10-1-2004

Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom

Alexis Anderson
Boston College Law School, alexis.anderson@bc.edu

Arlene Kanter
Syracuse University College of Law, kantera@law.syr.edu

Cindy R. Slane
Quinnipiac University School of Law, crsjd@aol.com

ETHICS IN EXTERNSHIPS: CONFIDENTIALITY, CONFLICTS, AND COMPETENCE ISSUES IN THE FIELD AND IN THE CLASSROOM

Alexis Anderson, Arlene Kanter, & Cindy Slane*

Law school faculty engaged in externship teaching have long recognized that the tripartite nature of externship practice, which joins law students, field supervisors, and faculty supervisors in the common enterprise of providing students with opportunities to observe, participate in, and reflect on the work that lawyers do in various practice settings, gives rise to ethical issues that are in some ways distinct from the ethical issues commonly encountered in in-house clinical settings. This article explores the challenges facing each of the externship players with respect to a number of such issues, all clustering around three central professional obligations lawyers owe to clients and others for whom they perform legal work: the duty to keep confidential client and other workplace information; the duty to avoid conflicts of interests in client representation and in the adjudicative process; and the duty of competence, the first ethical duty announced in the Model Rules of Professional Conduct. The article presents case scenarios as the context for an examination of these issues from the vantage point of each of the externship players: the extern, whose participation in an externship program will require him to engage with ethical issues on a regular basis; the field supervisor, who is intent on adhering to the highest professional standards in the work setting and who, under most student practice rules, is charged with professional responsibility for the extern's legal work; and the faculty supervisor, whose professional and pedagogical interests lie in ensuring that her externship program complies with all applicable ethical standards. It then proposes protocols to assist the players in meeting their respective ethical obligations. These protocols provide guidance for protecting the confidentiality of client or workplace information while allowing externs -- in journal entries, tutorials, and seminar meetings -- to discuss the important personal, professional, and systemic issues raised by their field experiences. They suggest practices that will enable externs, field supervisors, and faculty supervisors first to identify, and then either to avoid or cure, conflicts presented by externs' obligations to previous or current clients, their personal interests or activities, or their relationships to third parties. Finally,

---

*All three authors direct externship programs and have been involved in clinical teaching for many years. Alexis Anderson joined the clinical faculty of Boston College Law School in 1983 as an in-house civil clinical supervisor; beginning in 1994, she became co-director of Boston College Law School's externship program. Arlene Kanter joined the Syracuse University College of Law tenure track faculty in 1989 to direct an in-house clinic and to serve as the overall Director of Clinical Legal Education. Since 1991, she also has directed the Externship Program and taught disability law classes. Cindy Slane joined the clinical faculty of Quinnipiac University School of Law in 1994 as the Director of Field Placement Programs. She currently teaches five of Quinnipiac's nine externship courses. Since 1998, she also has been a member of the Connecticut Bar Association's Committee on Professional Ethics.

The authors wish to thank a number of people for their contributions to this piece. First, and foremost, we wish to thank the Editorial Board of the *Clinical Law Review* for their wise counsel. Our gratitude goes, too, to those members of the extern community who attended the session on externship ethics we facilitated at the Externships²: Learning from Practice conference hosted by Catholic University School of Law in March 2003; those clinicians who reviewed earlier drafts of this Article, in particular Professor Peter Joy and the members of the New England Externship Directors' Working Group, Professor Steve Wechsler of Syracuse University College of Law; and our research assistants, for their hard work and patience, Julie Morse and Chris Waters (Syracuse), Zach Miller and Brian Shaw (Boston College), and Jennifer Katz (Quinnipiac). Last, but far from least, Alexis and Arlene also wish to acknowledge Cindy's artistry in drafting and editing.

they outline strategies for structuring field placement experiences, supervisory interactions, and seminar curricula in ways that will help students to develop the skills and professional habits they will need to provide competent representation to their clients.

INTRODUCTION

We have long known that questions involving legal ethics are highly contextual.[1] It should come as no surprise, then, that different clinical opportunities produce distinctive ethical dilemmas. Those of us involved in externships recognize that these programs raise a number of novel ethical issues unlike those commonly confronted in in-house clinics. Because of the unique nature of externship practice, resolution of these issues calls for protocols[2] distinct from those appropriate in other settings.

As externship faculty and clinical teachers, we have struggled with these problems in relative isolation for all too long. The existing literature on the subject of professionalism offers only general guidance, with few or no definitive answers for those engaged in externships.[3] A little over a year ago, we had the opportunity to discuss these issues within the externship community, at "Externships[2]: Learning from Practice," the second national externship conference sponsored by Catholic University's

---

[1] *See generally* Paul Tremblay, *Symposium: Client Counseling and Moral Responsibility: Client-Centered Counseling and Moral Activism,* 30 PEPPERDINE L. REV. 615, 624 (2003) (acknowledging this traditional view, but offering new insights into its accuracy).

[2] By "protocols," we mean policies and operating procedures that externship faculty can implement to address ethical issues that arise in externship practice. We do not suggest that one set of protocols will fit the needs of each and every program; instead, we propose guidelines for establishing ethics policies and procedures that conform to good practice.

[3] The leading externship text, J.P. OGILVY, LEAH WORTHAM & LISA LERMAN, LEARNING FROM PRACTICE (1998), devotes one chapter to the issue of Ethics in Externships (Chapter 4), authored by Lisa Lerman. She and a handful of other clinicians have added to the literature on professionalism issues in the externship setting, most notably Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORD. L. REV. 2295 (1999) (expanding on her chapter in LEARNING FROM PRACTICE and on her work at the first national externship conference held at Catholic University School of Law in 1998); Peter Joy & Robert Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLIN. L. REV. 493 (2002) (discussing those ethics questions as applied to a variety of clinical settings including externships); Stacy Caplow, *Ethics: Conflicts and Confidences in the Judicial Clinic* (presentation at the first externship conference held at Catholic University School of Law in 1998) (raising questions relating to ethics of judicial chambers) (materials on file with authors); Kate Bloch, *Subjunctive Lawyering and Other Clinical Extern Paradigms*, 3 CLIN. L. REV. 259 (1997) (focusing on different models of faculty supervisor intervention for a criminal ethics dilemma arising in an externship program).

Columbus School of Law.[4] This Article collects the ethics insights that we have gathered from that conversation and other such discussions with our externship colleagues, and from our work with externship students and their field supervisors. We offer these insights here in the hope that they will encourage further discussion of these critical questions.

Let us first clarify the scope and limits of this Article. Our goal is to offer practical guidance for those involved in externships – for externs who confront ethical questions on a regular basis, for field supervisors intent on adhering to the highest professional standards in their work settings, and for externship faculty[5] who have both a professional interest[6] and a pedagogical stake in ensuring that their programs comply with all applicable ethical standards. While our contributions are consistent with professional norms, it is not our intent to offer an academic treatise on professional responsibility. Rather, our discussion focuses on the implementation of professional standards in the throes of externship reality. Therefore, we first analyze how certain ethical norms apply in view of the special constraints that exist in the externship context. Then, we propose basic protocols to assist members of the extern community in grappling with their ethical responsibilities.

Critical to an understanding of our approach is our starting premise: although far more joins in-house and externship clinical programs than separates them, an externship is, in at least some respects, a distinct clinical format, one with unique characteristics that shape the nature and resolution of the

---

[4] The co-authors led a concurrent session on ethical issues in externships, *Ethical Dilemmas – in the Field and in the Classroom*, at Externships²: Learning from Practice, the second externship conference sponsored by Catholic University's Columbus School of Law, on Saturday, March 8, 2003 (hereinafter "Externships² Conference").

[5] The terms "faculty supervisor" and "field supervisor" have crept into the externship lexicon, aptly emphasizing the complementary roles played by clinical faculty members and participating lawyers, judges, and mediators in externship practice. In our discussion, we will use the terms "externship faculty" and "faculty supervisor" interchangeably to refer to the faculty member who has the responsibility for teaching the externship clinic. We recognize that in some cases that faculty member may also be the faculty *director* of the law school's externship program; in others, the faculty supervisor may be an adjunct professor or a full-time member of the academy, but not charged with the administrative and managerial tasks of a director. Our use of "externship faculty" or "faculty supervisor" is intended to be inclusive, not exclusive.

[6] Many externship faculty members wear two hats; in addition to being the faculty person tapped to teach the program, many faculty supervisors are also licensed to practice in the jurisdiction in which they teach and in which their externs are placed.

ethical issues faced by each of the externship players. For that reason, the literature on professional responsibility issues as they present in in-house clinics is of only limited help. An independent investigation of how ethical dilemmas arise and how they should be resolved in externship settings is in order.

What unique features distinguish externships from other clinical courses?[7] Two factors drive our analysis of externship ethical dilemmas: the first is structural, the second, pedagogical. As to structure, the fact that our externs are undertaking legal work certainly does not warrant special treatment for externships; lawyering is the bread and butter of in-house clinics, too. Rather, it is the tripartite nature of externship practice that proves the distinctive trait. Externships, by definition, involve a collaboration of three parties: the extern, the field supervisor, and the faculty supervisor. Ethical dilemmas encountered by any one of these parties affect all three partners to the union. Each of the participants in this triangular relationship plays a special role critical to the analysis of professionalism questions.

Take first the extern student. She has elected to participate in an externship to observe and participate in the practice of law in a particular legal setting, which may range from judicial chambers to a corporation's in-house legal office.[8] Unlike her in-house clinic counterpart, though, whose status

[7] *See generally* J. P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155, 158-60 (2002/3) (discussing history and uniqueness of extern programs).

[8] Surveys of externship programs demonstrate a variety of configurations. Some law schools limit their list of available placements to public sector and pro bono opportunities; others include private sector placements. Some schools place externs from like placements into discrete clinics (*e.g.* all externs in judicial placements in the same seminar and clinic); many schools offer general externship clinics, gathering a host of different types of placement opportunities under one pedagogical roof. Still other schools have developed hybrid externships, particularly in the criminal justice field, in which faculty work closely with prosecutors or defense attorneys to prepare their students to handle cases. *See* Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLIN. L. REV. 413, 423-428 (1996); survey conducted for the Externship Workshop at the AALS Clinical Conference on May 21, 2002, in Pittsburgh, PA, entitled *Externship Programs at Selected Schools* (materials on file with authors); Stephen Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537, 539 (1990) (contrasting traditional externship programs, in which all case supervision occurs at the placement under the direction of the field supervisor, and "case supervised" programs, in which the extern director retains some supervisory duties).

as a student-lawyer ordinarily is clear,[9] the extern's professional position may be murky, at best. In-house clinics traditionally empower their students to be the front-line lawyers on their cases, subject to faculty supervision as outlined in the relevant state's student practice rules.[10] While some externs assume like roles,[11] others do not have primary case responsibility,[12] undertaking instead responsibilities more akin to those of law clerks.[13]

A threshold question, then, is whether, for professional responsibility purposes, externs *are* subordinate lawyers,[14] bound by the professional rules of the jurisdiction in which they extern. As noted, some externships provide students the opportunity to practice law pursuant to student practice rules or orders; others do not. However, we concur with other commentators who urge that all externs

---

The seminar components of externship programs also run the gamut. In some, students share their reflections on the lawyering they have observed at their placements in "grand rounds" style seminars. In others, legal skills development is the primary focus. The occasions for ethical dilemmas to present themselves in the externship seminar will depend on the pedagogical goals of the particular program, and therefore, may vary greatly.

[9] *See* David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 S.M.U. L. REV. 1507 (1998). *But see* Joy & Kuehn, *supr*a note 3, at 511 (noting that some in-house clinics enroll both certified and non-certified students).

[10] For a detailed examination of state student practice rules, see Adrienne Thomas McCoy, *Law Student Advocates and Conflicts of Interest*, 73 WASH. L. REV. 731 app. (1998); Chavkin, *supra* note 9.

[11] Students in Quinnipiac University School of Law's Criminal Justice Externship, for example, routinely sit first chair on misdemeanor and infraction trials, though they are more likely to sit second-chair in felony proceedings.

[12] *See* discussion in Joy & Kuehn, *supra* note 3, at 494, n. 5 (noting that a critical distinguishing feature between in-house clinics and externships is that the former provide for students to be the primary lawyer). These distinctions directly affect the analysis of questions such as whether the extern is herself "practicing law" or observing others' lawyering, whether the extern is subject to discipline for her misconduct or required to report others' lapses, and whether her field supervisor's supervision is adequate.

[13] *Compare* MODEL RULE 5.2 ("Responsibilities of a Subordinate Lawyer") *with* MODEL RULE 5.3 ("Responsibilities Regarding Nonlawyer Assistants"). MODEL RULES OF PROF.'L CONDUCT (2002) [hereinafter MODEL RULES when we refer to them collectively and MODEL RULE when we designate a specific rule]. The ABA has only recently adopted the 2002 version of the MODEL RULES, after a lengthy Ethics 2000 Commission study; these MODEL RULES, therefore, may not be in effect in particular jurisdictions. Unless otherwise indicated, all references in this Article are to the MODEL RULES as adopted in 2002 by the ABA, with any subsequent 2003 amendments. *See* JOHN DZIENKOWSKI ed., PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 420-21 (2003-04) (abridged edition) (listing 41states plus the District of Columbia as having adopted a version of the Model Rules).

While there are no direct counterparts to MODEL RULE 5.1, MODEL RULE 5.2, and MODEL RULE 5.3 in the MODEL CODE OF PROF.'L RESPONSIBILITY [hereinafter MODEL CODE], MODEL CODE DR 4-101(D) does require a lawyer to ensure that his "employees, associates, and others whose services are utilized by him" maintain client secrets. *See also* RESTATEMENT OF LAW GOVERNING LAWYERS (2000) §11(4) [hereinafter RESTATEMENT] (supervisory duties over nonlawyer employees) and §12 (duties of lawyer subject to supervision). For an excellent, detailed discussion of the different student practice rules and their implications for clinic students, see Joy & Kuehn, *supra* note 3, at 506-514.

[14] We use the term "subordinate lawyer" as that term is defined in MODEL RULE 5.2. Note that we do not intend any normative judgment; indeed, we contend that externs should be treated as lawyers to the fullest extent possible.

should be held to the governing professional conduct rules, whether or not they are their clients' front-line lawyers.[15] We start, then, from the conviction that, absent an ethics opinion or court decision to the contrary, externship programs should *treat* their students as lawyers, even where students are not certified under student practice rules, and "even in jurisdictions where the student practice order is silent about the certified student's ethical responsibilities."[16] This view furthers the educational mission of externships, as one of the main purposes of many externship programs is to provide each student an opportunity to develop a personal system of professional ethics.[17]

The role of field supervisors is similarly complex. These lawyers and judges retain ultimate case responsibility.[18] However, by agreeing to accept externs, they also have undertaken additional supervisory duties, which carry their own ethical responsibilities and attendant risks of personal and professional penalties. The Model Rules, for example, require supervising attorneys to make reasonable efforts to ensure that the extern's conduct either "conforms to" or is "compatible with" the

---

[15] *See* Joy & Kuehn, *supra* note 3, at 513-514 (distinguishing between student lawyers who practice law in clinics pursuant to student practice orders and clinic students who are not certified to practice under such orders). Although only student lawyers may technically be bound by their state's professional responsibility rules or codes, we concur with Joy and Kuehn that student lawyers and clinic students alike should be treated as "lawyers for ethics purposes," among other reasons, in order to "train and acculturate all law clinic students to the ethical obligations they will assume upon their admission to the bar." *Id*. at 514.

Several courts have reached similar conclusions. *See* Pisa v. Streeter, 491 F. Supp. 530, 532 (D. Mass. 1980) (concluding that law student working as a law clerk under the supervision of a practicing attorney was subject to the relevant rules of professional responsibility); Glover Bottled Gas. Corp. v. Circle M. Beverage Barn, Inc., 514 N.Y.S. 2d 440, 441 (2d Dept. 1987) ("[w]hile the Code . . . does not apply to nonlawyers, it does place a burden on attorneys to insure that their employees conduct themselves in accordance with the Code"); People v. Williams, 97 Ill. 2d 252, 454 N. E. 2d 220, 240 (1983) (deeming law student practicing under state's student practice rule to be acting as a criminal defendant's legal representative and to be bound to maintain his client's secrets and confidential communications).

[16] Joy & Kuehn, *supra* note 3, at 511. Accommodating student interest in particular placements may be possible in those situations and jurisdictions in which the extern is considered a non-lawyer or legal assistant under MODEL RULE 5.3, even where participation would be precluded were the student to be considered a lawyer. *See* discussion of these conflicts questions*, infra* Part II.

[17] David Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 73 (1979) (contending that the purpose of clinical legal education is to assist the law student in developing a coherent and personalized system of professional responsibility). *See generally* James E. Moliterno, *Legal Education, Experiential Education and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 74, 108 (1996).

Rules of Professional Conduct,[19] while the Model Student Practice Rule imposes on the supervising attorney personal, professional responsibility for the quality of a certified student extern's legal work.[20]

The third member of every externship team is the faculty supervisor.[21] These faculty members are neither front-line lawyers with professional responsibility for their students' case work nor disinterested outsiders. Instead, through journals, individual tutorials, and seminar discussions, they are intimately connected to the lawyering to which their externs are exposed. In addition, faculty supervisors are often catalysts for the identification and exploration of professionalism issues, as they exhort their externs to reflect upon the ethical questions the students are confronting in their placements.[22]

---

[18] For example, while the MODEL CODE OF JUDICIAL CONDUCT (2002) (hereinafter "CODE OF JUDICIAL CONDUCT") provides that judicial staff should conduct themselves in compliance with all applicable ethical standards, that Code clearly places the ultimate responsibility on judges themselves. *See*, *e.g.,* CODE OF JUDICIAL CONDUCT, Canon 3 C.1. *See also* MODEL RULE RELATIVE TO LEGAL ASSISTANCE BY LAW STUDENTS, 94 Rep. of the ABA 118 (1969) [hereinafter MODEL STUDENT PRACTICE RULE] (providing for supervising attorney's "personal professional responsibility" for the quality of the student's work).

[19]The professional responsibilities of supervising attorneys are spelled out in MODEL RULE 5.1 ("Responsibilities of … Supervisory Lawyers" over subordinate lawyers); and MODEL RULE 5.3 ("Responsibilities Regarding Nonlawyer Assistants"). As the description of those two provisions suggests, a field supervisor's ethical responsibilities are defined in relation to the extern's status. If the extern is deemed to be practicing law, then the field supervisor will be required to make reasonable efforts to ensure that the subordinate lawyer's conduct "conforms" to the rules of professional conduct. MODEL RULE 5.1 (providing also that a lawyer with supervisory responsibility over another, subordinate lawyer (*i.e.,* the extern who is certified to practice) "shall be responsible" for ethical breaches if that lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action"). MODEL RULE 5.1 (c)(2). Were the extern to be viewed as a non-lawyer assistant, then the constraints of MODEL RULE 5.3 require only that the supervisory lawyer make reasonable efforts to ensure that the non-lawyer assistant's work is "compatible" with the rules of professional conduct. MODEL RULE 5.3 (c) (providing for continuing supervisor liability as in MODEL RULE 5.1). The nuanced difference in these provisions highlights the importance of the status of externs in a particular program or practice setting with respect to the obligations undertaken by the lawyers who supervise them. *Compare* RESTATEMENT §11(3), similarly distinguishing between a supervisory lawyer's duty to supervise a subordinate lawyer *with id.* §11(4), regarding his duty to supervise a nonlawyer employee. *See also* discussion *infra* note 63.

[20] *See* MODEL STUDENT PRACTICE RULE, Section VI. B. That Rule also envisions that the student will be familiar with the current ethical rules. *Id*. at III.F.

[21] *See supra* note 5 for the definition of faculty supervisor.

[22] This piece is by no means the first to acknowledge the unique role of externship faculty. *See*, *e.g.,* Bloch, *supra* note 3 (discussing various models of director response to ethical dilemmas arising in prosecutorial placements); Caplow, *supra* note 3 (detailing the particular conflicts facing externship directors of a judicial externship program); Chavkin, *supra* note 9 at 1513-15 (questioning whether an attorney-client relationship exists between clinic supervisor and clinic client).

Their tripartite structure is not the only unique feature of externships. Externships also present special pedagogical opportunities to explore ethics in practice in ways that are distinct from opportunities afforded by their in-house clinical cousins.[23]

Professionalism issues, of course, are either an explicit or implicit part of pedagogy in every externship program. Many externship programs include a seminar component, which in some cases satisfies students' professional responsibility graduation requirements.[24] The leading externship text, *Learning from Practice*, includes chapters on ethics, reflective lawyering, and professional life.[25] Even if not expressly part of course coverage, ethics questions seep into the externship world. Students experience them, field supervisors have to resolve them,[26] and faculty directors invite their careful exploration.

But ethics is a pervasive part of all clinical education. If our contention that externship ethics pedagogy is unique is to have any force, it must mean that externship participation exposes students to ethical questions in some qualitatively different fashion than does participation in in-house clinics.[27] And that is precisely our experience.

---

[23] *See generally* Seibel & Morton, *supra* note 8, at 417-418 (contending that externships have a unique pedagogical aspect stemming from the faculty director's "freedom … to maintain some distance from the demands of producing the work product" and from the externs' willingness and ability to assume more responsibility for crafting their own learning goals).

[24] *See* ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, STANDARD 305 (2003) [hereinafter ABA ACCREDITATION STANDARDS] (recommending a contemporaneous classroom or tutorial component for all externship courses, and mandating one or the other for those programs awarding more than six credits per semester). S*ee also* Seibel & Morton, *supra* note 8, at 429-30.

[25] OGILVY ET AL.*,* s*upra* note 3. *See also* Seibel & Morton, *supra* note 8, at 432 (graph indicating that over one third of programs surveyed included "reflection" as a subject of the externship class coverage); James Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere,* 60 U. CIN. L. REV. 83 (1991) (concluding that externships are more effective than classroom instruction for teaching professionalism issues); Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLIN. L. REV. 347 (1999) (noting the importance for externship pedagogy of student journals as tools for extern reflection); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55 (1996) (describing the benefits of requiring students to keep journals in a number of law school courses, including externships).

[26] We do not mean to suggest that externs and externship faculty should or must remain passive when ethical dilemmas arise. To the contrary, as developed in more detail below, we contend that students, often in collaboration with faculty clinicians, can and should take an active role in identifying ethical issues and suggesting solutions to ethical puzzles.

[27] We intend no normative judgment here. In contending that externship participation exposes externs to ethical issues and their resolution in a manner in some ways distinct from the manner in which faculty and students approach ethical issues in live client clinics, we do not suggest that one forum is superior to another.

Our conclusion on this score is based on our own in-house and externship clinical supervision experience, over four decades in the aggregate. We know that when we are wearing our externship hats, free from the immediate tensions of case management and client responsibility, we can offer a more dispassionate appraisal of the ethical dilemmas that arise in our programs and thereby encourage more measured reflection by our students. We can take the time, through journal feedback and seminar discussion, to shape the ethical questions that students encounter into teaching moments from which emerge thoughtful models of professional conduct. Therefore, ethics questions can take center stage in externships.[28]

This explicit and primary pedagogical focus on ethics shapes how the externship players perform their professional roles. Externship directors want their students to embrace as fully as possible their professional responsibilities.[29] It is important to the externs' development that they consider themselves more than mere non-lawyer assistants. If they perceive themselves as having responsibilities akin to those of front-line lawyers, they will both better comprehend their field supervisors' plight and be better prepared for the day when they become full-fledged lawyers themselves.[30] The externship programs' focus on ethics also provides a natural forum for field supervisors desirous of consultants to assist them in dealing with thorny ethical dilemmas.

---

[28] For an insightful appraisal of the effect that the forum has on the teaching of legal ethics, *see* Moliterno, *supra* note 17, at 113 (concluding that simulated clinical courses may be the optimum setting in which to teach professionalism issues, while noting some limitations inherent in the live in-house clinic forum which complicate the teaching of ethics in that setting); Kathleen Butler, *Shared Responsibility: The Duty to Legal Externs*, 106 W. VA. L. REV. 51, 55-56 (2003) (extolling the educational value of externship clinics). Clinicians have long debated the merits of teaching professional responsibility through clinical education. *Compare* Robert Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. LEGAL EDUC. 604, 613 (1983) (expressing reservations about using clinics to teach ethics) *with* his earlier, related piece, Robert Condlin, *The Moral Failure of Clinical Legal Education*, THE GOOD LAWYER: LAWYERS' RULES AND LAWYERS' ETHICS (David Luban ed., 1983), *and* Norman Redlich, *in The Moral Value of Clinical Legal Education: A Reply,* 33 J. LEGAL EDUC. 613 (1983) (concluding that clinics can provide effective professional responsibility instruction).

[29] *See generall*y Chavkin, *supra* note 9, at 1544-45.

[30] *See* discussion *supra* note 15 (noting that extern programs should view their students as would-be lawyers rather than as nonlawyer assistants)*;* Joy & Kuehn, *supra* note 3, at 513-14; McCoy, *supra* note 10, at 739-41.

Like ethics issues generally, these themes are best tested in the context of specific ethical problems.[31] We have selected three general areas of professional responsibility for discussion because of the frequency with which we have grappled with issues that cluster in these areas in our own programs. In Section I, we begin with one of the hallmarks of the lawyer-client relationship: confidentiality. Specifically we investigate how externship programs can best manage lawyers' professional duty to preserve client confidences. That discussion leads naturally to a review of potential conflicts of interests in Section II, where we offer guidance on avoiding and resolving such conflicts in externship practice. Section III presents an analysis of the ways in which the externs' duty of competence affects each of the externship players. We close with examples of teaching materials referenced in the Article, which are included as an Appendix.[32]

I. CONFIDENTIALITY

A. Introduction

[31] The authors presented the topic of "Ethical Dilemmas in Externships" at the Externships ² Conference, *supra* note 4. As part of that presentation, they compiled a number of case scenarios which raised ethical questions in the extern setting, which were published in the Conference handbook, pp. 32-38, and which are now available on line at: http://law.cua.edu/News/conference/externships/satruday1030c/Ethics%20Session%20)utline%20and%Homework%20Assignment%20FINAL.doc.pdf. We have based the scenarios discussed in this Article, which draw heavily upon those developed for the Conference, on actual externship ethics situations we have confronted. Most scenarios are sanitized accounts; a few (particularly in the Conflicts section, to permit us to discuss various analytical wrinkles) are fictional composites. As you will see, the context of the scenarios is quite varied: some occurred in criminal settings; others presented in chambers; a handful arose in in-house counsel placements or in private practice.

[32] We recognize that our ordering of these sections is somewhat arbitrary. For example, we considered leading with the section on competence, as the professional rules announce that ethical duty first. *See* MODEL RULE 1.1. We also considered addressing conflicts first, because externship faculty and externs must consider conflicts questions in identifying the range of placement options open to the students, even before attorney-client relationships are formed and questions of competence and confidentiality arise. However, the level of interest in confidentiality issues expressed by the clinicians who attended our presentation on this topic at the Externships[2] Conference, *supra* note 4, persuaded us to begin our discussion with an analysis of the implications of lawyers' duty to protect client information in the externship context.

Confidentiality – the quintessential element of the lawyer-client relationship.[33] Lawyers promise it, clients rely on it, state disciplinary boards demand it.[34] As extern students embark on their field placements, they become part of the legal team obligated to protect information related to the representation of clients.[35] Their placement supervisors, whether they operate in the private or the public sector, routinely communicate and reinforce the demands of this professional duty to their new charges.[36]

Why, then, is there any problem? After all, law students practicing in live client clinics grapple effectively with these responsibilities daily. It is not the student status of externs that complicates the application of these professional duties for externship programs. Rather, it is the connection of externs

[33] *See generally* MODEL RULE 1.6 cmt. 2 ("[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."); MODEL CODE DR 4-101(B)(1) ("a lawyer shall not knowingly . . . [r]eveal a confidence or secret of his client "). As noted in the INTRODUCTION, we do not design this section as a comprehensive survey of attorneys' professional duties to preserve client confidences or of the constraints of the attorney-client privilege. Rather, its focus is on how the ethical requirements of confidentiality can be most appropriately taught and implemented in externship clinics.

[34] Lawyers have long recognized the onerous responsibilities they shoulder in promising confidentiality to clients. The recent decision of the Washington State Supreme Court in the disciplinary action against attorney Douglas Schafer, which affirmed his suspension, reinforces the public policy interests behind protection of client confidences. The Court ultimately concluded that Schafer should be barred from practice for six months, for breaching a client's confidence in the attorney's effort to seek a corrupt judge's removal. *See In re* Disciplinary Proceeding Against: Douglas Schafer, 66 P.3d 1036 (Wash. 2003). For a chilling account of the prevalence of confidentiality breaches observed by externs, see Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values*, 4 GEO. J. LEGAL ETHICS 537 (1991). In his empirical study, Hellman reports that breaches of confidentiality were one of the most frequently reported types of ethical violations observed by his externship students at the University of Oklahoma Law School. *Id*.at 603. S*ee also* Lerman, *supra* note 3 (reporting more impressionistically that her extern students commonly write in their journals that they have observed supervisor misconduct).

[35] *See* discussion, *supra* INTRODUCTION, noting uniqueness of externship context; *infra* Part I.B., concerning application of confidentiality duties to prosecutorial placements.

[36] Indeed confidentiality is important even when no client relationship exists. For example, students who have chosen to be judicial clerks must learn to maintain chambers secrets. *See generally* the ABA CODE OF CONDUCT FOR JUDICIAL EMPLOYEES (1996) Canon 3 D [hereinafter JUDICIAL EMPLOYEE CODE] ("[a] judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties. . . ."). The JUDICIAL EMPLOYEE CODE is posted at http://www.uscourts.gov/guide/vol2/ch2a.html. *See also* MAINTAINING THE PUBLIC TRUST: ETHICS FOR FEDERAL JUDICIAL LAW CLERKS 5-9, Federal Judicial Center (2002) (offering practical guidelines for law clerks dealing with confidentiality questions). Many states also offer guidance to their law clerks, including legal interns. *See, e.g.*, SUPERIOR COURT LEGAL INTERNS: GUIDELINES FOR PROFESSIONAL RESPONSIBILITY 2-4, Massachusetts Superior Court Administrative Office (discussing need to maintain chambers secrets) (unpublished; on file with authors).

to their greater law school communities that causes the rub.[37] Commonly, the extern submits journals to the externship faculty member (who typically is not part of the client's official legal team), participates in seminar discussions with fellow externs placed in other settings, and seeks guidance on ethical dilemmas and supervision matters both from fellow students and the faculty supervisor. Each of these facets of the externship experience forces students to make very complicated and challenging decisions about their confidentiality responsibilities.

