ETHICS ISSUES ARISING IN EXTERNALS

SUPERVISOR AWARENESS AND STUDENT JUDGMENT
ETHICS ISSUES ARISING IN EXTERNSHIPS

- Supervisor Awareness
  - The Three C’s
    - Confidentiality
    - Conflicts
    - Competence
  - Student Practice and U.P.L.
  - Malpractice Insurance
  - Duty to Report
- Teaching Ethical Awareness in Practice
CONFIDENTIALITY

- Students need to learn how confidentiality operates in practice – how attorneys “edit” their conversation
- Faculty can teach general rules; you can teach how they apply in your setting
- Consider not only ethical limitations, but statutory obligations (HIPAA, etc.)
- Suggestion: discuss topics that students can write about in journals / talk about in class.
SCENARIO I

- A student works with you on a case in Atlanta involving multiple parties, and sits in on a series of complex settlement discussions as your assistant. The case results in a consent order, with no appeal.
- Which of the following is consistent with the student's obligation of confidentiality?
  - The student discusses in-court testimony in a class discussion.
  - The student writes about your negotiation strategy in a journal, without disclosing the names of the parties.
  - The student critiques the performance of opposing counsel in a conversation with the externship supervisor.
  - In a final journal, the student criticizes your client's specific choice of options in assessing your performance as a counselor.
CONFLICTS

- Concurrent conflicts for students can arise due to multiple clinical courses or part-time work in addition to clinical courses.
- Successive conflicts arise more often for students than attorneys because of multiple externships, internships and jobs during law school.
- Consider whether your conflict-checking procedure takes into account student conflicts.
- Suggestion: involve students in your conflict checking and analysis process.
SCENARIO II

- A student interns at a private non-profit that litigates against governments and commercial interests on environmental issues.
- Can the student:
  - Work at the non-profit if she has previously interned at one of the governmental agencies sued by the non-profits?
  - During her internship at the non-profit, continue her work with that same governmental agency?
  - During her internship, interview for a post-graduate job with a firm that routinely represents commercial opponents of the non-profit?
COMPETENCE

- Supervisors have the task of assessing student competence for work.
- Students should be proactive about asking questions
- Consider materials in this afternoon’s session as guidelines for competence assessment.
- Ensuring an attorney’s availability to the student is important
- Finding the right balance between “out of comfort zone” and “out of competence zone” can be hard
STUDENT PRACTICE AND UNAUTHORIZED PRACTICE OF LAW

- "Practice of law" includes both representing clients in court and giving legal advice.
- Student practice rules permit certain students to act as attorneys, eliminating UPL concern.
  - Physical presence of supervisor is still required in court
- Suggestions: allow student to participate in conveying advice but ensure participation of supervising attorney
SCENARIO III

- You prepare a student to handle a hearing on a pre-trial motion. In your judgment, the student will handle the hearing well. The student tells you that he wants you to “have his back” at the hearing.

- Can you:
  - On the day of hearing, resolve a sudden scheduling conflict by sending the student to the hearing on his own?
  - Resolve the same conflict by sending another attorney?
  - Step out of the courtroom to take a phone call while the student is arguing?
  - Insist that the student negotiate the case at the courthouse without you present?
MALPRACTICE INSURANCE

- Law schools and externship faculty do not have practice responsibility for student work.

- Placements facing malpractice risks should assure coverage of student interns.

- Supervisory practice, protection against UPL and competence assessments enhance protection.
DUTY TO REPORT

- Students often observe conduct they believe to be unethical (rightly or wrongly).
- Externship faculty discuss and help them to assess whether and how to raise an issue with you.
- If conduct comes from outside your office, encourage discussion with you.
- If conduct comes from within your office, you can help through clarity about your internal ethics process.
SCENARIO IV

- A student reports to his externship supervisor that, before closing on a low-income home loan, he saw his supervising attorney shred evidence of undisclosed bad debts of his client.
- The externship supervisor should:
  - Assure the student that it happens all the time and that she will get used to it.
  - Call the supervising attorney and ask for an explanation.
  - Let the student finish the semester and never let students work there again.
  - Ask the student more questions
    - about the closing and the documents,
    - and about whether the student has talked with the supervisor.
TEACHING ETHICAL JUDGMENT

• You have a huge impact on setting the norms by which students understand and assess ethical issues.
• Students have both:
  • Intense curiosity about how ethics work.
  • Intense desire to learn how to think, act, relate professionally.
• Teaching ethics in practice is unsettling:
  • Often no clear-cut analysis or solution.
  • Sometimes it’s about others, and hard enough.
  • Sometimes it’s about you, and your practice.
GUIDING ETHICAL AWARENESS

- **Seeing**
  - Easy prompts: breaks in routine; unduly harsh action.
  - Hard prompts: feelings; intuitions; “hair-raising”

- **Naming**
  - Identifying the covering rules.
  - ALSO: identifying broken norms and unproductive practice.

- **Assessing**
  - Formal research.
  - Exploring factual, practice, human context.

- **Resolving**
  - Lawyers outside your practice: Rule 8.3 and reporting.
  - Lawyers within your practice:
    - Resolution in advance.
    - Self-reporting and correction.
SCENARIO V

• In a pretrial hearing, opposing counsel is unprepared, makes poorly researched arguments and loses track of his case.
• Afterwards, the lawyers (with the student observing) talk settlement. The student smells alcohol on opposing counsel’s breath.
• The student and her supervisor can overhear opposing counsel raising his voice during private talk with his client: “This is the best deal I can get.”
• A deal is struck that gives his client less than the least the student’s supervisor expected to give.
• The student asks whether that kind of practice is “right.”