He said that he also understood that even though the University released the film today, TPT still has the right to decide whether it will show it.

Professor VandenBosch said she was told that the Committee was the first to hear about the decision to release the film. The Provost requested that the University's announced not be released before the conversation with this Committee in order to respect the Committee's prerogatives and the fact the meeting was scheduled so close to the time the decision was made to release the film; after this meeting, the University will issue a press release (see [http://www1.umn.edu/news/news-releases/2010/UR\\_CONTENT\\_255555.html](http://www1.umn.edu/news/news-releases/2010/UR_CONTENT_255555.html)).

Professor Oakes reiterated his thanks to the Provost for his devotion to academic freedom and the tenure code, and said that Provost Sullivan had now personally done an enormous amount to protect academic freedom at the University. Provost Sullivan thanked Professor Oakes for his comment. He said that he was not alone responsible for the University's position and recalled that the process started about eighteen months ago with a conversation with the chair of the Committee on Academic Freedom and Tenure, Regents Professor Tom Clayton, and they worked elbow-to-elbow on strengthening the Regents' policy on Academic Freedom and Responsibility. The Provost also gave credit to Professors VandenBosch and Cramer for their counsel in recent days. Professor Oakes said he understood that others had played a role but it was the Provost who made the tough decision.

Professor Elliott also thanked the Provost for his leadership. She said that as he, the President, and Mr. Rotenberg do their work, the Committee on Academic Freedom and Tenure looks forward to assuring the discussion regarding the "gray" areas is moved forward. Provost Sullivan assured her that he was committed to working with the committees.

Professor VandenBosch thanked Provost Sullivan for the discussion and his action.

## **5. Committee Memorandum on Closing Meetings**

Professor VandenBosch turned next to a draft Memorandum for the Record prepared by Professor Cramer. She noted that the Committee has occasionally received questions about why it closes meetings and how it "gets around" the state's Open Meeting Law. She recalled that General Counsel Mark Rotenberg joined the Committee at the last meeting and provided an opinion that it was not subject to the Open Meeting Law. Professor Cramer thought it would help to have a memorandum on file. She said the memo, if approved by the Committee, could become one of the operating protocols that will soon be included on the Senate website.

Committee members discussed what the effect would be if, for example, reporters showed up at meetings, and whether or not the meetings should be closed. Professor VandenBosch suggested it would be difficult to have a hard-and-fast rule; it will depend on the topic. Professor Luepker said that there could be a chilling effect on the discussion and that the minutes, which are available, convey a great deal of information. Professor Chomsky said that the Committee is not a public body and might have to close more often if the presence of reporters would inhibit the discussion. Professor Hancher said that the Committee wants transparency and it would be ironic if \_\_\_ were to shut down the rich flow of information that comes out from the meetings. Professor Sheets said that if a meeting is covered by a reporter, the function of the minutes would be pre-empted because they would come out later than a

media report, and there could be conflicts between the report and the minutes, which could create controversy. There is a risk to derailing the orderly process of communication within the committees and communication of that discussion to the larger community.

Professor Morrison, who had joined the meeting to discuss the federal health-care law, related that he was a member and chair of his Committee when significant events were occurring and there were reporters present at meetings. Their presence does change the nature of the meeting but also creates a relationship between the Committee and the press, which can be useful. But the Committee always reserved the right to close its meetings. It should not close the meetings because a reporter might be present, it should close them when it needs to discuss things among its members. It should be ready to say things about University policy, for example, that get picked up in the press. If there is a discrepancy between the news report and the minutes, 98% of those on campus will believe the minutes and 98% of the external audience will never see the minutes and will believe the newspaper.

Professor Anderson said she was not comfortable with the idea of closing a meeting on the spot but is with the idea of advance notice of closing a meeting because of a need to do so.