At first blush there appears to be an easy answer to the extern's dilemma. Surely the student's professional duties[38] must trump the needs of outsiders who might desire to be brought into the "loop." Classmates' and faculty's interests in receiving a full accounting of the client's business should take a backseat to the rights of clients to have their secrets protected. Therefore, the extern's lips must remain sealed.

While that straightforward ethics analysis has a visceral appeal, it misses the point when applied in the externship setting. As previously discussed,[39] externship faculty members ask students to reflect upon their experiences in their journals, in connected seminar classes, and in individual discussions with the faculty supervisor. Indeed, the legitimate pedagogical goals of most externship programs depend upon students developing a nuanced understanding of the lawyering role and its attendant

---

[37] For a discussion of this tension in the context of in-house clinics, see James Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORD. L. REV. 2377, 2396 (1999) (concluding that the educational mission of such clinics complicates application of ethical norms).

[38] Whether or not externs are "practicing law" under applicable state student practice rules (and are subject to discipline under those rules) or are serving in more limited capacities during their externships, externs have a duty to maintain client confidences. *See generally* Joy & Kuehn, *supra* note 3 at 505-15 (noting that clinic students' ethical lapses may trigger professional liability issues, whether or not they expose the students to professional discipline); McCoy, *supra* note 10, at Appendix (listing by state the various student practice rules with information about the concomitant duties of such students to abide by the professional norms of that jurisdiction); MODEL RULE 5.1 (subordinate lawyer's conduct should "conform[…] to the Rules of Professional Conduct"). Those programs which view their externs as most similar to law clerks should refer to the rules regarding non-lawyer assistants. See MODEL RULE 5.3 ("Responsibilities Regarding Nonlawyer Assistants") (externs' conduct should be "compatible with the professional obligations of a lawyer").

[39] *See* discussion *supra* INTRODUCTION, regarding externship pedagogy, which explicitly values students' reflective lawyering.

ethical dilemmas.[40] To accomplish those objectives, programs invite (and sometimes require) externs to seek guidance on their ethical questions in journal entries and in seminar, to share their angst over the difficult professional issues they encounter, and to discuss with their fellow students and externship faculty possible resolutions to the puzzles they face.[41] Externs engage in those tasks at the same time that they must remain ever- mindful of their ethical duties.

From the faculty supervisor's perspective, navigating the confidentiality morass can be equally challenging. Remember our starting premise: faculty supervisors are not part of the lawyer-client relationships at the field placements. While externs are part of the lawyering team, the externship faculty members are merely curious outsiders.[42] But that very definition flags the faculty member's problem. On the one hand, ensuring that students comprehend and execute appropriately all ethical constraints, including their duty of confidentiality, is a clear imperative.[43] On the other, faculty also take their consultative role seriously and want to assist their students who are struggling with ethical dilemmas; they are constrained, though, in their ability to provide sage counsel by the need to respect the confidentiality of the externs' workplaces.

---

[40] *See* discussion, *supra* INTRODUCTION. S*ee also* Bloch, *supra* note 3, at 279-83 (proposing a "subjunctive" model involving extern consultation rather than interventionist lawyering for externship faculty directors); Lerman, *supra* note 3, at 2296-97.

[41] These tensions may not present in those specialized externship clinics where all students work at the same placement (*e.g.,* at a legal services or prosecutor's office). In such programs, participating students may be able to share confidential information with the faculty supervisor if she, too, is viewed as part of the lawyering team. Externship faculty who wish to pursue those avenues, though, must obtain client consent before they become privy to any confidential information, and must remain alert to and resolve conflicts occasioned by their participation in client representation. *See* discussion of actual and potential externship faculty conflicts, *infra* Part II.B.2.

[42] *See* discussion, *supra* INTRODUCTION. *See also Bloch, supra* note 3, at 283 (noting the likelihood that field supervisors may misperceive the externship faculty's role and fear that students are divulging client confidences to faculty).

[43] The externship faculty's role is further complicated by the dearth of literature applying the confidentiality constraints to the externship setting. Not surprisingly, leading professional responsibility casebooks do not focus on how lawyers and law students should handle confidentiality requirements in the externship context. *See, e.g.,* GEOFFREY HAZARD, JR., SUSAN KONIAK & ROGER CRAMTON, THE LAW AND ETHICS OF LAWYERING (2d ed.1994); DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS (1992); STEPHEN GILLERS, REGULATION OF LAWYERS (2002). However, clinicians have begun to offer their colleagues some guidance. *See* Joy & Kuehn, *supra* note 3, at 572-574 and app. A (appending a "Sample Clinic Manual Description of Student-Lawyers' Ethical Obligations" which includes in Section IV a proposed description of clinic students' duties to preserve client confidences and chambers' secrets). S*ee also infra* Appendix*,* which includes sample teaching materials dealing with externs' confidentiality duties for use in externship seminars.

Field supervisors are caught in this tension as well. They bear the immediate burden of maintaining their clients' secrets. While that responsibility exists regardless of the externship overlay, field supervisors frequently experience heightened concern about their ability to protect client confidences because of their involvement in externship programs. They are aware that their externs are submitting journals and discussing their work with externship faculty and seminar colleagues. Efforts to assist these supervisors in their search for protocols designed to help ensure professional compliance by externs are long overdue.

These are the tensions we explore in this section of the Article. To provide context for our discussion, we first offer graphic examples of these dilemmas as they have arisen in our own clinical experience as externship directors.[44] Then we explore how the relevant players might address these concerns in an effort to develop best practices for externship programs dealing with the demands of client confidentiality.

B. Case Scenarios

1. Breach of the Duty of Confidentiality: Georgia's Inadvertent Disclosure of Confidential Information

At the beginning of each meeting of a Corporate Counsel externship seminar, the professor asks students for an update on placement activities. Georgia, who works in the in-house legal department of a large, publicly traded company, responds to the professor's inquiry in a despairing tone: "Things have been pretty awful for the last two weeks." "What's the problem?" the professor asks. "It seems as though no one has any time for me," Georgia responds. "They're all too busy working on the merger." "Is the merger public knowledge?" the professor asks with trepidation. Georgia hesitates as she begins to grasp the significance of the question; "No, it isn't," she replies.
=ft

[44] Following in the footsteps of clinical teachers who have long recognized that client stories can be powerful teaching devices, Professor Lisa Lerman adapted case stories for use by externship programs in one of the only textbooks dedicated to those courses. OGILVY, ET AL., *supra* note 3, Chapter 4: Ethical Issues. Lerman offers two vignettes designed to highlight the confidentiality dilemmas that externs encounter. While she poses thoughtful questions about the externs' professional duties, the chapter does not attempt to resolve the issues. S*ee also* Lerman, *supra* note 3, in which Lerman again puts her discussion of professional duties of externs in context by using case scenarios; REBECCA COCHRAN, JUDICIAL EXTERNSHIPS: THE CLINIC INSIDE THE COURTHOUSE (2d ed. 1999); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000) (exploring the ethics of legal scholarship that relies on client and case stories).

This scenario proves an apt departure for our discussion of the professional responsibilities related to confidentiality because it raises the issues in their most pristine form.[45] The analysis must begin with a determination of the roles of the respective parties. Let us start with Georgia. As we have outlined in our introductory comments, she is functioning as a member of a lawyering team – in this case externing in the office of the general counsel of the corporation.[46] The team of which she is a part has a client – the corporation.[47] And that client has a secret – the impending merger, news of which it has not yet publicized.[48]

What then are Georgia's ethical duties?[49] This extern has become privy to client confidences as a direct result of her externship duties in the corporation counsel's office. Certainly were she an assistant general counsel employed by the corporation, there would be no doubt that she must not

[45] The authors recognize that many externship programs do not include private-sector placements. However, some do (including those of two of the authors). In addition, our students' lawyering experiences often include work in law firms or other private sector practice settings. Even in seminars focused primarily on public-sector practice, though, we have found this scenario an effective tool for exploring with our students the demands of confidentiality and the ways in which lawyers may discuss their work with others in a professional manner.

[46] *See* discussion *supra* INTRODUCTION.

[47] *See generally* MODEL RULE 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

[48] As made clear by Comment 3 to MODEL RULE 1.13, information shared by the corporation's constituents (*e.g.,* its officers, directors, and employees) with its lawyer in his organizational capacity is protected under the Rules. *See also* RESTATEMENT, *supra* note 13, §59 cmt. b. For purposes of this discussion, we are assuming that Georgia is correct, and that news of the merger is not yet public. However, even in the event that a corporate officer, director, or employee had already leaked news of the merger, the extern and her field supervisor would still have a duty under MODEL RULE 1.6 to maintain client confidentiality with respect to any "information relating to the representation," especially in those circumstances in which the information may be known by some third parties, but not generally known. *See* RESTATEMENT, *supra* note 13, §59 cmt. d. In addition, once that information becomes public, Georgia's field supervisor, acting with the express or implied consent of the corporate client, may well authorize her to discuss any public part of the merger information with the seminar class.

[49] *See* discussion *supra* note 19, concluding that an extern, whether functioning as a student lawyer or as a non-lawyer assistant, is still held to the professional standards of conduct applied to lawyers, such as the duty to maintain workplace confidences, even if she may not be subject to state disciplinary action.

divulge confidential information to outsiders.[50] Why, then, is there any question but that Georgia's obligations should be the same?

First, we can eliminate what are not distinguishing factors. As we have seen, Georgia's externship status does not absolve her of professional responsibilities.[51] Nor is her conduct excused because her disclosure was undoubtedly innocently made, without intent to prejudice her client. The professional duty to maintain client confidences exists whether lawyers intend to cause their clients harm or are guilty only of innocent slips.[52]

Next, the inquiry should proceed to an analysis of the role of Georgia's audience. In our scenario, Georgia has shared her client's secret with her peers and professor of the Corporation Counsel seminar. She might have shared the information just as easily (and, for purposes of our discussion, just as improperly) in a journal entry submitted to the faculty supervisor overseeing her externship. In either case, Georgia has divulged confidential information to persons outside the corporation's legal team.

Hasn't Georgia done just what most externship directors would suggest when their students experience nagging problems at their placements that seem to elude their own remedial efforts? Her field supervisor is so enmeshed in the merger project that he does not recognize her malaise. So, Georgia has turned to the one community that might both empathize with her plight, and, perhaps,

---

[50] That fact could not be clearer than in this example involving an insider's leak of material information regarding an impending merger that is not yet public knowledge, although a full discussion of the potential criminal and civil penalties that attach to persons responsible for insider trading and the applicability of the federal securities laws is outside the scope of this Article. In addition, while MODEL RULE 1.6 contains certain limited exceptions to maintaining confidentiality, most notably client consent, we will not address those exceptions here; rather, we will assume for purposes of this discussion that none of those exceptions is applicable. *See also* MODEL CODE DR 4-101.

[51] *See* discussion on ethical duties of externs, *supra* note 19.

[52] *See* MODEL RULE 1.6 cmt. 16 (referencing "inadvertent" disclosures as triggering the same ethical duties for attorneys and for those persons "who are subject to the lawyer's supervision" as unauthorized and intentional breaches). S*ee also* RESTATEMENT, *supra* note 13, §79 cmt. h (concluding that "inadvertent disclosures" constitute waivers of the privilege even when not intended to do so). The Reporter's Notes to Comment h provide an annotated review of the law on knowing waivers.

assist her in resolving the work issue. To ignore her plea for understanding seems particularly cruel, at worst, and pedagogically questionable, at best.

How then might we balance the conflicting needs of the partners to this scenario? Certainly, the corporation has a legitimate interest in protecting its secrets. In addition, as a practical matter, it would become very difficult for externship programs to place their students were externs to become known for leaking confidential information,[53] for field supervisors would almost certainly be loathe to participate in externship programs if they concluded that law schools were not supporting their efforts to practice consistent with all professional duties. In short, both good practice and pragmatic considerations demand that externs comply with all professional duties to maintain confidentiality.

With that principle established, let us turn to an examination of the role of the faculty supervisor and Georgia's seminar colleagues in this dilemma. The seminar members, student and faculty alike, have a legitimate interest in fostering for externs an atmosphere of free exchange of ideas and of mutual support. But there are practical considerations at issue here, too. Many programs' seminar discussions focus on questions about supervision, lawyering role, and professional responsibility. Thus, faculty supervisors routinely encourage their students to share their work-related concerns in their journals and during seminar.[54]

The crux of the problem, then, becomes what is shared with outsiders to the legal work setting. Concerned and well-intentioned though they may be, fellow classmates and the faculty supervisor cannot receive confidential information.[55] However, that constraint does not mean that the needy

[53] S*ee* Bloch, *supra* note 3, at 283-84.
[54] *See* discussion *supra* INTRODUCTION, regarding the importance of reflection to externship pedagogy.
[55] These facts demonstrate a critical aspect of externship life. An in-house clinic can discuss client work openly in a connected clinical seminar attended only by clinic members because all participants are members of a single law firm. *See* MODEL RULE 1.0 (c) (Terminology: "Firm") and cmts. 2-4. By contrast, in many externship programs, there is no common work setting; rather, students work in a variety of placements. Even those programs which place all students in the same shop (for example, in one public defenders' office) risk breaching confidence by divulging workplace secrets to the faculty supervisor. Hence, the related seminar would not be viewed as a law firm meeting. *See* Lerman, *supra* note 3, at 2311.

extern cannot communicate her work issues with her class and in her journal. Prophylactic measures[56] could have allowed all the actors in this externship vignette to accomplish their goals and helped to avoid the problem that has befallen Georgia.[57]

But what to do when the proverbial cat is already out of the bag? We should assume that the externship program in our scenario tried to sensitize its students to the demands of practice, including the ethical constraints surrounding confidentiality.[58] Now that Georgia has breached that duty, we need to explore what the response to that lapse should be, both by the extern and by the externship faculty. We can only imagine the faculty supervisor's shock when the disclosure occurred. With one misstep, Georgia has shared highly sensitive corporate insider knowledge with the entire seminar class.[59] What remediation would be appropriate?

A mea culpa undoubtedly would be forthcoming. Like other externs, Georgia was so focused on her personal plight of inadequate supervision and felt so relieved that she at last had the ear of colleagues who could assist her that she neglected her professional duties. Would her apology, coupled perhaps with a request to her audience that the information not be shared and that no trading be done, suffice? No; even if we include a stern warning from the externship professor,[60] Georgia's lapse has inflicted client harm – a leak of highly sensitive client information has occurred.

---

[56] *See* discussion *infra* Part I.C, regarding best practices related to a required ethics introduction for all students, before they start their field placements, and mandatory review of relevant state ethics rules.

[57] Later in our discussion, we will explore these prophylactic measures. *See infra* Part I.C.

[58] Indeed many state student practice rules require student lawyers to have a working familiarity with the relevant professional rules or to have successfully completed a course in professional responsibility. *See* Joy & Kuehn, *supra* note 3, at 499.

[59] For purposes of this discussion, assume that Georgia's placement was a publicly traded corporation and that the news of the merger would be material information presumed to affect stock prices. Assume, though, that the leak to student seminar participants and the faculty supervisor would not automatically trigger a violation of federal securities laws.

[60] Given the stakes implicit in our fact scenario, one might envision that the externship supervisor and her students might consider imposing even more onerous compliance mechanisms to ensure no further leaks of the prejudicial information. The particular protocols best suited to achieve compliance would need to be developed consistent with the demands of applicable law.

Although charting an appropriate course of action under the circumstances may be challenging, all involved will benefit from the endeavor. As ugly as the occurrence may seem, it provides the seminar group with a rich teaching moment. One can envision a much more sophisticated discussion of the demands of confidentiality stemming from this regrettable scenario. Not only would Georgia's peers have a new appreciation for the reach of their professional duties, but they might well assist Georgia and the faculty supervisor in determining appropriate next steps. Both must decide whether to inform the field supervisor (and, therefore, indirectly "the client" in the context of this in-house counsel placement) of the disclosure and, if so, how.

To whom and in what way should the players in an externship program disclose breaches of the duty of confidentiality? Field supervisors, who bear ultimate responsibility for students' work for placement-site clients, have become embroiled in ethical problems by such lapses. As Comment 16 to Model Rule 1.6 provides: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or *other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[61] (emphasis added.)Thus, Georgia's disclosure has exposed her supervising attorney to inquiry as to his own competence and adequacy of his supervision. Her direct site supervisor has a duty to "make reasonable efforts" to ensure that Georgia's conduct is compatible with his own professional obligations, and "shall be responsible" for any such lapses, if he "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[62]

Georgia and her faculty supervisor essentially have two options: leave the field supervisor in the dark or come clean. The first option may have some initial appeal; after all, it avoids what would

[61] *See* MODEL CODE DR 4-101 and EC 4-2 through 4-4.

surely be a difficult conversation with the field supervisor, and, under a strict reading of Model Rule 5.1, if the supervisor were never to learn of the lapse, his lack of timely knowledge of the incident would absolve him of personal professional liability. However, such an interpretation seems ill-advised on both pragmatic and ethical grounds. Just as Georgia inadvertently let slip the secret, others in the seminar also might lapse, despite earnest admonitions to keep quiet about the merger. If so, the damage might well snowball beyond control. In addition, were the field supervisor to learn subsequently of the breach, any constructive relationship that the law school and externship program had fostered with the placement would be unalterably severed.[63]

Prompt candor seems the only choice. This approach empowers the supervising attorney to take whatever remedial steps he feels are advised, thus repairing – as much as possible – the damage caused by the breach, and thereby saving himself from disciplinary action. It also allows him to implement additional assessment mechanisms to assist him in determining if public disclosure is required.

Girding oneself to have that conversation would not be easy. While time would be of the essence, particularly given the sensitivity of the confidential information at issue, Georgia and her faculty supervisor surely would want to discuss first how to reveal her lapse and decide which of them

---

[62] MODEL RULE 5.3 (c) (2). *See* discussion *supra* note 19.

[63] This scenario could implicate MODEL RULE 8.3's mandatory reporting requirements in at least two situations. First, if the student is certified to practice under governing local rules and therefore subject to discipline in a jurisdiction which mandates reporting, then the student would need to comply with MODEL RULE 8.3. *See* Joy & Kuehn, *supra* note 3, at 505-15. Second, if the faculty supervisor were to learn subsequently that the field supervisor, once notified of the confidentiality breach, ignored his duties to take remedial measures, and the faculty supervisor were to conclude that such failure raised a "substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. . . ," MODEL RULE 8.3 (a) would require the faculty supervisor to report. Even in that unlikely scenario, MODEL RULE 8.3 would require the faculty supervisor to report only if the faculty member herself is a lawyer, and therefore subject to the professional rules governing lawyer conduct, and even then, only if the faculty member could accomplish the reporting without "disclosure of information otherwise protected by Rule 1.6." *See* MODEL RULE 8.3 (c). Whether conduct such as Georgia's original breach would trigger mandatory reporting duties is subject to much debate and controlled ultimately by the student lawyering rules in the particular jurisdiction. *See* Joy & Kuehn, *supra* note 3 at 501-02 (noting that student practice rules frequently provide for revocation of the right to practice under those rules); Chavkin, *supra* note 9, at 1521 (discussing field supervisors' personal professional responsibility for supervising student-lawyers).

should inform the field supervisor of the situation.[64] Furthermore, they would want to consider strategies for eliciting from the field supervisor his suggestions for addressing the issue, including his recommendations for remedial measures to be undertaken with the seminar group.[65] Resolution of those questions would undoubtedly depend on the nature of the relationships among all the externship cast members, but the conversation would occur.

This exercise, detailing the ethical demands on all parties when a breach of confidentiality occurs in an externship, reinforces the need for preemptive action. All of us can learn from Georgia's experience. Externship faculty can build seminars around her saga, fashion exercises to reinforce its themes, and design directed journal topics to reinforce the lessons that it teaches.[66]

2. Appearance of Impropriety: Risk that Soo-Lie or Jacob May Disclose Confidential Information in Seminar and in Journals

Two externship students who participate in a common mandatory externship seminar are assigned to the same high-profile litigation in a federal district court in a large and very busy jurisdiction, albeit in different capacities: Soo-Lie is assisting the Assistant United States Attorney ("AUSA") assigned to prosecute the matter, Jacob is externing in the chambers of the Judge to whom the case is assigned. The first half of each seminar meeting is generally given over to discussion of students' placement activities. Students also discuss placement activities in journal entries they submit to the externship director. During the first seminar class of the semester, Soo-Lie opens the discussion by noting with great glee that she has just been assigned a challenging research project related to this criminal case. Jacob, sitting across the seminar table, suddenly looks shaken, recognizing that the case has been assigned to his judge.
=ft

[64]Having the extern reveal her lapse to her field supervisor has the advantage of putting the primary responsibility on the student who made the improper disclosure. However, were the student to be unable or unwilling to inform her field supervisor of her lapse, the faculty supervisor would have a responsibility to make the call so that the field supervisor could be on notice should he need to take prompt remedial action. *See* MODEL RULE 5.1 and MODEL RULE 5.3 and discussion *supra* note 19.
[65] In the most egregious case of disclosure of insider information, the field supervisor might consider whether he is obligated to initiate disciplinary actions against his extern. In those jurisdictions in which externs are subject to discipline, the field supervisor would need to evaluate whether he had a duty to report the extern. *See* MODEL RULE 8.3. In those jurisdictions in which the extern is not subject to discipline, the field supervisor might still wish to report the student to the appropriate authority within the student's law school.
[66] *See* discussion *infra* Part I.C.

This vignette builds on the analysis of the first case scenario. Rather than focusing on just one extern, however, this scenario introduces two externs and their confidentiality duties in the seminar context.[67] Once again, these fledgling lawyers have a professional responsibility not to disclose confidential information. Applying that standard to this fact situation, however, proves anything but straightforward.

Who are the clients represented by the legal teams of which the externs are a part? Take the extern in the federal prosecutor's office. While much has been written about the duties of prosecutors to represent the interests of the community,[68] the prevailing view is that prosecutors do not have a "client" in the traditional sense, but rather represent the public, generally, in its search for justice.[69] Similarly, an extern placed with a judge has neither a client affiliation nor an advocate's role, but

[67] Some law schools offer only one or two externship options (externships with state and federal judges, for example, or externships in governmental agencies or in legal services offices). In many externship programs, however, students work at diverse placement sites and in diverse practice settings, from judicial chambers and prosecutors' and public defenders' offices to in-house corporate legal departments and private law offices. Boston College Law School's externship clinic is an example of such a program; all the externs are also enrolled in a related ethics seminar, which is a co-requisite to the clinic. At Quinnipiac University School of Law, by contrast, students may enroll in any one of eight practice-setting-specific externship courses, with seminars tailored to the roles lawyers play, and the ethical issues they are likely to confront, in each setting. At Syracuse University College of Law, all externs in the Advocacy, Judicial and Public Interest Externship clinic join together for their weekly seminar. However, beginning in 2004-05, Syracuse will offer a choice of seminars for extern students, with each seminar focusing on different aspects of law practice or different substantive areas of law.

While this second case study deals directly with the needs and duties of the students in their extern seminar, one can apply the general principles at issue to other externship settings, such as journal discussions and individual supervisory meetings between the extern and the faculty supervisor. Furthermore, the externs face the same disclosure questions whether they are working on different aspects of the same case or not. Indeed, the fact that they are conjoined on the same case serves only to highlight the ethical dilemma each faces.

[68] *See* Robert Jackson, The Federal Prosecutor, Remarks at the Second Annual Conference of United States Attorneys, in Washington, DC (April 1, 1940) *reprinted in* 31 J. CRIM. L. 3 (1940); Attorney General v. Tufts, 239 Mass. 458, 489 (1921).

[69] *See generally* MODEL CODE EC 7-13. *See also* STANDARDS OF CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION [hereinafter ABA CRIMINAL JUSTICE STANDARDS], STANDARD 3-1.2 ("The prosecutor is both an administrator of justice, and an advocate, and an officer of the court . . . .").

instead is part of the judicial team assisting the parties in conflict resolution. That said, it would be short-sighted to assume that neither legal office has confidentiality concerns that warrant protection.[70]

Just because basic ethics analysis regarding preservation of client information does not govern this classroom scenario, because neither of these externs has a "client" in the traditional sense,[71] we should not assume that the actors in this externship dilemma are free to divulge workplace secrets without professional constraint. Let us begin our analysis with the prosecutorial placement.[72] That office commands a vast arsenal of governmental resources and has the duty to exercise power with appropriate restraint.[73] From closed, grand jury proceedings to team strategy conferences, prosecutors function in an atmosphere where office secrets must be maintained. When they offer to serve as field supervisors, prosecutors assume additional responsibilities to ensure that externs' conduct is consistent

[70] Freedom of information statutes recognize such concerns. The federal Freedom of Information Act, 5 U.S.C.A. § 552, which requires government agencies to publish (5 U.S.C.A. § 552(a)(1)) or make available to the public for inspection and copying (5 U.S.C.A. § 552(a)(2)) broad classes of documents, under certain conditions exempts information and documents compiled for law enforcement purposes (5 U.SC.A. §552(b)(7)), and "does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C.A. §552(b)(5). The United States Supreme Court has held that work product created by an agency's attorney in contemplation of litigation is intra-agency memoranda protected from required disclosure by §552(b)(5), N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132 (1975), regardless of the status of the litigation for which the work product was prepared. F.T.C. v. Grolier, Inc., 462 U.S. 19 (1983). *See also* Connecticut's Freedom of Information Act, Conn. Gen. Stat. § 1-210 *et seq*. (2003) (exempting from disclosure many records related to law enforcement activities (*id.* § 1-210((b)(3)), as well as "[r]ecords pertaining to strategy and negotiations with respect to pending claims or pending litigation to which the public agency is a party until such litigation or claim has been finally adjudicated or otherwise settled" (*id.* §1-210(b)(4)) and "communications privileged by the attorney-client relationship" (*id*. §1-210(b)(10).

[71] For example, MODEL RULE 1.6 deals expressly with "client" representation, which is irrelevant in the judicial setting. *See also* MODEL CODE DR 4-101 (dealing with preservation of "confidences and secrets of a client"). However, the ethical rules governing the protection of information related to the representation of clients do have relevance for prosecutors, as well as for private counsel. *See* MODEL RULE 1.6 and MODEL RULE 3.8; ABA CRIMINAL JUSTICE STANDARDS 3-1.2 (e) and 3-1.4 (b).

[72] While this scenario stems from work in a prosecutor's office, externs placed in other public sector and governmental positions also will find the traditional analysis, which assumes the existence of an attorney-client relationship, to be unavailing. Therefore, externs should be encouraged at the outset of their placements to determine the relevant professional rules governing attorney conduct in that setting. *See* discussion regarding Best Practices, *infra* Part I.C.

[73] For an enumeration of the basic professional regulations governing prosecutors, *see* MODEL RULE 3.8, ("Special Responsibilities of a Prosecutor") and MODEL RULE 3.8 cmt.1 ("[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate") and MODEL CODE DR 7-103.

with all professional standards.[74] Model Rule 3.8 (f) specifically flags the significant responsibility these prosecutors shoulder in seeking compliance from all personnel under their charge: "The prosecutor in a criminal case shall...exercise reasonable care to prevent…employees or *other persons assisting or associated with the prosecutor in a criminal case* from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 [Trial Publicity] or this Rule."[75] (emphasis added.) These provisions have two critical objectives, both of which are imperiled by loose tongues: prevention of prejudice to the rights of the accused and preservation of an untainted adjudicative process.[76]

When we turn to an analysis of the duties of a judicial extern, similar systemic concerns are at play. The principal texts for professional regulation of members of the judiciary and their staffs are the ABA Model Code of Judicial Conduct, applicable state or federal judicial guidelines, and state and federal codes for judicial employees.[77] Recognizing that judges are the lynchpin of our rule of law,[78] regulators have fashioned their ethical constraints to prevent bias and prejudice in the administration of justice. Canon 3 B (9), for example, speaks directly to the duties of judges to ensure that their staffs refrain from extrajudicial leaks: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

---

[74] MODEL RULE 3.8 cmt. 6 extends the generic rules regarding supervisory responsibility set forth in MODEL RULES 5.1 and 5.3 specifically to the prosecutor/supervisor: "Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3 . . . . Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case." *See* discussion *supra* note 19.

[75] MODEL RULE 3.8 (f). *See also* MODEL RULE 3.8 (f) cmt. 6; ABA CRIMINAL JUSTICE STANDARDS 3-1.4 (b), *supra* note 69, (extending prosecutors' duties to exercise reasonable care to prevent improper extrajudicial statements to all "employees or other persons assisting or associated with the prosecutor . . ."). We recognize that this scenario raises issues regarding ex parte communications. However, our discussion here focuses on the related questions of maintaining client confidentiality.

[76] MODEL RULE 3.6 cmt. 1 and MODEL RULE 3.8 cmts. 5 and 6.

[77] *See*, *e.g.,* CODE OF JUDICIAL CONDUCT, *supra* note 18; JUDICIAL EMPLOYEE CODE, *supra* note 36.

[78] CODE OF JUDICIAL CONDUCT, Preamble (1) ("The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.").

