Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service

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PROFESSIONAL AND ETHICAL ISSUES IN LEGAL EXTERNSHIPS: FOSTERING COMMITMENT TO PUBLIC SERVICE

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INTRODUCTION

MANY law schools have developed extensive externship programs in which students receive academic credit for unpaid work at organizations outside the law schools. These programs provide law students with significant opportunities to explore various professional paths and discuss their professional choices with others. The structure of externship programs provides incentives to many students to do fieldwork at organizations that could not afford to pay them, because the ABA rules prohibit students from getting paid for work for which they receive academic credit. Externship opportunities present a curricular opportunity to assist students in making thoughtful choices about their professional paths and in developing personal standards of professional conduct. These programs also offer students an immersion experience in the actual practice of law, including nose-to-nose encounters with some flagrant unethical behavior. The externship programs offer significant human resources to provide volunteer services to low-income persons. More significantly, perhaps, externship programs lead many students to make a long-term commitment to public service work. In this Article, I explore the larger issue of professional choices presented to law student externs. Then I explore some of the particular ethical dilemmas that law students and their teachers encounter in externship programs.

I. Professional Issues

When I began teaching in a law school clinical program in the early 1980s, I was gratified to discover that I had found a professional set-

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2. This offers a sharp contrast to the on-campus interviewing programs at many law schools, which offer the easiest access and greatest visibility to available jobs at large law firms. These programs are often perceived by students as providing institutional encouragement to go into private practice and not to explore jobs in government or legal services or in non-profit organizations.


4. From 1982 to 1984, I was a Clinical Fellow at the Center for Applied Legal Studies at Georgetown University Law Center. At the time, the clinic handled con-
ting in which I could provide legal services to low-income people without making the compromises in client service that often are required in a high-volume practice. We did not serve very many clients or supervise very many students. The enrollment and the caseload were kept low precisely to facilitate the provision of high-quality legal services. I observed that most of the time and energy that went into even the smallest cases was well-spent. The students learned a great deal and developed high standards of practice, the clients received attentive and thoughtful service, and our success rate in case outcomes was phenomenal.

I was unsatisfied, however, with the clinical work in two respects. First, I felt we were serving only a trivial number of clients. I did not believe that we could expand the caseload without major sacrifices in educational benefit and client service, but still it troubled me that we served so few people. Second, I was frustrated that the clinical work seemed to have very little impact on the students’ long-term career choices. I noticed that many students were motivated to enroll in the clinic not by a desire to serve low-income people, but primarily by a desire to improve their own litigation skills. Very few of the students in the clinic sought public service jobs after graduation; those who did seek public service positions generally had planned to do so before they enrolled in the clinic.

In 1987, when I began teaching at Catholic University Law School, I started supervising the work of students doing fieldwork at organizations outside of the law school. Initially, I found the work disorienting. I was not supervising the students’ work in the field, so I could not identify and explore the myriad issues and choices that confronted them as I would have done in a live-client clinical setting. At first I perceived my role as troubleshooter, quality control manager, and placement broker. Gradually, however, I found that being the distant faculty supervisor offered pedagogical opportunities that were different from those of a live-client clinic. Because I was more distant from the fieldwork, I could invite the students in class and in journals to reflect openly on what they observed, on the work they did, on the consumer cases and social security disability cases. For a discussion of the structure and operation of that clinical program, see Jane H. Aiken et al., The Learning Contract in Legal Education, 44 Md. L. Rev. 1047, 1050-61 (1985).

5. The students worked in teams of two. Each team handled two or three cases during the course of a semester. The clinic had four teachers and sixteen students. The teachers supervised students in teams of two as well, so each teacher supervised eight students.

6. The smallest of the small cases I supervised was a consumer case in which our client was aggrieved by the damage done to her one large tree by some landscapers who “trimmed” it, removing most of the branches from one side of the tree. Though she had paid only $75 for the work, she was deeply upset by the destruction of this tree. Therefore, it meant a great deal to her to seek vindication in small-claims court. The students handling the case arranged for appraisal of the damage, and the value of the claim rose into the thousands.
operation of the placement organizations, and on the professional conduct of their supervisors. The students shared ideas, reactions, and concerns with me that they did not share with their field supervisors. Furthermore, each student was exposed indirectly to the professional settings that had been chosen by the others because the students in each seminar were at different placements.

Even more important, perhaps, I was able to work with the students in selecting placements, and to urge them not to grab the first opportunity that came along, but to think hard about what they wanted to do and why. Partly because of our location in Washington, D.C., the opportunities are endless, and the students seeking unpaid part-time positions during the academic year, are (for once) in a buyer's market. I encouraged students to think of the fieldwork as a career-shopping opportunity—to seek a placement in a type of organization where they had not previously worked and a type different from their anticipated summer jobs. Our program allows the students almost unlimited choices of placements, so the students wrestled with their own ideas about what was important to do, why they were making the choices they were making, and so on. For the first time, I found that I was able to integrate questions about professional paths into an academic agenda, and to encourage the students to think as hard about their own aspirations and responsibilities to themselves and their communities as I might ask them to think about the doctrine of consideration or the application of rules on candor to tribunals.

Unlike my experience in the live-client clinic, the work of the externship program seemed to affect the students' thinking about professional roles, and sometimes to affect their choices. Although I aspire to motivate students to seek public service opportunities, I do not believe it is my role to direct their choices, but only to encourage them to make careful and informed choices about professional paths. Sometimes this process produced dramatic results. For example, one student spent a semester working as an extern at one of the juvenile detention facilities near Washington, D.C., representing the "residents" in disciplinary hearings. Perhaps it was her first direct contact with poor people, and perhaps she was shocked by how poorly the kids were treated. By the end of her externship, this student had decided to pursue a career in criminal defense work instead of applying for a job at a law firm. She changed political parties and found her values diverging from those of her parents. This is a particularly striking story. More common is that students who have some interest in government jobs, for example, undertake externships at federal or state agencies, love the work, and then are offered full-time positions in the offices where they worked as externs. The externship program encourages exploration of professional arenas beyond private practice, and often provides access that leads, directly or indirectly, to job offers in those organizations.
Supervising externships alleviated my frustration with my apparent inability to engage clinical students in thinking about professional choices. The externship structure also allowed me to work with a larger number of students, thereby facilitating a larger volume of service. Only some of the students chose to work in government, legal services, or non-profit organizations, but the net potential impact was greater. In my clinic four teachers supervised sixteen students. In an externship seminar, I can supervise sixteen externs alone, and that work is only about half of my teaching load for the semester.