There is an intermediate step, if a reporter agrees, of embargoing any reports for a period, Professor Cramer suggested. Short embargos would ensure that press stories and committee minutes would appear simultaneously, so that the University community could refer to the latter in the event of errors or ambiguities in the former.

The Committee voted unanimously to adopt the memorandum, which read as follows:

#### MEMORANDUM FOR THE RECORD

FROM: The Faculty Consultative Committee (FCC), 2010-2011

DATE: September 21, 2010

SUBJECT: Occasional closure of FCC meetings

The FCC is a consultative body that interacts on a regular basis with various members of the University community, including administrators. Consistent with its mission to both represent and serve the faculty, the FCC takes seriously its responsibility to act in a transparent fashion and to communicate to the faculty its activities. With that goal in mind, shortly after each of its meetings the FCC distributes detailed minutes describing the majority of its discussions.

In certain instances, the FCC believes that its consultative mission is best advanced, and the views and interests of the faculty best conveyed, in closed executive session. Such closures ensure that (i) no violations of the privacy of individuals occur during the discussion of personnel matters and (ii) frank and candid discussions of particularly sensitive topics may take place. In such instances, the minutes reflect the topics discussed and may summarize the discussion.

Informing the practice of the FCC in this regard are the bylaws of the University Senate, which provide that any Senate committee may close its meetings. In particular, Article II(3)(d) of the University Senate, adopted unanimously, provides that "Committees of the University Senate shall have a policy of open meetings. Closed or executive sessions may be held only after approval by a two-thirds majority of the committee members present and voting. The committee

shall keep a list of all topics discussed and actions taken in its closed meetings and incorporate that list in its minutes. Only committee members and others designated by the chair may remain in the meeting once a motion to close the meeting has been adopted." Article IV(3)(e) provides the same for committees of the Faculty Senate and Article VI(3)(e) provides the same for committees of the Student Senate. The FCC adheres to these bylaws in all respects, and is moreover mindful that votes to close meetings should occur only for compelling reasons.

Responding to occasional queries with respect to the degree to which the FCC may be subject to the Open Meeting Law of the State of Minnesota, the FCC sought advice from the Office of the General Counsel of the University of Minnesota in September of 2010. That advice, appended to this memorandum, concluded: "[T]he FCC is not subject to the provisions of the Open Meeting Law."

Based on past practice, the University and Faculty Senate bylaws, and advice from counsel, the FCC will continue to exercise its discretion with respect to going into close session, adhering to the precept that such sessions can be useful in specific circumstances but should be infrequent as a matter of principle.

## **6. Impact of Federal Health Care Law on the University UPlan and Its Employees**

Professor VandenBosch now welcomed Professor Fred Morrison to review for the Committee the impact of the recently-adopted federal health-care law on the University. She also welcomed Mr. Cavalier, from the Civil Service Committee, and Mr. Pearthree and Ms. Waldemar from the Council of Academic Professionals and Administrators; she invited them to join the discussion because all University employees will be affected by the changes in federal law. Committee members were provided copies of the slides Professor Morrison used.

Professor Morrison noted that this day is the six-month anniversary of the passage of the health-care reform law and that people may have been hearing about. Some of the provisions take effect today. After the law was enacted, he has been involved in trying to identify its effects on the UPlan (the umbrella term for the health-care benefits provided to University employees, created when the University separated from the State Health Plan in 2002). The Board of Regents asked for a presentation, which he made in June, and he also made a presentation to the Benefits Advisory Committee later that same month.

Professor Morrison began by reporting on the principles of UPlan. (1) It follows an "insurance principle": individuals pay the premium and are not then penalized when they get sick. (2) It provides coverage at an affordable cost for employees: Employees pay 10% of the cost of the basic plan and pay 15% for family coverage. (3) It offers optional levels of coverage: Employees pay 100% of the cost above the cost of the basic plan. (4) It encourages wellness and prevention of disease. In its first year, UPlan offered free flu shots, which was unheard of at the time, and it has done so every year since; it also provides a subsidy for fitness clubs and sponsors the farmer's market on campus.