The judge *shall require similar abstention on the part of court personnel subject to the judge's direction and control."*[79](emphasis added.) The federal Code of Conduct for Judicial Employees further clarifies the duties of judicial externs, confirming that judicial externs, like their prosecution counterparts, are required to maintain the confidences of their work settings.[80]

With that framework established, let us return to the plight of the two externs who find themselves classmates in a weekly, mandatory seminar and joined by their involvement in the same litigation. Note that, in contrast to our first scenario, here no breach of confidence has yet occurred. While Soo-Lie has mentioned a case name in the context of a general description of her work assignments, the only information divulged was the name of the criminal defendant and, by implication, the fact that the case is being prosecuted by the United States Attorney's office in which Soo-Lie is working. Normally, professional rules regarding client confidences protect all information relating to the representation, which traditionally

---

[79] *See also* CODE OF JUDICIAL CONDUCT Canon 3B (5) (a judge shall not "manifest bias or prejudice … and shall not permit staff, court officials and *others subject to the judge's direction and control* to do so") (emphasis added.) The Code reflects the general policy supporting confidentiality in judicial conduct. Canon 3 B (11) further admonishes judges not to "disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." "Non-public information" is elsewhere defined in the judicial canons as: "information that, by law, is not available to the public." Such rules are also strictly enforced by appellate courts. *See, e.g.*, United States v. Microsoft, 253 F. 3d 34 (2001) (reversing certain key trial court findings and reprimanding the trial judge for his extensive public and private discussion of the pending case). *See also In re* Boston's Children First, 244 F. 3d 164 (1st Cir. 2001) (concluding that the failure of the trial judge, who had made limited public comments about pending case, to recuse herself was an abuse of discretion).

Advisory opinions have also broadly defined the duty of all judicial employees to maintain chambers' secrets. *See* ABA Comm. on Ethics and Prof'l. Responsibility, Informal Op. 1452 (1980) (concluding that judicial secretaries, who were allied with a labor union involved in negotiations regarding labor-management issues in judicial employee contract, should not be privy to non-public information as to the consideration and internal processing by the judges of pending but undecided cases in which the collective bargaining representative of the secretaries' union was a litigant; "[t]he risk of improper disclosure of confidential information exists even though no improper disclosure occurs" (*citing* Canons 1, 2 and 3)).

[80] Canon 3D, JUDICIAL EMPLOYEE CODE, *supra* note 36. Canon 3D provides: "A judicial employee should never disclose any confidential information received in the course of official duties except as required in the performance of such duties . . . ." Prior to the adoption of this Code by the Judicial Conference of the United States in 1995, Canon 3 of the CODE OF CONDUCT FOR LAW CLERKS had addressed the professional duties of federal law clerks to maintain confidentiality. *See also* the materials on confidentiality duties of federal law clerks in MAINTAINING THE PUBLIC TRUST, *supra* note 36, at 23 (advising that law clerks confer with their judges about any "case-related discussions with anyone outside chambers, including other law clerks").

could includes even matters of public record.[81] However, in this context, involving the prosecutor's office and judicial chambers, the particular information that the extern revealed would not be deemed confidential. Soo-Lie has not breached any confidence of her client, the people, acting in this context through their duly authorized representative, the government.

But Jacob's discomfort has already become obvious. He knows, as his seminar colleagues may soon know as well, that this criminal case is assigned to the judge for whom he is clerking;[82] he may anticipate that, in discussing her work, Soo-Lie could reveal information that is not a matter of public record. For example, assume that Soo-Lie announces that she is researching a particular criminal theory. Even if she does not explicitly confirm that the research project is for the case the externs have in common, the mere existence of that possibility could irreparably undermine the fairness and impartiality of the proceeding. Were either Jacob or Soo-Lie to breach office confidences, even inadvertently, the disclosure could have immediate and grave impact on the course of the litigation. This risk seems to call for action.

But recall that, as of this point, neither Soo-Lie nor Jacob has divulged confidential information. Is

---

[81] *Compare* MODEL RULE 1.6 *with* MODEL CODE DR 4-101. *See also* RESTATEMENT, *supra* note 13 at §59 (defining "Confidential Client Information" to exclude information that is generally known). However, in other situations, an extern would be barred from revealing even his clients' names, as well as information covered by the strictures of MODEL RULE 1.6. For example, an extern working in a private firm known for handling divorce matters should not reveal the name of a client who is filing for a divorce, nor should an extern working in a private firm specializing in criminal defense reveal the name of a client who has consulted with the lawyer. Divulging the client's name to third parties not part of the legal team risks seriously prejudicing the client's position, as well as causing the client significant personal angst. Based on those concerns, some jurisdictions have concluded that there are circumstances when lawyers should not disclose names of clients and case names. *See, e.g,.* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 720 (1999) (when a lawyer moves from one firm to another, the new firm must request and the lawyer may disclose the names of the clients represented in order to check for conflicts, but only if such information is not protected as a confidence or secret of the clients of the first firm and if disclosing such information does not violate any contractual or fiduciary duties of the lawyer to the first firm). *See also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 411 (1998) (concluding that hypothetical or anonymous consultations are preferred).

Furthermore, just because a matter is of public record (*e.g,* a client is the defendant in a DUI criminal case) does not mean that he has impliedly authorized his lawyer to reveal that fact at the neighborhood Little League game. Such a disclosure would violate MODEL RULE 1.6, in particular, cmt. 4, which explicitly provides that divulging information even in hypothetical terms would violate MODEL RULE 1.6 if there is "reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

[82] Information about judicial assignment of criminal cases in federal court is commonly made public at the initial filing of the action. *See generally* http:// www.uscourts.gov/faq.html (last visited August, 2003).

intervention necessary only in the event of an actual breach, or can the mere appearance of impropriety call for remedial action? Let us assume that these students' externship program has done a masterful job of sensitizing the externs to the need for preservation of workplace confidences and that Soo-Lie and Jacob are so well-schooled that there is virtually no risk that either will misstep. Let us assume, too, that as the semester progresses, both externs scrupulously adhere to their ethical duties, revealing confidential information neither to classmates nor to their faculty supervisor. Even so, we can imagine the tense moments that would ensue at the next hearing on the case if both the judge and the Assistant United States Attorney remained ignorant of the externs' association. Imagine their reaction when they suddenly realize that the law students they have assigned to assist them with the same litigation are enrolled in a common seminar, but have failed to notify their field supervisors of that fact. While both the Assistant United States Attorney and the judge undoubtedly would be relieved at the reassurance that no leaks had occurred, the issue is not whether either student has disclosed confidential information; that approach misses the point.[83] The mere fact that Soo-Lie and Jacob have access to confidential workplace information arising out of the same litigation and have opportunities to disclose it – even inadvertently – during seminar discussions could give rise to an appearance of impropriety.[84] Therefore, timely notice to their field supervisors is appropriate.[85]

---

[83] *See* discussion *infra* Part II.

[84] *Compare* CODE OF JUDICIAL CONDUCT, Canon 2, *with* the Preamble to the MODEL RULES cmt. 5. Although the MODEL RULES no longer refer to the appearance of impropriety, the prohibition of the appearance of impropriety is prominent in the CODE OF JUDICIAL CONDUCT. The language also survives in the MODEL CODE's conflicts rules. *See* discussion, *infra* Part II.A. In any case, the players must take some preventive action even where the students have NOT spilled the beans. *See* discussion *infra* Part II.B.2.

[85] *See generally* CODE OF CONDUCT FOR LAW CLERKS, Canon 3 D ("A law clerk should inform the appointing judge of any circumstance or activity of the law clerk that might serve as a basis for disqualification of the judge. . . ."). *See also* discussion *supra* at text accompanying note 62, regarding communications with field supervisors when workplace confidentiality concerns surface. The externs and their faculty director would surely want to talk, in the first instance, about who should inform the field supervisors and then about what information should be revealed. A judge, promptly advised of the problem, would be able to determine the appropriate remedial measures in this situation, which might range from preventing the extern-clerk from working on the case, to advising defense counsel of the development, to recusal.

Thus far, we have addressed the concerns raised by Soo-Lie's and Jacob's respective roles in the high-profile case from the perspectives of the externs and their field supervisors. The effect of the situation upon the faculty supervisor warrants separate consideration, too. The inherent tension between ensuring externs' ethical conduct and encouraging students' reflective lawyering complicates the externship supervisor's role. Having encouraged her students to share their work experiences through their journals, in individual meetings, and in seminar, the faculty supervisor is now privy to information about their overlapping assignments. A creative professor may be able to build on her students' challenge to the benefit of all seminar participants. Using Soo-Lie and Jacob's dilemma as the focus of the balance of the class meeting would allow all the externs to gain a concrete appreciation of the challenges presented by their new professional duties.

While rich teaching moments may offer the professor temporary solace, we should not ignore the sizeable pressures confronting any faculty supervisor forced to operate on the brink of an ethical breach within her program. On the one hand, she feels responsibility to the field supervisors whose participation in the program she, and her law school, have courted. On the other, she surely feels an allegiance to Soo-Lie and Jacob, who are investing significant personal and financial resources to participate as legal externs in their chosen placements. She will not relish having to tell her students that their freedom to accept assignments has been compromised because of their placement with supervisors serving in different roles with respect to the same case.

While she may still be an ear for her externs' angst, the faculty supervisor generally is not empowered to intervene unilaterally in the workplace decisions.[86] Instead, she will need to consult with her externs with regard to how and by whom their field supervisors would be told. The newest formulation of Model Rule 1.6 actually invites just such consultation, allowing lawyers (and in our

case, externs) who wish to seek legal advice from their colleagues (here, their faculty supervisors) about compliance with the Rules to divulge otherwise-confidential client information in order to do so, without breaching their duty of confidentiality.[87]

Given the challenges facing the players in this case study, it is striking to recall that this predicament arose even though no one did anything wrong. Unlike the circumstances in our first scenario, where Georgia did breach her duty of confidentiality (albeit inadvertently), here Soo-Lie and Jacob found themselves enmeshed in an ethics puzzle through no fault of their own. Their faculty supervisor, perhaps reasonably, did not anticipate that the very small risk that their respective field supervisors would assign Soo-Lie and Jacob to work on the same case would materialize.[88] For their part, the field supervisors undoubtedly would have avoided the overlapping projects had they known.[89] Precisely because this problem arose in the absence of ethical lapses by any of the players, this scenario vividly demonstrates that ethical questions are inherent in the operation of externship programs and that participants need to develop protocols to deal systematically with those dilemmas when they arise.

C. Best Practices

---

[86] *See* Bloch, *supra* note 3, at 282-83 (noting that under the subjunctive model of faculty involvement, the professor is primarily teaching, not lawyering). Each faculty supervisor may have different expectations and responsibilities with respect to her students and their degree of empowerment, depending on the clinic's approach to supervision.

[87] The Ethics 2000 Commission reviewed this problem, which has long plagued lawyers who wish to seek advice with regard to their own ethical duties. Although previously any such consultation with an "outsider," *i.e.,* an attorney not part of the same work setting, would risk ethical breach if the lawyer seeking guidance divulged confidential information in the course of the consultation, the Commission revised MODEL RULE 1.6 (b)(2) to permit disclosures in connection with such counseling as an exception to the general duty to protect information related to the representation. *See also* MODEL RULE 1.6 cmt. 7.

[88] That said, we must add a word of caution: even in large, metropolitan communities, the possibility exists that one or more of the cases being handled by the United States Attorney's Office will be assigned to a particular judge sitting in the same courthouse. Given this risk, externship faculty must be exceedingly careful when assigning students in a common seminar to both litigation offices and chambers in the same jurisdiction. As this scenario aptly illustrates, assuming away even a small risk in such circumstances may result in significant problems for all of the externship players as the semester progresses.

[89] One preventive measure that might assist field supervisors in screening for and avoiding potential conflicts is to share a directory of externship placements for a given semester with all participating supervisors.

We would be foolish to assume that any one method, or even combination of techniques, will ensure that the players in externship programs will never run afoul of their duties to maintain workplace confidences. Ethical dilemmas over preserving client information undoubtedly will still occur, despite everyone's best intentions and superior training, as we saw in the second case study. However, the ability of the players to respond promptly and appropriately to those dilemmas will be enhanced if the program develops protocols designed to protect confidentiality. These protocols should support all the partners in the externship relationship in their efforts to comply with their professional duties. We offer suggestions for each of the players here, including: 1) materials for sensitizing externs to their new responsibilities; 2) mechanisms for alerting field supervisors to their duties to train their students in the particular nuances of confidentiality within their practice settings; and 3) means for supporting the externship faculty in their ongoing mission to ensure program compliance.

1. Extern Protocols

A starting premise has to be that externs should receive as much information as possible about the professional duties of confidentiality, and as soon as practicable. By definition, externs are still students learning their professional craft. Not all programs require a professional responsibility course as a co-requisite or pre-requisite to enrollment, and even in those that do, it is likely that instruction in the doctrinal ethics course will focus on the Model Rules and the Model Code, not on the local variations on the confidentiality rules in particular jurisdictions. Compiling materials that will help externs to accelerate their confidentiality learning curve is the necessary first step. Such a packet would likely include the professional rules governing lawyers for the jurisdiction in which the extern will work,[90] any special

[90] Many externship programs encourage their students to choose out-of-state placements. See externship surveys referenced *supra* note 8. Given that distinctions exist among the disciplinary rules in force in different states, programs should provide externs with the rules for the jurisdictions in which they will be placed.

confidentiality provisions unique to the externs' placement,[91] and disciplinary rulings and ethics opinions from the relevant jurisdiction that clarify the interpretation of the rules.[92] Many programs also reiterate the externs' professional duties at the program's commencement, in a list of course requirements, in program manuals for students, and in instructions about journal writing.[93] Field supervisors, in their supervisory meetings with their externs, and faculty directors, in seminars and in journal feedback, can reiterate these duties.[94]

But providing written materials for student review, without more, will not guarantee that externs will be sufficiently sensitized to their professional duties. Rather, externship faculty should develop teaching modules designed to test externs' grasp of confidentiality requirements.[95] The Appendix includes sample seminar materials addressing hypothetical disclosures of placement-site information, which could be assigned reading for a program's initial, mandatory class on confidentiality and how to "talk shop." The seminar discussion would then focus first on whether, in revealing the information at issue in a journal entry or in a seminar presentation, the student in each hypothetical breached

---

[91] For example, faculty supervisors could provide students involved in judicial externships with rules relevant to law clerks; students going to in-house counsel positions would benefit from having copies of any internal memoranda on work-place confidentiality standards.

[92] Our research to date has not found any reported cases of extern discipline for breaches of confidentiality, undoubtedly because externs are commonly not deemed to be subject to the states' professional regulation due to their student status. However, externs could profit by reading cases such as *In re* Shafer, *supra* note 34.

[93] Faculty supervisors routinely advise their students that they must abide by professional standards, including confidentiality duties. Often these requirements are communicated in general, holistic terms. Some programs, however, have gone further and proscribed particular conduct, such as transporting case materials off worksite without express permission of the field supervisor, or using extern work product as writing samples, absent express approval from the field supervisor. *See*, *e.g.*, the externship manuals and course requirements prepared by the externship faculty at Boston College Law School, Quinnipiac Law School and the Syracuse University Law School (copies on file with the authors). *See also* Joy & Kuehn, *supra* note 3, app. A, Section IV on confidentiality.

[94] Some states, through their student practice rules, go further, requiring externs who will be practicing pursuant to those rules to certify that they have read and are familiar with the relevant ethical standards for their jurisdiction. Externship clinics in those states would be well-advised to confirm that familiarity by requiring clinic students to so certify before embarking on their clinical responsibilities. *See* Quinnipiac Law School Externship Program's Professional Rules Certification (on file with the authors). More informally, externship faculty might assist students in honoring their confidentiality duties by providing them with a large-font copy of the particular ethical rules on confidentiality in their jurisdiction for display on their home refrigerators. Professor Slane reports that posting the controlling law in this manner helps externs explain to their roommates and significant others why the students can talk about their placement-site work only in appropriately sanitized terms.

workplace confidentiality. If so, the conversation would turn to how to remedy each ethical misstep.[96] Similarly, an early, focused, journal assignment, such as the model included in the Appendix, could require externs to identify who their clients are, or where no clients exist, any others to whom they owe a duty of confidentiality, and to solicit their field supervisors' comments on their own experiences in dealing with confidentiality issues. These assignments and classroom activities can help students both to understand the abstract ethical principles involved and to implement their mandate in practice.[97]

Helping students navigate a safe course through these confidentiality constraints is anything but easy. The recurring tension implicit in externship programs between ensuring compliance with ethical practice standards, on the one hand, and maximizing experiential learning and reflection, on the other, makes providing crisp guidance to externs difficult. It is a given that faculty will ask their externship students to reflect on their placement activities; identifying an acceptable format for that information sharing, one that is respectful of confidences, is the critical next step. At every turn, of course, faculty need to model ethically appropriate ways for their students to "talk shop." For years, the accepted approach has been to redact client identifiers, to use initials or pseudonyms, and to massage the facts.[98] However, that approach has come under recent scrutiny as some commentators have questioned

---

[95] *See* Bloch, *supra* note 3, at 277 (concluding that externship seminar discussions led by students who wish to bring a nagging ethical dilemma to the group in the guise of hypothetical examples can be very effective teaching devices for the issue of confidentiality).

[96] *See infra* Appendix containing materials developed by the authors, which we have modified for use in this Article. For another, analogous approach, *see* Lerman, *supra* note 3, at 2310, in which the author recounts her experience with an extern who brought confidential case material to his seminar and thereby breached his duty of confidentiality, despite his efforts to redact the client's name from the documents shared with his seminar colleagues.

[97] *See infra* Appendix.

[98] MODEL RULE 1.6 cmt. 4.

whether such quick fixes are effective in ensuring that workplace confidences are not divulged, particularly in small legal communities.[99]

It might be tempting to conclude that students should be barred from any off-site discussions of their workplace activities. Such a preemptive strike would indeed prevent leaks. In practice, though, that policy would contravene a central educational mission of all clinical programs, in-house and externship alike: helping students to become reflective lawyers within a supportive community composed of fellow lawyers-in-training and faculty supervisors. Recognition of the implications of this pedagogical focus in the externship context has prompted some faculty to suggest that we should err on the side of encouraging student discussion in externship seminars, even if doing so means that occasional breaches of workplace confidentiality will occur.[100] Others have urged externship faculty to refrain from adopting for our students any but the highest standard of compliance with ethical norms.[101] But, under either approach, the "degree of separation" needed to ensure client confidentiality is

---

[99] *See* Moliterno, *supra* note 37, at 2395; Miller, *supra* note 44 (analyzing the ethics of using client stories); Lerman, *supra* note 3, at 2313 (recognizing that precluding externs from discussing any client work in class hampers seminar discussions, but concluding that much meaningful dialogue about workplace observations can still occur).

A graphic example of the difficulties of sanitizing case and client information involves a student in a simulation course taught by a defense lawyer. The professor in this instance – an experienced practitioner highly regarded by other members of the legal community – used as course materials redacted documents from a murder trial that had concluded with a conviction during the preceding year. The defense lawyer teaching the course had represented the defendant at trial. A number of the redacted documents distributed to class members had not been admitted into evidence, and so were not part of the public record. Unfortunately, although the professor redacted the defendant's street address where it appeared in police reports and other documents, he did not redact or disguise the names of other streets. Those street names, taken together with other bits and pieces of information in the documents, allowed the student to conclude that the defendant was actually his neighbor, a young man who remained at home on bail pending appeal of his conviction. The student, through his participation in the course, now was privy not only to many of the public documents related to the case, but also to sensitive, non-public information. Comment 4 to MODEL RULE 1.6 puts lawyers on notice of their professional duty to guard against such risks: "Paragraph (a) [of MODEL RULE 1.6] prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person." MODEL RULE 1.6 cmt. 4.

[100] Professor Lisa Lerman suggests that, after orienting students to their ethical duties, programs should tolerate "small breaches of confidentiality" to assist students in accomplishing the larger goal of learning appropriate professional conduct. Lerman, *supra* note 3, at 2310. Her analysis implies a spectrum of ethical lapses – from the relatively minor (e.g. where no harm actually befalls the client due to the lapse) to the most severe (when the opposing side becomes privy to the client's confidences). While different types of breaches may have different adverse consequences to the client, any unauthorized disclosure could risk irreparably impairing the attorney/client relationship and would have direct repercussions for the extern's supervising attorney.

[101] *See* Moliterno, *supra* note 37, at 2395.

contextual. For example, a student working on a robbery case in a busy criminal court might be able to discuss an evidentiary issue that arose in that case in "sanitized" terms without breaching confidentiality. However, even in a busy court, it is unlikely that such a student would be able to discuss an evidentiary issue that arose in an axe-murder case, or a terrorist prosecution; those cases are so likely to be in the public eye that, even if the student uses no names in reporting on her casework, other seminar participants will be able to identify the matter involved from even the most cursory description of the facts. We therefore invite each program to develop its own standards for information sharing based on the particular legal community within which it operates, the nature and goals of the extern seminar, and the opportunities available to attend to ethical dilemmas as they arise.[102]

2. Field Supervisor Protocols

On-site supervisors know what measures are best designed to protect their workplace confidences. Furthermore, in externships, they are the front-line lawyers who must deal with ethical issues as they arise. Familiarity with the externship program's expectations for its students will help field supervisors as they discharge their responsibilities in this regard. Many externship clinics have developed field supervisor manuals, which detail both the program's educational goals and the law school's efforts to ensure extern compliance with professional norms.[103] Field supervisors would also benefit from reviewing copies of the materials faculty supervisors provide to students detailing their externship responsibilities. An invitation to field supervisors to participate in an early seminar

[102] A significant educational goal for externs should be learning to "talk shop" as professionals. Not only do the ethics rules require attorneys to adopt appropriate measures to ensure that confidential information, including client identifiers, are not divulged, but, in those jurisdictions with mandatory reporting duties under MODEL RULE 8.3, externs who are certified to practice under certain student practice rules also run the risk of exposing themselves to discipline for any confidentiality lapses. *See supra* note 63.

[103] *See supra* note 93.

dedicated to exploration of confidentiality constraints would undoubtedly be a win-win, as well, sending an unmistakable message that all parties have consistent ethical expectations.

3. Faculty Supervisor Protocols

Externship faculty members are involved whenever any ethical lapse comes to light. While the measures previously discussed are designed to minimize confidentiality breaches, externship faculty will still face dilemmas over confidential client or workplace information. Externship students will seek the faculty supervisor's wise counsel as concerns over the scope of their confidentiality duties arise, during seminars or at their placements.

Identifying in advance resources available to faculty supervisors when they confront particularly thorny questions is critical.[104] The externship faculty's law school community is a natural first place to establish connections, as both clinical and non-clinical faculty can be an invaluable resource when ethical questions arise. For instance, externship faculty could invite those colleagues teaching doctrinal ethics courses to serve as consultants to the externship program.

[104] The predicament faced by many externship faculty is heightened in those instances in which they are also attorneys licensed to practice in the jurisdiction in which they teach. These faculty members may have an additional personal responsibility to report suspected cases of material breaches of professional conduct under disciplinary rules mandating reporting in effect in many states. *See* MODEL RULE 8.3. *See generally* Lerman, *supra* note 3,at 2303 (suggesting that faculty lawyers may encourage externs to seek professional guidance in confidence, thereby shielding the disclosures from becoming the grounds for a disciplinary referral under MODEL RULE 8.3, but cautioning locally unadmitted faculty to consider whether offering such advice constitutes the unauthorized practice of law); Joy & Kuehn, *supra* note 3, at 515-21 (noting the additional professional duties externship faculty shoulder if their externs are certified under student practice rules). Syracuse University College of Law has developed a protocol by which students and faculty may discuss ethical issues that arise in externships, confidentially, with a faculty member. A non-clinic colleague who teaches Professional Responsibility (and is now a member of the state bar ethics committee) is willing to review ethical issues with externship and in-house clinic faculty, and has done so since 1990.

Additional resources exist outside the confines of one's school. Collegial support is available from other members of the national network of externship clinicians,[105] and beleaguered externship faculty may also obtain much needed direction by requesting advisory opinions from state bar association ethics committees.[106]

Faculty supervisors face professional and institutional pressures to prevent the misconduct of their charges.[107] Those dire consequences alone should be sufficient impetus for all faculty supervisors to work diligently with their externs and their placement supervisors to implement adequate prophylactic measures to ensure protection of workplace confidences.

II. CONFLICTS OF INTERESTS

A. Introduction

[105] For example, national conferences offer externship faculty frequent opportunities to share concerns about ethical issues. These include Catholic University's Columbia School of Law Externship conferences in 1998 and 2003 and the Association of American Law Schools' annual Clinical Section Conferences. In addition, faculty can subscribe to one or more of several clinical listservs, including the extern faculty listserv, http://lists.cua.edu/scripts/wa.exe (select "Subscribers Corner") and the more generic email clinical listserv, lawclinic@lists.washlaw.edu. In addition, regional externship program consortiums, such as the Greater Los Angeles Consortium on Externships, which piloted this model of externship program cooperation, may provide much needed counsel because of the consortium faculty's intimate knowledge of local placements and the jurisdiction's ethical rules.

[106] The ABA also provides guidance on ethical questions to both members and non-members through ETHICSearch, an ethics research service. *See* http://www.abanet.org/cpr/ethicsearch/home/html. The authors are also available to consult with their externship faculty colleagues.

[107] *See* Joy & Kuehn, *supra* note 3 at 515-16 (reviewing student practice rules and concluding that, in those externship clinics in which students are certified or where the faculty supervisor serves as the externs' supervisor, extern faculty have personal professional responsibility); Lerman, *supra* note 3, at 2303. However, in those extern programs where the field supervisors provide the direct work supervision and where the externs are not certified to practice, no personal professional obligations attach to externship faculty under either the student practice rules or under MODEL RULE 5.3. In those situations, a faculty supervisor's personal ethical obligations would arise, if at all, through instances in which an extern divulges workplace confidences related to the ethical missteps of the field supervisor which trigger mandatory reporting duties under MODEL RULE 8.3 for a faculty supervisor who is licensed to practice. Faculty supervisors also must operate in an institutional climate which would be adversely affected by their externs' professional lapses.

Like their ethical duty to refrain from disclosing confidential client information, externs also have an ethical duty to avoid representation that would create conflicts of interests for their clients.[108]

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 been involved; 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.[109]

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 Rule 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

[108] Generally, a conflict of interest results when a "party to a social relationship has an interest that conflicts with the interests of the other party." McCoy, *supra* note 10, at n. 3. This section of the Article does not attempt to discuss all aspects of MODEL RULES 1.7 through 1.12 in detail, nor the many bar opinions and court decisions interpreting these Rules. Rather, we present examples of conflicts of interests that most commonly arise in externships and suggestions for how to address them.

government lawyers, speaking to the interests 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.[110]

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.[111] 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."[112] 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."[113]

---

[109] Concerns about lawyers' conflicts of interest have a long history. As early as 1280, a London Ordinance forbade attorneys from engaging in a variety of situations that presented conflicts of interests, including representing two sides of an action. *See* Jonathan Rose*, The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 146-147 (2000), *quoted in* RONALD ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2d ed. 2002*)*. For a recent study on lawyers' attitudes towards conflicts of interests, see SUSAN S. SHAPIRO, TANGLED LOYALTIES, CONFLICT OF INTEREST IN LEGAL PRACTICE (2002).

[110] The MODEL CODE, by contrast, does not use the term "conflict of interests." Instead, Canon 5 of the MODEL CODE uses the phrase "differing interests." *See* MODEL CODE Canon 5 and DR 5-105(A).

[111] The MODEL RULES and the MODEL CODE have been revised to make it easier for lawyers to represent multiple clients, or clients for whom such representation may present a conflict. Previously, a lawyer was prohibited from representing any client who would be directly adverse to another client unless the lawyer believes that such representation would not adversely affect the relationship with the other client, and if each client consents.

[112] MODEL RULE 1.7. *See also* MODEL RULE 1.8, MODEL RULE 1.13 and MODEL RULE 2.2 (deleted in 2002). Issues relating to lawyers acting as intermediaries are dealt with in the Comment to Rule 1.7. *See* CTR. FOR PROFESSIONAL RESPONSIBILITY, AMER. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 295 (5th ed. 2003).

[113] MODEL RULE 1.7.

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.[114] 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.[115]

The Model Rules define the term conflict of interests to include not only actual conflicts but also "the potential for harm."[116] 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."[117] 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.[118] 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.[119] As lawyers have become more mobile, and as more

[114] MODEL RULES 1.7, 1.8, 1.9.
[115] MODEL RULES 1.1, 1.3.
[116] *See* MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 255, *quoting* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.4 (3d ed. 2001).
[117] *Id.*
[118] MODEL RULE. 1.10 (providing that if one lawyer in the office is barred from taking a case due to a conflict, so, too, are all the other lawyers in the office).
[119] MODEL RULE 1.11.

cases involve multiple litigants, conflicts of interests have become increasingly common grounds for disqualification motions and civil malpractice suits by clients.[120]

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.

The discussion that follows highlights a number of conflicts of interests issues that commonly arise in externships and offers suggestions for addressing them. It also presents our view, based on the prevalence and seriousness of these conflicts issues, that externship faculty should be sure to build into the design and implementation of each externship program a system to identify conflicts and to avoid or cure conflicts as they arise.

B. 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.

---

[120] *See* ABA Standing Committee on Lawyers' Professional Liability, THE LAWYER'S DESK GUIDE TO PREVENTING MALPRACTICE 214 (1999). It is worth noting here, however, that the legal standard which courts apply in ruling on disqualification motions may not be the same as the standard announced in the applicable disciplinary rules. For example, even if the firm's representation appears to be forbidden by the conflict rules, a court may refuse to disqualify a law firm in order to preserve the client-lawyer relationship and in the interest of fairness and economy. *See, e.g.,* N.Y. St. Bar Ass'n. Comm. Prof'l. Ethics Op. 720 (1999). One commentator has argued that because disqualification as a remedy for conflicts of interest falls primarily on the client, not the lawyer, it is not the most appropriate sanction in light of alternatives that are available to courts seeking oversight of litigator's conduct. *See* Bruce Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 72 (1996).

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 chose 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.[121]

Externs may also encounter actual or potential successive-representation conflicts arising from the lawyer's duty of loyalty to both current and former clients.[122] 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

[121] *See* MODEL RULE 1.7.

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.[123]

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.[124] 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

---

[122] Whether a particular client is a current or a former client turns on the reasonable belief of the client involved. According to one commentator, "[t]he basic rule is that a person is a current client if he reasonably believes he is a current client." ROY D. SIMON JR. & MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS 304-305 (3d ed. 1994).

[123] In cases involving successive conflicts where a lawyer moves from one firm to another, MODEL RULE 1.9(b) applies to conflicts that affect the new firm, and MODEL RULE 1.10(b) applies to conflicts that affect the previous firm.

[124] In every instance, the rules from the jurisdiction of the externship placement govern the conflicts analysis.

representation to the affected client or clients.[125] Once such an incurable conflict is identified, the extern must withdraw from representation.

