



## ORGANIZATIONAL POLICIES

### Governing Boards and Staff

Policy #515a

#### Conflict of Interest.

#### I. **Benefit from ACLU Activities: Conflicting Interests of Lay Leaders and Key Employees**<sup>1</sup>

##### A. **“Conflict of Interest” Defined.**<sup>2</sup>

A conflict of interest affecting a director, officer, volunteer board committee member or key employee of National or an Affiliate (a “covered person”) may arise with respect to a transaction or action proposed to be entered into or undertaken by National, in the case of a National covered person, or an Affiliate, in the case of an Affiliate covered person, when the covered person has any personal interest with respect to that transaction or action. A “personal interest” of a covered person with respect to a transaction or action arises when the financial (including compensation-related), organizational or fiduciary interests or obligations of (i) that person, (ii) a person in the person's immediate family,<sup>3</sup> (iii) a person with whom the person has an intimate relationship, (iv) a non-ACLU client of the person, or (v) an employer or business associate of the person, may be directly affected by the transaction or action proposed to be taken. An organizational interest shall be limited to situations where a person has fiduciary responsibility with respect to that organization or has a relationship with the organization that includes being able to influence (i) the management or direction of the organization as a whole, such as serving as a key employee, or (ii) the management or direction of the specific transaction or action in question. An organizational interest shall not include the adoption by the ACLU or another organization of a substantive civil liberties policy. A financial interest in a transaction or action shall not include interests that are insignificant or immaterial.

##### B. **Disclosure**

Each National covered person is required to disclose to National any personal interest with respect to a proposed or prior National transaction or action of which s/he is aware, and each Affiliate covered person is required to disclose to that Affiliate any personal interest with respect to a proposed or prior Affiliate transaction or action of which s/he is aware, prior to (if possible) the

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<sup>1</sup> In light of the fact that it is the ACLU's Key Employees that are most in a position to exert influence with respect to the ACLU, this policy applies only to ACLU's Key Employees and not ACLU employees generally. The Board of Directors delegated to ACLU management the adoption of a conflict of interest policy applicable to ACLU employees other than Key Employees.

<sup>2</sup> This policy does not modify or supplant the obligations of lawyers to clients and former clients under professional responsibility rules, including conflict of interest legal ethics rules.

<sup>3</sup> “Immediate family” includes the covered person's spouse, partner, children, parents and other ancestors, siblings, grandchildren, great grandchildren and spouses and partners of the covered person's children, siblings, grandchildren and great grandchildren.

consideration of the transaction or action. In the case of board members, officers and volunteer board committee members, the usual procedure for disclosing potential conflicts of interest is that the covered person informs the applicable board or board committee (or board committee chair) considering the transaction or action or the ACLU President of the personal interest. In the case of a key employee, the usual procedure is that the key employee informs his or her supervisor (or in the case of the Executive Director, the President) of the personal interest.

### **C. Participation in Discussion and Decision**

A covered person may participate in the discussion of a transaction or action with respect to which s/he has a personal interest only after all material facts regarding the covered person's personal interest have first been disclosed to the other participants in the discussion and the participants have had the opportunity to discuss the matter (without that person present if they choose to discuss in that manner<sup>4</sup>). Generally, a covered person may not participate in making decisions with respect to any matter in which s/he has a personal interest. However, in certain situations where the covered person's personal interest is determined to be indirect or immaterial, it may be determined (without participation of the covered person in such determination) that the covered person may participate in making decisions concerning such matter.

In all cases, prior to an ACLU entity entering into a transaction or taking an action after a covered person has disclosed a personal interest with respect to that transaction or action, it shall be determined by that ACLU entity that the transaction or action is fair and reasonable to it and does not result in an unfair or unreasonable financial or other benefit to the covered person who has the personal interest.

In cases where a covered person's personal interest is a financial interest, the determination of whether to enter into the transaction or take the action shall be made by the entity's audit committee and shall be made only after considering the value of comparable transactions. (If the ACLU entity does not have an audit committee, its board or executive committee shall make such determination.) In all other cases, the determination shall be made by the group with the authority to make the determination of whether to enter into the transaction or take the action (i.e., generally for board matters, the board shall determine; for board committee matters, the board committee shall determine; and for staff matters, the Executive Director or Deputy Executive Director (if any) shall determine (unless either is the covered person with the personal interest, in which case generally the other shall determine) in consultation with the In-House or Board General Counsels). (In the event the covered person with the personal interest is an ACLU Executive Director and the ACLU entity does not have a Deputy Executive Director, the determination shall be made by the entity's audit

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<sup>4</sup> One example of an action that might be discussed entirely without the covered person present is when a covered person is a board member of an organization against which an ACLU entity is contemplating litigation.

committee if it has one or by its executive committee or board if it does not.) The same procedure shall be used for determining whether a covered person may participate in making decisions with respect to a matter with respect to which s/he has a personal interest.