Now that health reform is law, what happens next? There are still many questions, Professor Morrison said. Answers will come from several sources: (1) a Technical Amendments law; (2) from administrative regulations (some from Health and Human Services, some from the IRS, and some from a committee of state insurance commissioners); and (3) from later substantive changes that may be made by Congress. (Note that the Republican campaign this fall calls for repealing the entire act; other less drastic

changes are possible.) The law is complex and there is an effort to coordinate implementation, but some elements will fall between the cracks.

The timetable is that during the period 2010-13 several preliminary rules take effect (including some today), in 2014 the federal plan begins to operate and the exchanges are in place, and the University will have to comply with many new rules, and in 2018 the "Cadillac tax" takes effect (about which more later).

The first phase of the impacts of the federal law takes effect this year, Professor Morrison told the Committee. The federal government will reinsure a portion of the cost of coverage for some early retirees. (The University has carried the cost of health care for early retirees; the federal government, to encourage the option, will provide funding for it.) The law requires that the institutional savings be passed on to the retirees. Also this year, the UPlan will cover all employee children up to their 26th birthday. The University made this change ahead of the date required by the law; the change will cost the University about \$1.8 million per year. This coverage does create challenges, because most University coverage is for people in Minnesota, but many of the children in this age range are living outside the state.

In 2011 the flexible-spending accounts will no longer be permitted to cover most over-the-counter drugs (e.g., aspirin) unless they are prescribed by a physician. This change will cost the University nothing and will be easy to implement. The lifetime maximum on benefits will be eliminated. Professor Morrison reported that the UPlan addressed this, in effect, a number of years ago. The state plan, from which the University separated, had a \$1 million lifetime limit. The University said that was not fair and should not exist, but the stop-loss insurers said they would not reinsure the University unless it had lifetime limits. So the University adopted a \$2 million limit, and later raised it to \$5 million. The reinsurers didn't care what the limit was, just that there was one. With the legal abolition of the limit, the University estimates the reinsurers will charge the University about \$150,000 more for a risk that they have never had to pay for, but in order to have this protection we must pay the going rate.

Also in 2011 the pre-existing condition exclusion for children is no longer permissible; it is barred for adults in 2014. This is not a problem for the UPlan because it has never barred anyone with pre-existing conditions from entering the plan—that, Professor Morrison said, is part of the "insurance" principle. They thought it was unfair when they set up the plan, so didn't include one. Also, in an employment situation such as the University's, the cost of administering such a rule outweighs its benefits.

In 2012, W-2 statements issued in January must show the value of 2011 health-care benefits. This is easy to implement and carries only programming costs. It is purely a matter of accounting and has no effect on anyone's taxes. Also in 2012 there will be a "comparative effectiveness research fee" imposed, to study the effectiveness of various treatments. The cost will be \$37,000 (\$1 per plan participant) and it doubles in 2013. The money goes to the federal Department of Health and Human Services and will be used to fund research grants.

Beginning in 2013 the flexible-spending accounts will be limited to \$2500, which will cost the University about \$44,000—because the income no longer excluded from tax will be subject to FICA, which both the individual and the University pay.

In 2014 any annual maximum must be eliminated. This change affects only fertility coverage and will carry minor cost for the University.

Big changes come in 2014 and 2018, Professor Morrison said. In 2014 the new federal Health Insurance Exchange opens in each state. Everyone without insurance from another source will be required to buy a plan. The plans in the Exchanges will probably have relatively high deductibles and co-pays. That will make their premiums relatively low. All large employers must either provide company insurance plans or pay a fee. If the employer plan has premiums that are too high, some employees can get a voucher to buy coverage from the Exchange. (The penalty to an employer for having premiums that are too high is greater than the penalty for not offering any health benefit at all, which will encourage some employers—particularly small employers big enough not to be completely exempt from the provisions—to abandon providing health insurance for employees, something the University and other big employers are not likely to do.)