As noted, in some cases, actual or potential conflicts of interests become apparent even before the externship begins, during the application and placement process. In others, they present during the externship, in the course of students' work at their placements and association with seminar colleagues and the faculty supervisor. In still others, they arise only later, after the externship ends, as students apply for legal employment.[126] Our discussion of conflicts in this section addresses first the issues involved in a number of scenarios typical of those that give rise to actual or potential conflicts of interests for externship students at different points along this continuum. We then offer our own "best practices" suggestions, recommendations that we hope will assist students, field supervisors, and faculty supervisors in identifying conflicts, and avoiding or curing them as they arise.

1. Conflicts Arising in the Application Process

Often the rules on conflicts of interests are among the first rules of professional responsibility that externship students encounter. Indeed, the question of whether or not a student may be admitted to a particular externship course in the first instance often turns on the favorable resolution of a conflict of

[125] *See* MODEL RULE 1.7(b). *See also* MODEL CODE DR 5-105(c) and RESTATEMENT, *supra* note 13, §122 cmt. g (iv) (a nonconsentable conflict is one in which a "reasonable and disinterested layer would conclude that one or more of the affected clients could not consent . . . because the representation would fall short in either respect…"). *See* Greene v. Greene, 391 N.E.2d 1355 (N.Y. 1979) (plaintiff's lawyers were potential defendants); Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994) (rule of disqualification in simultaneous representation cases, in all but few instances, is *per se*); Clinard v. Blackwood, 46 S.W. 3d 177 (Tenn. 2001) (relationship between an attorney's former and present representations is substantial when the subsequent representation is adverse to the matters at issue in the previous relationship or when the lawyer was so involved in the matter that the subject representation can be justly regarded as a changing of sides in the matter in question). *See also* JAMES E. MOLITERNO, ETHICS OF THE LAWYERS' WORK, 218-223 (2d ed. 2003).

[126] Regardless of when a conflict arises, and regardless of whether a conflict is concurrent or successive, or curable or not, all of the externship players must be aware of the rules of professional conduct that govern conflicts of interest and be sure to follow them carefully to avoid the serious consequences that may ensue from their violation. Sanctions range from disqualification, *see, e.g,. In re* Epic Holdings, Inc., 985 S.W. 2d 41 (Tex. 1998) (attorneys disqualified); Press v. Lozier, Inc., 659 N.Y.S.2d 648 (N.Y. 1997) (attorney disqualified due to attorney's prior representation of town in substantially related matter), to public reprimand, Clermont County Bar Ass'n v. Bradford, 80 Ohio St. 3d 194 (1997) (attorney who was a beneficiary of a will he drafted subject to public reprimand).

interests problem. As the Model Rules make clear, "[a] conflict of interest[s] may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under [certain] conditions." [127]

Each of the following scenarios presents the dilemma of an externship applicant with a conflict of interests problem.

(a) *Concurrent Representation Conflict: Steven's Duties to Multiple Clients*

Steven has applied for an externship at the District Attorney's Office. Steven has been working for the past year at the public defender's office and hopes to continue his part time job at that office while he is participating in the externship. The public defender's office represents only clients in cases brought by the District Attorney's Office. May Steven enroll in the externship at the District Attorney's Office?
=ft

No. Steven's application for an externship at the District Attorney's Office presents an example of an impermissible concurrent-representation conflict of interests. As noted, some potential conflicts may be cured by disclosure and client consent.[128] Here, though, the actual conflict of interests that would be posed by Steven's simultaneous representation of the State and defendants prosecuted by the State is so serious that it cannot be cured, even with client consent after full disclosure.[129]

While the District Attorney may be authorized by local rules to grant a blanket waiver of the conflict on behalf of the State on the condition that both offices implement appropriate screening measures, Steven could not work in both offices based on the State's consent alone. Nor would the District Attorney's consent on behalf of the State, coupled with consent from each of the public defender clients on whose cases Steven proposed to work, suffice. Rather, because Steven's conflict

---

[127] MODEL RULE 1.7 cmt. 3.
[128] The Florida Bar v. Dunagan, 731 So. 2d 1264 (Fla. 1998); Kentucky Bar Ass'n v. Bates, 26 S.W.3d 788 (Ky. 2000). *See* MOLITERNO & LEVY, *supra* note 125, at 218-223.
[129] *See* RESTATEMENT § 22 cmt. g (iv) (a lawyer is prohibited from representing two parties who are "aligned directly against each other in the same litigation"); *In re* A. and B., 209 A.2d 101 (N.J. 1965) (holding that an attorney may not represent both a governmental body and a private client merely because disclosure was made and they are agreeable that the attorney represent both interests).

would be imputed to each public defender working in the office, each and every client of the public defenders' office would have to consent to Steven's contemporaneous work at both offices.

Obtaining informed consent from every client at the outset seems unlikely at best. Unfortunately, it would also be inadequate, for even if all necessary waivers were in place as the externship began, the public defender's office would face the continuing burden of securing like consent from each new client as the semester progressed, and the corollary cost of retaining substitute counsel for any client who refused to waive the conflict created by Steven's divided loyalties.[130] From the public defender's perspective, the costs of hosting Steven would almost certainly far outweigh the benefits.

(b) *Successive Representation Conflict: Pamela's Duties to Former Private and Government Clients*

Pamela has applied for an externship at the United States Attorney's Office. Last summer she worked as a summer associate at a law firm, and she has accepted an offer to return to the firm following graduation. Pamela became interested in the position at the United States Attorney's Office after she observed an attorney from that office argue a motion in the case on which she was working. She is not sure if the case is still pending. May Pamela enroll in the externship at the United States Attorney's Office?

In this scenario, Pamela is confronted with two potential conflicts of interests. The first conflict involves the question of whether her previous work as a summer associate at the private firm will conflict with her duty of loyalty to United States Attorney's Office once she becomes an extern. The second conflict concerns her plan to return to her previous employer after her law school graduation. Unlike Steven, whose conflict involved two current clients, Pamela faces a conflict between her duty to her former (and future) clients at the firm and her duty to a current client of her externship placement.

[130] The 2002 amendments to the MODEL RULES also now require lawyers to obtain written confirmation of a client's consent to the lawyer's conflict of interests. MODEL RULE 1.0 (b) defines "written confirmation" to include a letter from the lawyer to the client confirming the client's oral consent.

If the case on which Pamela worked during the summer is ongoing when she begins her externship, Pamela will confront an actual (rather than a potential) successive-representation conflict. Under the applicable rules, she cannot work on the case, nor can she undertake representation that is adverse to her former client on any other matters that are "substantially related" to the case, unless both the former client[131] and the appropriate government agency[132] give "informed consent, confirmed in writing."[133]

Because Pamela was privy to confidential information about the matter pitting her former "firm" client against her current placement-site client during her summer at the firm, it is likely that neither the firm nor the government will consent to her involvement with the matter during her externship. However, if Pamela's supervisor at the United States Attorney's Office assigns her to work only on cases that do not involve her former client and are not "substantially related" to the matter she handled for the former client, she may work at the United States Attorney's Office without violating any conflicts rule.[134]

If Pamela is in a jurisdiction that permits screening, her field supervisor may offer to screen Pamela from the case on which she had worked at the firm while she is working as an extern. If the case in which the firm is involved is a civil matter, for example, the supervisor could assign her to work in the criminal section of the United States Attorney's Office. Even in a smaller office, where Assistant United States Attorneys carry mixed caseloads, careful screening, together with informed consent from all affected clients, could address ethical concerns about improper disclosure of confidential

---

[131] MODEL RULE 1.9(a) (made applicable to current government officers and employees through MODEL RULE 1.11(d)(1).)
[132] MODEL RULE 1.11(d)(2)(i).
[133] MODEL RULE 1.9(a) and MODEL RULE 1.11(d)(2)(i). *See* William Freivogel on Conflicts, Former Client– the Substantial Relationship Test, http://www.freivogelonconflicts.com (last visited February 9, 2004).

information.[135] And although Pamela's conflict will prevent her from having any connection at all with the case in which her firm is involved while she is working at the United States Attorney's Office, she may be able to work on other, unrelated matters with the attorney whose work so impressed her during the preceding summer.

Even if Pamela's supervisor screens her from the case that gave rise to her conflict and assigns her only to cases unrelated to the work she herself did at the firm, though, Pamela may not be completely off the hook, because she intends to return to the firm after graduation. As discussed above, one of the central purposes of the rules against conflicts is to preserve a lawyer's undivided loyalty to her clients.[136] Here, because Pamela has committed to return to the firm after graduation, her loyalty to the United States Attorney's Office may be compromised as a result of her ongoing loyalty to the clients of the firm. Therefore, although the conflicts rules do not require that Pamela's field supervisor screen her from *all* matters involving her former and future employer during her externship, the players may be unanimous in their conclusion that such expanded screening is prudent under the circumstances.

As Pamela's situation illustrates, the Model Rule's successive conflicts provisions, which limit lawyers from undertaking representation adverse to a former client only where the *matter at issue* is the same or substantially related to the prior representation, are more liberal than the concurrent conflicts rules, which prohibit lawyers from undertaking *any representation at all* adverse to another current

---

[134] Under Model Rule 1.9, a lawyer may not represent a new client if such representation involves the "same or a substantially related matter" as a former representation if the new client's interests are "materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." Thus conflicts involving former clients are a problem only if there is a "substantial relationship" between the work done for the former client and the new matter. Conflicts involving current clients, however, may be prohibited regardless of the nature of the work involved. *Compare* MODEL RULE 1.9 *with* MODEL RULE 1.7 (b).

[135] The availability of screening as a remedy for a conflict of interests will depend on the size, organization and practices of the office. *See* N.Y. St. Bar Ass'n Comm. Prof'l Ethics, Op. 720 at 4 (1999), *citing* Trustco Bank Y. v. Melino, 625 Y.S.2d 803, 808 (N.Y. 1995). Although some states' ethics codes, including New York's Code of Professional Conduct, discourage screening as a remedy for conflicts problems, the Model Rules are more receptive to the use of screening. *See* MODEL RULE 1.11.

client. This more relaxed approach to successive representation conflicts seems to err on the side of allowing lawyers to move on, from client to client, rather than imposing the severe limits on representation more appropriate in concurrent representation situations.[137]

This scenario also allows us to examine the operation of the conflict rules that apply to government lawyers. Under Model Rule 1.11, Pamela will be a "lawyer currently serving as a public officer or employee"[138] during her externship, and a former government lawyer[139] when she returns to her firm after graduation. Under the Rule, Pamela will not be barred from working on matters that do not involve her former firm client during her externship at the United States Attorney's Office, nor will the conflict resulting from her duty to her former client be imputed to the other lawyers in the office.[140] Perhaps more importantly, the Rule will permit Pamela to work on cases against the United States Attorneys Office without government consent upon her return to private practice, so long as she gives timely notice of her new affiliation to the government,[141] is screened from matters that she worked on at her externship[142] to avoid imputation of her conflicts to other lawyers in her firm,[143] and does not use any confidential information she learned while at the United States Attorney's Office to the detriment of the clients of that office.[144] Such a flexible rule regarding lawyers in government service benefits students seeking to participate in externship placements at governmental law offices. Indeed, it would be unfortunate if students were routinely turned away from public-sector externship positions because

---

[136] *See* discussion *supra* Part II.A.1.
[137] *See* RESTATEMENT, *supra* note 13, §132 cmt b.
[138] MODEL RULE 1.11(d)
[139] MODEL RULE 1.11(a), (b), and (c).
[140] MODEL RULE 1.11 cmt. 2 ("Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.").
[141] MODEL RULE 1.11(b)(2).
[142] MODEL RULE 1.11(b)(1).
[143] MODEL RULE 1.11(b).
[144] According to the Comment to MODEL RULE 1.11(c), "unfair advantage could accrue to the subsequent client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service." MODEL RULE 1.11(c) cmt. 4.

of their need to work part-time in order to pay tuition or their plans for employment after graduation. In general, externship programs should seek to be similarly flexible in their admissions policies, but always within the boundaries of the rules.

(c) *Potential Conflict of Interests: Kim's Personal Beliefs and Civic Activities and the Policies of her Placement*

Kim has founded a new law student organization, "Law Students Against the Death Penalty." She has applied to be an extern at the District Attorney's Office so that she can "learn about the other side." She has informed you that under no circumstances would she work on a death penalty case at this office. This office has pursued the death penalty in more than one recent case. Will she be permitted to work at the District Attorney's office?

A student's view on a particular issue may present a conflict of interests for a prospective externship participant. Here, Kim is opposed to the death penalty and actively working against it. She has applied to an office that routinely pursues the death penalty in certain cases. The first question presented is whether Kim should inform the faculty supervisor and the field placement supervisor about her work against the death penalty before accepting a position in the externship program. Although technically not required under the Rules, such disclosure generally would be advisable, because Kim's work against the death penalty may interfere with her loyalty to her "client" – the State. From the prosecutor's point of view, the office may be entitled to know, at the very least, if "one of their own" is working outside of the office against a policy advanced by the office. Consequently, disclosure is well-advised. If, after disclosure, the field supervisor is willing and able to accommodate Kim's preference to work on cases other than those involving the death penalty, the faculty supervisor should permit her to participate in the externship at the District Attorney's office. In fact, for many students, externships are a valuable means of exploring practice settings and substantive legal areas they do not wish to pursue after graduation.

The more difficult situation may arise, however, if Kim does not make her views about the death penalty known to the faculty supervisor or the field supervisor until after she begins work at the placement. If Kim's field supervisor is unaware of Kim's personal views and current efforts against the death penalty, he may assign her to a case on which the District Attorney is advocating for the death penalty. If she is not willing to work on the case, Kim will find herself in an exceedingly difficult position.[145] She will have to consult with both her faculty supervisor and her field supervisor to determine the best course of action. If, after speaking with her faculty supervisor, Kim decides to request assignment to another case, but her supervising attorney denies her request, she may have little choice but to withdraw from the placement, forfeiting both the externship experience and a positive recommendation. Even if her field supervisor grants her request, he nonetheless may perceive Kim as less loyal to the office than other students. For these reasons, even where personal convictions such as Kim's may not give rise to conflicts of interests that would completely bar participation under the applicable rules, early disclosure is the best course of action.

(d) *Potential Conflict: Kevin's Externship Duties and his Personal Loyalty to a Family Member*

Kevin has applied for a position as a judicial extern with a state court judge. His wife is an attorney at a law firm representing a large company currently in litigation before this judge. Will Kevin be permitted to enroll in the judicial externship?

This scenario presents a concurrent conflict problem, not arising from a conflict between or among client interests, but arising from Kevin's own conflict between his loyalty to the judge and his loyalty to a third person – his wife. Kevin's assignment to the judge's chambers would put Kevin in the difficult position of monitoring his every word and action in order to avoid the appearance of

[145] *See* MODEL RULES 1.7, 1.9. If this scenario involved Kim's loyalty to another client, rather than to her personal convictions, and if she were being asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position she was urging on behalf of another client in the same jurisdiction, she would be required to secure client consent from all affected clients. If no such consent was forthcoming, she would be required to refuse the second

impropriety prohibited by the Code of Judicial Conduct;[146] even the slightest suggestion that he might be attempting to influence the judge in his wife's favor, or sharing confidential information from the judge's chambers with his wife, could undermine public confidence in the integrity of the judicial system. Because of the risk of such perceptions, the judge may be unwilling to accept Kevin as an extern; Kevin's conflict could well be imputed to the judge, and thereby create for the judge not only an appearance of impropriety, but also an actual conflict that would require his recusal from the case in which Kevin's spouse is involved.[147]

In all cases, participants in judicial externships must give serious attention to ethical considerations, not only under the rules of professional conduct,[148] but also under the applicable state

---

representation if there was a substantial risk that her advocacy would create legal precedent adverse to the other client. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 377 (1993).

[146] CODE OF JUDICIAL CONDUCT, *supra* note 18. Although the prohibition against the appearance of impropriety has generally been abandoned in the Model Rules, it remains intact in the ABA CRIMINAL JUSTICE STANDARDS, STANDARD 3-2.8(b) which refers to the need "to preserve the appearance as well as the reality of the correct relationship which professional traditions, ethical codes, and applicable law require between advocates and judges." *See* RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 411 (2d ed. 2002). The appearance or fact of impropriety, as those terms are used in the Code of Judicial Conduct, may occur in three different contexts: (1) evidentiary concerns in which the judge, or her extern, views evidence that is not part of a case, *see, e.g.,* Price Brothers College v. Philadelphia Gear Corp, 629 F.2d 111 (6th Cir. 1980) (prior to trial, trial judge sent law clerk to the plaintiffs' plant to observe an allegedly malfunctioning machine); contacts with jurors, *see* United States v. Valesquez-Carbona, 991 F. 2d 574 (9th Cir. 1993) (trial judge's law clerk gave juror a ride); or in subsequent employment by judge's law clerks. *Compare* Fredonia Broadcasting v. RCA, 569 F.2d 251 (5th Cir. 1978) (former clerk hired to represent party in pending case before the judge) *with* First Interstate Bank of Arizona v. Murphy, Weir & Butler, 210 F.3d 983 (9th Cir. 2000) (law firm had no duty to disclose that it had hired law clerk of judge before whom the client was appearing).

[147] *See In re* Hatcher, 150 F. 3d 631(7th Cir. 1998). In this case, the petitioner inmate was indicted for drug and conspiracy crimes. Prior to trial, he filed a motion asking the presiding judge to recuse himself because the judge's son had worked, while employed in the United States Attorney's office as a third-year law student, on the case against one of petitioner's co-conspirators. The Court of Appeals noted that although petitioner's case and the co-conspirator's case were separate proceedings, the two indictments alleged virtually the same offenses. Therefore, the court concluded, the judge's son's participation in the co-conspirator's case was of such a nature that a reasonable person could have questioned the judge's impartiality, and granted the petition for the judge's recusal. *See also* MODEL RULES 8.2, 8.3, and 8.4, which address lawyers' special obligations in relation to judges, other judicial officials, and candidates for judicial office.

[148] MODEL RULE 8.2 prohibits lawyers from making false or misleading statements regarding the qualification or integrity of a judge; MODEL RULE 8.3(b) requires lawyers to report judges who commit violations of the applicable rules of judicial conduct; and MODEL RULE 8.4 prohibits lawyers from "knowingly assisting a judge or judicial officer" in judicial misconduct.

or federal Judicial Code,[149] which sets forth the rules governing judicial conduct, and the relevant rules governing judicial employees.[150]

2. Conflicts Arising in the Academic Component of the Externship

One of the unique characteristics of an externship program is its pedagogy.[151] Both the academic component of the externship program and the journal requirement that most externship programs include present unique opportunities for exploration of ethical issues in law practice.[152] The academic component of many externship programs plays an important role in training law students to become competent practitioners.[153] Because externship faculty ordinarily do not have responsibility for their students' actual cases, externship seminars may foster discussion on ethical issues and other issues

[149] Because any impropriety of an extern may be imputed to a judge and create the possibility of a charge of judicial misconduct, field and faculty supervisors should require externs to become familiar with the judicial code. *See* CODE OF JUDICIAL CONDUCT, *supra* note 18.

[150] JUDICIAL EMPLOYEE CODE, *supra* note 36. Canon 2 of the Judicial Employee Code states that a judge's employee shall avoid impropriety and the appearance of impropriety in all of the judge's activities. Specific prohibitions are not included; instead, the Canon suggests that the test for appearance of impropriety is where the conduct would create in reasonable minds a perception that he judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. *See* Commentary on Canon 2. For judges, the consequences of a violation of the conflict rules are recusal or worse.

Faculty supervisors also may need to alert externs to obligations of attorneys regarding the duty of reporting judicial misconduct. Model Rule 8.3(b) provides that "[a] lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." *See e.g.,* Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175 (1999); Matter of D'Addario, 658 N.Y.S.2d 582 (1997) (noting that attorney's failure to report judicial misconduct violated NY Code of Prof'l Resp. DR 1-103(A)); Matter of Canavan, 589 N.Y.S.2d 150 (N.Y. 1992) (attorney should have reported widespread and ongoing judicial misconduct). Although externs are not yet licensed, and therefore are not technically required to report judicial misconduct, the extern's field and faculty supervisors, if they are lawyers, are so obligated. *But see* Joy & Kuehn *supra* note 3, at 548 (observing that in jurisdictions in which students are certified to practice under a student practice rule, the student may have a duty to report). Consequently, where an extern tells the field or faculty supervisor about judicial misconduct that the student witnessed, the supervisor may be obligated to report such misconduct to the state judicial commission. *See* MODEL RULE 8.3. It is not clear, though, whether the supervisor is required to report such allegations of misconduct if the supervisor has only second-hand knowledge of the misconduct at issue. However, even if the field or faculty supervisor decides not to file a formal complaint against a judge, the faculty supervisor should consider removing the judge's chambers from the school's list of approved externship sites.

[151] *See supra* INTRODUCTION.

[152] Oglivy, *supra* note 25; Siebel & Morton, *supra* note 8.

[153] Office of the Consultant on Legal Education to the American Bar Association, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, STANDARD 305(f)(4) (1992) (requiring seminar component for externship programs granting six or more credits) [hereinafter ABA STANDARDS].

related to practice, outside the context of particular cases but nonetheless within the context of a "real" law practice.

Each of the following scenarios addresses a conflict arising from the student's participation in the academic component of an externship program.

(a) *Avoiding Conflicts: Participation in a Generic Seminar*

To consider the issue of conflicts of interests in the seminar setting, recall our earlier discussion of Soo-Lie and Jacob.[154] Soo-Lie is working with an Assistant United States Attorney, prosecuting a high profile case; Jacob, a fellow extern, is working for the judge who presides over the case.

Not only does this scenario present the confidentiality issues we explored in the previous section of this Article; it also highlights the way in which externships may present conflicts that do not arise within in-house clinics. Many externship programs include within a common seminar class students who work at various externship placements, including offices that are adversaries in litigation. In the seminar, students from the district attorney's office may sit next to externs from the public defender's office, and federal judicial externs may sit across from students externing at the United States Attorneys' Office. Although some faculty supervisors may believe that bringing together in one classroom students working with lawyers or judges involved in different capacities in the same case presents an obvious and outright conflict of interests, we respectfully disagree. True, the general conflict of interests rules prohibit a lawyer from representing a client if such representation will be directly adverse to another client,[155] and impute conflicts among lawyers practicing together.[156]

[154] *See* discussion *supra* Part I.B.2.
[155] MODEL RULE 1.7.
[156] MODEL RULE 1.10.

Indeed, the potential for conflicts of interests in this case would seem beyond dispute, *if* the class were a law firm. But "[a] seminar is not a law firm."[157]

Participants in an externship seminar class, unlike lawyers in a firm, need not –and should not – discuss confidential information with one another. Indeed, in many externship programs, externs receive express instructions *not* to discuss any confidential matters from their placements in the externship class, and, in most cases, they comply.[158] Faculty supervisors in those programs focus class discussions instead on general issues of lawyering, without reference to facts or case strategy related to the students' assignments at their externship placements.[159] Such seminar classes are designed not to encourage discussion about particular clients or cases, but rather to provide a forum in which students may discuss other, broader issues: students' reactions to the work they are doing at their placements; their assessments of the skills they are acquiring; their observations about the roles lawyers play in the larger legal system; their insights about the relationships they gradually discern – relationships between the lawyers and staff members at their placement sites, between placement-site actors and other actors in the justice system, and between their externship experiences and their ultimate career goals. Supplemental readings, other assignments and activities, and guest speakers further enrich these discussions. Because students in such externship seminars do not discuss confidential, case-specific information, the risk of conflicts is reduced, if not eliminated.[160]

Avoiding conflicts in the seminar class is only the first step, though, as conflicts also may emerge through information contained in student journals. Although the faculty supervisor ordinarily cannot intervene in placement site matters, she may identify issues that are ripe for discussion from student

---

[157] Lerman, *supra* note 3, at 2311.
[158] *See supra* note 76.
[159] *See* discussion of confidentiality issues inherent in externship practice *supra* Part I.
[160] Some may say that in sanitizing the seminar discussion in this way, educational opportunities are lost. We take a different view. All lawyers must learn how to talk about cases without breaching confidences, and how to reflect on their lawyering experience within the boundaries of the ethical rules. *See* OGILVY ET. AL., *supra* note 3.

journal entries. For example, students may express their displeasure about certain positions their field supervisors are taking on particular cases or toward certain adversaries. Where a journal entry raises such an issue, the faculty supervisor may speak to the student privately to ask if the student is willing to offer the issue for discussion during the externship seminar class. The faculty supervisor also may discuss the issue one-on-one with the extern, assisting the extern in developing the skills necessary for discussing the issue with the extern's immediate placement supervisor, or, if the supervisor's judgment is the cause for consternation, with other lawyers in the office. After all, the opportunity to experience such real-life ethical dilemmas, and then to step back to reflect on and discuss these experiences in classes and in journals, is what sets externships apart from other legal work experiences. In each such interaction, though, both faculty supervisor and students must remain mindful of the lawyer's duty to recognize and either avoid or resolve conflicts of interests.

(b) *Potential Conflicts: Kay's Faculty Supervisor's Pro Bono Activities*

Kay is an extern at the Attorney General's Office who has been assigned to work on a sex discrimination case filed against the State. Kay's faculty supervisor provides pro bono assistance to a local law firm in sex discrimination cases. Is there a conflict of interests posed by Kay's work at the placement and her faculty supervisor's representation of pro bono clients in sex discrimination cases?

The short answer to the question posed by this scenario is "No." The externship model we are discussing is one in which the faculty supervisor is not part of the externship placement's staff, the faculty supervisor is not privy to confidential client information at the placement and is not a member of the placement "law firm." Therefore, even if a faculty supervisor represents clients whose interests are adverse to clients represented by the extern at a placement, there is no conflict of interests, because the faculty supervisor, in her role as a lawyer, is not representing two clients. Instead, the faculty supervisor represents her *pro bono* clients, and Kay represents the State. However, even though this

scenario does not give rise to an actual conflict, it does highlight the need for the faculty supervisor to be cognizant of her own potential conflicts of interests. If a faculty supervisor does *pro bono* work outside of the law school, teaches in an in-house clinic program, or engages in a private practice, the faculty member must be particularly careful to avoid actual or potential conflicts of interests.[161]

In some schools, though, the faculty supervisor is formally a part of the extern placement's law office or is deemed by field supervisors to be a consulting lawyer, and so has access to the placement's confidential client information. In such cases, the faculty supervisor, as a lawyer with responsibilities to placement site clients, must disclose any other legal work that may present a conflict with respect to those clients, including the nature of the other practice and the identities of the clients she represents in that practice.[162] She must also obtain informed consent to any actual or potential conflicts of interests from all affected clients.

3. Conflicts Arising in the Extern's Post-Externship Job Search

Conflicts of interests related to externship participation may follow externs long after both the application process and the academic component of an externship program are complete, arising during the extern's pre-graduation or post-graduation search for legal employment. In fact, if an extern

[161] Another issue to consider here is whether the faculty supervisor's extra-externship activities may impair her ability to counsel Kay or other students whose positions on cases at the externship site differ from her own.

[162] The faculty supervisor also may need to be alert to conflicts with the law school itself. Although the authors could find no case involving conflicts between law schools and externship programs, a recent opinion of the New York State Bar Ethics Committee raises the analogous question of whether a clinic attorney may represent a clinic client with an interest adverse to the interests of a member of the law school's board of trustees. In this case, the Committee concluded that under the New York State Bar Association Code of Professional Conduct, the clinic attorney may represent the client so long as the clinic attorney reasonably believes that his professional judgment will not be adversely affected by the relationship of the board member to the clinic, but then only if the clinic attorney discloses to the client the relationship between the board member and the clinic as soon as practicable and obtains the client's consent to the continued representation. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 688 (1997). Applied to the externship setting, this reasoning would suggest that faculty supervisors who are part of a placement's legal team must consider their need to identify, and then either avoid or cure, conflicts between externship placement-site clients and the law school.

interviews at offices whose clients are adverse to clients represented by the externship placement office, "each interview represents a potential conflict of interest[s]."[163]

4*Successive Representation Conflict: Michael's Duties to Former Government and Current Private Clients*

Michael is a summer extern at the city law department. During the externship, Michael's field supervisor includes him in a series of meetings at which city lawyers discuss strategy for an ongoing case. His supervisor tells him that the litigation has been extraordinarily contentious and that the outcome is very important to the city client. In fact, the city views this lawsuit as the most significant problem that the city has faced in the last decade. When the externship ends, Michael begins a search for employment and includes his externship experience on his resume. He participates in an on-campus interview with the law firm on the other side of the litigation involving his former externship placement, receives a job offer from the firm, and begins working part-time at the firm during the Fall term of his third year. Michael does not disclose his new employment to his former externship placement supervisor. Rather, the placement supervisor learns of Michael's new position at the firm only by happenstance, when, several months later, the supervisor returns a call from his former extern, who contacted the supervisor to ask for a bar affidavit. The secretary who answered the phone when the supervisor called identified the firm by name. Michael says that because the firm did not ask him about his "employment" in the city law department during his interviews, he "did not think it created any ethical problems." Is he correct?

Like Pamela, who as a summer associate had worked on a case in which her firm opposed the government office in which she subsequently wished to extern, Michael is presented with a dilemma regarding his successive representation of a client adverse to the client of his externship placement. But unlike Pamela, who had only accepted an offer at the firm, Michael has completed his externship and is now working at the firm.[164] Accordingly, Michael's situation gives rise to several additional issues related to successive conflict of interests of which faculty, field supervisors and students should be aware.

First, Michael is confronted with a conflict of interests between his current firm's client and the client of his former externship placement, the city. Because he moved from a government position to a private firm, this conflict is governed by Model Rule 1.11. Had Michael complied with Rule 1.11's

[163] Joy & Kuehn, *supra* note 3, at 548.

provisions, his situation could have been decidedly better than that of a colleague moving between private law firms; as we have noted, the rules governing conflicts involving government lawyers are more lenient than the rules governing private practitioners. Specifically, had Michael's externship experience been in a private law firm, and had the affected firm client refused the consent required by Rule 1.10, Michael's successive conflict involving the ongoing case would have disqualified all of the other lawyers in his new firm under the theory of vicarious disqualification.

