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Harvard Law School Clinical Program Guidance on Conflicts of Interest

There is no single, centrally-administered conflict of interest policy or procedure for the Harvard Law School clinical programs. Each clinic and student practice organization¹ is its own independent law firm with a confidential list of clients not shared with other clinics or the Office of Clinical and Pro Bono Programs (OCP). Moreover, the clinics work in different settings and jurisdictions, and the clinics' practical needs and the ethical rules applicable to their work, or even to different cases or projects within a clinic, might differ. Accordingly, each clinic is independently responsible for undertaking appropriate conflict of interest checks and for educating attorneys and students within the clinic about their obligations related to conflicts.

It is therefore recommended that each clinic create a formal record-keeping system to identify and track conflicts of interest among students, attorneys, clients, and cases and identify a person or a committee that will be responsible for overseeing conflict checks for the clinic (akin to a conflicts partner or committee at a law firm). It is further recommended that each clinic develop a formal conflict of interest policy addressing the applicable ethical rules and types of conflicts likely to arise in that clinic and setting forth procedures for processing and resolving conflicts of interest. Finally, it is recommended that clinics incorporate conflict checking information and materials into their training programs for staff and students.

This document is intended as a resource for clinics as they carry out conflict checks and craft their conflict of interest policies and procedures. In particular, it offers recommendations for clinics related to three different categories of conflicts commonly seen in HLS clinical work: (1) the conflicts that clinical students, with their wide-ranging law school experiences, bring to clinic work; (2) conflicts arising from the past or concurrent work of clinical instructors and other supervising attorneys; and (3) conflicts among different clients and cases. Clinics are encouraged to contact OCP with questions about conflict policies or the resolution of specific conflicts; while OCP cannot conduct conflict checks or provide technical assistance, it can direct the clinic to appropriate advisers or resources within the Law School.

A Note on the Applicable Ethical Rules

The ethical rules applicable to clinics vary depending on the type and jurisdiction of the clinic's work. Nonetheless, for most HLS clinics, the Massachusetts Rules of Professional Conduct provide at a minimum a useful point of reference for thinking about conflicts of interest. They also closely resemble the ABA's Model Rules of Professional Conduct, which do not directly apply to client work but have served as the basis for most states' own ethical rules. The Massachusetts Rules and relevant commentary are available at <http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc307.html>.

Key provisions include:

- [Rule 1.6](#): Confidentiality of Information
- [Rule 1.7](#): Conflict of Interest: General Rule
- [Rule 1.8](#): Conflict of Interest: Prohibited Transactions
- [Rule 1.9](#): Conflict of Interest: Former Client

¹ Hereinafter, the word "clinic" is defined to include student practice organizations.

- [Rule 1.10](#): Imputed Disqualification: General Rule
- [Rule 1.11](#): Successive Government and Private Employment

Guidance and Recommendations for Identifying and Handling Conflicts of Interest

I. Students

Each clinic should establish a process to check that incoming students do not have existing or prior conflicts that would prevent them from working in the clinic, or that would require screening from certain matters. The clinic should also ensure that incoming students understand that, as a result of their work, they may incur conflicts that they will carry forward and that may limit their ability to undertake certain kinds of work in the future. Finally, to protect the confidentiality of clinic client information, each clinic should develop and share with students a policy on the release of clients' names and information to students' future employers, who may need to perform conflict checks of their own.

The effectiveness of any conflict-checking system, and the protection of clients' sensitive confidential information from improper disclosure, depends on students' understanding of the rules. Accordingly, it should be standard practice that all clinical students receive conflict of interest training upon entering a clinic. In addition to the basic ethics training offered each semester by OCP, it may be prudent for each clinic to offer its own informational session at the start of each term, based upon its particular area(s) of practice.

A. Identifying potential conflicts created by students' previous, concurrent, and future legal work

Because of their many legal experiences - including summer jobs, student practice organizations, other clinics, and even future employment plans - students joining clinics bring with them the risk of an imputed conflict of interest. This type of conflict arises, for example, when an attorney (or student attorney) who previously acted for a party later joins a new firm or organization, and that firm or organization is currently representing or may later wish to represent a client whose interests are adverse to the attorney's previous client. The incoming attorney's relationship with the previous client may be imputed to the new firm or organization and prevent the firm or organization from representing an existing or future client.