In 2018 the federal tax on high-value plans, the "Cadillac tax," takes effect. It is designed to address plans that offer too many benefits. Different perspectives were brought to bear in the negotiations over the tax. Health-care economists said that high-benefit plans encourage people to do foolish things, while the IRS said they are tax shelters that protect too much income and it should be able to tax excess benefits beyond a reasonable amount.

The biggest issue is plan cost, Professor Morrison said, and there will be problems for the UPlan. **There are four major limits: the "Cadillac tax" penalizes plans with high cost (a 40% tax on the excess over the limit); there are limits on employee share of the "premium" cost (employee contributions to plan costs) for low-income employees; there are limits on out-of-pocket costs (co-pays, deductibles) for low-income employees; and there are minimum coverage requirements (and a substantial penalty for not meeting them). So there is a box, Professor Morrison said, with the four factors each constituting a side of the box. The UPlan must fit inside the box. He addressed each of the four elements as it relates to the UPlan.**

### **1. The Cadillac tax**

The Cadillac tax will be imposed in 2018 if the sum of (1) the employer contribution to the medical plan plus (2) the employee premium for the medical plan and (3) any Flexible Savings Accounts exceeds \$10,200 for single employees and \$27,500 for families. Right now the UPlan is comfortably within those limits—but the amounts will not be indexed until beginning in 2018. If one assumes an 8% increase in health-plan costs, the UPlan will bump up against those limits in 2018. The University's consultants estimate the cost to the University of not avoiding the Cadillac tax could be \$8.9 million in 2018 and that it would rise rapidly thereafter. Professor Morrison said the University will take steps to avoid falling into that category.

What does the University do? One way to avoid the tax is to choose the best providers, those who are high-quality and low-cost. That lowers overall cost because there are fewer visits to the doctor and a lower price for each visit. This approach emphasizes Accountable Care Organizations (ACOs) and Health Homes, new concepts that are currently emerging. The idea is that, for example, people who are pre-diabetic will be pushed to do what will keep them from getting seriously ill. The University may do use this as a base (or preferred plan) but allow access to other providers only with much higher deductibles and co-pays. Professor Morrison provided a scattergram (composite quality score on the Y

axis, adjusted per-capita cost on the X axis) indicating where metropolitan area clinics fall (not identified by name) on these dimensions. While they cluster toward the center, there are outliers. The quality measures are based on the University's data using standard quality measurements.

Another way to avoid the Cadillac tax is to more aggressively promote wellness, Professor Morrison reported. The UPlan has had programs the last several years, including a benefit for going to fitness centers. The consultants say that will not be enough; the rewards must go to those who actually achieve goals, not just participate. People would have to actually lose weight or control their blood pressure. This aligns incentives to employers with incentives to providers. This is something that may require discussion, Professor Morrison said; he noted that those who are already healthy would also be rewarded and there would be provisions for those who simply cannot get better for good reason.

Other approaches to avoiding the Cadillac tax include shifting internal costs to other budgets, using deductibles and higher co-pays and coinsurance, consider returning to the two-tier system, with only "single" and "family" coverage. The reason for the last is that if there are three or four tiers, the charge for a "family" with both parents/partners and children are too high and subject to the tax; if the different levels are merged, the average of their costs is lower and possibly not subject to the tax. Other possible actions include merging the Twin Cities and Greater Minnesota groups and reducing or eliminating the flexible-spending accounts.

They will carefully monitor federal developments, Professor Morrison said. Congress may modify the thresholds (or repeal the Cadillac tax) and IRS regulations may change the calculations.

What will NOT help avoid the Cadillac tax is increasing the employee premium—because the tax is calculated on the total of the employee and employer contributions, so moving the cost from one to the other has no effect on the calculation. Deductibles and co-insurance or co-pays will limit the possible tax. There will be new limits on deductibles, co-insurance, and co-pays for lower-income employees. There will thus be a need to reduce benefits, Professor Morrison concluded.