Law school clinics provide students with opportunities to take responsibility for representation of clients under the supervision of an attentive, experienced lawyer. This is a precious and unparalleled educational opportunity. Externship programs, on the other hand, provide different educational opportunities and allow enrollment of larger numbers of students than do most live-client clinics. I suspect that the externship programs have a greater impact on the students' long-term professional choices than the clinics.

II. Ethical Issues for Externs

In the preceding part, I discussed the "macro" professional-educational issue relevant to this conference: how externship programs may foster a sense of social responsibility and encourage some students to make public-spirited professional choices. In this part, I discuss some of the ethical issues that arise in externships for students who select placements in government, legal services, or non-profit organizations.\footnote{I focus a little more broadly on ethics issues than just on the issues that arise for students engaged in individual representation of low-income persons. Students working in government agencies may be representing the government, but as the government is supposed to represent the people, they have a greater public responsibility than a student doing an externship in a private law firm. Students working in non-profit organizations may be working on legislation or policy development on behalf of low-income persons, so their work is also relevant.}

I describe several examples of ethical questions that come up for student externs, and explore the professional and ethical inquiries that might be generated by each. In discussing the application of the ethical rules to these situations, I will refer to the Model Rules of Professional Conduct as a proxy for the ethical rules in the relevant jurisdiction.

An extern working in a law office, a government agency, or an organization may observe and participate in the work of the lawyers in the office. Each student has opportunities to notice the ethical dilemmas that arise in the course of that work and to study whether and how they are resolved. Law students often have more questions about the obligations or decisions of the lawyers with whom they work than do the lawyers themselves. A law student may be encountering issues for the first time, while his or her supervisor may have dealt with these
issues on many prior occasions. Alternatively, a student might be aware of some ethical rules that the supervising lawyer has not studied. Legal ethics courses were not offered by many law schools until the 1970s, and the subject matter of these courses has expanded during the last decade. A student who raises an ethical question with her supervisor may elicit a thoughtful inquiry, or might receive a cursory or dismissive response. Regardless of whether a student raises ethical questions with his or her supervisor, a student may raise them in class or discuss them in a journal.

Clinical experience in law school (whether in a live-client clinic or an externship) provides students with opportunities to think carefully about issues that might not get such attention in a busy practice. Student externs can cultivate their skills as reflective practitioners. Even if the students become busy lawyers who have little time to ruminate, they will carry with them the skill of reflective observation.

A. Supervisor Misconduct

One of the most common types of dilemmas encountered by externs is what to do when they observe unethical behavior by their supervisors. A student working for a lawyer in a high-volume practice might see evidence of client neglect, such as stacks of unreturned phone messages, or neglect of matters undertaken because of the press of other business. Many externs work more closely with their lawyer supervisors than do other lawyers in the same office, so they may become aware of problems about which others in the office know nothing. Externs in this situation face difficult choices about what, if anything, to do to address such problems. A student might misjudge a situation because of her inexperience or limited information. If the misconduct is unambiguous, any action by the student to remedy, confront, or report the misconduct presents the student with difficult interpersonal challenges.

The following is an example of a situation that arose for a student working in a prosecutor's office. "Isaiah Goodwin" (not the student's real name) told this story in his externship seminar:

I'm working at the prosecutor's office, and mainly working for this one guy named "Steven Charney" (not his real name). Yesterday I went with him to court to see him try a case involving charges

8. Most of the problems presented below involve real problems that have been presented by law students in externship situations. Some facts have been changed to obscure the identity of the placement, and some details have been elaborated. The students and the lawyers in these stories have been assigned fictitious names.

9. A prosecutor is not, of course, engaged in the representation of low-income persons. Nevertheless, this example offers a vivid picture of how prosecutorial discretion may be used in a manner that adversely affects low-income persons—in this case, most directly, a criminal defendant.
of possession of cocaine. It was a pretty straightforward felony case, except for one thing.

The arresting officer got on the stand and testified that when he searched the suspect, he found a large bag of white powder (which later turned out to be cocaine) in the suspect's right jacket pocket. Well, of course the defendant was convicted, and that was that. Steve stayed in the courtroom to deal with another case, but I left to go back to the office to work on a memo I was writing. I stopped at the water fountain, and then noticed that the cop who had testified was chatting with another officer a few feet away. So I took a long drink and listened.

The arresting officer was boasting to his friend about how this poor slob was going away for years, for sure, and that it was about time, because everyone knew he was a dealer. He said: “Of course I didn’t really find anything when I searched him, but no one will ever know that now. It’s about time that guy got taken off the street.”

I felt like I had just stumbled onto the set of “Law and Order.” I couldn’t believe it. When Steve got back to the office, I went in to see him and told him what I had heard. He said: “Well, Isaiah, welcome to the real world. These things happen all the time. It’s just part of law enforcement.” I tried to argue with him, but he became incredibly patronizing, as if I was some sort of Polyanna.

