

University of Louisville School of Law
Live Client Courses – Pre-Registration Materials

Conflicts of Interest Guidelines:
Summary for Law Students Earning Academic Credit
for Work Performed in the Field in Real Cases

- The following excerpt from a law review article (four pages) discusses conflicts of interest issues from the perspective of externship courses, but the principles and guidelines are more broadly applicable to any course allowing law students to earn academic credit for work performed in the field relating to real cases or for real clients.
- Review the excerpt to help you in preparing a **Conflicts of Interest Inventory** for your live-client course application. You also will update and submit the inventory to your course faculty member or placement supervisor at the beginning of your participation in a Live Client course.

Excerpt from: Alexis Anderson, Arlene Kanter, & Cindy Slane, *Ethics in Externships*, 10 Clinical Law Review 473, 505-510 (2004-05).

Numerous relationships can present potential and actual conflicts of interests, not only for externship students, but also for their faculty and field placement supervisors. Conflicts may arise from the interests of past or current clients of two or more externship placements or other legal practice settings in which an extern has worked; from the personal or financial interests of the extern, the field placement supervisor, or the faculty supervisor; or from the interests of third parties. Accordingly, all parties involved in an externship program - students, faculty, and field supervisors alike - must become acutely aware of the professional standards and ethical rules governing conflicts of interests, how they apply to the respective players in an externship program, and how to recognize and avoid potential conflicts within the program even before actual conflicts of interests arise.

1. The Rules Governing Conflicts of Interests

Current rules governing conflicts of interests appear in Model Rules 1.7 through 1.12. Concurrent conflicts, involving two current clients or one current client and one prospective client, are addressed in Model Rules 1.7 and 1.8. Successive conflicts, involving conflicts between current and former clients, are addressed in Model Rule 1.9. Model Rule 1.10 addresses imputed conflicts, which prohibit lawyers from representing clients when other members of their firm have conflicts that are imputed to them. Model Rule 1.11 specifically addresses successive and imputed conflicts that involve government lawyers, speaking to the obligations of lawyers who leave government practice to work in the private sector, or vice versa. Conflicts involving judges, mediators, and arbitrators are addressed in Model Rule 1.12.

In February 2002, the ABA adopted a comprehensive set of changes to the Model Rules, including several new provisions that liberalize the rules on conflicts. Under revised Model Rule 1.7, a lawyer generally may not represent a client if such representation involves a concurrent conflict, or one in which ‘the representation of one client will be directly adverse to another client[,] or . . . if there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer.’ In such cases, the lawyer may represent the client only if the lawyer reasonably believes that he or she will be able to provide ‘competent and diligent representation to each affected client,’ and, further, only if the representation is not prohibited by law and “does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. Even then, the representation is permissible only if each affected client provides informed, written consent to the representation.”

These conflicts of interests rules are based, in large part, on the lawyer's need to protect client confidences and the lawyer's underlying duty of loyalty to his or her clients. If a lawyer is privy to a client's confidential information, and either concurrently or subsequently represents another client with interests adverse to those of the first client, the lawyer may be tempted to use the first client's confidential information to benefit the second client. Such conduct would constitute not only a breach of confidentiality, but also a violation of the lawyer's duties of loyalty to, and diligent representation of, the original client.

The Model Rules define the term conflict of interests to include not only actual conflicts but also ‘the potential for harm.’ Accordingly, a conflict of interests will exist ‘whenever the attorney client relationship or the quality of the representation is ‘at risk’ even if substantive impropriety - such as a breach of confidentiality or less than zealous representation - [does not] in fact eventuate.’ The conflicts rules also assume that lawyers who work together (e.g., in a firm or government law office) ordinarily have access to confidential information regarding every matter in which any other lawyer in the office is involved. Accordingly, an individual lawyer's conflict does not affect the individual lawyer only, but will be imputed to all other lawyers in the office in which the lawyer works, according to the principle of vicarious disqualification. As lawyers have become more mobile, and as more cases involve multiple litigants, conflicts of interests have become increasingly common grounds for disqualification motions and civil malpractice suits by clients.

What do the conflicts rules mean for law students in externship programs? As noted in our Introduction, we view externs as student lawyers, bound by the applicable rules of professional conduct in their respective jurisdictions. Accordingly, externs, as well as their field supervisors and faculty supervisors, must be keenly aware of conflicts.

2. Sources of Conflicts of Interests in Externship Practice

Conflicts of interests may arise from many sources and present at various points during and after a student's participation in an externship. Conflicts may arise in connection

with students' placement site activities, for example, or with student participation in the academic component of the externship, in the course of discussions in seminar classes or in the externs' reflections in their journals. Conflicts may appear as early as in the application process, or not until much later, in the job search following graduation.

An extern will face a concurrent conflict of interests when the extern is unable to give undivided loyalty to a current client of the placement because of a competing loyalty to another client or to a third person, or because of the student's own interests. Some concurrent conflicts are actual conflicts - that is, they already exist; others are potential conflicts - conflicts that may arise in the future.

For example, a student may wish to work part-time at a local criminal law office during the same semester in which he or she is enrolled in an externship at the local office of the district attorney. In this situation, the extern seeks to provide concurrent representation to clients with conflicting interests. The adverse interests of the clients of the firm (who face criminal charges) and the client of the externship placement (the State, which is bringing those charges) will necessarily present an actual concurrent conflict of interests for the extern, forcing the extern to choose either to work at the firm or enroll in the externship.

A potential concurrent conflict, on the other hand, exists where the partner or roommate of an extern is employed by a firm that has a case before the judge for whom the student is externing. Though the extern in this case would not be engaged in the representation of clients with conflicting interests, this situation nevertheless gives rise to a potential concurrent conflict of interests for the extern, and for the judge for whom he is externing.

Externs may also encounter actual or potential successive-representation conflicts arising from the lawyer's duty of loyalty to both current and former clients. Most externs come to an externship with at least one summer's legal work experience; some have worked in two or more legal practice settings. This prior experience could present a conflict with respect to the clients of the extern's current placement, either because the extern may be tempted to reveal confidences of a former client to benefit the client of the externship placement, or because the extern could be asked to engage in work at the placement that would be considered disloyal to the clients of the student's former employer.

In such cases, the extern's conflict may be "curable" or "consentable" if both the affected client(s) of the former employer and the affected client(s) at the externship placement give informed consent to the extern's work at the placement. Informed consent, though, requires disclosure and consultation. Once a conflict of interests is identified under the applicable rules of professional conduct, the student must disclose the conflict to her placement supervisor, and must then seek consent to the proposed representation from both the previous employer's affected client(s) and the affected client(s) at the externship placement in order to 'cure' the conflicts problem. If even one affected client does not consent, the student may not be able to participate in the externship at a particular site. Worse still, if the conflict does not arise until the semester is underway, and client consent to the representation is not

forthcoming, the student may be required to withdraw from a placement without completing the externship.

Some conflicts are so serious that they are not “curable” at all, not even with client consent. These “incurable” or “unconsentable” conflicts include representation that is prohibited by law, or where one client has or will assert a claim against the other in the same litigation, or in any other case in which it is not reasonably likely that the lawyer will be able to provide competent and diligent representation to the affected client or clients. Once such an incurable conflict is identified, the extern must withdraw from representation.

Source:

Excerpt from: Alexis Anderson, Arlene Kanter, & Cindy Slane, *Ethics in Externships*, 10 Clinical Law Review 473, 505-510 (2004-05).

If the material on confidentiality or conflicts of interest has raised questions or concerns in your mind about these rules as applied to your externship, please discuss your questions with your field supervisor first.