## **2. Limits on Employee share of "premium" cost**

There are two rules limiting employee share of the cost, Professor Morrison said. First, beginning in 2014, an employee who pays more than 9.5% of salary for employer-sponsored coverage will be entitled to switch to the Exchange. The University would pay a federal "fee" of \$3000 for each such employee. Professor Luepker noted that the current premium of about \$10,000 is more than 9.5% of the salary of many University employees. Professor Morrison pointed out that the premium used to calculate the percentage is the part paid by the employee only, which is usually about \$1200, not the total premium cost. But the limit could affect family coverage, he agreed.

The other rule limiting employee cost is that employees would be entitled to opt out of the UPlan and receive a voucher if (1) employee share of the plan cost is more than 8% of household income AND (2) household income is less than 400% of the federal poverty level (currently \$42,520 for a single person, \$88,000 for a family of four, about \$110,000 for a family of six). For each voucher it would have to issue, the University would pay about \$5,519 for a single employee and \$11,177 for a family. The employee could then take the money and buy an Exchange-issued health plan. So a family of four with a total income of \$60,000 could opt out of the UPlan and take a voucher to buy an Exchange plan. The

Exchange plan would be less generous because it would have high deductibles and minimum coverage. But the employee could keep any excess cash after paying the Exchange premium.

The Exchange plans would be cheaper, Professor Morrison said, so what is likely is that young, healthy, 20-30-year-old staff would go to the Exchange, get a high-deductible plan (which would cost less than the amount of the voucher the University would issue), and keep the additional money. (They could opt back in later at each open enrollment period.) It is likely that only the "good risks" would choose this option, changing the University's risk pool (leaving the UPlan with the less-healthy individuals), which would raise the average cost of the UPlan and, in the words of those in the insurance business, send the UPlan into a death spiral. The University must find a way to avoid this. One way would be for the University to impose a maximum cost of 8% for employees so that no one would jump ship. The University may have to give employees a voucher for the average cost of the basic plan, which would mean the University would lose the cost of the voucher and may also increase the average cost of the plan.

What the University must do, to avoid problems with the federal law, is limit the employee share of the premium, at least for low-income employees. That increases the University's share of the cost and raises equity issues with other employees.

### **3. Limits on co-pays and deductibles**

There MAY be limits on out-of-pocket expenses for low-income employees, Professor Morrison explained. Whether there are depends on the regulations to be adopted. For example, at income of \$44,000 the individual limit is \$1,983; the family limit is \$3,967. At \$66,000 in income, the individual limit is \$2,975 and the family limit is \$5,950. This part of the law has minimal impact on the UPlan, but the University will need to monitor out-of-pocket increases.

### **4. Minimum coverage requirements**

There will be minimum-coverage standards, Professor Morrison said, which will certainly include preventive care, basic medical and hospital care, and basic pharmacy coverage. There appear to be few problems for the UPlan in this area, but it limits the ability of the UPlan to save costs by cutting coverage. One problem is dental care for children. The UPlan provides separate dental coverage but may need to move children to the medical pool or the plan could run into the Cadillac tax.

The box is getting smaller, Professor Morrison said. The range of options available to us will be more limited. There are several elements to a possible solution to the limits imposed by these rules.

-- Price the "basic policy" under the level of the Cadillac tax, adjusting benefits as necessary to keep it there. Use high-quality, lower-cost providers and emphasize wellness to control cost.

-- Keep the employee share of the premium cost below thresholds for lower-income individuals (although, Professor Morrison said, he did not know how the University would find out what household income of an employee is because it does not have that information; it may have to assume that the employee salary is the household income).

-- Keep employee out-of-pocket costs below the applicable limit.