To identify potential imputed conflicts that incoming clinic students may be bringing, it is recommended that each clinic create a written or electronic conflict of interest form that students complete at the start of each term before beginning their work, and that the clinic reviews to ensure that no conflict exists. Examples are available on the OCP Wiki. The form might ask students to provide information about:

- prior and current employment, volunteer experience, summer work experience, student practice organization involvement, and clinical placements (both legal and non-legal);
- a general description of the legal matters students have worked on and the parties involved in them, but only insofar as this information is reasonably necessary to detect or resolve a conflict of interest that might arise with the clinic's work and disclosure does not violate the attorney-client privilege or otherwise prejudice the student's prior client;

- the start dates and end dates of the above engagements, in order to identify ongoing relationships with firms, organization, or other entities and ensure that students do not have conflicting loyalties or that there is not a threat of simultaneous representation; and
- future employment plans, including any pending or accepted offers of summer or post-graduate employment.

To ensure that students provide sufficient information while respecting their duty of confidentiality to their former or current clients outside the clinic, it is recommended that the form, or the written informational materials accompanying it, explain to students the different types of conflicts that might arise, as well as their ethical obligations to identify and avoid such conflicts. In addition, clinics should review students' forms promptly to identify potential conflicts and, where necessary, seek additional information necessary to determine whether an actual conflict exists. Clinics and SPOs should file and retain the completed forms, as well as document situations in which a conflict was identified and further action was required.

B. Resolving potential conflicts resulting from students' other professional experiences

1. Former clients - screening and waivers

Where a clinic student's prior legal work - at a summer job, for example - conflicts with certain work of the clinic, it may be possible to avoid an imputed conflict of interest by screening the student from one or more matters of the clinic. Screening would allow other students in the clinic to represent a client even though a student in the same clinic is disqualified because of a conflict of interest. The purpose of screening is to isolate the disqualified student from any participation in the matter involving the conflict, thereby ensuring that confidential information known by the disqualified student remains protected. The clinic should consult the relevant rules of professional conduct to determine whether a screen is appropriate. Screening can often be used when attorneys move between different types of employment (for example, between government employment and private practice), and is generally not permissible to remedy a concurrent conflict of interest.

When screening is permissible and feasible, it is often implemented as follows:

- The former client is notified of the current matter and the screen, in accordance with the applicable ethical rules.
- The screened student has no involvement in the clinic's or SPO's representation of the client or in the current matter.
- The screened student does not discuss the prior matter or any information relating to the representation of the former client with anyone in the clinic.
- All lawyers and students in the clinic are advised not to discuss the current matter or the previous representation with the screened student.
- Where feasible and educationally appropriate, the current matter is discussed only within the limited group that is working on the matter.

- The files of the current client, including computer files, are physically segregated from the clinic's or SPO's regular filing system, specifically identified, and accessible only to those lawyers, students, and support staff who are working on the matter or who require access for other specifically identified and approved reasons.

In some circumstances, it may be possible for the student to obtain an outright waiver of the conflict from the student's former client. Many jurisdictions permit an attorney to proceed with representation after written disclosure of a conflict to a client, with some types of conflicts also requiring the client's informed written consent. Advance waivers may also be an option that clinics wish to consider; the effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails and the available alternatives. It should be noted that obtaining a waiver can be difficult because of the duty to protect the confidential information of, and relationships with, both involved clients. Any effort to obtain a waiver should be carefully considered and discussed between the clinic and the student before action is taken.

In most cases, conflicts resulting from students' prior legal work will be able to be resolved through waivers and screening. However, in certain cases, it may be that a student's conflict of interest will prevent the student from participating in a clinic. In the event that a student must be excluded from a clinic, other options that allow the student to pursue the student's area of interest might be considered. For example, the student might be able to seek out an independent clinical project or placement, conduct pro bono work, serve as a research assistant to a professor who studies the topic, or participate in a student practice organization that facilitates the pursuit of other relevant activities and development of important skills. The clinic's director has sole discretion to determine how to best manage a student's conflict of interest, and may consult outside experts as appropriate in making such determinations.

2. Concurrent work

Students concurrently involved in SPOs and clinics or maintaining employment or volunteer work during a clinic semester must be particularly vigilant, on an ongoing basis, to avoid creating conflicts of interest between their various firms. Typically, neither screening nor generalized conflict waivers are available for students whose conflicts arise from concurrent employment. Cessation of the concurrent conflicting SPO or clinic involvement or employment -- or exclusion from it may be necessary where the risk of conflicts is too high or adequate ongoing conflict checking is not feasible.

3. Job offers and future employment

In some circumstances, a conflict can arise when a student has accepted an offer of future employment, or even where an offer has been extended to a student but remains open, having been neither accepted nor declined. Each clinic should make its own determination of how best to address conflicts that might arise in such circumstances. The most conservative approach holds that once a student receives any offer of employment, the offer creates a sense of loyalty and an obligation to that entity. Accordingly, if that entity's work is in conflict with the clinic's work, the student should not work in the clinic. The student should not be permitted to "game the system" by delaying acceptance of an offer in order to work, for a time, in the clinic. However, the student can decline the offer before beginning to work in the clinic, and also withdraw their application to any entity that would pose a conflict, thus allowing the student to pursue the intended clinic opportunity.