An initial question about this scenario is whether Isaiah is bound by the attorney-client privilege or by the rules of confidentiality not to reveal this information to the class, the judge, or the disciplinary authorities. The attorney-client privilege covers only communications between lawyer and client that are related to the legal advice sought by the client. This situation does not implicate the privilege because the witness is not a client. The information, however, is confidential within Model Rule 1.6 in that it is “information relating to representation of a client.” The question then is whether Rule 3.3 obligations of candor to the court “trump” the Rule 1.6 obligation of confidentiality. Lawyers for the government, and prosecutors in particular, have special obligations to seek justice that should be added to the Rule 3.3 obligations. Rule 3.3 alone, however, requires a lawyer

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12. Id. Rule 3.3.

13. See, e.g., Model Code of Professional Responsibility EC 7-13 (1981) (“Then responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”).

who learns that he has offered false evidence to inform the court that the false evidence was presented.\textsuperscript{15}

Model Rule 3.3(a)(4) says that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."\textsuperscript{16} The facts do not indicate that the prosecutor knew that the police officer's testimony was false until after the testimony was given. The rule continues: "If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."\textsuperscript{17} Certainly the officer's testimony is "material evidence" that was "offered" by the lawyer. Does the prosecutor "know" of its falsity? "Knows" is defined in the rules to mean "actual knowledge of the fact in question."\textsuperscript{18} If the prosecutor knows Isaiah to be an intelligent and truthful person, then the report of the hallway conversation should be considered actual knowledge that the officer's testimony might have been false, or at least sufficient knowledge to trigger an inquiry into the matter. Perhaps the officer was lying to his friend; there is nothing in the facts, however, to suggest that the hallway conversation was disingenuous. The obligation to take remedial measures cannot be obliterated by interpreting it to apply only when the lawyer knows beyond a reasonable doubt that he has presented false testimony. The standard has been interpreted by one court to require that the lawyer "clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention."\textsuperscript{19}

In this scenario, the prosecutor arguably is obliged to take remedial measures. A comment that follows Rule 3.3 explains what is meant by "remedial measures."

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.\textsuperscript{20}

In Formal Opinion 87-353,\textsuperscript{21} the ABA Committee on Ethics and Professional Responsibility interpreted Model Rule 3.3.\textsuperscript{22} The opinion makes clear that where the witness will not correct the perjured testimony, disclosure to the court is the only measure that will remedy the situation.\textsuperscript{23}

\begin{itemize}
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id. Rule 3.3(a)(4).
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Model Rules of Professional Conduct at 9 (defining terms).
  \item \textsuperscript{19} See \textit{In re} Grievance Comm., 847 F.2d 57, 63 (2d Cir. 1988).
  \item \textsuperscript{20} Model Rules of Professional Conduct Rule 3.3 cmt. 11 at 65.
  \item \textsuperscript{21} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
\end{itemize}
Rule 3.3(b) provides that the duties imposed by subsection (a) over-ride the obligation imposed by Rule 1.6 to protect client confidences.\(^{24}\) Rule 3.3(b) states that the duties "continue to the conclusion of the proceeding."\(^{25}\) Presumably this means that the duty to make disclosure to a tribunal terminates at the conclusion of the proceeding. Thus, even if the prosecutor would be found obliged under Rule 3.3 to disclose to the judge the police officer's hallway admission that his testimony was perjured, this obligation would end at whatever point the "proceeding" is "concluded."\(^{26}\) Is that point the conviction, the sentencing, the expiration of time for appeal, or some other point? Because proceedings that have "concluded" may be re-opened because of allegations of fraud, one could argue that the duty to disclose the presentation of false evidence continues indefinitely. The "conclusion of the proceedings" language was intended to set boundaries on the lawyer's duties. However, the expiration of a duty to notify a court that false evidence was presented could produce arbitrary results. A thoughtful practitioner might elect to report such a matter to a tribunal even if the proceeding had concluded.

This analysis is helpful but does not produce a definitive conclusion. If Isaiah believes that the prosecutor is obliged to reveal to the judge what the police officer said in the hallway, then what should Isaiah do? If Isaiah were admitted to the bar, he might be obliged to report the perjured testimony to the judge. If he believes the prosecutor is obliged to do so and has declined to do so, then Isaiah (if he were a member of the bar) might be obliged to report Steve's violation of Rule 3.3 to the "appropriate professional authority" (the bar counsel) under Rule 8.3.\(^{27}\) This obligation would apply if the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."\(^{28}\) The failure to come forward with information about perjured testimony is arguably serious enough that reporting of that misconduct to the disciplinary authorities would be required.

Isaiah is not yet admitted to the bar, so the ethical rules in the jurisdiction in which he is doing his externship do not formally bind him. Isaiah might decide to consult with another attorney in the office about what should be done. Isaiah may be hesitant even to talk with someone else in the office about Steve's behavior. Any attempt to address the problem could disrupt Isaiah's externship and destroy his relationship with Steve. Isaiah might worry that Steve would give him a negative letter of reference or retaliate in some other way.

\(^{24}\) Model Rules of Professional Conduct Rules 1.6, 3.3(a)-(b).
\(^{25}\) Id. Rule 3.3(b).
\(^{26}\) Id.
\(^{27}\) Id. Rule 8.3(a).
\(^{28}\) Id.
Isaiah has told this story in class. Isaiah's professor may be a member of the bar and therefore be obliged to report Steve's conduct to the "appropriate professional authority." If she does this over Isaiah's objection, she would be violating an explicit or implicit commitment to keep confidential the communications received from students about their fieldwork. Also, she probably would do serious damage to her externship program. What fieldwork supervisor would accept a student from a school that had previously reported to the bar alleged misconduct by another placement supervisor? The teacher is then in an awkward situation. Her obligation to comply with Rule 8.3 is mandatory, but to do so would jeopardize a valuable teaching enterprise.