-- Offer the more expensive plans, which have a broader range of providers and facilities, primarily in the form of high deductible plans, rather than higher premium plans.

As for next steps, Professor Morrison said the University would implement the "preliminary steps" in the next few years, it will avoid action that would complicate "staying inside the box" in 2018, it will model the net effects of efforts to "stay inside the box," and will watch for Congressional and administrative action.

Professor Morrison next spoke about the Republican agenda. There could be paralysis on this issue through 2014. Even if the Republicans make substantial gains or even take both houses of Congress this year, President Obama can veto any legislation to repeal the law. But there may not be appropriations to create the Exchanges, so the preliminary steps continue to be valid and there would be continued discussions—but it could be that not a lot happens. Some elements of the law could be altered or repealed (e.g., the requirement that all buy insurance, which undermines the requirement that requires employers with more than 100 employees to provide insurance). They will have to watch how things play out, and there may be no more clarity as time goes on.

He has attended Continuing Legal Education courses about the new law. The discussions at those meetings indicates that many small employers (those with fewer than 100 or 200 employees) may end their plans in 2014, sending their employees to the Exchanges for coverage and also possibly giving them some pay raises (taxable) to help pay for the cost there. For big employers, the penalty will be large; for the University it would be \$34 million—and bad press. That is not a nice number even if the University were to save money. (The University currently spends about \$200 million on health benefits, so there clearly would be savings. What does one think this Committee would have to say about the University dropping health benefits and sending everyone to the Exchange? That would be a non-starter, Professor Morrison predicted.) For large employers, the ability to shelter the cost of health insurance from income taxes is a substantial benefit in recruiting employees.

Professor Morrison reviewed the immediate next steps, such as consulting with employees (UPlan members) and the Benefits Advisory Committee, issue an RFP for medical plans for 2012-2017 that includes flexibility to address the situation, aggressively promote wellness initiatives, control costs, and avoid cost shifts that will complicate the situation in 2014 and 2018.

Professor Hancher asked how University of Minnesota Physicians (UMP) would be positioned. Professor Morrison noted that one reason the University left the state plan in 2002 was because the state had excluded UMP from the state network. They do not want to revisit that question, although UMP may not be the cheapest option offered. An RFP will be issued this fall to solicit proposals for management of employee health insurance for 2012-2017. The availability of UMP and Boynton Health Service in the proposed networks will be one of the issues examined, but he could not say that they would be available in all of the options.

Ms. Waldemar asked if the health-care providers, knowing the rules and the impact they will have, are making adjustments in order to keep their clients. There are two sets of providers, Professor Morrison said, health plans and individual clinics. He said he believed that the health plans are aware of the law, although not doing as much as they should to prepare for it. As far as individual clinics go, Minnesota is far ahead of the rest of the country in Health Homes and Accountable Care Organizations,

so that is probably a sign that they are doing something. But they have not done a lot, and the rest of the country has done almost nothing. He said he has been surprised at the vacant looks he receives when he talks to the health plans about health-care reform.

How will this operate for two-income families, Professor Curley asked? It is a family choice, Professor Morrison said, but he believes one spouse is employed elsewhere, that spouse should have individual coverage from that employer. Then one of them "should cover the kids." Most University employees select University coverage because the premiums are lower and the benefits are better. This adds substantial cost to the University and saves money for the other employer. The University would like to encourage working spouses at places that provide reasonable coverage to get coverage at their place of employment. That would save the University money. But they cannot be forced to do so, Professor Luepker observed. Professor Morrison agreed.

Will the University continue to have multiple plans, Professor Luepker inquired? It will, Professor Morrison said, although probably not as many. At the high end, the plans could bump into the Cadillac tax. So on the high end, there will be more deductibles and co-pays and premiums will go down, Professor Morrison said.

Professor VandenBosch thanked Professor Morrison for the extensive explanation and adjourned the meeting at 4:10.

-- Gary Engstrand

University of Minnesota