Another approach would allow for screening options, where logistically possible, if the student, their prospective employer, and the clinic so agree. Clients might need to be notified of such screens. It should remain in the sole discretion of the clinic to determine whether or not a screen will be the appropriate option, taking into account the clinic's own professional and educational obligations. There may be situations in which a clinic decides that a student with a potential conflict should not enroll based on the clinic's obligations to a client.

Clinics should make clear to students that we rely on them to be honest about open offers and the firms or agencies to which they have applied. The onus is on students to report where they are seeking employment, where they have received offers, and when they have declined or accepted such offers, and students have an ongoing obligation to update clinics about their job applications and offers. Ideally, conflicts will be identified before the term begins and a student will either decline the offer that creates the conflict or, in cases where they choose not to do so, withdraw from the clinic before the term begins.

II. Attorneys

A. New Hires

Each clinic should establish a process to ensure that newly hired attorneys do not have existing conflicts that would prevent them from working in the clinic and to determine whether any screening might be required. Like students, new hires bring the risk of an imputed conflict of interest. This type of conflict arises, for example, when an attorney who previously acted for a party later joins a new firm or organization, and that firm or organization is currently representing or may later wish to represent a client whose interests are adverse to the attorney's previous client. The incoming attorney's relationship with her previous client may be imputed to her new firm or organization and prevent the firm or organization from working with or retaining a client.

It is recommended that the clinic use a written (or electronic) conflict of interest form, like the one used with students, that new attorneys complete before they are formally hired, and that the clinic reviews for potential conflicts before the new attorney is given access to the clinic's confidential information or engages in any representation of clients. Recently hired attorneys whose potential conflicts were not carefully checked before hiring should also complete the form to determine whether any screening or other corrective measures should be taken. The design and implementation of this process should take into consideration the administrative burden on the new hire of providing the information and on the clinic of reviewing it for potential conflicts, all in light of the likelihood that a conflict will exist given any connections between the attorney's prior work and that of the clinic.

As with students, clinics should take care to respect incoming attorneys' duties of confidentiality to their former clients by requesting only the minimal information necessary to identify and resolve conflicts of interest. Potential hires should be asked, at this initial stage, to provide only the names of their clients and opposing parties, the general subject matter of the representation, and the attorney's role in the matter, and only where the new attorney reasonably believes it is necessary to provide this information to help screen for conflicts of interest. Should a potential conflict emerge, the clinic should then work with the attorney to obtain whatever additional information is necessary to determine whether in fact there is a conflict of interest, still respecting the attorney's duty of confidentiality to the former client. There may be circumstances in which an attorney cannot provide even the basic case information above because its disclosure would violate the attorney-client privilege or otherwise unduly prejudice the attorney's

former client. Such situations should be handled on a case-by-case basis in consultation with the incoming attorney and potentially the attorney's former employer and client(s).

It is also a good idea for the new attorney, upon arrival, to review a list of the clinic's current clients and adverse parties and bring any potential missed conflicts to the clinic director's attention.

If conflicts are identified at any stage of this process, the clinic has the options outlined in section I with respect to students. Regardless, it is recommended that clinics file and retain conflict forms in a secure location and document situations in which a conflict was identified and further action was required. In addition, as conflicts may arise as new clients are added to the clinic, the new attorney's list of clients and adverse parties should also be added to the clinic's conflict-checking system.

B. Concurrent employment

1. In general

Attorneys who continue to maintain a legal practice separate from their clinic work or otherwise engage in lawyering outside the clinic pose particular conflict challenges. When an attorney employed by (or volunteering with) a clinic would be barred, due to her outside legal work, from representing a particular clinic client, that disqualification is likely imputed to all other lawyers and students at the clinic, meaning that no one at the clinic can represent that client either. Conflicts are imputed in the other direction as well, limiting the concurrently-employed lawyer's (and her law partners') ability to represent clients in the outside practice.

Where a clinic attorney will maintain concurrently a legal practice separate from the clinic's, that clinic should create a system to ensure, on an ongoing and regular basis, that the attorney's outside work does not conflict with her work in the clinic. Ideally, the concurrently-employed lawyer will check all potential outside clients and adverse parties against the clinic's conflicts database before accepting a retainer and will add each new outside client to the clinic's database as soon as she is retained. However, depending on the nature of the lawyer's outside practice – including the resources available to the lawyer for conflict checking, the number of clients added annually, and the likelihood that conflicts will in fact arise between the practices – it may be appropriate instead to allow the concurrently-employed lawyer to provide new client lists on a periodic basis, e.g., every six months, and then to process those lists as it would with a newly-hired lawyer. Concurrently-employed lawyers should also be asked to ensure that clinic clients are regularly added to the conflict-checking databases of their outside practices, where necessary and consistent with the lawyer's duty of confidentiality to clinic clients discussed previously in this document, and might be asked not to take on new outside clients who might create conflicts for the clinic without first discussing the subject with the clinic director.