One solution to this problem would be for the teacher to invite students who wish to discuss possible misconduct by field supervisors with her to do so in private and to preface the disclosure by a request to seek legal advice from the teacher in confidence. This would create a lawyer-client relationship between the teacher and the student; the teacher would then be exempt from the obligation to report the supervisor's misconduct, because Rule 8.3 does not require reporting of information protected by Model Rule 1.6.30

If the teacher is not an active member of the bar of the state where she is teaching, a strict interpretation of the unauthorized practice rule would say the teacher is not entitled to give legal advice within that state. In that case, however, the teacher also would not be subject to that state's rule requiring reporting of misconduct. The teacher might be a member of another bar whose ethical rules impose a duty to report. She would be obliged to comply with those rules even if she is working in another state. Model Rule 8.3 on its face is not limited only to unethical behavior by lawyers admitted in the same state as the reporting lawyer.31 Therefore, a teacher admitted to practice in another state would be obliged by her bar to report this misconduct.

Even if the information is discussed with the teacher in confidence, it could later become the basis of a classroom discussion. This might destroy any possible claim of attorney-client privilege but would not affect the teacher's obligations of confidentiality to the student.

B. Competency, Diligence, and Neglect

Some of the most troubling ethical dilemmas that arise in externships involve supervisors who are incompetent, lazy, or neglect their cases. Many externship programs try to avoid such problems by asking faculty or staff at the law school to screen each possible placement supervisor and to avoid sending students into organizations in which

29. See id.
30. See id. Rule 8.3(c).
31. See id. Rule 8.3.
the standards of practice leave something to be desired. Even in a small program, such efforts are very difficult to implement; in a large program, this type of screening is impossible. Furthermore, some of the best learning experiences tend to emerge from some of the most troubling field experiences. Query whether the students should be shielded from problematic professional practices, or whether they might gain more as professionals by exposure rather than protection. Here is an example of such a situation. "Aleah Caparizzo" submitted the following journal entry to the professor who was teaching her externship seminar:

I started work last week at the law firm of "Solomon Helman." He's a solo practitioner who does mostly immigration work. It looks like a very challenging position. He has so much more work than he can do that the students who work for him wind up working as lawyers. The only problem is, I'm not sure I can hack it.

Last Thursday, for example, he gave me a file and told me to go down to the INS hearing office and take care of this "little hearing." He said he wasn't sure whether it was an exclusion or a deportation. He told me to ask the clerk when I got there. He had a trial in federal court that day, so there was no way he could go with me, and the other extern was doing another hearing.

Needless to say, I was completely petrified since I knew nothing about immigration law and had never done a hearing of any sort before. I tried to get him to explain the case to me, but he said he had to leave. He just handed me a treatise and said, "Read the file. The hearing isn't till two. Anything you need to know about the law you will find in that book."

I got to the hearing office, and I had to ask the receptionist which of the people waiting there was my client. The client's English wasn't so good, but she was happy to see me. Almost as soon as I got there she started crying and begging me not to let them send her back to Rwanda. I was sweating; I didn't have a clue what to do. The hearing started; the judge started asking questions to the client. We really needed an interpreter, but we did the best we could. I felt really bad that I couldn't do more for her. I don't know which was worse, my insecurity or my lack of preparation. I kept wondering how much Mr. Helman was charging the client for my brilliant assistance. The case hasn't been decided yet.

When I got back to the office, Mr. Helman's secretary gave me two more files and told me Mr. Helman wanted me to handle the hearings on those matters. Both hearings are scheduled for Tuesday, which is the next day I work. He wasn't around. I asked her why he is dumping all this work on his externs, and she told me he has 1500 active cases. There are more hearings scheduled each workday than Helman can attend.

If you have any time, I'd really like to talk to you about this before I go in on Tuesday. I'll stop by tomorrow to see if you are in.
What should Aleah do? Quit and find another externship? Call the bar counsel’s office? Tough it out so that she can avoid harming clients? Suppose Helman turned down other applicants after Aleah accepted his offer to work as an extern. Suppose that Helman could not get another extern this semester? What if he cannot even minimally meet his obligations to clients without the externs?

Mr. Helman obviously is engaged in serious professional misconduct. He is neglecting his cases and is failing to provide even minimal supervision to the law students who are working for him. The situation is so extreme that the teacher must intervene.

First, the lawyer’s misconduct is so serious that if the teacher is a member of a bar that has a reporting obligation, the teacher would be obliged to report the misconduct to the disciplinary authorities. Model Rule 8.3 requires lawyers to report conduct by other lawyers that violates a disciplinary rule and that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”32 The student might be in a better position to make the report, because she observed Mr. Helman’s conduct first hand. However, because she is not a member of the bar, she is not obliged to report the conduct. The teacher might claim that her second-hand “knowledge” of the situation was insufficient to impose a reporting obligation, but if the misconduct is flagrant and the student is a credible source of information, the knowledge probably would be sufficient to trigger a reporting obligation.

Even if the obligation is clear, it might be very difficult for the teacher to report the lawyer’s misconduct in this situation. Doing so might harm the student’s professional prospects and might disrupt the externship program. Furthermore, the reporting of the misconduct may lead to a hearing in which the student would be required to testify. The student might feel that this action would jeopardize her chances of obtaining employment as a lawyer. She might fear that she would be branded as a troublemaker. The teacher and the student should discuss the reporting question in depth, consult the rules and relevant case law, and perhaps seek guidance from an ethics expert.

The student cannot be allowed to continue at the placement; the school cannot allow a student to work for academic credit in an environment in which there is no supervision or where there is a serious pattern of client neglect. This raises some awkward questions about how the student’s extrication is to be handled. Most students prefer to handle problems with their supervisors without the teacher being directly involved. The teacher should offer to call the fieldwork supervisor or to participate in a meeting in which the student’s work at the placement is terminated. The teacher should defer to the student’s preferences on how this process might proceed, as long as the result is

32. Id. Rule 8.3(a).
either to terminate the placement or to obtain a commitment of appropriate supervision. The latter probably would be impossible in this instance because of the supervisor's heavy caseload and irresponsible attitude, and because of the obligation to report the misconduct to the disciplinary authorities. They should terminate the placement before the next workday and then begin to seek an alternate externship. The report to the disciplinary authorities can wait until the student is no longer an extern at the law office of Solomon Helman.