Model Rule 1.11, though, provides that even if, while in government employ, a former government lawyer personally and substantially participated in a matter that is being handled by his current firm, the lawyer will be permitted to work at the firm without agency consent,[165] provided that the lawyer notifies the affected government agency of his new affiliation, and provided that his new firm takes timely steps to screen him from the matter.[166] The Rule further protects the lawyers with whom the former government lawyer works at his new firm from vicarious disqualification based on his conflict.[167]

The rationale for applying more lenient conflicts rules where lawyers move between government and private practice is relatively simple: if an entire government entity, such as the United States government, is considered one firm for conflicts purposes, such that knowledge of all confidential information possessed by one lawyer in this firm is imputed to every other lawyer in the

---

[164] Externship faculty should be aware of the ethical rules in their jurisdiction regarding the extent to which information may be shared when checking for conflicts. *See supra* note 81.

[165] MODEL RULE 1.11 (b)(2). Were the lawyer moving between private firms, by contrast, the lawyer's successive-representation conflict would be imputed to the lawyers of his or her current firm and would bar their continued representation of the client in the matter on which the lawyer worked at this previous firm. *See* MODEL RULE 1.10**.** According to a recent opinion, a district attorney will be permitted to work at a legal aid office defending clients prosecuted by the district attorney after he leaves the district attorney's office if, as a district attorney, he had not been involved in the client's case. N.Y. St. Bar Ass'n Comm on Prof'l Ethics, Op. 748 (2001). Furthermore, a government lawyer who also maintains a private law practice may not represent a private client in a matter against the government client without the informed consent of both parties. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Ops. 405 and 409 (1997). *See also* MODEL RULE 1.11(a); 18 U.S.C. § 207(a)(1)(B) (2001).

[166] MODEL RULE 1.11 (b). Where the lawyer proposes to work on a matter in which the lawyer had personally and substantially participated as a government lawyer, however, the lawyer is more limited. Subject to the strictures of MODEL RULE. 1.9(c), MODEL RULE 1.11(a)(2) would allow a lawyer who participated personally and substantially in a matter while in government employ subsequently to represent a client in connection with that matter only with the informed consent of the appropriate government agency, confirmed in writing.

[167] MODEL RULE 1.11 (b).

firm, every former government lawyer would be precluded from representing any client against the government where confidential information regarding that client's matter was in the possession of any government agency during that lawyer's time in government service. If such disqualifications were imputed to all lawyers in the former government lawyer's new law firm, no firm employing a former government lawyer could ever represent clients in matters involving the government, at least not so long as those matters involved confidential information accumulated during the period of the former government lawyer's employment.[168]

Although no formal opinion has addressed how Rule 1.11 would apply to externs or law clerks, it would seem that if Michael had been more attentive to the Rule's requirements, he almost certainly would have been able work at the firm without government consent, and without risk that his conflict would be imputed to the other lawyers at the firm. However, because Michael worked on the case that his current firm handles while he was an extern at the city law department, but did not give notice to the city of his new affiliation or observe Rule 1.11's requirement for timely implementation of screening mechanisms, neither Michael nor his firm colleagues will benefit from the Rule's more generous provisions.

To the contrary, because Michael did work on the matter, acquiring confidential information about the city in the process, and because his firm represents a party adverse to the city in the matter, Michael himself has a conflict of interests governed by Rule 1.11(a). Further, because he did not

[168] Note, though, that MODEL RULE 1.11(c) prohibits a former government lawyer who has confidential governmental information about a person acquired while the lawyer was in government service from representing "a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." MODEL RULE 1.11(c). Consequently, a former government lawyer who had participated in a criminal investigation of an FBI target could not subsequently represent a private client in litigation adverse to the target if the confidential information obtained by the lawyer while in governmental employ could be used to the material disadvantage of the target. The lawyer's conflict, however, would not be imputed to the other lawyers in his new firm, provided that "the disqualified lawyer [was] timely screened from any participation in the matter and [was] apportioned no part of the fee therefrom." MODEL RULE 1.11 (c). Importantly, unlike MODEL RULE 1.11(b), MODEL RULE 1.11(c) does not require notice to the government agency of the lawyer's new affiliation.

comply with the Rule 1.11(b) strictures, his conflict will be imputed to his entire firm, so that neither he nor his new firm can continue representation without the consent of the affected clients.[169]

In Michael's case, disclosure was mandatory. There was a direct conflict between Michael's previous client and a client of his current employer. Model Rule 5.2, which offers protection to a subordinate lawyer who defers to a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility, can provide Michael with no solace here, for Model Rule 2.1 obligates all lawyers, supervisory and subordinate, to exercise *independent* professional judgment. Michael could not determine whether the ethical question at the fore was arguable, and, if so, whether the hiring committee's resolution of that question was reasonable, without conducting his own, independent analysis of the conflicts issues involved. That analysis most surely would have indicated that Michael's employment at the firm would give rise to a conflict of interests curable only with notice to the city and the implementation of appropriate screening mechanisms, or with informed consent from all affected clients.

Michael's lapse may have serious consequences, not only for Michael and his firm, but also for their client. Once the city law department learns of Michael's current employment, it may respond by filing a motion to disqualify both Michael, individually, and his new firm. The motion to disqualify would be on solid ethical ground, because the Model Rules prohibit Michael from undertaking the conflicting representation without client consent, and Model Rule 1.11 imputes Michael's conflict to the new firm because he did not comply with its notice and screening provisions.[170] If the court grants the motion to disqualify, the firm's client will have been denied counsel of its choosing, and will have to incur the additional expense of retaining substitute counsel.

---

[169] As noted, MODEL RULE 1.11 is more lenient with respect to lawyers moving to and from government practice, than is MODEL RULE 1.10, which governs lawyers moving from and to private firms. In this case, consent might have cured the conflict, but query whether a city in this position would have been willing to give Michael consent.

[170] *But see* New York Code of Prof'l Responsibility DR 9-101(B); MODEL RULE 1.10.

Of course, the prospect of maintaining a major client may trump any erstwhile loyalty the firm may have felt toward its new law clerk. Michael should not be surprised, therefore, if in an attempt to avoid a disqualification motion altogether, the firm elects to fire him immediately. In that case, Michael may well find himself not only looking for a job again, but doing so without a positive reference from either of his former legal employers.[171]

Michael's failure to disclose his conflict to his new employer and to his previous field supervisor also risked irreparably damaging the externship program's relationship with this placement. To avoid such problems, the faculty supervisor should remind students throughout the semester, and particularly during the job search season, of their obligation to inform their placement supervisors of any job interviews they have secured at law offices whose clients may have interests adverse to those of placement-site clients. If a student receives an offer during the externship semester, the student should disclose that fact immediately to the placement supervisor (and preferably to the faculty supervisor, as well). However, if the extern's conflict could be imputed to the other lawyers at a prospective employer's office, the extern may have to wait to interview at the firm until after the externship ends.

As Michael's case so vividly illustrates, students must also disclose potential and actual conflicts to prospective employers, whether the employer raises those issues or not. Disclosure in this instance was mandatory, not elective. There was a direct conflict between Michael's previous client and a client of his current employer. When such a conflict arises, the extern, together with the employer and field supervisor, must take appropriate measures to address it, requesting client consent as the rules require, or providing

[171] In the actual case from which Michael's scenario is drawn, the student's former institutional client did file a motion to disqualify his new firm, incurring several thousand dollars in legal fees in that effort. The firm responded quickly and decisively upon being served with the motion -- by terminating the student's employment. The firm then filed a memorandum of law in opposition to the motion, arguing that both its client's interest in representation by counsel of choice and the absence of evidence that the student had transmitted any confidential information about his former client to his colleagues at the firm before his termination weighed in favor of denying the motion. The judge ultimately agreed, but ruled from the bench after oral argument rather than entering a written decision in the matter. Although both the firm and the student were responsible for this regrettable situation, the judge stated that he did not want this new lawyer's name to be searchable in the ethics database.

notice and implementing screening as the rules permit. If informed consent from the client is required but not forthcoming, the extern will not be able to continue work on the matter(s) at issue at the externship site while pursuing employment with the law office representing an adverse party.[172]

In addition, the faculty supervisor should encourage students to keep careful lists of all matters on which they work at their placements, so that they can recognize and avoid conflicts even after the externship ends. Again, if a potential employer does not raise questions about conflicts of interests during an interview or when an offer of employment is made, the extern should nonetheless fully disclose all potential sources of conflicts.[173] Both the extern and his prospective employer may then assess whether any conflicts are present, and if so, what remedies, if any, may be available to cure them.

C. Best Practices

The scenarios discussed above are merely examples of the many conflicts of interests that may emerge in the externship setting. Indeed, conflicts of interests are among the most pervasive and potentially problematic ethical issues that arise in externship programs. Consequently, faculty supervisors must take care to avoid conflicts before they arise, and work hard to resolve conflicts that do arise. Externship faculty should communicate early and often with students and placement directors to identify all source(s) of conflicts and to determine whether and under what circumstances clients may waive

[172] *See* Joy & Kuehn, *supra* note 3, at 550-551. In our view, the rules require an extern to disclose to the field supervisor the extern's application to any law office representing clients with interests adverse to those of the placement's clients. The extern must then be prohibited from working on any matters handled by that potential employer until after the extern rejects an offer from the firm or until the firm notifies the extern that no offer will be forthcoming. If the extern receives and accepts an offer from the firm, the extern must not be permitted to work on any matters involving the firm for the duration of the externship.

conflicts so that externs may continue representation. We offer the following suggested protocols to help each of the externship players in identifying and resolving both potential and actual conflicts.

1.Extern Protocols

From the extern's point of view, learning how to identify and resolve conflicts is an important and transferable legal skill. Accordingly, students and faculty supervisors should work together to identify and address conflicts, with faculty supervisors offering instruction on spotting actual and potential conflicts and providing guidance on resolving conflicts once they arise. Such lessons are important not only because they may resolve specific conflicts, but also because they can help externs learn how to address the conflicts they inevitably will encounter once they graduate and are admitted to the bar.[174]

From the extern's perspective, if a conflict emerges that requires her to withdraw or change work on a particular case, one concern may overshadow all others: will the conflict affect her grade or placement evaluation? As long as the student adheres to the professional rules and follows the required program protocols and policies, she should be able to depend upon her faculty supervisor to take all available steps to protect her from any negative consequence that may flow from a conflicts problem. If the student fails to reveal a conflict, though, she should expect her field and faculty supervisors to hold her accountable for the consequences of that conflict, even if the non-disclosure was inadvertent.

---

[173] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 400 (1996) clarifies the lawyer's duties during job negotiations with adverse parties or firms. According to this opinion, a lawyer who is actively representing a client in a matter and who is seeking employment with a firm or party to whom the client is opposed in this matter must consult with the client and obtain the client's consent prior to his continuing work on the client's case while the lawyer explores such future job prospects. If the client consents, the lawyer may continue representation. If the client does not consent, the lawyer must withdraw from participation in the representation and transfer his work to another lawyer in the firm, so long as withdrawal is permitted by the court in the case. Although the lawyer's conflict of interest would not then be imputed to other lawyers in the firm, the other lawyers would need also to examine their own interests to determine if they themselves have a conflict that arises from their colleague's negotiation with the new firm.

Externs should be aware that even if a prospective field supervisor does not raise the issue of conflicts, the extern has an independent professional responsibility to inform the supervisor of any personal or professional connection that may give rise to a conflict, including relationships with law firms (because of previous employment or externship participation or because the law firm employs a family member, or represents or opposes a family member in litigation), or with individuals or entities with whom the externs will have work-related contact at the placement site. Further, where in the course of reviewing a new assignment or sending out resumes to potential employers, the extern discerns a potential or actual conflict of interests, she should inform the supervisor as soon as possible, erring on the side of caution if she is in doubt about whether a conflict exists. Where disclosure may be uncomfortable for the extern, she should consult with the faculty supervisor about how to approach the placement supervisor to discuss the conflicts issue.[175]

2. Field Supervisor Protocols

The field placement supervisor and his placement-site colleagues are perhaps most at risk if a conflict involving an extern emerges. As discussed above, an extern's conflict could be imputed to all lawyers at her placement or to her supervising judge, threatening disqualification of all lawyers in the law office or necessitating the judge's recusal in a pending matter. Because conflicts issues may remain invisible to an extern, placement supervisors must play an important role in both identifying and resolving conflicts of interests as they arise.

---

[174] Indeed, there is a growing body of law governing lawyers. Students should become familiar with as much of this body of law as possible while still in law school. For an excellent new casebook on the law governing lawyers, see LISA LERMAN & PHILIP SCHRAG, ETHICAL DILEMMAS IN LEGAL PRACTICE (forthcoming 2004).

[175] As our discussion regarding Michael's situation above illustrates, the rules require externs to disclose to the field supervisor even the extern's *intent* to work at any law office with interests adverse to those of the placement's clients. *See* discussion *supra* Part II.B.3.

The most common remedy for a conflict of interests is disclosure, consultation, and client consent to the conflict. Some jurisdictions permit screening of a lawyer (or extern) from any work on cases involving the affected client, or on related matters. At least one commentator has argued for more liberal screening for law students, contending that due to students' short-term affiliation with externship law offices and agencies, and their continuing employment searches, the rules should provide for screening as a less severe remedy for conflicts than withdrawal.[176] According to this view, for the purpose of conflicts analyses, externs are more like "contract lawyers," or temporary lawyers, than full time employees.[177] If an extern is viewed as a contract lawyer, or temporary lawyer, instead of a lawyer associated with the office, an extern's conflicts may not necessarily be imputed to other lawyers at the externship placement.[178]

Although from the point of view of the field placement supervisor, screening may be a desirable way to deal with a conflicts situation, screening may not be available in all jurisdictions.[179] In fact, in 2002, the ABA House of Delegates specifically rejected a proposal to amend the Model Rules to

---

[176] *See* McCoy, *supra* note 10.

[177] *See, e.g.,* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 715 (1999) (contract lawyer may take on clients at multiple law firms on a temporary project basis without creating a problem of vicarious disqualification depending on the relationship of the contract lawyer to each employing law firm and if such relationship raises to the level of an "association' with the firm). *See also* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 762 (2003) (obligation of New York law firm and of supervisory lawyers to ensure compliance with the New York Code does not extend to lawyers who are licensed to practice law in another jurisdiction and are not subject to the Code).

[178] In response to several inquires regarding the status of temporary lawyers regarding conflicts of interests, the ABA issued a lengthy formal opinion in 1988, in which it concluded that under MODEL RULES 1.8 and 1.9, a temporary lawyer may not work simultaneously on matters for clients of different firms if the representation of each is directly adverse to the other. The ABA reasoned that the temporary lawyer, like other permanent associates in the firm, "represents" the client for the purpose of the rule prohibiting simultaneous representation of adverse clients. The more interesting question became whether a temporary lawyer is consider "associated" with a firm so that the conflicts of the temporary lawyer will be imputed to the firm. As the opinion states, "whether a temporary lawyer is treated as being 'associated with a firm' while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 356 (1988).

[179] Many jurisdictions do not permit screening to cure imputed disqualification. *See, e.g.,* Schiessle v. Stevens, 717 F. 2d 417 (7th Cir. 1983); Shrader v. Montforte, 622 N.Y.S. 2d 363 (N.Y. App. Div. 1995); Trustco Bank of New York v. Melino, 625 N.Y.S. 2d 803 (N.Y. Sup. Ct. 1995). For a comprehensive chart reviewing every state's student practice rule and screening provisions, *see* McCoy, *supra* note 10. *See also* Chart on Lawyer Screening (2002), reprinted in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 173.

provide screening as a method of curing imputed conflicts when lawyers move from one law firm to another.[180]

Further, screening may not be in the extern's best interest. To screen a student from particular cases or client matters due to conflicts of interests is necessarily to limit the extern's exposure to certain cases within the office. Externship programs aim to train students in the legal skills necessary for effective client representation, and to expose students to the range of lawyering styles and professional experiences and relationships that working as lawyers-in-training at a "real law office" provides.[181] To this end, both field and faculty supervisors should encourage externs to develop professional

---

[180] *See* Ethics Report 2000-February 2002 Report, at R. 1.10, *available at* http://www.abanet.org/cpr/e2k-202report_summ.html (last visited July 10, 2003). On the other hand, the ABA recently liberalized the screening rules for nonlawyers, for lawyers within government offices, and for former government lawyers who enter private practice. *See* MODEL RULE 1.11 (b); *see also* cmt. 2 to MODEL RULE 1.11 ("Because of the special problems raised by imputation within a government agency, . . . the conflicts of lawyer currently serving as an officer or employee of the government [will not be imputed] to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."). *See also* MODEL RULE 1.10 cmt. 4 (permitting screening of nonlawyers).

The issue of screening has been controversial for some time. In 1988, the ABA issued Informal Opinion 1521, which permits the use of screens for legal assistants in ongoing legal matters. The opinion indicates that a law firm may continue to represent a client who presents a conflict for a newly hired legal assistant so long as the firm screens the legal assistant effectively and no confidential information is revealed. Most state bar opinions have concurred with the ABA opinion based on the view that legal assistants should not be as limited as lawyers in their opportunities for employment. *See* ROTUNDA *supra* note 109, at 214 and cases cited therein.

However, at least one expert has observed that "the critical element in determining whether the non lawyer should be burdened by application of the conflicts rules was that the actor's prior duties were those of a confidential agent." Charles W. Wolfram, MODERN LEGAL ETHICS § 7.1.6, at 324 (1986), *quoted in* Lerman, *supra*, note 3, at 2314. It is also settled law in New York, for example, that a law firm may be disqualified from representing a client due to a paralegal's prior employment. United States v. Pappa, 2002 WL 398222 (2d Cir. 2002) (counsel disqualified, in part due to disclosure of confidential information to interns), *cert. denied,* 537 U.S. 823 (2002). A few courts, as well as bar opinions in at least three states, have specifically applied the rules of conflict of interests to law students in a jurisdiction that does not, by statute, require students to be bound by the Code. *See In re* Hatcher, 150 F. 3d 631 (7th Cir. 1998) (upholding recusal of judge whose child was an extern at the United States' Attorney's office); Bechtold v. Gomez, 576 N.W.185 (Neb. 1998) (discussing disqualification of clinic program from case because former clinic student subsequently worked on unrelated matter for opposing law firm); Pisa v. Streeter, 491 F. Supp. 530, 532 (D. Mass. 1980) (holding that lawyer who had worked as a law student under a lawyer's supervision was bound by the state's ethical standards); Connecticut Comm. on Prof'l Ethics, Informal Op. 10 (1997) (concluding that clinic student is considered lawyer for purpose of applying state conflict of interests rules); Massachusetts Comm. on Prof'l Ethics, Op. No. 80-1 (1980) (concluding that clinic student who represents clients is subject to state's code of professional responsibility.); and Bar Association of the City of New York, Op. No. 79-37 (1991) (concluding that clinic student who functions as lawyer under a practice order is considered lawyer for the purpose of a conflict of interests analysis).

[181] Indeed, a major goal of clinical legal education today is to instruct student in ethics and professional responsibility. Clinical teachers encourage students to examine existing codes and professional rules and learn to interpret these rules as applied to their clinical experience. *See Report of the Committee on Future of In-House Clinics*, 42 J. LEGAL ED. 508, 514 (1992) (goal of clinical programs is to teach students to "respond in role to ethical dilemmas, with real life consequences attached to their decisions").

relationships with staff at their offices, to seek out lawyers to discuss pending matters (including those on which the students are not working directly), to seek guidance and feedback with respect to the extern's own legal skills, and to engage lawyers and others at the placement in discussion of career issues. Screening would require externs to be cut off from many such potentially rich learning opportunities. To limit the extern's interactions with lawyers in the office, or the extern's exposure to certain cases, would therefore jeopardize the educational goals of the externship program. Accordingly, screening may not be the best resolution of conflicts problems. Instead, field supervisors should work with faculty supervisors and externs during the application process and throughout the semester to avoid potential conflicts of interests even before they arise.

3. Faculty Supervisor Protocols

The externship faculty member ordinarily does not incur the same personal consequences as the student or the placement supervisor if a conflict emerges. However, the faculty supervisor's interest in preserving the integrity of the externship program, as well as in maintaining ongoing positive relations with field supervisors, requires the faculty supervisor's careful attention to matters of conflicts.

An important first step in avoiding conflicts is for the faculty supervisor to acknowledge the externship program's obligation to help student applicants to determine whether or not potential conflicts of interests exist. The faculty supervisor should inform each extern of the professional rules that apply to his or her placement and work with the extern and the placement supervisor on an ongoing basis to resolve any conflicts questions.

All law schools with externships have developed their own externship application and selection processes. Some schools allow students to find their own placements, others place students at established placements, and still others arrange interviews for students at pre-approved placements,

with the faculty supervisor assigning selected students to placements based on the outcome of those interviews.[182] In those programs in which the faculty supervisor makes placement decisions, it is her responsibility not to place a student in an office in which the student has an actual or potential conflict.

Avoiding conflicts before they arise is in the best interests of the student, the school, and the placement, because doing so saves the time and embarrassment of having to withdraw an extern from a placement if the placement supervisor subsequently determines that the extern has a nonconsentable conflict. The best way to avoid conflicts altogether is to develop an effective conflicts checking system, one that will gather as much information about the extern's work and personal history as possible, and as early in the application process as possible. As part of that process, students should complete detailed conflicts forms that solicit information about existing or potential conflicts.[183] Once the semester begins, externs should complete conflicts updates to identify any new conflicts that may have arisen since the time the student originally applied to the program.

Of course, two questions then emerge. First, how much information about current or previous clients and the matters in which a student has interests may a faculty supervisor require the student to

---

[182] *See, e.g.*, Peter Jaszi, Ann Shalleck, Marlana Valdez, & Susan Carle, *Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University,* 5 CLIN. L. REV. 403 (1999) (noting that the externship program at Washington College of Law requires students to find their own placements).

[183] *See* Syracuse University College of Law Externship Program Conflicts Form, included in the Appendix. The Practicing Law Institute of New York proposes the following "practice pointers" for law firms instituting conflicts policies and procedures. These pointers appear equally applicable to externship and clinic programs:

=xt

[A]ny new attorney should provide a list of clients for whom and matters on which substantive work was performed during the past three years; the list should be placed in the attorney's personnel file; the attorney's disclosure statement should be cleared through the firm' records department to determine if any conflicts exist; before the new attorney arrives, the firm should send an email to all members of the firm requesting information about conflicts; all actual or potential conflicts should be resolved before the new attorney (student) arrives; the new attorney should be required to review the firm's confidentiality policy and to sign an acknowledgement indicating the absence of any conflicts and understanding and compliance with the firm's conflict policies; place the attorney's disclosure statement and acknowledgment in the attorney's file; post the attorney's disclosure statement on the firm's conflicts database so that future conflicts can be identified and reported automatically; insure that the new attorney does not disclose confidential information from former clients during the conflict check process or thereafter and apply these pointers to all paralegals and other non lawyers who have access to client confidential information.

=ft

Charlotte Moses Fischman & David M. Rubin, *Staying Out of Trouble: What Every Lawyer Must Know about Ethics,* 127 PLI/NY 419, 441 (2002).

divulge for the purpose of identifying and resolving conflicts with the clients of the proposed externship placement? Second, how much personal information should a faculty supervisor request or require an externship applicant to reveal in the application process in order to disclose potential sources of conflicts?

Although the Model Rules are silent on the first issue, at least one state bar recently issued a formal opinion decided under a variant of the Model Code regarding the amount and type of information an attorney may reveal for the purpose of checking for conflicts.[184] That opinion instructs law firms, except in special circumstances, to seek the names of clients previously represented by each newly hired lawyer and, in some cases, by all other lawyers the newly hired lawyer's former firm. The circumstances under which a client's name may be protected as confidential remains an open question under the Model Rules.

As to the second question regarding requests for personal information, the Model Rules likewise offer little guidance. It is advisable, therefore, for the faculty supervisor to discuss this matter with each applicant and obtain at least enough information from the extern to determine if further investigation regarding actual or potential conflicts is warranted.

If, after initial consultation with the extern applicant and the placement supervisor, the faculty supervisor determines that there is no actual or potential conflict, the student's application may proceed. If, however, initial consultation reveals that an actual or potential conflict exists, the faculty supervisor and extern applicant should consult with the placement supervisor as soon as possible to identify the nature and extent of the conflict, and to determine whether the conflict may be cured

[184] *See* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op 720 (1999), which refers to the 1996 amendment to the New York Code that requires all New York law firms to institute formal systems to identify conflicts of interests. The Opinion concludes that when a lawyer moves to a new law firm, the new firm must seek the names of clients represented by the lawyer. Depending on the size of the firm, the lawyer may have to reveal the names of all clients of the former firm, within a reasonable period of time in the past, unless the client's name is protected as a client confidence or secret. *See* New York Code of Prof'l Responsibility DR 5-105(E) (2002).

pursuant to the appropriate jurisdiction's rules of professional conduct.[185] If the conflict is incurable, the faculty supervisor cannot grant the student's request for that placement, but she may work with the student to select another placement that does not present a conflict.

A final issue remains. What if the field supervisor and the faculty supervisor disagree as to the existence of a conflict? If the faculty supervisor does not see a conflict that the field supervisor identifies, the field supervisor's judgment must always prevail, because he or she is the lawyer for the client. What course of action is appropriate, though, if a faculty supervisor spots a conflict where the field supervisor does not?

If, in her consultation with the field supervisor, the faculty supervisor learns that the field supervisor is not troubled by the existence of the conflict that the faculty supervisor has flagged, the faculty supervisor must decide either to override the field supervisor's judgment to protect the student from the consequences of a potential or actual violation of an ethical rule, or to acquiesce in the supervisor's assessment. If the faculty supervisor is also a lawyer, as is frequently the case, and believes that the field supervisor, in accepting the extern despite the existence of a conflict, would be engaging in representation that would constitute an ethical violation, the faculty supervisor is obligated to override the field supervisor's decision.

Unfortunately, though, the faculty supervisor's decision to override the field supervisor's judgment and to place the extern in another placement that does not pose a conflict of interests for the extern does not resolve the issue, for the faculty supervisor will still have to decide between two options: removing the placement from the program or finding another supervising lawyer at the placement, one whose views on adherence to the applicable rules of professional conduct more fully align with those of the externship faculty supervisor.

[185] The applicable rules ordinarily will be those from the jurisdiction in which the school is located. In out-of-jurisdiction

III. COMPETENCE

A. Introduction

The duty of competence – lawyers' first professional responsibility under the Model Rules[186] and the duty that, together with the duty of diligence, lies at the heart of the standard-of-care analysis courts apply in legal malpractice cases[187] – requires lawyers to employ "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"[188] of their clients.

The duty applies with equal force to both novice and seasoned practitioners.[189] In fact, courts hold fledgling attorneys to the same standard as their much more experienced colleagues,[190] apparently

---

externships, though, the ethical rules of the jurisdiction in which the externship placement is located will apply.

[186] MODEL RULE 1.1. The Model Rules' duties of competence (MODEL RULE 1.1) and diligence (MODEL RULE 1.3) replace the Model Code's professional mandate of zealous advocacy (MODEL CODE DR 7-101) and admonition against a lawyer's "hand[ling] a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it" (MODEL CODE DR 6-101(A)(1)); "handl[ing] a legal matter without preparation adequate in the circumstances" (MODEL CODE DR 6-101 (A)(2)); and neglecting client matters (MODEL CODE DR 6-101(A)(3)).

[187] *See* RESTATEMENT, *supra* note 13*,* § 16(2) (noting that a lawyer must, in matters within the scope of representation "act with reasonable competence and diligence"); *id*. cmt. d ("In pursuing a client's objectives . . . the lawyer must be competent to handle the matter, having the appropriate knowledge, skills, time, and professional qualifications. The lawyer must use those capacities diligently.").

[188] MODEL RULE 1.1.

[189] Christopher Sabis & Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 927 (2002) (noting that "[y]outh does not insulate anyone from charge[s] of incompetence or negligence").

[190] Indeed, at least one court has noted that "[t]he burden of [the competency] rule unfortunately appears to fall disproportionately on younger members of the legal profession who begin their careers as solo practitioners. It is they who are most likely to lack **'**the learning and skill ordinarily possessed by lawyers . . . who perform . . . similar services,' yet be unable to easily 'associate' or 'professionally consult' another lawyer possessing the requisite learning and skill." Lewis v. State Bar, 621 P.2d 258, 261-262 (Cal. 1981) (Bird, J., concurring) (alteration in original) (decided under MODEL CODE DR 6-101).

on the presumption that "law school entrance requirements and bar passage ensure at least a minimal, initial level of competence."[191]

Rule 1.1's mandate can be anxiety-inspiring for law students beginning externship practice,[192] whether they are certified under student practice rules or not.[193] Although many are reasonably confident of their command of the rules of law and procedure covered in their doctrinal courses, and some consider themselves to have strong written and oral communication skills, few are able to articulate a comprehensive definition of lawyer competence.[194] Fewer still would assess themselves as having mastered more than a small subset of the skills identified by commentators and experienced practitioners as essential to competent practice.[195]

---

[191] JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK 101 (1993). *See also* HAZARD & HODES, *supra* note 116, at § 3.2, 3-3 (3d ed. 2001) (tracing the absence of a professional rule requiring competence to the view that bar passage and satisfaction of other entrance criteria provide per se evidence of competence to practice); Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, 63 N.Y. ST. B.J. 34, 35 (1991) (noting that one rationale for requiring bar exam passage as a condition of admission to practice is that "the Bar Exam, as a test of 'minimum competence,' serves to 'protect the public against unqualified lawyers and promote public confidence in the legal profession'"). *But see* Deborah Rhode, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 65 (1994) (noting that an ABA survey indicated that 70% of lawyers agreed that bar exams "[do not] adequately measure the ability to practice law"). In an effort to address this inadequacy, a number of states now include performance tests (*e.g.*, the Multistate Performance Examination) on their bar examinations.