## II. **ACLU and Personal Opportunities**

ACLU lay leaders have a legitimate right to pursue their own interests and activities in their own personal capacities, even where such activities are similar to the activities undertaken by the ACLU.<sup>5</sup> However, there may be situations where an opportunity is presented to an ACLU lay leader in his/her capacity as an ACLU leader and is therefore more appropriately an ACLU opportunity. An opportunity that is an ACLU opportunity should not be taken by an ACLU leader unless the opportunity first is disclosed to the ACLU, and a disinterested ACLU decision maker determines that the ACLU will forego the opportunity itself. An ACLU leader who takes an ACLU opportunity him/herself without going through this process may be considered to have breached his/her fiduciary duty to the ACLU. This particularly may be a concern where a lay leader is compensated or receives a gift in exchange for undertaking the opportunity. Examples of ACLU opportunities that may be presented to an ACLU lay leader are the following:

- Opportunities that were brought to the lay leader in his/her capacity as a lay leader. An example is when a potential legal matter is brought to an ACLU legal committee or to an ACLU lay leader in his/her capacity as a member of that committee, and an ACLU lay leader takes on that legal matter in his/her own personal capacity.
- Opportunities that it is reasonable to conclude would not have been brought to the lay leader but for his/her role as a lay leader. An example is when a lay leader attending an ACLU event is approached and asked to give a speech on a civil liberties matter the ACLU works on, but with respect to which that lay leader has little or no background or with which the lay leader is not publicly identified.

The determination of whether an opportunity presented to a lay leader may be more appropriately an ACLU opportunity involves an analysis of all relevant facts and circumstances. When there is any doubt, ACLU lay leaders should raise the issue with the applicable ACLU President, appropriate staff or an appropriate committee chair in order to collectively make a determination.

If an opportunity has been brought to an ACLU leader in his/her ACLU capacity, the ACLU decision maker with respect to that opportunity should determine by a disinterested vote whether the ACLU will pursue the opportunity. If it chooses not to, the ACLU lay leader generally should feel free to undertake the opportunity her/himself, but solely in her/his personal capacity. A disinterested vote may be made on this matter by the applicable ACLU's board of directors or an ACLU board committee.

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<sup>5</sup> In light of the fact that ACLU employees are compensated for their services for, and generally work full time for, the ACLU, the determination of the line between and the development of procedures for addressing employees' ACLU versus personal opportunities is properly delegated to management.

### **III. Recordkeeping; Policy Distribution; Applicability to National and Affiliates.**

#### **A. Recordkeeping**

ACLU lay leaders and employees are encouraged to keep records of their individual efforts undertaken in order to comply with this Policy. In all matters decided by either the board or a board committee of an ACLU entity, the minutes of that board or board committee shall reflect the matter that was disclosed, any decisions made, and whether the individual involved participated in any decision or discussion of the matter. In the case of a conflict of interest, the minutes also shall reflect that a disinterested determination was made whether the transaction or action could be entered into or undertaken in accordance with this policy (and if comparables were obtained, records of such comparables should be maintained). In all matters decided by an ACLU President, a Board committee chair, the Executive Director or the Deputy Executive Director, that person (or his/her designee) will document in a permanent memorandum to files whether the key employee participated in the decision or in the discussion of the matter and that a determination was made whether the transaction or action could be entered into or undertaken in accordance with this policy.

#### **B. Policy Distribution**

To ensure that covered persons are aware of this Policy, each ACLU entity shall deliver a copy of the Policy to each board member, officer, volunteer board committee member and key employee of that entity at the beginning of his or her service for that entity and annually thereafter. Each distributee shall acknowledge having received, read and understood the policy and, if s/he has a matter s/he is required to disclose under this policy at that time, shall disclose that matter.

#### **C. Applicability to ACLU National and Affiliates.**

This Policy shall apply to ACLU and ACLU Foundation ("National"). It shall also apply to each ACLU Affiliate (both the Section 501(c)(3) and the Section 501(c)(4) arms of each Affiliate), except in cases where an Affiliate's boards have each adopted a conflict of interest policy that provides for the disclosure, handling and documentation of conflicts of interest in a manner that is at least as thorough, and that provides for the review of transactions or actions with respect to which there may be a conflict under a standard that is at least as stringent, as provided for in this Policy.<sup>6</sup>

[National Board minutes, October 24, 2009, and April 21-22, 2012.]

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<sup>6</sup> Of course, an affiliate also may adopt a conflict of interest policy that differs from this one to the extent necessary for its policy to comply with state law applicable to the affiliate.