C. Unauthorized Practice of Law

Some placement supervisors, especially in organizations with high caseloads, have so much to do that they ask the student externs to do work that really should be done by a lawyer. Sometimes adequate supervision is available, sometimes not. This type of environment can offer excellent learning opportunities for externs, but may risk asking them to engage in unauthorized practice of law. Here is an example:

"Fitz MacMillan" accepted a position as an extern with the county attorney's office. Once he reported in class that he was getting some really great experience—actually trying cases. He said his boss told him that he was so impressed with MacMillan's work that he had decided to let him try some misdemeanor cases. Fitz spent one day in court watching a prosecutor trying cases. He made his first court appearance the following week.

Another student asked whether the judges before whom Fitz had appeared knew that he was a law student. Fitz said he had just introduced himself by name. Another student asked if Fitz was admitted under the student practice rule. He said no. He said he had been concerned about whether he was eligible to speak in court, but the lawyers in the County Attorney's office said it was really no problem—they knew he would do a good job. "Frankly," Fitz commented, "this experience is worth its weight in gold to me. If they want to let me do it, I don't see why I should be such a goody-two-shoes."

In most jurisdictions, a student cannot appear in court without special approval under the student practice rule. A particular supervisor might find it expedient to encourage a student to ignore the formal bar admission requirements. This might be entirely in harmony with the student's educational goals. The student, however, as a future applicant for admission to the bar, should be vigilant about compliance with court rules. Moreover, the law school must comply with student

33. See, e.g., David F. Chavkin, Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor, 51 SMU L. Rev. 1507 app. A at 1546 (1998) (summarizing various states' student practice rules); Documentary Supplement, Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study, 15 Wm. & Mary L. Rev. 353 app. IV, at 476-79 (1973) (setting forth an A.B.A. model rule on student practice); see also Model Rules of Professional Conduct Rule 5.3 (providing responsibilities for supervising attorneys).
practice rules to maintain good relationships with the courts. This may place the teacher in the unpleasant role of pouring cold water on what might be a valuable, but improper, educational opportunity.

One possible middle ground would be for the student to decline to try cases without explicit approval of the arrangement by the trial judge. The supervisor could file a motion with the judge for waiver of the student practice rule restriction and explain why the supervisor believes the student is qualified and under sufficient supervision to try the cases. If the judge grants the motion, the student could try the cases with some confidence that he had not evaded the rule. A motion to waive the rule should be filed by the supervisor rather than the student, so that if the filing of the motion is deemed improper, the responsibility would be borne by the fieldwork supervisor. Absent explicit judicial approval, this arrangement could jeopardize the student's future bar admission.

This problem could be used as an opportunity to discuss the policy issues surrounding the rules against unauthorized practice, both the client protection rationale and the critique that these rules are anti-competitive and monopolistic. The students then might be invited to consider whether they believe that they have a professional obligation to comply with all rules, even with those of whose rationale they disapprove.

D. Billing Fraud

Some student externs work in organizations in which legal fees are generated by hourly billing or through fee petitions submitted by successful plaintiffs. An unpaid student extern who works at a private law firm might be asked to keep time records for administrative reasons, or the firm might bill the student's time to clients as if she were a law clerk. If the client is not informed that he is being billed for the time of a student volunteer, this practice is problematic. But what if the extern is at an organization in which all the lawyers are paid fixed salaries, and time records are kept because the organization receives fee awards in some cases?

"Fred Colton," an aspiring labor lawyer, got a position as an extern at the “National Center for Employment Law” (“the Center”). He was excited to have this opportunity to assist with litigation of cases under Title VII of the Civil Rights Act of 1964.

The Center was a not-for-profit corporation. The attorneys were paid salaries from $60,000 to $80,000 per year. They hired some law clerks, who were paid $15 per hour. They also hired many unpaid law student interns. Most of the Center’s funds were generated by fee awards in successful Title VII cases. Even though the Center’s lawyers did not bill clients for their time, they kept careful time records. When a lawyer won a case, he or she prepared a fee peti-
tion, requesting that the court order the employer to pay the plain-
tiff's attorney's fees.

During Fred's orientation, "Amanda Masterson," his supervisor,
showed him how to record his time and went over the office policy
on what work was and was not "billable." She told Fred that his
time would be billed out at $65 per hour, the same rate used for law
clerks. She asked Fred if he had free access to Lexis and Westlaw.
He said he did. Amanda directed Fred to use his educational ID
numbers for Lexis and Westlaw for research relating to his extern-
ship. She instructed him to keep all his time records for on-line
research, because the Center got reimbursed for Lexis and Westlaw
time in many fee awards.

There are two problems here. One is whether it is appropriate for
an organization to include an extern's time in a fee petition even if the
extern is not being paid by the organization. The other is whether it is
appropriate for the fieldwork supervisor who asks the student to use
his educational access to Lexis and Westlaw to do work for the organi-
zation to include that expense in a fee petition.

The last is the more obvious: if the organization gets free access to
Lexis and Westlaw from whatever source, it should not bill anyone for
that access as if the organization had paid for the access. Whether it is
proper for Fred to do online research using his educational access
should be resolved by reference to the contract between the law stu-
dent or the law school and Lexis and Westlaw or, if the issue is not
addressed in the contract, by consultation with representatives at the
two companies.

Whether the Center should bill for the student's time is less clear.
The principal problem is one of misrepresentation. If Fred is listed as
a "law clerk" on the fee petition, there is an implication that the
Center is paying him for his time. On the other hand, if the Center
lists his time in a petition but makes clear that he is an unpaid extern
working for academic credit, any problem disappears. As long as the
judge has full information about Fred's status, it is up to the judge to
decide whether the employer should pay the Center for Fred's time.