[192] By the second year of law school, when ABA accreditation standards first permit students to earn credit for participation in field placement programs (ABA STANDARD 305, *supra* note 24, section f (1)), law students are generally accustomed to (if not fully comfortable with) accepting critique on both written and oral performance from faculty members. However, students know that in field placement programs, their legal work will have real-world consequences for their clients, and will expose them to critique, not only by faculty members, but also by field supervisors and others outside of the relatively "safe" environment of the law school. This state of affairs tends to provoke at least moderate anxiety in even the most self-confident of student practitioners.

[193] *See* discussion, *supra* note 19, regarding responsibilities of supervising and subordinate lawyers.

[194] That students should have trouble enumerating the components of competent practice should come as no surprise. Although some commentators note "relative agreement among legal academics and the practicing bar regarding the identification of skills that a competent lawyer should have," Joanne Martin & Bryant G. Garth, *Clinical Education as a Bridge between Law School and Practice: Mitigating the Misery*, 1 CLIN. L. REV. 443, 443 (1993), others contend that "[t]here is no agreement among lawyers, consumers of legal services or scholars on what constitutes competent performance, let alone the appropriate criteria for its measurement." Douglas E. Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257, 270 (1976). *See also* George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 433 (1990/1991) ("There is no such thing as competency per se. There are, however, certain generic competencies which would apply to most, if not all, lawyering tasks."). The standard for minimal competence may depend upon the practice setting. *See, e.g.*, Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 480 (1993) (noting higher dissatisfaction with preparation for practice offered in law school among rural practitioners, who "tend to assume more responsibility by themselves sooner than their urban counterparts").

[195] ABA SECTION OF GENERAL PRACTICE REPORT ON LAWYER COMPETENCIES (1991), *reprinted in part in* Steven C. Bahls, *Preparing General Practice Attorneys: Context-Based Lawyer Competencies*, 16 J. LEGAL PROF. 63 app. (1991).

Rather, most students see their externships as vehicles for both *defining* and *developing* competence, through "guided participation"[196] in the real work that lawyers do.

1. *The Externship as Vehicle for Defining and Developing Competence*

The first step toward achieving any goal is defining it. Where the broad goal is developing the knowledge, skill, and professional habits necessary for the competent representation of clients, the definitional question is fairly straightforward: exactly *what kind and quality* of "knowledge, skill, thoroughness and preparation" really *are* "necessary for the representation" of clients in particular sorts of matters?[197]

The Rule 1.1 Comment offers only limited guidance. Comment 1 notes as factors relevant to a determination of competence "the relative complexity and specialized nature of the matter, the lawyer's general experience**,** the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." Comment 2 points to certain skills (*i.e.*, the analysis of precedent, the evaluation of evidence, and legal drafting) as "important legal skills . . . required in all legal problems" and suggests that the "most fundamental legal skill consists of determining what kind of legal problems a situation may involve . . . ."

Comment 2 does offer at least some comfort to the novice professional. It notes that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type

---

[196] Brook K. Baker originated this simple, but wonderfully descriptive term in *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLIN. L. REV. 1 (1999). Baker explains his theory of ecological learning as "suggest[ing] that there are certain forms of participation, a certain quality of interactions, and a number of different interpersonal connections in the workplace that facilitate competence and reproduce a community of practice. This theory offers the metaphor of guided participation, participation that is measured by the degree to which one is permitted to engage in the valued, authentic activities of a practice domain and permitted to forge workplace connections that count." *Id.* at 4 (internal citations omitted).

[197] Defining the universe of competencies required by lawyers in general practice is even more challenging. *See* Bahls, *supra* note 195, at 66 ("There is a surprising dearth of information about the areas in which general practice attorneys use their skills, perhaps because by definition a general practice attorney is one with a broad practice who puts few limitations on subject matter or type of client.").

with which the lawyer is unfamiliar" and announces reassuringly that "[a] newly admitted lawyer can be as competent as a practitioner with long experience."

However, neither Rule 1.1 nor its Comment offers a direct answer to our straightforward, definitional question.

Not surprisingly, legions of commentators have moved courageously into this void, crafting both general definitions of competence[198] and careful enumerations of the various "skills" and "knowledge" components of competent practice.[199]

The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, more commonly known as *The MacCrate Report*,[200] is among the most comprehensive (and oft-cited) of such offerings. The MacCrate Report identifies ten fundamental lawyering skills and four core lawyering values "with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client."[201] It points to two skills – problem-solving and legal analysis and reasoning – as the "conceptual foundations for virtually all aspects of legal practice"[202] and posits eight other fundamental skills as similarly essential: legal research; factual investigation; communication (both oral and written); counseling; negotiation; litigation and alternative dispute-resolution procedures; organization and management of legal work; and recognizing and resolving ethical dilemmas.[203] The

---

[198] MOLITERNO & LEVY, *supra* note 191 (noting that "[t]he duty of competence contemplates that a lawyer will have basic knowledge of the law, ability to learn the law by doing research, and basic skills of lawyering"); William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 226-27 (1996) (contending that, with curricular reform, law schools can graduate competent "students who know basic legal doctrine, possess certain core lawyering skills, and have experience using this knowledge and skill to perform a reasonable range of lawyering tasks" and identifying "legal analysis and effective communication" as core lawyering skills).

[199] Alice Alexander & Jeffrey Smith, *Law Student Supervision: An Organized System*, 15 NO. 4 LEGAL ECON. 38, 43-44 (1989) (offering a detailed list of "basic competencies essential to becoming an effective lawyer[,]" which, when analyzed as part of the student's self-assessment, help the student to develop or refine skills).

[200] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Robert MacCrate ed., 1992) [hereinafter MACCRATE REPORT].

[201] *Id*. at 125.

[202] *Id*. at 135.

[203] *Id.* at 138-140.

MacCrate Report also recognizes the importance of substantive legal knowledge[204] to competent practice.

Some commentators have taken an even broader view, including as elements of competence what many would categorize as personal rather than professional attributes. Professor Critchlow, for example, has urged that "[c]haracter traits are important dimensions of lawyering competency and should be evaluated as such**.**"[205] Others have identified "mutual understanding and tolerance" as ethically required practice skills, while noting that these skills are "often deployed defensively – to remove competence-impairing barriers**.**"[206]

Skills catalogues like that presented in the *MacCrate Report* can be helpful in focusing students' attention on the scope of substantive knowledge and range of skills and practice habits embraced by Rule 1.1's duty of competence. However, through their work with supervising attorneys and judges, through their observations of and interactions with others at their field placements, and through reflection and discussion with faculty supervisors and seminar colleagues, externship students ultimately begin to construct their own understandings of what competent practice requires.

The primary thesis of the *MacCrate Report* is that law school education is just one part of the much broader process of professional education, which properly takes place in a continuum beginning

---

[204] *Id.* at 207-212.

[205] Critchlow, *supra* note 194, at 434 (discussing student immaturity and emotional instability as factors that may weigh in favor of a clinical teacher's more interventionist stance).

[206] Joan L. O'Sullivan, Susan P. Leviton, Deborah J. Weimer, Stanley S. Herr, Douglas L. Colbert, Jerome E. Denise, Andrew P. Reese & Michael A. Millemann, *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLIN. L. REV. 109, 133 & n. 59 (1996) (noting that these skills "help lawyers to identify how opposing counsel, decisionmakers, witnesses and others are 'different' from them, which is the first step in enlisting the other as a cooperative partner or persuading the other"). *See* DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 18-31 (2004) (discussing motivation in lawyer-client dialogues, and positing seven "inhibitors," which impair lawyer-client communication, and five "facilitators," which help to overcome inhibitors and encourage meaningful counseling dialogues; among the facilitators the authors urge lawyers to incorporate into all lawyer-client dialogues are recognition of the client's help or cooperation and empathic understanding of the client's feelings, experiences, and behavior).

long before a law school and continuing throughout each lawyer's professional career.[207] The *Report* acknowledges that most prospective lawyers will not have acquired all of the requisite lawyering skills and values before admission to the bar.[208] Rather, law schools and the practicing bar share responsibility for helping law students and new entrants into the profession to develop competence.[209]

2. Competence Concerns from the Viewpoints of the Externship Stakeholders

Commentators, educators, practitioners, and law students are all in general agreement that clinical education plays an important part in moving law students along the competence continuum.[210] Through simulation, observation, carefully supervised participation, and reflection, externship students, like their in-house clinical colleagues, acquire the skills and values that allow them to honor their Rule 1.1 duty to provide competent representation to their clients.

However, sending students away from the law school to assume lawyering roles without direct faculty oversight involves special considerations, not least among which are concerns about the adequacy of supervision in off-campus placements and the risk that students will learn lawyering skills from incompetent or unethical role models.

a. *The Extern's Perspective*

---

[207] MACCRATE REPORT, *supra* note 200, at 3. *See* Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 89 (1994) [hereinafter MacCrate, *Preparing Lawyers]*. Both the Model Rules and the Model Code include express guidance with respect to lawyers' responsibility to maintain competence through ongoing study. *See* MODEL RULE 1.1 cmt. 6 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."); MODEL CODE EC 6-2 ("A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, [and] participating in continuing legal education programs. . . .).

[208] MACCRATE REPORT, *supra* note 200, at 125.

[209] *Id.* at 131.

[210] *See* Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Education and its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509 (2003); Baker, *supra* note 196; Rodney J. Uphoff, James J. Clark & Edward C. Monohan, *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381 (1997); Roy T. Stuckey, *Education for the Practice of Law: The Times They Are a Changin'*, 75 NEB. L. REV. 648, 680 (1996) ("In-house clinics will play particularly important roles in connection with specialty tracks and for students who are expected to enter practice in unsupervised settings."); Leonard D. Pertnoy, *Skills is not a Dirty Word*, 59 MO. L. REV. 169 (1994); Bahls, *supra* note 195.

The average externship student, aware of her ethical duty of competence and eager to impress a supervising attorney or judge, but unsure of the adequacy of her knowledge and skills, may find little solace in Rule 1.1's reassurance that, through study and preparation, new lawyers may be just as competent as lawyers with many years of experience.[211] Nor is she likely to take comfort in proclamations by commentators,[212] and even courts,[213] that she is not alone in her plight.[214] If the student is certified for student practice under some variant of the Model Student Practice Rule, she knows that her dean has attested to her good moral character and competent legal ability, and has certified that she is "adequately trained to perform as a legal intern;"[215] she wants nothing more than to validate that trust. In every case, she knows that she represents not only herself, but also her law school, in the larger legal community. The pressure is on.

It has been our experience that most clinical students, both in-house and externship, do feel pressure, not only to succeed, but also to excel. That pressure, however, is in some respects greater in the externship context. Of course, like her in-house-clinic counterparts, an externship student faces evaluation by a faculty member and by clients as she works to develop her lawyering skills. However, unlike students who enroll in in-house clinics, the extern must test her professional wings almost entirely away from the familiar environment of the law school, and must do so under the supervision and watchful eyes, not only of a member of the law school "family," but also of a judge or lawyer in the larger legal community. From the extern's perspective, this judge or lawyer occupies two distinct

---

[211] MODEL RULE 1.1 cmt. 2.
[212] MACCRATE REPORT, *supra* note 200, at 127 (noting that "many law students . . . lack an adequate understanding of the requirements for competent practice . . .").
[213] Lewis v. State Bar, 621 P.2d 258, 262 (Cal. 1981) ("Despite recent trends in legal education, graduates of law schools . . . are seldom prepared to begin the practice of law on their own.").
[214] *See*, *e.g.*, Uphoff *et. al*., *supra* note 210, at 386 (noting that few beginning lawyers "are competent to begin representing clients [even] when they pass the bar").
[215] *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 REP. OF THE A.B.A. 290, 290 (1969). *See also* McCoy, *supra* n. 10, app. (cataloguing state student practice rules).

roles: supervisor and mentor in the first instance, and direct – or at least indirect – source of future employment in the second.

b. *The Field Supervisor's Perspective*

Whether students are certified for student practice[216] or not, the attorney or judge who takes on the role of practice supervisor in an externship program assumes considerable responsibility[217] for helping students to develop the skills they will need "before assuming ultimate responsibility for the representation of a client."[218] The field supervisor, for example, identifies the universe of lawyering assignments available to the extern at the placement, and sequences those assignments to allow the student both to build upon existing competencies and to develop new skill sets. By working with the field supervisor and others on the legal team at the externship placement, the extern not only gains a much broader and deeper understanding of substantive law and procedure, she also begins to connect the lessons learned in the law school classroom to the real work that lawyers do.

The field supervisor's stake in helping students to develop competence is significant; after all, students assigned as externs to a law office work under the license of the supervising lawyer at that office. It is the supervising attorney who signs (or at least co-signs) the pleadings prepared by the legal services extern, and the supervising judge who signs the opinions drafted by the judicial extern. It is the supervising lawyer or judge (or judicial clerk) who may have to scramble to make a deadline if an extern does not possess the skills or knowledge required to produce useful work product in a timely

[216] Where law student externs are certified for student practice under a rule that tracks the ABA Model Student Practice Rule, the field supervisor also assumes "personal, professional responsibility for the student's guidance and for supervising the quality of the student's work." *ABA Model Student Practice Rule*, 94 REP. OF THE ABA 290 (1969). As one commentator notes, "[i]n other states, the student practice rules impose 'personal professional responsibility' or 'personal responsibility' on the supervisor 'for the student's work.'" Chavkin *supra* note 9, at 1520. In this provocative article, Professor Chavkin discusses the difference between personal responsibility and professional responsibility, and argues that most student practice rules do not require the formation of a lawyer-client relationship between the clinical supervisor and the client.

[217] *See* discussion *supra* note 19, regarding responsibilities of supervising and subordinate lawyers.

[218] MACCRATE REPORT, *supra* note 200.

fashion. It is the supervising lawyer or judge who, under the Model Rules and the Model Code of Judicial Conduct, is ultimately responsible for ensuring that the extern's work at the placement complies with applicable professional norms.

c. *The Faculty Supervisor's Perspective*

Although the professional rules do not make faculty supervisors guarantors of student performance, externship faculty do have important roles to play in assisting students in developing professional competence. They also have important responsibilities to field supervisors, to their externship programs more generally, and to their parent institutions.

As noted in our discussion of conflicts issues,[219] externship programs vary in the roles that students, placement site supervisors, and faculty supervisors play in placement selection. At some law schools, faculty supervisors play a central role: they meet with prospective students to discuss prior experience, professional goals, and placement opportunities; they call prospective field supervisors to arrange interviews for student applicants, or "matches" between students and established placements; and they develop new placements where the existing roster of options does not include opportunities suited to particular students' interests. At the other extreme, students identify and arrange their own placements, with faculty supervisors performing only a minimal monitoring function with respect to the placement process, perhaps forwarding program information to prospective supervisors once students have secured their agreement-in-principle to participation. Somewhere in the middle are programs that provide students with historical information about the preferences and performance of supervisors at established placement sites, but leave to the students the process of applying to those supervisors for placement.

[219] *Supra* note 182 and accompanying text.

As program design shifts away from faculty involvement and toward student initiative in the placement process, the responsibility of field supervisors and students for assessing their compatibility increases. However, in programs where externship faculty perform what we will call "full-service" matchmaking functions, faculty supervisors shoulder much of the burden of balancing placement site requirements and learning opportunities, on the one hand, against existing student competencies and learning goals, on the other. Under this model, the faculty supervisor assumes primary responsibility for identifying both an appropriate learning environment for each student and an appropriate student for each learning environment.

As experienced externship faculty know, the broad range of law student interests, aptitudes, and abilities can make arriving at a good match for every student challenging. When we factor in the broad range of placement options available in many externship programs, the task of pairing students with field supervisors becomes even more complex.[220]

Where an externship program operates under the "full-service" matchmaking model, the faculty supervisor's responsibilities in this regard are significant. She must begin by exploring with students their educational and professional goals and their substantive and geographic preferences. Then, mindful not only of student qualifications and preferences and placement site characteristics and requirements, but also of any actual or potential conflicts,[221] she must identify a suitable placement for each student. In many instances, she ultimately will contact supervisors herself to arrange placements.

At all times, the faculty supervisor's goal is to match students with placements that will

[220] *See* discussion *supra* note 67.
[221] *See* discussion of conflicts in externship practice, *supra* Part II.

challenge them without demoralizing them.[222] Unlike an in-house clinician, though, who can make adjustments to accommodate for demonstrated student aptitude and ability as the semester progresses, the full-service faculty supervisor must make fairly reliable, *ex ante* assessments with respect to a number of factors. Her errors in judgment (in placing a student in an office that requires much stronger writing or oral communication skills than a student possesses or could expect to develop quickly, for example) may expose all of the players – not only the extern, her field supervisor, and their placement site clients or constituents, but also the externship program, and the law school itself – to considerable harm.

As is the case when confidentiality and conflicts issues are in play, where competence is at the fore, externship faculty's status as an appropriately curious outsider with respect to their students' lawyer-client relationships creates both challenges and opportunities. On the one hand, faculty supervisors must deal with inevitable concern about what we will term the "gosling phenomenon:" the tendency of newly hatched lawyers to imprint on the first mature lawyer they see.[223] If that first role model is competent, no problem ensues. If not, the novice lawyer may develop any or all of a wide assortment of bad practice habits that, because of new lawyers' reluctance to question early role

[222] As Brook Baker notes, students learn best when asked to perform work within their general level of ability, "within reach of their present competence but slightly beyond their level of total comfort and mastery." Brook Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 326 (1994). Students learn best, too, when their workplace supervisors "assign work that is challenging but doable, work that is neither too simple nor too difficult, work that is at the fringe of the student's comfort zone – in the 'zone of proximal development' – where real learning is likely to take place. For most students, based on their first year of law school, their initial comfort zone is limited to research and writing, but it quickly expands to other less familiar and more complicated areas." Baker, *supra* note 196, at 71 (citations omitted).

[223] Coauthor Cindy Slane coined this phrase shortly after beginning her clinical teaching career, to highlight for prospective externship site supervisors the importance of primacy (here, early role modeling) in professional development. *See also* John M. Burman, *The Role of Clinical Education in Developing the Rule of Law in Russia*, 2 WYO. L. REV. 89, 107-108 (2002) ("It is only natural . . . that a budding lawyer watches most carefully and imitates most closely the first lawyer with whom he or she comes into significant professional contact"); Uphoff *et al*, *supra* note 210, at 406-07 ("[P]owerful professional experiences early in a career seem to influence the development of cognitive and effective processes through which young attorneys filter their future professional experiences.[fn90] . . . [T]he progress and professional development of these law students and novice lawyers is heavily influenced both by the nature of their early professional experiences and by the quality and attributes of the lawyers from whom they initially learn about the practice of law.").

models,[224] may be very resistant to subsequent correction.[225]

On the other hand, because of their distance from casework[226] and freedom from teaching the lawyering skills students will soon deploy in the service of client interests,[227] externship faculty are uniquely positioned to focus on student needs,[228] facilitate reflection about ethical issues,[229] and encourage the kind of systemic critique[230] that will encourage students not only to maximize the educational value of the time spent at their placements, but also to discharge their ethical responsibility to improve the profession.[231]

These are the unique competency issues with which the participants in externship programs routinely engage. The scenarios that follow bring these issues into high relief**.** Our discussion will focus on examining the ethical duties of each of the players in the externship drama where competence

---

[224] *See* Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship between "Academic" and "Ecological" Clinical Education*, 3 CLIN. L. REV. 337, 406-414 (1997) (discussing a student's experience involving the "difficult and not infrequent problem of correcting an oversight by his supervisor").

[225] *But see* Baker, *supra* note 196, at 15-16 (discussing a student's ability to delineate a role model's good practice from bad – enabling supervisors to serve not only as "models for emulation," but also for "avoidance"); Daniel J. Givelber, Brook K. Baker, John McDevitt, & Robyn Miliano, *Learning through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1 (1995) (finding only four variables, none of them quality of supervision, statistically significant in predicting students' assessment of the quality of the learning experience at their externships).

[226] Because the externship faculty supervisor maintains distance from the demands of producing legal work product at the placement site, the faculty supervisor can bring an independent view to the casework, relinquish control of the learning agenda to the student, and independently raise issues of interest that are not directly related to the case. Seibel & Morton, *supra* note 8, at 417-418 *See also* Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLIN. L. REV. 527, 544 (1999) ("[T]he field instructor is neither the ideal person nor in the ideal position to sponsor the fullest range of learning. Rather, the faculty member, with expertise as an educator and objective distance from the practice setting, should help the student critically evaluate his experiences . . . . As someone not directly involved in the legal institutions encountered, the faculty member should be able to study them objectively with the student. The faculty member can assist the student in understanding the field supervisor's own role definition within the legal system in a way no one else could.").

[227] *See* Seibel & Morton, *supra* note 8, at 420 ("[T]he externship teacher may be freer than the in-house clinician to devote teaching time to broader issues, because he or she may have less responsibility for conveying the elements of the discrete skills the students must soon deploy on a particular case.").

[228] *See* Hellman, *supra* note 34, at 615 (discussing, as among the benefits of special courses for students in field placements, providing a "mechanism through which students' feelings can be elicited and confronted").

[229] *See* Bloch, *supra* note 3, at 279 (suggesting that "[d]isengagement from the client enhances the clinician's ability to provide the student with a balanced approach to [ethical issues];" thus, "[t]he clinician can concentrate on working with the student to develop a long-term framework for responding to ethics issues without the burden of personal supervisory responsibility for the case, the client, or the student's lawyering conduct."). *Id.*

[230] Seibel & Morton, *supra* note 8, at 419-420.

hangs in the balance.

B. *Case Scenarios*

1. *Sharon's Duty to Seek (and Her Field Supervisor's Duty to Provide) Supervision on an Assignment in an Unfamiliar Substantive Area*

A field placement supervisor in a private law firm gives Sharon, a law student intern, a research assignment with the following instructions: "I got a call over the weekend from a woman who needs some estate planning advice. She's pretty sure that her mother will have to go into a nursing home soon. Her mother doesn't have much by way of cash reserves, but Marilyn says she and her mother both want to do whatever they can to avoid selling the family house to pay the nursing home bills. They hope there's a way keep the house in the mother's estate for the children and grandchildren. I don't know anything about this area of the law; I hated trusts and estates in law school, and I've done my best to stay clear of this stuff since then. Why don't you see what you can find while I'm away on vacation, though, because this client is my neighbor and I promised we'd have an answer for her next Monday. Don't worry; I'll be out of touch for the rest of the week, but I get back from my rafting trip on Sunday evening, and I'll take a look at what you've got on Monday morning."

Sharon is not completely sure that she understands the assignment, but her supervisor is in a hurry to get out of the office, so there is no time for assignment clarification. She sets to work, producing a memorandum of law on the topic as she understands it. The assignment is very time consuming; in order to finish it by the deadline, Sharon has to miss two classes and cancel her plans to go into the city with her sister to see a play on Saturday evening. She winds up working almost twenty hours more than the eighteen hours she had scheduled for her externship during the week.

When Sharon gets to the office on Monday, her supervisor is gathering documents for a hearing unexpectedly calendared for 9:30 that morning. He glances quickly at what Sharon has prepared, then says, "This looks good. Why don't you put everything you say here into an advice letter from me to the client; I'll sign it when I get back from court, and we'll send it out." At her externship seminar meeting on Tuesday, Sharon recounts her experience and repeats the lawyer's words of praise with some measure of pride; after all, he was so impressed with her work that he used it to advise a client!

In fact, although neither Sharon nor her supervisor can be certain of this fact at this point, the conclusions Sharon reached are completely accurate and fully in accord with governing law.

This scenario captures a number of the competence concerns that animate externship practice. At the outset, we should agree that Sharon's desire to impress her supervisor with her ability to work independently on a challenging research assignment is understandable, as is her obvious pleasure in his

[231] *See* MODEL RULES, Preamble sec. 6 ("As a public citizen, a lawyer should seek improvement of the law, access to the

satisfaction with her work product. Like many externship students, Sharon sees her field supervisor not only as a supervisor and mentor, but also as a potential employer. If his firm is in a position to add a new associate in the near future, Sharon assumes that a candidate's demonstrated self-reliance will factor favorably into the hiring decision.

The supervisor's acknowledged paucity of knowledge[232] of the relevant legal area, in and of itself, does not necessarily foreclose representation. Recall that although Model Rule 1.1 requires lawyers to provide competent representation to clients, the Rule 1.1 comment advises that "[a] lawyer can provide adequate representation in a wholly novel field through necessary study . . . [or] through the association of a lawyer of established competence in the field in question."[233] The Model Rules, however, require both Sharon and Sharon's supervisor, as a condition of representing the client, either to *become competent* to handle the matter themselves or *to associate or consult with a lawyer who is competent* to handle the matter.[234]

Our natural sympathies may lie with Sharon as the novice too inexperienced to be held accountable if her work had proved to be less than competent. Sharon's supervisor, after all, failed to provide guidance when assigning the project, was inaccessible for consultation and feedback while Sharon worked on the project, and barely scanned Sharon's work product prior to adopting her conclusions as his own. Any one of these practices alone raises serious concerns under Model Rules 5.1 and 5.3 about the adequacy of supervision in this instance, and more generally, about the firm's

---

legal system, the administration of justice and the quality of service rendered by the legal profession."); MACCRATE REPORT *supra* note 200, at 216-17.

[232] For a helpful review of judicial authority addressing the knowledge necessary for the competent representation of clients, see Sabis & Webert, *supra* note 189.

[233] MODEL RULE 1.1 cmt. 2. Although the Model Code likewise prohibits a lawyer from "[h]andl[ing] a legal matter which he knows or should know that he is not competent to handle," and from "[h]andling a legal matter without preparation adequate in the circumstances" MODEL CODE DR 6-101(A), it also permits a lawyer to undertake to represent a client in a matter outside of the lawyer's established zone of competence if he can "associat[e] with him a lawyer that is competent to handle it" *id.,* or if, "in good faith [the lawyer] expects to become qualified through study and preparation, as long as such preparation would not result in unreasonable delay or expense to [the] client." MODEL CODE EC 6-3.

[234] MODEL RULE 1.1 cmt. 1.

policies and procedures with respect to ensuring the ethical conduct of subordinate lawyers and non-lawyer assistants.[235] It would also appear that, unless one of the supervisor's rafting companions was a trusts and estates lawyer who spent evenings by the campfire edifying the group about the state of the law with respect to Sharon's issue, Sharon's supervisor could not possibly have discharged his independent ethical duty of competence.

Sharon's supervisor, though, does not bear sole responsibility for the supervisory breakdown here: every supervisory interaction is a two-way street. In the guise of asking even the most basic questions about her new assignment ("How long should this project take?" "May I consult with another lawyer or one of my professors if I need guidance while you are away?"), Sharon could have begun a conversation with her supervisor about both her time constraints ("Remember, I'm doing a four-credit externship, so I'm here for only eighteen hours a week") and her lack of expertise in the subject area ("I don't take Trusts and Estates until next term, so my learning curve on this project is going to be pretty steep"). By submitting a research log[236] with her memo upon her supervisor's return, and asking specific questions about her approach to the assignment and the sources she consulted, she could have invited a more meaningful exchange as to the adequacy of her efforts to identify all relevant authority

[235] *In re* Yacavino illustrates the risks inherent in such a "hands off" approach to the supervision of new lawyers. Yacavino, who was assigned to work in an outlying office of a twenty-lawyer firm, was assigned to handle an adoption case, but did nothing to advance the child's interests for a year. When he left the firm, he remained involved with the case, but continued to do nothing on the file. Finally, he told his client that the adoption had gone through, and forged a court order to that effect. In disciplining the lawyer, the court condemned the law firm's "sink or swim" attitude, noting that the "respondent was left virtually alone and unsupervised . . . . [in an office] lacking the essential tools of legal practice . . . . Had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident might never have occurred." *In re* Yacavino, 494 A.2d 801, 803 (N.J. 1985).

[236] Keeping track of sources of authority consulted and key numbers and search terms used makes sense for new and experienced lawyers alike. Not only is a research log a handy tool for verifying that no important stone has been left unturned by an intrepid researcher, but the log also will allow the subordinate lawyer to respond in detail to the first question a supervisory lawyer will ask if the subordinate reports that her efforts to answer the question presented have yielded no applicable authority: "Where'd you look?"

("I've attached copies of the relevant statutes and cases and a log of the other sources I consulted so you can review it to make sure I haven't missed anything").[237]

Although Rule 5.2(b) does shield the subordinate lawyer who defers to a supervisory lawyer's "reasonable resolution of an arguable question of professional duty,"[238] it does not protect a subordinate where there can be no dispute about what the professional rules require. In Sharon's case, the underlying professional obligation at issue is the duty of competence, and the ethical questions are whether her supervisor's conduct – giving a research assignment to a law student intern, offering her no guidance as she worked on the assignment, and rendering legal advice to a client based on her research and analysis without conducting an independent review of the authority on which her conclusions relied – was competent in and of itself, and whether it constituted a reasonable effort to ensure that Sharon's conduct conformed to that professional obligation.[239]

Under the ethical rules,

> [t]he subordinate's permission to defer to the supervisor's resolution (within the meaning of Rule 5.2(b) disciplinary immunity) is dependent upon the reasonableness of the resolution . . . . If the level of supervision provided is inadequate, Rule 5.2(b) does not permit the [subordinate] to accede to the supervisor's failure to provide reasonable supervision.[240]

---

[237] The importance of taking steps to ensure careful supervision was highlighted in a Connecticut case in which a subordinate lawyer submitted work product for a corporate client for review by a partner. Like junior lawyers in big firms everywhere, the associate assumed that where all's quiet, all's well: she relied on the partner's silence as an indication that her work was competent. In fact, she had incorrectly concluded that an important regulatory requirement did not apply to the client, with the ultimate consequence of noncompliance with this requirement being that the state's banking commissioner entered a final cease-and-desist order forcing the client out of business. Noting with approval the trial court's holding that the conduct of the Schatz & Schatz lawyers involved in this representation constituted malpractice, a holding not challenged on appeal, the Connecticut Supreme Court pointed out that the trial court reasonably could have concluded that the associate's passive reliance on the partner's silence (*i.e.* her assumption that "somebody was . . . watching, taking care of looking at my work") "departed from the applicable standard of care." Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff, and Kotkin, 717 A.2d 724, 730 (Conn. 1998).

[238] MODEL RULE 5.2(b).