Clinic directors should assess the conflict-checking system of any concurrently-employed lawyer to ensure that the needs of the clinic are adequately addressed. Although it is the responsibility of the concurrently-employed lawyer to ensure that adequate conflict checking is occurring in both of his/her practices, the clinic director has discretion to determine how any identified actual or potential conflict should be resolved. Please note, however, that screening is likely not possible for concurrently-employed lawyers, and that any conflict that is created as a result of insufficient conflict checking across practices may cause ethical problems for both the clinic and the lawyer's other firm. Nor are generalized conflict waivers likely to be sufficient.

2. Special considerations for lawyers concurrently employed in firms, partnerships, and organizations

If a clinic lawyer has a law partner or is concurrently employed by a firm or nonprofit organization, additional measures are likely necessary. All conflicts of all lawyers in the outside firm are likely imputed to the clinic, and the regular exchange of new-client lists will be more complicated. Therefore, before permitting this type of concurrent employment, the clinic should review the nature of the attorney's outside engagement, assess the capacity of the outside practice to maintain a complete separation from clinic matters, assess the willingness and capacity of the outside practice to engage in complete and ongoing conflict checking with the clinic, and possibly obtain an outside opinion.

As with students (see Part I *supra*), the clinic should also offer clear guidance to the concurrently-employed lawyer regarding the clinic client information that lawyer may and should share with the outside employer. While complete, regular disclosure of clinic client lists (with adverse parties and the nature of the matters) will best ensure accurate conflict-checking, the names and case information of clinic clients are confidential and must be protected to the extent practicable consistent with other legal and ethical obligations.

III. Clients and Cases

Each clinic should establish a process to check that it can accept new clients or matters without creating a conflict of interest, and must monitor this on an ongoing basis. For clinics that already use TimeMatters, that program could be an appropriate tool. Regardless of the program or method selected, however, clinics should develop systems for ensuring that students or staff conduct appropriate checks when consulting with potential clients or accepting new clients, and should ensure that students are properly trained in how to use those systems.

A robust and useful database for identifying conflicts might include the names (including maiden names and aliases), dates of birth, and for corporate or business entities, corporate and business names, trade or alternative names, names of the parent or controlling shareholder, names of subsidiaries and the parent company, proper and business names of other relevant affiliated companies, names of officers and directors, names of partners and limited partners of:

- clients;
- immediate family members of clients;
- adverse parties;
- other parties involved in the matter or who become involved after the file is opened, plus information on their relationship with the client (*e.g.*, spouses, witnesses, and experts);
- people offered one-time office or telephonic consultations;
- potential clients whom the clinic has declined to represent²;
- clients of concurrently-employed lawyers;
- former clients of new lawyers or students

² A potential client from whom a clinic receives no or limited confidential information creates less risk of conflict than one who is actually represented. To ensure clear communication and minimize conflicts, clinics may consider sending non-engagement letters to potential clients they decline to represent. Such a letter might confirm that the clinic is not representing the client, advise him/her to find another lawyer to act for his/her and protect his/her interests, and document that the clinic has not received any confidential information if this is the case.

For each person listed in the conflict-checking database, the clinic should maintain information about the nature of that person's connection to the clinic and its work. The conflict rules apply differently to current clients, former clients, prospective clients who provided the clinic with only limited confidential information, and former clients of new lawyers and students, and the nature of the matters involved is often relevant. Tracking this information in the conflict checking database will make it easier to separate actual conflicts from apparent conflicts or those that might be resolved through waivers or screening. To further facilitate the resolution of potential conflicts, each clinic is encouraged to maintain a searchable electronic database containing, for each matter or prospective matter:

- Opening and closing dates
- Matter name and any file number
- Client name(s)
- Names of related and adverse parties and their relationship to the client/matter
- All lawyers and students who have worked on the matter
- Brief description of matter and nature of services provide, including whether representation was provided or declined

IV. Conclusion

This document is intended as a resource for clinics as they develop their own conflict of interest policies and procedures. While OCP cannot monitor or resolve conflicts within the clinical programs, clinics should feel free to contact OCP to brainstorm solutions, to seek information about how other clinics have handled a particular situation, or for referrals to resources outside the clinical program.