The Model Rules of Professional Conduct discuss legal fees in Rule
1.5, which requires that legal fees be reasonable,34 but is not particu-
larly helpful in this situation. Somewhat more relevant is Model Rule
7.1, which prohibits a lawyer from making "a false or misleading com-
munication about the lawyer or the lawyer's services."35 Absent clear
and specific information about Fred's status as an extern, the demand
for fees based on his time would be misleading.

What should Fred do? How can he raise these issues with
Amanda? What should he do if she insists on conduct that he believes
is improper? It is useful to ask each student to imagine such a con-

34. See Model Rules of Professional Conduct Rule 1.5(a).
35. Id. Rule 7.1.
frontation with his or her own supervisor—this will help each to identify the problems. Some students are relying on their supervisors for references or future employment. Some are working with supervisors who would not respond well to having law students question their judgment. Some work in organizations in which it would be awkward at best to consult another lawyer about the conduct of the supervisor.

Consider what, if any, assistance might be provided by the faculty supervisor. Few students would want the teacher to intervene directly, but many might benefit from the opportunity to point to a law school policy on this issue. The teacher can assist in establishing guidelines that will lend credence to student objections in such situations.

A final problem is whether the teacher or the students have “knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to [a] lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” and, if so, who should report what to which “appropriate professional authority.” If Amanda rejects a request by Fred to disclose his status as an unpaid extern in the fee petition and insists on billing his time as if he were a paid law clerk, this would be a reportable violation. At that point, the teacher, if she is a member of the bar, might have a duty to report, but the student, whose knowledge is more direct, would not, unless the student is admitted to the bar under a student practice rule. The student might feel morally obliged to report even if he is not legally obliged to do so. On the other hand, he might feel constrained from reporting the violation for the same reasons that most lawyers fail to report ethical violations by other lawyers.

E. Confidentiality and Client Relations

Most externs encounter questions about maintaining confidences of clients or of the organizations where they are placed. Many students enroll in externship experiences before taking a course in professional responsibility, so orientation on confidentiality, conflicts of interest, and other common ethical problems is essential.

An early task for every extern is to talk with his or her supervisor about confidentiality. Students need to find out whether they are permitted to talk about their work in class, with their faculty supervisors, and with their friends. They need to ask whether they may keep copies of their own work product from the externship, and what if any information should be redacted (blacked out). They should ask whether they may use redacted copies of their work product as writing

36. Id. Rule 8.3(a).
37. Id.
samples to give to prospective employers, or whether they may share this work with other students or with a faculty supervisor.

Here is an example of a situation in an externship seminar that raises the issue of confidentiality.

“Drake Culpepper” was an extern at the legal services office in his town. He did a presentation in his seminar that was designed to give the other students a vivid snapshot of legal services work. He became one of his clients, and asked the other students in the class to do an intake interview with him as if he were his client. In the interview he called himself “JF.” His client’s name was “John Finley.” He brought photocopies of some of JF’s medical records—the client was seeking social security disability benefits. Drake blacked out the client’s name from the records, but left all the medical information intact, including some details of his client’s mental health problems.

In the discussion after the interview Drake talked with the class about his difficulty in communicating with his client, and his client’s unease with him. A couple of times during the conversation he slipped and mentioned the client’s name.

Did Drake violate Model Rule 1.638 in his presentation to the seminar? Technically he did, of course, because he shared confidential information and then identified that information to a particular client. The externship seminar is not an extension of the legal services office, and neither the teacher nor the other students would properly be characterized as within the firm. This type of breach of confidence is not uncommon in externship seminars. It is unlikely to harm the client’s legal interests, because the disclosure is not made to an adversary. Likewise it is unlikely to harm the client’s privacy interests, because the teacher and the other law students are unlikely to know the client. The externship seminar is a good training ground on confidentiality, because the environment is one in which it is possible to attend even to small breaches of confidentiality, and because inexperienced students may make mistakes and develop better standards of care in a relatively safe environment. The conversation can also explore standards of professionalism, and highlight the importance of discretion as a matter of consideration to clients and because breaches of confidence reflect poorly on lawyers who commit them.

F. Conflicts of Interest

A student who works as an extern at a legal services office or an organization that represents multiple clients might encounter a situation in which the interests of one client conflict with those of a present or past client of the organization, or in which the student or another lawyer has represented a client in the past whose interests conflict

38. Id. Rule 1.6.
with those of a present client of the organization. Students who work as externs for government agencies may represent only a single client (for example, the United States). They might encounter conflicts between their personal interests and their client's interests, or conflicts between the interests of the client entity (the organization) and the interests of a particular employee of the agency.

In an externship seminar in which client matters are being discussed, a conflict could arise between the clients of two externship organizations, or between the clients of one student's field placement and the clients of her part-time employer. The following is an example of these types of conflicts.

"Mark Attanasio" and "Jules Bender" were enrolled in the same externship seminar. At the beginning of the semester, neither had selected a placement. Both interviewed for externships during the first week of classes. Mark accepted a position with the district attorney's office; Jules decided to spend the semester at the public defender's office. The public defender's office represented most of the indigent criminal defendants who were prosecuted by the district attorney's office. Only one section of the externship seminar was offered that semester, and their school did not allow students to do fieldwork for credit unless they enrolled in an externship seminar. Much time was spent in the seminar discussing the students' field experience. Each student made a presentation about his or her fieldwork. The students turned in time sheets and journals describing their work and their reflections on the field experience.

Assume that these law students are obliged to avoid situations that would violate the conflicts rules in the Model Rules of Professional Conduct. Is there a conflict of interest for these two students to participate in the same class while working for two organizations that litigate against one another? What should happen if Mark is assisting in the prosecution of a case in which Jules is assisting in defense?