[239] Although we have recommended that placement supervisors and externship faculty treat law student externs as subordinate lawyers for purposes of ethical analyses, if Sharon is functioning as a law clerk rather than as a student-lawyer, her supervisor's responsibility is somewhat different. *See* discussion *supra* note 19, regarding responsibilities of supervisory lawyers with respect to subordinate lawyers and non-lawyer assistants.

[240] Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 299, 301 (1994).

Where the subordinate does not possess the legal knowledge or skill required by Rule 1.1, or does not have the time to prepare adequately for the representation,[241] the subordinate's independent duty of competence requires that she take steps to remedy that situation.[242] As one commentator notes, "lack of time and skill fall outside of the scope of those arguable questions to which a [subordinate lawyer] can defer to the judgment of a supervisor because the supervisor is not in as good a position to [judge objectively] the situation as is the [subordinate lawyer]."[243]

A related question concerns the steps to be taken now that the field supervisor has signed Sharon's letter and sent it to the client. Should Sharon take any further action with respect to this matter? Should she approach her supervisor and ask him to consult an experienced trust and estates lawyer to confirm her conclusions? Should she just cross her fingers and hope for the best?

The temptation to leave well enough alone will be strong.[244] After all, Sharon was careful in her research and her supervisor, not Sharon, signed the advice letter to the client. The ultimate responsibility is now his. Sharon knows, though, that by his own admission, her supervisor has no independent knowledge of the substantive law in the area. She knows, too, that he engaged in only a cursory review of her work product, and made no independent effort to review her research in order to confirm her conclusions. There remains a very real risk that an undetected flaw in her analysis could

[241] MODEL RULE 1.1 cmt. 1 (whether a lawyer "employs the requisite knowledge and skill in a particular matter" will depend in part upon "the preparation and study the lawyer is able to give the matter").
[242] Miller, *supra* note 240, at 299 ("If the subordinate lacks the time, training, resources, or expertise to represent the client competently, or if the subordinate is not receiving adequate guidance or supervision in the handling of clients' matters, the subordinate is obligated to correct that situation to avoid potential ethical breaches.").
[243] *Id.* at 324, n. 183 (citing Leonard Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259, 306 (1985)).
[244] *See id.* at 324, n. 182 ("The performance pressure and 'practice shock' that a new lawyer feels, as well as having a limited benchmark with which to compare his or her situation, may aggregate to create a deferent attitude.").

result in significant harm to the client. The better course is to engage in this discussion with the supervising attorney.[245]

Like the scenarios we address in other sections of this paper, Sharon's experience can provide rich fodder for class discussion. Sharon likely will find an empathetic audience, as other students almost certainly have faced similar dilemmas. Her story implicates a number of broad professional issues related to competence, not least among which is the conflict between the ethical duty of competence, which implicitly requires lawyers to control workload to ensure that they will have adequate time to prepare for representation, and the economic pressure on lawyers in many practice settings – particularly solo practitioners and junior lawyers in firms of all sizes – to carry heavy caseloads and generate billable hours.[246] It raises other, more nuanced questions as well – such as whether, given that Sharon actually *did* provide competent advice to the client (supervisory vacuum notwithstanding), Sharon's supervisor's conduct nevertheless could – or should – expose him to discipline for violation of the supervision requirements set forth in the professional rules. The risk, unfortunately, is that Sharon's competent performance will reinforce her supervisor's hands-off approach to supervision, reassuring him that there is little risk in leaving Sharon to her own devices on future projects.

2. Jeremy's Duty to Decline Representation Where Time Constraints Will Prevent Competent Performance

[245] Initiating this conversation, though, may be difficult, particularly if Sharon's early interactions with her practice supervisor have not established a framework for open communication. *See* Hellman *supra* note 34 (examining the role law office work played in developing law students' professional values). Although Hellman's study lacks empirical reliability, its results are nonetheless enlightening, particularly the author's review of student journals for evidence of a relationship between intern and supervisor that might stimulate consideration of issues of professional responsibility. Of the eighty-one student journals analyzed, entries in only six revealed open channels of communication between interns and placement supervisors. *Id.* at 572.

[246] That tension has prompted associates in more than one large law firm to comment that the only important decision required of them during the first year or two of practice is whether to appear lazy or stupid. If the associates bill accurately, partners will judge them as stupid – how could anyone need twenty-five hours to research one legal issue and write an eight-page memo? If they "write off" their time to what they judge to be appropriate totals, the partners will conclude that the associates are not working hard enough to justify the inflated salaries they are collecting.

Jeremy, who is assigned to a prosecutor's office for his criminal justice externship, leaves an anguished voicemail message for his faculty supervisor asking if he can stop in to talk before the professor's evening class. When they meet, Jeremy is obviously upset. He tells his professor that when he arrived at his placement earlier that day, one of the lawyers in the office greeted him by asking if he had ever done a competency hearing. "No, I haven't," Jeremy responded truthfully, "but I did sit in on one competency hearing at the beginning of the semester."

"Good," the lawyer replied, "come with me. You can do the one that's on now. All you have to do is ask the psychiatrist . . . ." As they walked quickly toward the courtroom, the prosecutor rattled off a series of questions and offered a thumbnail sketch of the facts of the case. Jeremy did his best to make mental notes.

The hearing was due to begin in fifteen minutes. Jeremy barely had time to read the police report and the arrest warrant before the bailiff called court into session.

Jeremy felt trapped, he reports to his professor. He had been at his placement for five weeks and had not yet been on his feet before a judge; other students in his class had already conducted their first motor vehicle trials. In fact, only the day before, Jeremy had expressed to his field placement supervisor his eagerness to assume a more participatory role. His supervisor must have put out word of his impatience to other lawyers at the office. Jeremy feared that if he turned down this opportunity, he would be perceived as lacking self-confidence or, at the very least, as being ungrateful. He might not get another chance soon.

Jeremy tells his professor that, although he was extremely nervous as the hearing began, he did "okay" at the outset, introducing himself to the court, identifying himself as a certified law student intern, calling the state's witness, and asking the witness to identify herself and recite her educational and employment credentials for the record. When his first question about the psychiatrist's assessment of the defendant drew an objection, though, Jeremy drew a blank: no matter how he tried, he could not frame the non-leading question he needed to ask.

After the judge sustained three successive objections, the prosecutor stood and attempted to take over the examination. The judge, however, was not buying: "I'm sorry, counsel," she said, casting a challenging gaze in the prosecutor's direction, "but I believe the law student <u>intern</u> is conducting the direct."

Jeremy somehow got through the rest of the direct examination, but only by repeatedly bending down as the witness was answering his questions so that the prosecutor could whisper successive questions into his ear. "I was mortified," Jeremy says.

Our first scenario concerned a research assignment in an unfamiliar substantive area. There seemed no question but that Sharon's supervisor did not provide competent supervision: he did not supply appropriate guidance when he gave Sharon the assignment; he was completely unavailable for

consultation and feedback as the project progressed; and he offered only a perfunctory assessment of her work upon its completion. However, because Sharon's law school education had provided her with various opportunities to develop the foundational skills required to complete her project – legal research and reasoning and written communication skills – and because she was willing to "clear the decks" of virtually all other activities so that she could allocate adequate time to mastering an unfamiliar substantive area, she somehow managed to provide the client with competent representation.

In Jeremy's case, supervision was much more "direct," although it was obviously inadequate in many other ways. Jeremy's supervising attorney was in the courtroom and was prepared to – and indeed, attempted to – take over when Jeremy faltered. Perhaps she misunderstood the extent of Jeremy's involvement in the previous competency hearing and therefore harbored unrealistic expectations with regard to Jeremy's competence to conduct the psychiatrist's direct examination. Perhaps she views trial-by-ordeal as a professional rite of passage, but expected to be able to rescue Jeremy before he drowned. Because Jeremy was unwilling to voice his concerns at the outset, though[247] – by admitting the depth of his inexperience and declining to conduct the examination[248] – and because he could not allocate adequate time to preparation for the hearing, his performance was obviously, publicly, and very painfully incompetent.

In this instance, even leaving courtroom skills aside, attaining minimal competence would have required that Jeremy read the competency statute, review the leading cases interpreting the statute, review the prosecutor's case file (including all psychiatrists' reports), and interview the psychiatrist who would testify at the hearing. In the ideal situation, Jeremy would have been involved in the case from the outset, with the supervising lawyer monitoring his progress, offering guidance and providing

[247] *See* Miller, *supra* note 240, at 282 ("It may be difficult and awkward for subordinates to confess to supervisors that they need help in performing certain legal tasks.") (citations omitted). *See also* Robert J. Condlin, *supra* note 224, at 403.
[248] *See In re* Yetman, 552 A.2d 121, 124 (N.J. 1989).

feedback at each stage. To help him prepare for his courtroom debut, his supervisor might well have mooted him on each performance[249] and Jeremy would have had the benefit of her thoughtful critique.

Of course, once students are in practice, not every situation will be ideal. Supervision may not be readily available, deadlines will sometimes loom, and new lawyers may have to perform skills that they would prefer to have had more time to practice. The ability to come up to speed quickly in a new area will serve the new practitioner well.

Seminar discussions can help students to develop protocols for identifying available resources and use them efficiently to close skills and knowledge gaps like those that doomed Jeremy in this scenario. If he overcomes his embarrassment and can bring himself to discuss his experience with the class,[250] Jeremy may also find that he was not at all unlike many other new lawyers in his unwillingness to admit that he lacked the requisite skill or knowledge to provide competent representation to a client.[251] Alice Anderson and Jeffrey Smith have surmised that "[t]his reluctance to request help has its genesis . . . in the inherent imbalance of power in the relationship between employers and students, and the universal dread among students of being perceived as incompetent."[252] Discussing the ethical implications of Jeremy's decision can help students to shift the power balance and understand that, in

[249] Critchlow, *supra* note 194, at n. 14 ("Students should not be allowed to fail at a task because they did not understand it or because it had never previously been attempted . . . ."). Critchlow notes that "[t]he clinical teacher's responsibility is to be certain that the student understands what is expected. All tasks should be 'mooted' or simulated before the actual task is performed. The student is entitled to this degree of preparation to increase the likelihood of successful performance." *Id.*

[250] Externship clinicians seem to be in agreement that students benefit where they have assurances of confidentiality with respect to journal entries. Wise clinicians, however, take care to explain the difference between confidentiality and privilege, lest students think that, even without an express request for legal advice from the faculty supervisor, a journal entry enjoys the evidentiary protection of the attorney-client privilege. *See* discussion *infra* note 254. Our assumption, then, is that Sharon's faculty supervisor would approach her privately to address the concerns raised by Sharon's experience and ask if she would be willing share her experience – or authorize the professor to raise a hypothetical based on her experience – with the class.

[251] For instance, one new attorney took on a case for no charge in the expectation that it would be simple. When complications arose, he did not refer the case to another lawyer; instead, he became "afraid of the file," ignoring it and the client's requests for information about the matter. At his subsequent disciplinary proceeding, he insisted that his mistakes were not due to arrogance, but rather to embarrassment over his inability to handle the case. *In re* Yetman, 552 A.2d 121, 123 (N.J. 1989).

[252] Alexander & Smith, *supra* note 199, at 43.

acknowledging incompetence, they can help their supervisors to honor their own supervisory responsibilities.

Jeremy is no doubt acutely aware of at least some of the harm that his decision to forge ahead despite inadequate preparation may have occasioned: the blow to his confidence, his supervisor's disappointment in his performance and embarrassment at her role in his public humiliation, the possibility that the some or all of the players in the drama will draw general conclusions about the competence of students from his law school based on his performance. Class discussion, though, may help to tease out more subtle considerations, such as the special responsibilities of prosecutors in administering justice, the impact of an overwhelming workload on their ability to discharge those duties (would an experienced prosecutor ordinarily have waited until fifteen minutes before court convened to prepare for this sort of hearing?),[253] and the likely impact of what transpired during the hearing on the way the defendant and others in the courtroom view the criminal justice system.

Three final, related questions percolate in these two competence scenarios. All three stand at the intersection of competence and confidentiality rules. First, have both Jeremy and Sharon violated their ethical duty to keep confidential all information related to the representation of their clients by discussing their respective field supervisors' supervisory incompetence with their faculty supervisors? Recent revisions to Model Rule 1.6 would protect both students if their purpose in disclosing the otherwise-confidential information was to obtain legal advice about compliance with the Rules,[254]

---

[253] *See generally* DAVID HEILBRONNER, ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A. (1990).

[254] *See* discussion of confidentiality *supra* part I. Recall, too, that the lawyer's duty of confidentiality is much broader than the attorney-client privilege. While MODEL RULE 1.6(b)(2) would shield both Sharon and Jeremy from ethical liability if they disclosed confidential client information for the purpose of securing legal advice about their compliance with the ethical rules, the Model Rules do not control on the legal issue of whether disclosure to seminar students – rather than solely to supervising faculty who themselves are lawyers – waives the attorney-client privilege, which applies only to matters communicated *in confidence* by the client "for the purpose of enabling the lawyer to render legal service to the client." USCS FED. RULES EVID. RULE 501 ("The attorney-client privilege applies only if the client communicates to the attorney with the reasonable expectation that the communication is confidential. If a person other than the attorney, or an agent necessary to the effectuation of the attorney-client relationship, could with reasonable effort have heard the client's communication when it was made, then the communication as a general rule is not privileged.").

though whether a locally-unadmitted faculty supervisor who provides that advice engages in the unauthorized practice of law is beyond the scope of this article.[255] A related question is whether, given his placement at a legal office that represents only one client (the State), Jeremy can adequately sanitize any recitation regarding his dilemma to permit him to share it with his seminar colleagues without running afoul of confidentiality constraints. Finally, Jeremy's plight, like Sharon's, raises a very serious question as to whether the supervisory inadequacy at issue would obligate a faculty supervisor admitted to practice in any jurisdiction[256] to report the field supervisor to the "appropriate professional authority" under Model Rule 8.3(a).

Like the confidentiality and conflicts scenarios addressed in Parts I and II, our competence vignettes point to the need for protocols to help faculty supervisors, student externs, and field supervisors to deal with competence concerns**.**

C. Best Practices

Our discussion of the lawyer's duty of competence started from the premise that students look to externship experience as a vehicle for both defining and developing competence. All of the externship players share responsibility in this regard, and each can take concrete steps to discharge that responsibility.

1.*Extern Protocols*

Again, *all* externship students, whether certified for student practice or not, must have as much information about their professional obligations as possible, as soon as practicable. Because lawyers'

[255] *See* Lerman, *supra* note 3, at 2302-2303.
[256] *Id.* at 2303.

professional duty under Model Rule 1.1 includes a duty of ethical competence,[257] all entering students, even those who have completed a legal ethics course, should undertake a careful review of the professional rules that govern in the jurisdiction in which they will work.[258] All should remain mindful, as well, that pre-admission misconduct may affect bar admission.[259]

At the outset, each student also should undertake a thoughtful skill self-assessment.[260] Although deciding whether he is competent in a particular area may be difficult for a novice lawyer,[261] engaging in the assessment process will help students to identify developmental areas for focus during the externship semester.[262] Resisting the urge to focus only on areas of existing competency may be difficult: all of us have a natural inclination toward activities at which we believe we excel and a natural aversion toward activities that reveal our inadequacies (this tendency may explain why none of these authors plays the cello). Law students, who see job references and employment opportunities

---

[257] MODEL RULES Preamble sec. 12 ("Every lawyer is responsible for observance of the Rules of Professional Conduct."). Helping students to define and develop ethical competence is a core goal of many externship programs. However, reaching consensus with regard to what ethical lawyers do, how they respond to their clients, how they understand their ethical obligations and how they fulfill them, is not easy. The traditional view of the lawyer is as a zealous advocate, or in William Simon's words, the "neutral partisan" who serves her clients' interests regardless of what the lawyer herself thinks of the client's ends or means. *See* William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WISC. L. REV. 29, 36-38 (1978). More recently, other scholars have begun to challenge this model, suggesting a different conception of what ethical lawyering requires. For these legal ethicists, most notably Deborah Rhode and David Luban, lawyering does not involve suspending personal moral judgment, but exercising it to determine what justice requires, and therefore, what lawyers ought to do on behalf of their clients. According to these scholars, lawyers must take personal, moral responsibility for the consequences of their professional acts. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000) and Luban, *supra* note 28.

[258] In some jurisdictions, students admitted under student practice rules also must certify familiarity with and/or pledge to conform their conduct to the professional rules. *See* ABA MODEL STUDENT PRACTICE RULES, III. F.; *see also* Joy & Kuehn, *supra* note 3, at 499-500.

[259] Joy & Kuehn, *supra* note 3, at 504-505, citing Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 239 (1957) (Frankfurter, J., concurring) (the broad definition of "good moral character" required for admission to every Bar leaves open the possibility that pre-admission conduct may serve as the basis for denying bar admission as long as it has a "rational connection with the applicant's fitness or capacity to practice law").

[260] Many externship programs encourage or require students to engage in self-assessment prior to beginning work at field placements, and have developed self-assessment instruments for that purpose. *See, e.g.,* the Quinnipiac University School of Law Externship Program Skill Self-Assessment, *infra* Appendix.

[261] Sabis & Webert, *supra* note 189, at 917-918 (blaming lawyers' difficulty in determining compliance with the standard in part on the Model Code's failure to define the key term "competence").

[262] Alexander & Smith, *supra* note 199, at 43-44 (observing that self-assessment involves identifying the basic competencies essential to becoming an effective lawyer). The authors offer a list of six general competency areas and questions to assist students in assessing their strengths and weaknesses in each area, and note that participating in the assessment provides points of reference from which to track progress throughout the term of the externship.

hanging in the balance, are no different: understandably, they want to shine at their field placements. More than anything else, they do not want their supervisors to perceive them as incompetent. To the extent, though, that students can embrace externship participation as an opportunity to learn *new* lessons about law and procedure and flex *new* skills muscles, they will be more comfortable in acknowledging their weaknesses,[263] the important first step in developing strategies to address them.

There is ample evidence that where students and supervisors take time at the beginning of the field placement experience to share their expectations, students' later assessment of the educational value of that experience significantly improves.[264] In fact, working together to craft "learning agendas" or "semester plans" that honor mutual expectations does much more than enhance students' perception of the educational value of their externships. It also helps students to develop protocols for future learning[265] by teaching them, first, how to identify gaps in their knowledge and skills sets, and then, how to identify and marshal available resources to fill those gaps.[266] This experience with self-directed learning will serve students well once they have left law school[267] and no longer have the option of

[263] Students are often their own harshest critics, and may be reluctant to share their self-assessments with their supervisors. Where field supervisors are invested in advancing student competence, however, students generally find that sharing information about areas in which they still have "room for improvement" is liberating. If a student does not claim competence in a particular skill set, his supervisor will *expect* him to ask questions and invite critique!

[264] *See* Givelber *et al., supra* note 237, at 34. It is not clear, though, that the students' subjective assessment of the educational value of the externship experience serves also as a valid, objective measure of the extent to which the students are better prepared to provide competent representation to clients by virtue of the externship experience.

[265] *See, e.g.,* Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 284 (1981) ("Clinical education should reach beyond skills training to provide the students with a method for future learning from their experiences."); Seibel & Morton, *supra* note 8, at 415 ("[E]xternships not only provide skills training and concrete experience in an extremely wide range of actual practice settings, but also can be especially effective vehicles for teaching students self-directed learning . . . .").

[266] Alexander & Smith, *supra* note 199, at 43 (noting that self-assessment involves asking two, related questions: what do I want to accomplish, and what are the steps necessary to accomplish it?); Seibel & Morton, *supra* note 8, at 418 (asserting that externships provide "the best opportunities for faculty and students to experiment with the reallocation of control" over and responsibility for the learning agenda).

[267] Seibel & Morton, *supra* note 8, at 419-420 (noting that traditional classroom curriculum does little to accomplish the goal of teaching students to "learn to learn on their own – to develop the ability to analyze their own performances and the performance of others within the legal system . . . . By contrast, field placement teachers have the opportunity to accomplish these objectives by teaching students to use their field experiences to learn reflective thinking.").

simply registering for an elective (*e.g.,* Immigration Law or Environmental Law) in an upcoming semester to remedy an apparent educational omission.

Requiring externship students to collaborate with field supervisors to draft learning agendas confers other important benefits, as well. First, the planning process itself serves as an explicit reminder to field supervisors of both the novice status of student participants (they still have much to learn) and the pedagogical focus of externship participation (they are depending upon their supervisors to help them learn it). By encouraging students to acknowledge and discuss with their supervisors areas of relative "incompetence," the planning process also implicitly empowers students to ask questions, and to request help when they need it.[268] Finally, the learning plan the process produces sets the stage for the exchange of formal and informal feedback to assess student progress in targeted areas as the externship progresses.

Establishing open communication between students and field supervisors can help avoid the sorts of competence problems Jeremy and Sharon experienced. Students must speak up, not only to ask questions, request help, and invite more challenging and appropriate assignments, but also to decline inappropriate projects, such as Jeremy's competency hearing, and alert supervisors when inadequate supervision, assignment overload, or other constraints may threaten competent performance, the situation Sharon faced with the trusts and estates project.[269]

---

[268] Joy & Kuehn, *supra* note 3, at 562 (describing the problem of lack of competence as involving the "classic scenario of an inexperienced lawyer who accepts work beyond her competency and capacity and, when faced with almost certain disaster, continues to dig herself further into trouble rather than seeking help") (*quoting In re* Willer, 735 P.2d 594, 598 (Or. 1987)); Sabis & Webert, *supra* note 189, at 932 (recognizing a theme in disciplinary cases involving competence: "The longer individuals wait [to seek assistance], the worse the situation gets.").

[269] Role-plays may help students develop "safe" ways to convey information about time constraints to supervisors. For example, an "overloaded student" might say to a "demanding supervisor" seeking help with another appellate brief, "Wow! That sounds like an interesting assignment; I'd love to work on it. I'm here on Thursday and Friday of this week, but I still have quite a bit of work to do on the brief for the Owens appeal. I've already made commitments for this weekend, and the Owens brief is due next Thursday, so I probably wouldn't be able to begin work on the new project until next Friday. Is that timeframe okay for you?"

Students should remain mindful, too, of their own powerful roles as reinforcers of supervisory behavior. Behavioral psychologist B.F. Skinner[270] demonstrated scientifically what wise teachers have known instinctively for generations: behavior increases in frequency with positive reinforcement, and decreases in frequency without it.[271] Competent student performance is perhaps the most tangible reinforcer of appropriate supervisory behavior.[272] However, externs also can reinforce desirable supervisory behavior with precisely the sort of reinforcement that students themselves need to develop competence, *i.e.*, timely, accurate, and specific feedback with respect to performance (*e.g.,* "Thank you so much for your detailed comments on my draft; I learned so much from your critique of my contracts analysis!"), and thereby can substantially increase the likelihood that they will receive similarly thoughtful and helpful supervision on future projects.

The relationships that develop between student externs and their field supervisors often continue beyond the term of the field placement. Field supervisors expect to provide bar and employment references, of course, but they sometimes become mentors for life, continuing to help former students to develop competence long after they are admitted to practice by consulting on client matters and offering guidance with respect to career decisions. A formal thank-you note at the conclusion of an externship can set the stage for this kind of ongoing contact, as can a phone call or note upon bar passage ("I just wanted to tell you the good news: I passed! I know that the work I did on those evidentiary issues in the Michaels case really helped me on the Multistate!").

2. *Field Supervisor Protocols*

---

[270] B.F. Skinner, THE BEHAVIOR OF ORGANISMS (Richard M. Elliott ed., 1938); B. F. Skinner, SCIENCE AND HUMAN BEHAVIOR (1953).

[271] *See* Michael Hunter Schwartz, *Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 367-368 (2001) (discussing relevance of behavioral theories to law school curricula).

[272] As in Sharon's case, though, competent performance may risk reinforcing *in*adequate supervision.

Field supervisors have a vested interest in fostering the development of student competence; student *in*competence, after all, has professional and personal implications for supervisors under Model Rules 5.1 and 5.3 and local student practice rules.

Ensuring that students develop the skills and practice habits necessary to produce competent legal work[273] requires collaboration between supervisors and students. What *are* the student's interests and goals for the externship?[274] Is the externship the student's first lawyering experience? Has she worked before in a similar practice setting? Has she had other helpful work experience? How much relevant doctrinal coursework has she completed? What does the student's own self-assessment suggest about areas of strength and weakness? With this information as a starting point, the field supervisor can identify appropriate assignments and activities: projects that respect student interests and goals and

[273] Margaret Martin Barry, *Clinical Supervision: Walking that Fine Line*, 2 CLIN. L. REV. 137, 145 (1995) ("The typical clinical experience places students in the role of attorney, and by doing so places upon them the pressure to understand the implications of the role within the limited time frame of a one or two semester clinical experience.").

[274] An anecdote from early in the teaching career of one of the authors reinforces the value of facilitating a meeting of the minds between student and practice supervisor at the beginning of a field placement semester. Roger, a second-year law student, was assigned to work with an experienced prosecutor in the lower criminal court for what would be his first legal experience. Early in the semester, Roger met with Brian, his supervising attorney, to discuss the goals and objectives he had outlined in his draft learning plan for the term. First on Roger's list of goals was "Learn to try a jury case." His plan for achieving that goal was to "Try a jury case." Although Brian was momentarily taken aback by the learning plan Roger presented, the discussion that ensued provided the foundation for a very successful semester:

> Roger: "Here's my draft of the semester plan I have to turn in to my professor at the end of the week."
> Brian: "Hmmm. I see that you're interested in learning to try a jury case. I have to be honest; we don't often have jury trials at this level, but you're in luck – I have one jury trial scheduled toward the end of the term. Because you haven't had any experience in court yet, I can't let you try it yourself, but I can let you second-chair. You can work on the proposed charges, too, and help with witness prep, and you certainly can observe at voir dire and then voir dire a few prospective jurors. There should be no problem with having you examine at least one or two witnesses, too."
> Roger: "That sounds great. I'll add your ideas to the plan, if that's okay with you."

Had he not shared his goals with Brian, Roger almost certainly would have been consigned to the motor vehicle and misdemeanor dockets – negotiating with pro se defendants and conducting simple trials and perhaps a violation-of-probation hearing or two. Roger would have been reluctant to complain about his assignment (students, in general, do not want to make waves), and Brian would have been left to wonder why Roger seemed less-than-enthusiastic about the externship experience. Fortunately, they talked before that happened.

challenge rather than frustrate,[275] thereby helping the student to progress on the competence continuum.[276]

Supervisors sometimes suffer from what we will call "SMS" – selective memory syndrome. They remember themselves as remarkably competent novices: more careful researchers, more capable writers, and more eloquent speakers (by far) than today's law students. They forget that they, too, began their lives as lawyers unsettlingly close to the bottom of a steep learning curve. They, too, found the Code of Federal Regulations impenetrable and looked with dismay at the supervisory red ink that filled the margins of their early briefs. In all likelihood, they, too, missed objections, asked impermissible questions, and forgot how to lay the foundation for the admission of a business record

---

[275] *See supra* note 222 for a discussion of the importance of assigning projects within a student's zone of learning.

[276] Our expectation that field supervisors generally will tailor workplace assignments to students' goals and interests is tempered, of course, by the realization that all lawyers occasionally – and sometimes frequently – must perform tasks that are neither interesting, nor challenging, nor exciting, but rather tedious, thankless, and even onerous. Externship clinicians understand that externs, like their field supervisors, may have to pitch in to help complete certain placement-site work that just *must* be done. However, field supervisors should remain mindful of the implicit *quid pro quo* of externship participation. Under Interpretation 305-2 of ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, STANDARD 305 (August 1996, 1999) [http://www.abanet.org/legaled/standards/chapter3.html] (last visited 2/23/2004), law students cannot receive compensation for work for which they receive academic credit; therefore, they work at their externship placements without pay. Field supervisors, who enjoy the benefit of student labors, must "pay" student externs with education, ensuring that each student's learning curve remains in the ascendant phase as the externship progresses.

It is precisely on the basis of this *quid pro quo* that the Wage and Hour Division of the United States Department of Labor has concluded that the Fair Labor Standards Act does not apply to students who earn course credit for participation in externship programs. The Department has held that:

=xt

[i]n situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction. Where there is no employment relationship under the FLSA, the minimum wage and overtime pay provisions of the FLSA have no application.

=ft

Wage and Hour FLSA Op. Ltr. 1995 WL 1032495 (DOL WAGE-HOUR) (July 11, 1995). *See* David Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) for a discussion of the six criteria for exempting trainees from the minimum wage and overtime pay provisions of the FLSA: (1) the training must be similar to that which would be given in a vocational school; (2) the training must be for the benefit of the students; (3) the students must not displace regular employees, but work under the close observation; (4) the employer providing the training must derive no immediate advantages from the activities of the students, and on occasion, its operations may actually be impeded; (5) the students must not be entitled to a job at the conclusion of the training period; and (6) the employer and the students must understand that the students are not entitled to wages for the time spent in training. *See also* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947); McLaughlin v. Ensley, 877 F. 2d 1207, 1210 (4th Cir. 1989); Walling v. Portland Terminal Co., 330 U.S. 148, 152-153 (1947). *Compare* Marshall v. Regis Educational Corp., 666 F.2d 1324 (10th Cir. 1981), *with* Marshall v. Marist College 1977 WL 869 (S.D.N.Y. June 30, 1977).

during their first court appearances. Supervisors do their students a great service when, during supervisory interactions, they keep their own early struggles to develop competence in mind.

Supervisors also may forget that students often need much more time than do experienced lawyers to complete assignments. Eager to please, even overloaded students may be reluctant to turn down new projects. Absent supervisory attention to workflow and workload, the result may be incompetent student performance or neglect of other responsibilities.

Students also need and appreciate guidance when projects are assigned, ample opportunity to clarify assignments and receive feedback as work progresses,[277] and thoughtful, respectful critique when projects are complete.[278] Unfortunately, traditional legal education does little to prepare lawyers for these supervisory responsibilities. While business schools include supervision courses in curricular offerings[279] and corporate employers often provide formal training in supervisory skills to employees

[277] *See* Barry, *supra* note 273, at 145, n. 7 ("In order for a student to gain the most from clinical experiences, the student's supervisor needs to be aware of how much and what type of help the student needs given [his or her] current expertise in client representation.").

