

Office of Government Ethics

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Letter to a Law School Official dated April 3, 1990

This is in response to your letter of February 16, 1990, requesting guidance related to the application of Chapter 11 of Title 18 of the United States Code to law students who are enrolled in [a university law school criminal justice clinic] and who are also employed by the Federal Government or the District of Columbia government. In your letter you stated that a responsibility of students in the [program] is to represent defendants in cases prosecuted by the United States Attorney's office, District of Columbia, in the Superior Court of the District of Columbia.

The student's appointment with the Federal Government will determine the application of the criminal conflict of interest statutes. A student could be appointed as a volunteer, a special Government employee or a regular employee. These three types of appointments require different applications of the statutes. The differing applications are discussed below.

In addition to the criminal conflict of interest statutes, there may be further limitations on the student's activities contained in the standards of conduct regulations of the agency which the student serves, particularly if that agency is the Department of Justice. Because the standards of conduct regulations are unique to each agency, we will not discuss them here. Some students who work for the Government do so as volunteers appointed under 5 U.S.C. § 3111. Students appointed under this special statute do not receive monetary compensation for their work but do receive class credit from their schools. Students appointed under this statute are not generally considered employees for the purposes of conflict of interest laws. None of the prohibitions of section 205 apply to any student in the clinic appointed to a Federal position under section 3111. However, the department's or agency's internal standards may apply to volunteers appointed under section 3111, and each of these students should consult with the department or agency in which he or she holds such appointment.

If the student is a special Government employee as defined in 18 U.S.C. § 202, then there are two possible sets of restrictions

which may apply. Section 202(a) defines a special Government employee as "an officer or employee of the executive or legislative branch of the United States Government, or any independent agency of the United States or the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis" It is possible that some of the students in your clinic may be special Government employees and may thereby be subject to the less restrictive standards set forth in section 205(c). Please note, however, that the status of the student is not merely a function of how many days or portions of a day he or she may work for the Federal Government. For example, a special Government employee must be designated as such when he or she is appointed. If he or she is not so designated, then he or she is a regular employee regardless of the number of days he or she works. If the student, who is a special Government employee, has served less than 60 days in an agency during the immediately preceding 365-day period, then he or she may act as agent or attorney in a matter which is pending before his or her employing department or agency so long as he or she did not participate personally and substantially in the matter while he or she was a Government employee or special Government employee. For example, a student who has served in the Department of Justice as a special Government employee for less than 60 days in the immediately preceding 365 days would not be barred by the statute from representing a defendant in a case prosecuted by any United States Attorney's office so long as he or she did not personally and substantially participate in the matter. While this is used as an example, we must caution that the Department of Justice may have its own more strict administrative restrictions which may prevent this representation.

If the student has worked for the agency or department for more than 60 days in the immediately preceding 365-day period as a special Government employee, then he or she may not act as agent or attorney in relation to a matter involving a specific party or parties in which he or she participated personally and substantially as a Government employee or special Government employee or in a matter which is pending in the department or agency of the Government in which he or she is serving. For example, a student employed as a special Government employee by the Environmental Protection Agency would not be prohibited from representing a defendant prosecuted by the United States

Attorney's office, District of Columbia, in Superior Court for the District of Columbia. However, a student employed as a special Government employee by the Department of Justice or the United States Attorney's office, Eastern District of Virginia, would be prohibited from representing a defendant prosecuted by the United States Attorney's office, District of Columbia, in the Superior Court for the District of Columbia.

If the student is not appointed under 5 U.S.C. § 3111 or as a special Government employee, then, without some other unique appointment in a special program, he or she will be subject to the general restrictions of 18 U.S.C. § 205.1 Subsection (a) prohibits officers and employees of the Federal Government from acting as agent or attorney in claims against and other matters affecting the Federal Government. It would prohibit students who are Federal employees from representing defendants in criminal cases prosecuted by the United States Attorney's office, District of Columbia. Section 205(b) is directed at officers and employees of the District of Columbia and officers and employees of the United States Attorney's office, District of Columbia. It would prohibit students who are District of Columbia government employees from representing defendants in cases prosecuted by either the United States Attorney's office in which the District of Columbia is a party or has an interest or those cases prosecuted by the District of Columbia Corporation Counsel.

Because students in the clinic may fall within any of the four categories discussed above, and because individual agencies may have additional regulations which impose standards of conduct restrictions beyond those mandated by Chapter 11 of Title 18, United States Code, I strongly suggest that you encourage each student in the clinic who works in any capacity for either the United States or the District of Columbia to meet with the designated agency ethics official for the agency he or she serves to discuss the proper bounds of these outside activities. I am enclosing a list of ethics officials with this letter to aid you in directing students to the proper official.

Sincerely,

Donald E. Campbell
Acting Director

1 There may be other programs which indicate in the statute creating the program that program appointees are not officers or employees for the purposes of Chapter 11 of Title 18, United States Code. However, this Office is not aware of any such programs.