These two students taking a course together does not create the conflict of interest that would exist if they were both working in the same law office. A seminar is not a law firm. The obligations of one student should not be imputed to others, so there is no formal conflict of loyalties. Because one purpose of the class is to discuss the students' field experience, however, care must be taken to ensure that confidential information is not disclosed, especially because the two organizations are representing directly adverse interests. Because there is a risk that confidential information might be shared in class,

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40. In fact, the lawyers for whom they work are obliged to ensure that their employees do not violate the rules.
the class might be regarded as a quasi-law firm for the purpose of preventing leakage of confidential information.

If the class is treated for conflicts purposes as a sort of constructive law firm, the students might be prohibited from representing clients on opposite sides of a case by Model Rule 1.7(a) or its equivalent in the relevant jurisdiction, because the clients of one student might be regarded as clients of the class (firm) and therefore would be treated as the clients of the other student.\(^{41}\) The rule prohibits representation involving direct adversity unless "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and . . . each client consents after consultation."\(^ {42}\)

Even in the absence of directly adverse assignments, it is possible that one student would share in class information that the client/employer regarded as confidential. This possibility might involve violation of Rule 1.7(b), which prohibits representation of a client if the representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."\(^ {43}\)

Some jurisdictions have interpreted the conflicts rules to extend to non-attorney employees such as paralegals, law clerks, and legal secretaries.\(^ {44}\) Because non-lawyers often have similar access to confidential information, the protection of client confidences should require similar restriction of non-lawyer employees and lawyers. Students should be instructed not to share confidential information about cases and clients; it is prudent to give such instructions orally and in writing. The nature of the precautions to be taken to prevent disclosure of confidential information and to avoid even the appearance of a conflict may vary with the nature of the seminar and structure of the course.

The two students could be assigned to different divisions of their respective offices. This would almost eliminate the possibility that they would be assigned to work on opposite sides of the same case. It would also greatly reduce the likelihood that one would have access to confidential information relating to matters that the extern was not working on directly that might be of interest to the other. Mark could work in the misdemeanor division and Jules could work in the felony division. This type of solution may or may not be possible.

\(^{41}\) See Model Rules of Professional Conduct Rule 1.7(a).

\(^{42}\) Id.

\(^{43}\) Id. Rule 1.7(b).

If it is possible that the students could be assigned to work on opposite sides of the same case, or that one might be exposed to confidential information on a matter to which the other student is assigned, each student should talk with his fieldwork supervisor about the potential problem. The two offices and the teacher should establish a system to avoid assignments that would present direct adversity. For example, each student could notify the teacher of the name of each new matter that might be assigned to him, and the teacher could check the other student’s list and notify the student or his fieldwork supervisor if the other student was already assigned to that matter. In that event, the student could be assigned a non-conflicting case instead.

Another solution to this dilemma would be for the lawyers, the teacher, and the students to agree that the students would treat all information relating to clients as confidential and not discuss cases in class, avoiding even comments that did not disclose the identity of the relevant client. This might limit the students’ educational opportunities, but they could still share various aspects of their fieldwork in class, such as observations about the structure and mission of the organizations, the work styles of their supervisors and their interactions with their supervisors, the relationships between lawyers and support staff, etc. In a situation in which such conflicts are possible, the teacher should work out an arrangement that is acceptable to the relevant placements and put it in writing.

The likelihood of this type of problem arising is greater in a small community in which the students work at a limited number of placements than at an urban law school. I have been teaching externship seminars in Washington, D.C. since 1987, and I have never encountered such a problem. Nevertheless, it is important for externship programs to think through and plan how possible conflicts would be addressed. The externship seminar offers a useful context in which to teach students about conflicts of interest. Here is another example of a common conflicts problem:

“Carrie Dubester” is an extern at the local legal services office. She also has a part-time job as a law clerk at “Horton, Schwab and Kallas.” At the legal services office she has been working on one case on behalf of “Morris Webb,” an elderly man who made a contract with “Olson & Sons” to paint his house. Mr. Olson did the first coat of paint but never returned to deliver the promised second coat. Mr. Webb refused to pay the last $1000 on the contract. Carrie interviewed Mr. Webb, took pictures of the house, and completed a research memo on Mr. Webb’s rights against an unlicensed home improvement contractor.

Last week Carrie discovered that Horton, Schwab and Kallas represents Olson & Sons in their suit against Mr. Webb and on numerous other matters. She has not been asked to do work on behalf of Olson & Sons, nor has she yet told anyone at the firm or the legal services office about the problem.
It is useful to approach this as if Carrie were a lawyer and then to examine what if any difference it makes that she is a law student. If Carrie were a lawyer, under Rule 1.7(a) she could not represent these two clients against one another because their interests are "directly adverse," and she could not reasonably believe that the representation of one would not adversely affect the relationship with the other. Under Model Rule 1.10(a), if Carrie cannot undertake this representation, then no other lawyer in the firm may do so unless the clients agree to waive the conflict. In this situation the rules might require that unless the clients consent to the continued representation, both organizations withdraw from representation of these clients because of Carrie's conflict.

Carrie is not a lawyer, so one must evaluate whether the conflicts rules apply as if she were a lawyer. The lawyers for whom she works probably are obliged by their jurisdiction's equivalent of Model Rule 5.3 to ensure that her "conduct is compatible with the professional obligations of the lawyer." Model Rule 1.10 does not state that conflicts possessed by non-lawyer employees are imputed to lawyers, but because of the possibility of shared confidences, it would be prudent for the firms to treat the situation as if Carrie were a lawyer. Professor Charles Wolfram notes after review of cases involving conflicts presented by non-lawyers that "[t]he 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."

The law firm might notify its client of Carrie's conflict, seek consent to screen Carrie from work at the firm relating to Olson & Sons, and notify all firm employees that matters relating to that client should not be discussed in front of Carrie. Likewise, the legal services office might remove Carrie from Mr. Webb's case, disclose the problem to Mr. Webb, and seek his consent to continue the representation with Carrie screened from receipt of further information about it. Carrie, of course, would be obliged to protect any confidential information that she had learned in the course of her work at the legal services office on behalf of Mr. Webb.