[278] *Id.* at n. 7 ("[T]he feedback the supervisor gives to the student must meet certain criteria to be effective. The evaluation should be immediate, specific, limited in scope, aimed at the performance not the student, oriented to specified goals, focused on cause and effect, honest, relevant and handled in a non-threatening manner. Reiterated and specific suggestions as to how improvement may be made should be given."). *Cf.* Stephen R. Chitwood, *Effective Assignments and Feedback to Associates,* 23 J. LEGAL ECONOMICS NO. 5, 30 (July 1997/August 1997) ("[P]artners and associates must establish working relationships that provide for 1) the effective communication of work assignments, 2) the appropriate monitoring of assignments as they are undertaken and 3) timely and specific feedback to associates on the strengths and limitations of their work.").

[279] For example, the Harvard Business School currently requires, as part of its Masters of Business Administration Program, a course entitled "Leadership and Organization Behavior," which focuses on "how managers become effective leaders by addressing the human side of enterprise." http://www.hbs.edu/mba/experience/learn/curriculum/requiredcurriculum/term1.html (last visited 2/23/2004). Yale School of Management's Business Administration curriculum requires a course entitled "Leadership," which involves influencing others in a non-coercive manner to direct their efforts toward shared goals, by offering an experiential, practical and theoretical approach to understanding and developing leadership abilities. http://www.som.yale.edu/students/courses/core/coredesciptions2000-01.asp#MGT803b (last visited 2/23/2004).

with managerial responsibilities,[280] few law schools do more than mention supervision in passing, in the context of a discussion of "the Rules in the 5s"[281] during a legal ethics course.

Lawyers who themselves had the good fortune to work with supervisors gifted in the art of critique[282] may have acquired supervisory skills through modeling. Far too often, though, lawyers had only poor supervisors as exemplars, and so either offer critique in harsh terms that abort learning or elect to remain silent in the face of unsatisfactory student performance rather than risk hurting student feelings.[283]

Without question, students can do much to alter the frequency and content of supervisory interaction. They can request clarification and guidance with respect to assigned tasks, they can establish timetables for reporting on progress, and they can invite (and prepare lines of inquiry for) critique.[284] Rules 5.1 and 5.3, though, obligate supervisors to take reasonable steps to ensure student compliance with Rule 1.1's duty of competence. One obvious way that supervising lawyers can fulfill that obligation is by honing their own supervisory skills. The benefits of enhanced supervision will accrue to students (who will become more competent lawyers and, eventually, more competent

---

[280] For example, the Electric Boat Corporation, Quonset Point Facility, "requires all levels of management to complete leadership development and supervisory skills training . . . ." http://www.bmpcoe.org/bestpractices/internal/ebqp/ebqp_32.html (last visited 2/23/04). During the spring of 2004, the San Diego Employers Association will offer a series of twelve courses "to help managers and supervisors develop and apply good management principles in their work." Among the topics covered in the series are "Communicating Effectively," "Coaching & Counseling," "Orientation and Training," and "Performance Appraisal." http://www.sdea.com/pdfs/supervisory_spring.pdf (last visited 2/23/2004).

[281] MODEL RULE 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULE 5.2 (Responsibilities of a Subordinate Lawyer); MODEL RULE 5.3 (Responsibilities Regarding Nonlawyer Assistants).

[282] For an excellent discussion of importance of critique to the development of professional competence, see Richard K. Neumann, Jr., *Perspectives on Legal Education*: *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989).

[283] Supervisors can gain fluency in the language of critique in much the same ways as non-native speakers gain fluency in any new language: by taking pains to develop an expanded vocabulary and by thinking before speaking, choosing words carefully to ensure that the message conveys the intended meaning. For a discussion of the characteristics of effective feedback, see Liz Ryan Cole, *Learning from Supervision, in* OGILVY *ET AL.*, *supra* note 3, at 41-47.

[284] At least one court has expressly recognized a Rule 1.1 duty to seek appropriate supervision. *See supra* note 249 for a discussion of Beverly Hills Concepts v. Schatz and Schatz, Ribicoff, and Kotkin, 717 A.2d 724 (Conn. 1998). *See also In re* Yacavino, 494 A.2d 801 (N.J. 1985).

supervisors),[285] to field supervisors (who will reap very tangible rewards from the increasing competence of their student charges), and, ultimately, to clients and other consumers of legal services.

3.*Faculty Supervisor Protocols*

Faculty supervisors, by supporting students and field supervisors in their common endeavor, also can take concrete steps to help students define and develop competence.

First, externship supervisors can establish clear supervisory standards, publishing them at the outset to all entering students and new supervisors, and periodically thereafter (as "refreshers") to supervisors at established placements. Many law schools distribute program manuals to supervising attorneys and judges, gathering for easy reference information about course goals and requirements, copies of relevant student practice rules,[286] the ABA accreditation standard governing study away from the law school,[287] and guidelines for supervision.[288] Directors can assist field supervisors in developing supervisory skills, whether by providing formal instruction[289] or identifying or supplying other

[285]*But cf.* Givelber *et al.*, *supra* note 225 (finding only four variables, none of them quality of supervision, statistically significant in predicting students' assessment of the quality of the learning experience at their externships).
[286] For comprehensive summaries of student practice rules, *see* McCoy, *supra* note 10, at 756 app., and Chavkin, *supra* note 9, at 1546 app. A.
[287] ABA STANDARD 305.
[288] *See*, *e.g.,* Boston College Law School's Memorandum to Field Supervisors, Quinnipiac University School of Law Externship Supervisors' Packets, and Syracuse University College of Law's Externship Program Manual, on file with the authors.
[289] The Clinical Legal Education Association periodically sponsors training conferences on performance critique for clinical faculty members and field supervisors.

resources.[290] They can also model good supervisory techniques at site visits, inviting the exchange of constructive feedback by framing appropriate questions about goals and placement activities.[291]

Faculty supervisors can offer additional guidance to supervising attorneys by suggesting tasks appropriate for the development of an array of lawyering competencies, *e.g.*, drafting correspondence, performing various types of legal research using both general and specialized research tools, interviewing witnesses, preparing affidavits, drafting confidentiality agreements (which supervisors may then ask students to sign), and meeting with clients or client constituents to gather facts in advance of a contract negotiation.

Efforts to establish good working relationships with field supervisors are critical. Faculty supervisors can encourage supervising attorneys and judges to embrace pedagogical agendas by emphasizing that law faculty see field supervisors as important members of an educational "team" committed to helping new professionals develop the knowledge, skills, and ethical standards necessary for competent practice. Invitations to law school events, receptions in honor of supervising lawyers

[290] Supervisors may be more receptive to law-school-generated materials, such as the supervisor's manual developed by Northeast University's Co-Op faculty, see Alexander & Smith *supra* note 199, or to articles or books prepared for business audiences, than to dense, heavily annotated, theoretical pieces.

[291] The faculty supervisor, for example, might use the site visit to assist a field supervisor who seems reluctant to give corrective feedback to his law student intern by helping him to phrase that feedback in constructive terms. Imagine the following conversation between the faculty supervisor, the field supervisor (John), and Sarah (the intern): "You two have had a chance to work together for nine weeks now, John, and you've mentioned several areas in which Sarah has improved fairly significantly during that time. I'm sure that feedback is very reassuring to you, Sarah; both John and I remember what it was like to be the new kid on the block. There are about six weeks left in the semester, though – are there any other skills that you'd advise Sarah to try to concentrate on between now and the end of the externship, or particular courses you'd suggest that she take next term?" That question invites a constructive response from John: "Actually, I think it would be a good idea for you to spend some time working on your research skills, Sarah. You seem to be fairly adept at finding statutes and cases, but you haven't been as successful finding regulations; my sense is that you may not be very comfortable with regulatory research yet. In corporate practice, it's very important to think not only about statutes and case law, but also about the regulations that may apply to different aspects of your client's operations. Your missing even one regulation or set of regulations could have very serious consequences. We can work on that skill area during the next six weeks, but you probably should think about taking a course that will give you additional opportunities to do that kind of work before you graduate."

and judges,[292] and certificates (suitable for framing) acknowledging participation as practice supervisors[293] all help to reinforce the message that field supervisors occupy important teaching roles, respected by the academy.

Externship faculty can support students' efforts to define and develop competence by providing them with tools for self-assessment,[294] by reassuring them that both faculty and field supervisors understand that they are not yet full-fledged lawyers, and by prodding them to use their externships not only to refine established competencies, but also to target gaps in existing skills sets.[295] By emphasizing student responsibility for structuring supervisory relationships, faculty supervisors can also encourage students to develop the skills necessary to elicit supervision from busy lawyers and judges who may be untrained or unskilled in the art of critique.

Students generally report having four broad goals as they approach assignments at their externship placements. All hope to produce useful work product (or an effective lawyering performance); to complete assignments in a timely fashion; to "learn something" in the effort (so that their work on the next similar project will be both more efficient and more effective); and, if at all possible, to avoid appearing incompetent in the process. They also agree quite readily on what they need to accomplish these goals: assignment clarification and guidance at the beginning of the project; opportunities for interim "course correction" (consultation and feedback) as the project progresses; and

---

[292] For example, Quinnipiac School of Law hosts an annual reception for site supervisors and students involved in externship programs. The event is well attended, and supervising attorneys and judges frequently remark on the welcome message the party conveys: "The faculty and administration of the School of Law value your contribution to the education of our students."

[293] Vermont Law School gives supervisors framed certificates identifying their offices as host sites for students participating in the Law School's Semester in Practice program.

[294] *See infra* Appendix, Quinnipiac University School of Law, Externship Program Skill Self Assessment; *see also* Alexander & Smith, *supra* note 199, at 43-44 (suggesting questions for self-assessment).

timely and meaningful critique when the project or performance is complete. Through thoughtfully selected course materials and carefully designed classroom activities, and with the assistance of faculty directors and seminar colleagues, students can learn to get the supervision they need in all but the worst cases of supervisory inadequacy.[296]

Classroom exercises and seminar materials, for example, can help students to identify the basic questions necessary for assignment clarification: When is it due? What form should it take (memo, advice letter, oral report with research file)? How long should it take? What resources (library or otherwise) might help me to get started? Where can I find additional factual information? To whom shall I go with questions?[297] Faculty directors also can elicit from seminar members suggestions for ensuring adequate review of work product, such as submitting research logs with assignments and inviting supervisory feedback on process as well as product.[298]

Finally, faculty supervisors can encourage students to take a more active role in structuring critique of completed projects and performances, thereby focusing supervisory attention on skills in need of improvement. An offhand question ("By the way, how was my memo?") is likely to evoke a

---

[295] Risk-aversion will vary among students, but as a general matter, students do not want their supervisors or others at their placement sites to perceive them as incompetent. They worry that a misstep will elicit that dreaded question: "What *are* they teaching you in law school these days, anyway?" If they are honest with themselves, faculty directors will admit that they have a selfish interest in this regard, too: we look better when our students shine. As a rule, it is much easier to conduct a site visit with a supervisor who is delighted with her student intern than with one who is not, and much easier to persuade that supervisor to accept another student in a subsequent semester.

[296] Among the techniques students have found useful are using e-mail to inquire about a "good time" to stop in with questions and setting a schedule for ongoing supervision as the project progresses when accepting a new project ("May I check in with you on Thursday afternoon to fill you in on my progress?"). In some cases, though, "getting supervision" may require exceptional resourcefulness. We are reminded of one student, who arrived at his public defender placement on the eve of a very complicated murder trial. For reasons unrelated to this discussion, his supervising attorneys had had only forty-five days to prepare for the trial. The pressure in the office was palpable; every attorney had been working full throttle for over six weeks. The student's competent assistance was critical, but opportunities for assignment clarification, interim course correction, and thoughtful critique were virtually non-existent. However, by identifying – and seizing – the supervisory equivalent of "teachable moments" (during the anxious attorney's increasingly frequent cigarette breaks), the student was able to secure the guidance he needed.

[297] *See, e.g.,* Cole, *supra* note 283, at 29-36.

[298] The associate in Beverly Hills Concepts, *supra* note 237, might have avoided liability if she had submitted such a log to the supervising partner, with a memo acknowledging her own unfamiliarity with the substantive area and requesting that the supervisor review her log to make sure she had not overlooked any issues.

cursory response ("Fine"). A thoughtful question or series of questions ("Do you have a few minutes to talk with me about your changes to my draft? I understand most of what you did, but I would like to talk a little more about why you put the public policy argument last") is much more likely to elicit helpful critique.

CONCLUSION

This year marks the twenty-fifth anniversary of a path-breaking text in legal education, Gary Bellow's and Bea Moulton's *The Lawyering Process*.[299] One of the first of its kind, the book quickly became a standard resource for many clinicians, particularly in-house clinical faculty. Bellow and Moulton offered their clinical colleagues more than insights into skills training; indeed, they reframed the core clinical curriculum to include an explicit focus on the ethical dimension of lawyering. Their approach remains relevant today; even a glance at the testimonials in the Fall 2003 issue of the *Clinical Law Review*, which was devoted to the book's anniversary, demonstrates the currency of the ethics questions with which Bellow and Moulton urged clinicians and their students to engage.[300]

While *The Lawyering Process* did not expressly deal with externships, it did help all clinicians to develop an appropriate sensitivity to the ethical dilemmas inherent in clinical practice. We owe a debt to Bellow and Moulton and to the generation of clinicians who have followed in their footsteps since 1978, expanding upon Bellow and Moulton's discussion of ethics in the in-house clinical setting and extending the ethical focus to the externship context.[301] Our contributions here build directly on the scholarship of these able predecessors. We are grateful, too, for the community of clinicians who provide a source of support as we struggle with the ethical challenges inherent in our externship programs, and for opportunities to grapple with such questions in conferences and in our writing.

---

[299] GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS (1978) (explicitly noting that clinical education should include an ethical dimension).

[300] *See* Symposium, *The 25th Anniversary of Gary Bellow's and Bea Moulton's The Lawyering Process*, 10 CLIN. L. REV. 1 (2003).

We hope that our discussion here will encourage externship faculty, field supervisors, and externs to engage in rich dialogue about their respective roles and the important ethical responsibilities that flow from those roles. That dialogue should begin early in each externship cycle, during the application process, with the implementation of careful conflicts-checking procedures designed first to identify, and then to avoid or cure, conflicts of interests occasioned by students' prior or contemporaneous legal work, personal interests or convictions, or responsibilities to third parties. It should continue as the externship progresses.

The initial (and ongoing) conflicts-checking process itself highlights for students their responsibility to safeguard confidential information, for the lawyer's duty of confidentiality is inextricably linked with the duty of loyalty that lies at the heart of the conflicts of interests analysis. Discussions with seminar colleagues and faculty and field supervisors over the course of the externship should reinforce that theme.

Conversations about competence should begin early, too, to inform the matching process and to help field supervisors identify appropriate early projects for their student charges. Ongoing discussions can ensure that work assignments are tailored to student goals, interests, and developing skills; that students have the tools they need to secure necessary supervision; and that all of the players – students, field supervisors, and faculty supervisors alike – are giving best efforts to their common enterprise: helping students to develop the knowledge, skills, and professional habits necessary to the competent representation of clients.

The three "Cs" of externship ethics with which we have dealt are by no means exhaustive of the range of ethical questions that arise in this clinical setting. Other systemic questions, some noted in this

[301] *See* discussion *supra* note 3, noting the work of other clinicians who pioneered in the field of externship ethics.

Article[302] and others raised in our presentation at the Externships[2] Conference, await exploration.[303] Broader field testing of our proposals regarding best practices in various types of externship clinics may suggest different or more nuanced approaches to the issues we have addressed. We look forward to those continuing discussions.

[302] These include the questions raised, but not fully analyzed, regarding: mandatory reporting duties under MODEL RULE 8.3, *supra* note 63; the scope of the attorney-client privilege in the externship context, *supra* note 254; the applicability of the Rule 1.6(b)(2) exception for disclosures of confidential information to seminar colleagues where those disclosures are made to secure legal advice about the student-lawyer's compliance with the Rules, *supra* note 87 and accompanying text; and the reach of unauthorized practice of law restrictions in the externship context, *supra* note 255 and accompanying text.

[303] The authors proposed various externship ethics scenarios which touch on issues other than confidentiality, conflicts and competency at the Externships² Conference. Our conference materials are available on the web. *See supra* note 31.

APPENDIX

Boston College Law School's Semester in Practice

CONFIDENTIALITY PROTOCOLS

How to "Talk Shop" in Our Externship Seminar and in Journals

Consider the following types of information in light of your professional responsibility under MR 1.6 to maintain client confidences. Can you share the information with those not part of your field placement? If not, why not, and is there some alternative disclosure that would be permissible?

1. Client names/case involvement: "I was just assigned to work on the following matter:"
    a. United States v. Anderson (criminal case)[304]
    b. FAIR *et al.* v. DOD (named vs. unnamed class member)
    c. *In re* Mary Moe (juvenile proceeding)
    d. XYZ Corporation (deal)

2. "My client, I'll call her Sue, is in a terrible scrape relating to her pending divorce. She is worried that her estranged husband could become abusive. After hearing some examples of threats he's made, I counseled her that she could go into court and seek a restraining order. She now lives in Framingham so I told her that she could apply to the Framingham District Court even that night, or that I would go with her tomorrow if she'd prefer. She decided to go for the *ex parte* temporary order by herself after we rehearsed the procedure. Later she called back to report that she'd been successful and that her husband would be served with a copy of the order that very night."[305]

3. "In chambers, lots of the clerks were talking about courthouse rumors. They said my judge has a reputation for being a criminal defense counsel's dream come true, given how easy he is on defendants. They said they hoped more folks at the DA's office would start trying to appeal his sentences as outside the bounds of the guidelines. The judge walked in, overhearing the gist of the comments, and quipped, "Just let them try!"

[304] Related hypotheticals: a. you've been retained by the criminal defendant, but have not yet entered your appearance; b. you've been assigned to help the Assistant United States Attorney in charge of a criminal prosecution on the upcoming trial, but the matter is still in the grand jury stage.

[305] Related hypothetical: a. assume you are externing in a very small community where restraining orders are infrequently entered; b. assume the local newspaper reported the matter in the morning edition.

Boston College Law School's Semester in Practice

CONFIDENTIALITY PROTOCOLS

Directed Journal Entry- Who Is your Client?

You've made your placement choices and are ready to embark on your semester in practice. As you prepare your journal entries for the first week on the job, please devote one entry to answering the following question: Who is your client? I recommend that you consult with your field supervisor and other work colleagues to see how they would answer that question. Then, review the Model Rules, particularly MR 1.2, MR 1.6, and MR 1.7, as you consider to whom you owe your loyalty, your duty to maintain confidences, and your duty to avoid conflicts. We will share your responses to these matters in our next seminar.

SYRACUSE UNIVERSITY COLLEGE OF LAW

EXTERNSHIP PROGRAM MANUAL
(Excerpt)

CONFLICTS OF INTERESTS

Canon 5 "A lawyer should exercise independent professional judgment on behalf of a client." See also DR 5-101 – 5-111.

Lawyers are obligated not to engage in representation that would create conflicts of interests for their clients. Numerous relationships may present potential or actual conflicts for students, faculty directors, and externship field placement supervisors. Conflicts may arise from an extern's responsibilities to multiple past or current clients; an extern's personal or financial interests; or an extern's responsibilities to a third party. As an extern, you must be sure to avoid any actual or potential conflicts of interests, and even the appearance of such conflicts.

The professional rules on conflicts of interests are based, in large part, on the lawyer's need to protect the confidences and secrets of the client. If a lawyer is privy to a client's confidential information, and either concurrently or subsequently represents someone with interests adverse to those of the 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 and of zealous representation of the first client.

If you are working during the semester, if you have worked in another law office in the past, if you have received an offer of employment, or if you are engaged in interviewing at a law firm, in a judge's chambers, or with a government agency that is involved in any way in a case handled by your externship placement office, you must inform your placement supervisor and Professor Kanter immediately. Further, if you, yourself, or a family member or friend is involved as a party, witness, or attorney in any proceeding in which your placement is also involved, you must inform your placement supervisor and the Externship Professor immediately. If the conflict can be cured with client consent and screening, you will be permitted to continue to work at the placement, but not on the case or matter that created the conflict. In some cases, though, conflicts are so serious that they can not be cured, even with client consent. In such cases, you will be required to change placements.

At Syracuse, students may enroll in the year-long externship and/or the summer externship programs. In order to check for actual and potential conflicts, all students are required to complete the EXTERNSHIP PROGRAM CONFLICTS FORM at the time they apply for an externship and to update the form if any information needs to be changed throughout the semester. Specifically, all students are required to complete the form at the time they apply for an externship, and again on the first day of each of the semesters in which they have enrolled in the externship. In addition, if there is any change in circumstances that could present an actual or potential conflict for a student in the course of a semester, the student is required to inform the placement supervisor and Professor Kanter immediately of the conflict or potential conflict.

Following receipt of the conflict of interests forms, Professor Kanter will review each form to determine if an actual or potential conflict exists. Any student with an actual or potential conflict will be notified and instructed to speak to the prospective placement supervisor immediately to determine if client consent from the placement's client and all other affected clients is necessary, or if the conflict will prevent the student from externing at the particular externship site, client consent notwithstanding. If the placement supervisor concludes that the placement may proceed, the supervisor must provide Professor Kanter with written documentation of the consent of all affected clients, or, in the alternative, a written statement that no conflict or potential conflict exists.

Syracuse University College of Law
Externship Program

NAME: _____
Placement: _____

---

1. Have you worked or volunteered at a law firm, legal services office, governmental agency or with a judge or hearing examiner prior to enrolling in the Externship Program?
   [Yes] [No]

2. If yes, where have you worked? [List **all,** starting with most recent. Give dates and location.]

_____

_____

3. On what type of cases did you work at each location?

_____

_____

4. Are you **presently** employed or volunteering at any of the offices listed in question #1, or are you planning on being employed or volunteering at any office during the semester?
   [Yes] [No]

5. If yes, where are you (will you be) employed or volunteering?

_____

6. On what type of cases are you presently working?

_____

7. Are there any other personal, financial, or family interests that could present conflicts of interests for you at your proposed placement? If so, please identify them here.

_____

_____

Please feel free to attach another sheet if necessary.

QUINNIPIAC UNIVERSITY SCHOOL OF LAW

EXTERNSHIP PROGRAMS

Skill Self-Assessment[306]

STUDENT _____ DATE _____

PLACEMENT SITE _____ SITE SUPERVISOR_____

This evaluation instrument will assist you in identifying those lawyering skills you currently have mastered or are in the process of mastering, as well as those skills that you have not yet developed. Please feel free to add questions at the end of this instrument to address skill areas of particular interest to you that are not included here. The completed self-assessment will provide the basis for your initial planning conference with your field placement supervisor, and also will serve as a tool for measuring your progress during the course of the semester.

Please circle the number that corresponds with your perception of your skill level in each of the following areas:

1	**2 3**	**4 5 6**	**7 8**	**9 10**
Little or No Skill or Knowledge	**Emerging Skill or Knowledge**	**Moderate Skill or Knowledge**	**Adequate Skill or Knowledge**	**Thorough Mastery of Skill/Knowledge**

PROBLEM SOLVING

Please evaluate your present ability:

1. To identify the legal issues presented by a factual scenario.

1 2 3 4 5 6 7 8 9 10

[306] This instrument expands upon an early model developed by Professor Liz Ryan Cole, Director of Vermont Law School's Semester-in-Practice Program, who shared it with participants in a Supervisory Skills Workshop sponsored by the Clinical Legal Education Association in October, 1994.

2. To formulate and evaluate legal theory and argumentation relevant to those issues.

1 2 3 4 5 6 7 8 9 10

3. To identify those elements of a legal rule or concept that appear to make it either applicable or inapplicable to a particular factual scenario.

1 2 3 4 5 6 7 8 9 10

LEGAL RESEARCH

Please evaluate your present ability:

1. To identify all sources of authority relevant to a particular research issue.

1 2 3 4 5 6 7 8 9 10

2. To identify and use basic research tools.

1 2 3 4 5 6 7 8 9 10

3. To identify and use specialized research tools.

1 2 3 4 5 6 7 8 9 10

4. To develop and implement a thorough, efficient and coherent research plan.

1 2 3 4 5 6 7 8 9 10

FACTUAL INVESTIGATION

Please evaluate your present ability:

1. To determine the need for a factual investigation.

1 2 3 4 5 6 7 8 9 10

2. To formulate and implement a fact-gathering strategy.

1 2 3 4 5 6 7 8 9 10

3. To organize information in an accessible form.

1 2 3 4 5 6 7 8 9 10

4. To decide whether to continue or conclude the fact-gathering process.

1 2 3 4 5 6 7 8 9 10

5. To evaluate information gathered during your factual investigation.

1 2 3 4 5 6 7 8 9 10

LEGAL ANALYSIS

Please evaluate your present ability:

1. To make a realistic assessment of the strengths and weaknesses of a case or position in light of operative facts and governing law.

1 2 3 4 5 6 7 8 9 10

2. Given a legal theory, to predict the decision of a court or other decision maker as to the applicability of the legal theory to a particular factual scenario.

1 2 3 4 5 6 7 8 9 10

3. To craft well-organized, logical and persuasive legal arguments.

1 2 3 4 5 6 7 8 9 10

4. To anticipate arguments likely to be raised by opposing counsel, and develop counter-arguments to meet those arguments.

1 2 3 4 5 6 7 8 9 10

COMMUNICATION

Please evaluate your present ability:

1. To observe standard rules of English grammar, syntax and punctuation.

1 2 3 4 5 6 7 8 9 10

2. To use effective methods of communication to gather and communicate information.

1 2 3 4 5 6 7 8 9 10

3. To identify the client's goals for the representation.

1 2 3 4 5 6 7 8 9 10

4. To identify and inform the client of the decisions that will need to be made in connection with the representation.

1 2 3 4 5 6 7 8 9 10

5. To identify and gather information relevant to those decisions.

1 2 3 4 5 6 7 8 9 10

6. To plan for interviews and client counseling sessions so available time is used effectively.

1 2 3 4 5 6 7 8 9 10

7. To conduct client interviews and counseling sessions in such a way that the client leaves the sessions informed, and, to the extent possible, reassured.

1 2 3 4 5 6 7 8 9 10

SUBSTANTIVE LAW

To what extent do you presently:

1. Possess a working knowledge of (a)_____, (b)_____, and (c)_____, and keep abreast of current developments in those areas. (Identify areas of substantive law of particular interest to you and evaluate your knowledge of each separately.)

(a) 1 2 3 4 5 6 7 8 9 10

(b) 1 2 3 4 5 6 7 8 9 10

(c) 1 2 3 4 5 6 7 8 9 10

NEGOTIATION

Please evaluate your present ability:

1. To prepare an effective negotiating strategy.

1 2 3 4 5 6 7 8 9 10

2. To conduct a negotiating session, mindful of your client's goals and informed by a realistic assessment of the strengths and weaknesses of your client's position.

1 2 3 4 5 6 7 8 9 10

3. To counsel your client about proposals made by the other side during negotiations.

1 2 3 4 5 6 7 8 9 10

4. To implement your client's decision(s).

1 2 3 4 5 6 7 8 9 10

ALTERNATIVE FORMS OF DISPUTE RESOLUTION

To what extent do you presently:

1. Understand the functions and potential consequences of both litigation and alternative dispute resolution processes.

1 2 3 4 5 6 7 8 9 10

2. Have a working knowledge of: litigation at the trial and appellate levels, advocacy in administrative and executive forums, and proceedings in other dispute resolution forums.

1 2 3 4 5 6 7 8 9 10

PROFESSIONAL RESPONSIBILITY

Please evaluate your present ability:

1. To identify the nature and sources of ethical standards governing attorney conduct.

1 2 3 4 5 6 7 8 9 10

2. To recognize and resolve ethical dilemmas consistent with those standards.

1 2 3 4 5 6 7 8 9 10

3. To identify the means by which ethical standards are enforced in your jurisdiction.

1 2 3 4 5 6 7 8 9 10

4. To seek out and take advantage of opportunities to increase knowledge and improve skills.

1 2 3 4 5 6 7 8 9 10

5. To draw upon a general knowledge of legal issues and concepts to identify cases requiring particular expertise so that you can refer those cases to an appropriate specialist.

1 2 3 4 5 6 7 8 9 10

PRETRIAL AND TRIAL PROCEDURES

Please evaluate your current ability:

1. Whenever possible, to employ informal discovery methods to secure necessary information.

1 2 3 4 5 6 7 8 9 10

2. To use formal discovery devices effectively and efficiently to secure necessary information.

1 2 3 4 5 6 7 8 9 10

3. In preparing for an evidentiary hearing, to identify the elements of proof for, and the facts relevant to, each of the claims being asserted.

1 2 3 4 5 6 7 8 9 10

4. In preparing for an evidentiary hearing or an oral argument, to anticipate your opponent's strategy, and prepare to counter your opponent's arguments.

1 2 3 4 5 6 7 8 9 10

5. To use the Rules of Evidence effectively during pretrial and trial proceedings.

1 2 3 4 5 6 7 8 9 10

6. To conduct effective direct and cross examinations, tailoring your questions to respond to the witness's answers to previous questions.

1 2 3 4 5 6 7 8 9 10

7. To present clear, well-organized, logical and persuasive oral arguments that effectively communicate your client's position on the matter at issue.

1 2 3 4 5 6 7 8 9 10

8. To respond appropriately and effectively to informal and formal discovery requests.

1 2 3 4 5 6 7 8 9 10

ORGANIZATION AND MANAGEMENT OF LEGAL WORK

Please evaluate your present ability:

1. To maintain complete, well-organized files so that you (and others who may need information) can locate relevant materials.

1 2 3 4 5 6 7 8 9 10

2. To develop systems and procedures to ensure that you allocate time, effort and resources efficiently.

1 2 3 4 5 6 7 8 9 10

3. To develop systems and procedures to ensure that you complete assigned tasks in a timely manner and comply with deadlines.

1 2 3 4 5 6 7 8 9 10

4. To develop systems and procedures to enable you to work effectively with support staff (secretaries, paralegals and investigators) to ensure that tasks are completed correctly and efficiently.

1 2 3 4 5 6 7 8 9 10

5. To work effectively with peers and supervisors to ensure that tasks are completed correctly and efficiently.

1 2 3 4 5 6 7 8 9 10

Student_____
Signature