The best cure for this type of problem is prevention. Any law student working for two organizations should tell each employer of the work being done for the other, because the organizations may be in a better position to identify and avoid conflicts than the student. Even if one or both of the organizations is not engaged in litigation, disclosure is wise. Though the conflicts rules might not apply directly to

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45. Model Rules of Professional Conduct Rule 1.7(a).
46. See id. Rule 1.10(a).
47. Id. Rule 5.3(a).
48. Id. Rule 1.10.
conflicting work on legislation or policy development, the fieldwork supervisor and the employer should have the opportunity to consider whether the two positions might present conflicts.

Even if the students' fieldwork and part-time work is reviewed for possible conflicts, other issues of conflicts and confidentiality may arise in connection with the students' job searches.

"Stefan Neudorfer" came to law school to become a health law specialist. He felt very lucky to get a fall externship in the health law section of the state attorney general's office. This externship would give him the opportunity to work on litigation against hospitals and doctors who declined to treat Medicaid patients. Even better, he was told he could do some work on a lawsuit against three major tobacco companies for failure to disclose known health risks.

In early October, Stefan was invited to interview for a summer associate position with "Einsdorf, Guttman & Morgan," one of the leading health law firms in the country. In preparation for his interview, he read that the firm represents two of the three tobacco companies that are defendants in the attorney general's case. How should Stefan handle this situation?

Stefan should take care not to reveal to the lawyers at the firm any confidential information he had learned from the Attorney General's office about the tobacco litigation. Stefan need not disclose his work on the tobacco litigation to the law firm during the interview unless the interviewer begins to discuss information about the litigation. In that event, Stefan should tell the lawyer that he is working on this matter for the Attorney General's office so that the lawyer will not engage him in a conversation that might reveal confidential information.

If the firm offers Stefan a position and he would like to accept the offer, Stefan should disclose the work prior to accepting the offer, because Stefan might then be switching sides in the litigation. The law firm would then need to consult the state bar's version of Model Rule 1.11, which governs conflicts of interest caused by lawyers moving from government service to private practice or vice-versa. Stefan might consider asking to be assigned to work on a different matter at the Attorney General's office to avoid eliminating an attractive employment option. The firm might not wish to hire him because of the side-switching issue, even if it would not lead the firm to be disqualified.

\[50.\] Model Rules of Professional Conduct Rule 1.11.

\[51.\] See, e.g., D.C. Rules of Professional Conduct Rule 1.6(g) (1998) (covering, specifically, work done by law students and lawyers not yet admitted to a bar).
Along with all the other problems of real life that law student externs encounter, students occasionally find themselves working with attorneys whose competency is impaired by substance abuse.

"Melinda O'Connor" accepted a position as an extern with the legal aid office. She was assigned to work for "Burton Simms," a staff attorney. Burton is a litigator. He handles some of the more complex cases in the office.

Melinda worked Tuesdays and Thursdays. Burton often was not in the office during the hours when she was there. Instead he left assignments in her in-box. After a few weeks, Melinda realized that Burton was out of the office more often than he had obligations on cases. "Gina Porter," Burton's secretary, explained to Melinda that Burton often came in late and left early because of his drinking problem. Melinda asked Gina if others in the office knew about the problem. Gina laughed. "Oh yes, everyone around here is always filling in where Burton doesn't quite make it."

Melinda realized that she had not gotten any feedback on anything she had written, and that Burton essentially had not spoken to her since she started work. Melinda had assumed the Burton was not spending time working with her either because he was too busy or because he thought she was not worth his time. She began to consider the possibility that it was his deficiencies, more than hers, that were causing her isolation at her externship.

This is a particularly challenging situation because the lawyers in the office apparently know about the problem and are taking no action. Can an unpaid law student extern, who is both inexperienced and a temporary member of the office, have an impact on the situation? Perhaps not, but sometimes the comment of an outsider can galvanize those more directly involved.

Most bar associations have a committee or an office that provides advice and referrals on substance abuse. Melinda might consult with the relevant person at the bar association. She might initially request guidance without identifying the lawyer whose conduct concerns her. The lawyer counseling program might send her literature that she could pass on to another lawyer in the office or other guidance about how to proceed.

In addition to discussing how the student might respond to this situation, this problem provides an opportunity to discuss institutional dynamics relating to substance abuse. Why might the other lawyers be so passive in dealing with Burton's problem? How many law students would feel they could take any steps at all to address this situation? There may be students in the seminar who have had experience with substance abuse by friends or relatives. They can help to educate those who have no such experience.
III. THINKING ABOUT ETHICAL DILEMMAS

Most of the examples of ethical dilemmas presented in this article are fairly blatant. Most students are likely to encounter subtler problems. A student might be asked to do something that does not seem quite proper, but that does not utterly alarm him or her either. For example, a student might be asked to:

- complete a memo supporting a motion in such a short time that she can do no more than identify and discuss a couple of relevant cases—thorough research is just not possible;
- call a witness in a case to get some information without identifying himself or his relationship to the externship organization;
- backdate a form filed with a local regulatory agency to make it less likely that the agency will notice a missed deadline; or
- get advice from a law professor to assist the judge for whom the student works as an extern in deciding a complex legal issue.

One student might find such requests troubling, while another might barely notice the questions they raise. Some ethical dilemmas are addressed in the professional rules that govern lawyer conduct; some are not. Working as an extern provides each student the opportunity to act as a participant-observer, to reflect on his or her own values and judgments and those of others. A teacher can assist the students to increase their own sensitivity to professional choices and to ethical dilemmas. This increased awareness contributes to the students’ professional development and will assist them in future professional choices.