

Presentation Plan for Supervision

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Part I: DEFINING THE LANDSCAPE OF SUPERVISION: WHAT RULES, GUIDELINES, AND BEST PRACTICES GOVERN SUPERVISION OF FIELD PLACEMENTS?

What rules, guidelines and standards apply in an externship setting? Beyond specific rules, what aspects of best practices may externship directors integrate into the classroom that addresses supervision. Below are selected standards that specifically address externships:

- Levels of Supervision
 - of students
 - of supervising attorneys
 - programmatic & administrative
- Supervision = teaching
 - setting pedagogical objectives
 - determining methodology
 - implementing assessment

Because externships are credit-bearing courses within the academic curriculum, we are governed by Chapter 3 (Program of Study) of the ABA Standards for Legal Education.

ABA Standards

(presented by Cynthia Batt, Stetson College of Law)

- **Proposed Standard 304:**

(Moving out of Standard 305 and into Standard 304 - why is this move important.)

Standard **304**: Simulation Courses, Law Clinics, and Field Placements.¹ Below are excerpts relevant to supervision.

304(c) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

304(c)(i) direct supervision of the student's performance by a faculty member or site supervisor;

304(c)(ii) opportunities for performance, feedback from either a faculty member or a site supervisor, and self-evaluation;

304(c)(iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student's academic performance;

304(c)(iv) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;

Discussion points: The proposed language and merger of 305 into 304.

- **ABA Standard 303: Curriculum**

(a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following:

(1) one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members;

(2) one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised; and

¹ See

http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20151211_notice_and_comment.authcheckdam.pdf

(3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must:

- (i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
- (ii) develop the concepts underlying the professional skills being taught;
- (iii) provide multiple opportunities for performance; and
- (iv) provide opportunities for self-evaluation.

(b) A law school shall provide substantial opportunities to students for:

- (1) law clinics or field placement(s); and
- (2) student participation in pro bono legal services, including law-related public service activities.

- **Standard 305:** Field Placements and Other Study Outside the Classroom.² Below are excerpts relevant to supervision:

305(c) Each student's educational achievement in such a course shall be evaluated by a faculty member. When appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

305(e)(2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students;

305(e)(4) a method for selecting, training, evaluating, and communicating with site supervisors;

305(e) (5) for field placements that award three or more credit hours, regular contact between the faculty supervisor or law school administrator and the site supervisor to assure the quality of the student educational experience, including the appropriateness of the supervision and the student work;

- **Standard 310:** Determination of Credit Hours for Coursework
(presented by Chrissy Brown, Loyola University New Orleans College of Law)

² See

http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3.authcheckdam.pdf

(a) A law school shall adopt, publish, and adhere to written policies and procedures for determining the credit hours that it awards for coursework.

(b) A “credit hour” is an amount of work that reasonably approximates:

(1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks, or the equivalent amount of work over a different amount of time; or

(2) at least an equivalent amount of work as required in subparagraph (1) of this definition for other academic activities as established by the institution, including simulation, field placement, clinical, co-curricular, and other academic work leading to the award of credit hours.

Interpretation 310-1

For purposes of this Standard, fifty minutes suffices for one hour of classroom or direct faculty instruction. An “hour” for out-of-class student work is sixty minutes. The fifteen-week period may include one week for a final examination.

Interpretation 310-2

A school may award credit hours for coursework that extends over any period of time, if the coursework entails no less than the minimum total amounts of classroom or direct faculty instruction and of out-of-class student work specified in Standard 310(b).

Discussion: How should we calculate the hours in the field, journals, timekeeping and classroom time?

- **Standard 314: Assessment of Student Learning**
(presented by Natalie Wolfe, DePaul University College of Law)

A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.

Discussion: What is considered ‘meaningful feedback’? How to document the meaningful feedback given in individual meetings with students or through regular class assignments? Is there a specific method required to provide feedback?

Department of Labor Standards

(presented by Lauren Knight, Savannah Law School)

What is considered free labor?

Six Criteria for Unpaid Internships Under the FLSA:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operation may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.³

Latest factors for consideration from the courts to determine when an intern is not an employee:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.⁴

The key distinctions include that the DOL's test states that the six criteria *must* be applied, whereas *Glatt* concludes that no one factor is dispositive. The *Glatt* test also eliminates the “no immediate advantage” factor and focuses on the potential intern's academic and educational requirements.

Discussion points:

ABA Model Rules of Professional Conduct and Judicial Rules of Conduct⁵

(presented by Chrissy Brown, Loyola University New Orleans College of Law)

The following practices in an externship area may give rise to ethical issues: Journaling, final portfolios, classroom discussions, roundtable discussions in seminar class or in individual meetings.

³ U.S. DEP'T OF LABOR WAGE AND HOUR DIV. FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010).

⁴ *Glatt v. Fox Searchlight Pictures, Inc.*, 13-4478-CV, 2016 WL 284811, at *6-7 (2d Cir. Jan. 25, 2016)

⁵ Virginia Listach, Southern University Law School; co-presenter, Louisiana Judicial Conference, San Destin (2015).

To fully understand the intersection of the ABA Model Rules and Judicial Code and how both may apply in the externship setting, an outline of selected rules is provided below. Also included are scenarios when such issues may arise in an externship setting. Note: This is not an exhaustive list and new externship directors are encouraged study resources and engage student in discussions related to ethical concerns.⁶

ABA Model Rules of Professional Conduct

- ABA Rule 1.6 - Confidentiality
 - *In the externship seminar course or in a journal, a student shares an experience and discloses the client or specific issue research or nature of the work.*
 - *In the final written portfolio, the student produces a bench memo drafted in a judicial setting intended to assist the judge in her decision making.*
 - *In an individual meeting with the professor, the student shares an experience which provides information about a specific client they met in their externship.*

- ABA Rule 1.7- Conflict of Interest
 - *The extern was recently hired by a criminal defense attorney. The extern is currently externing at the prosecutor's office.*
 - *An extern applies for summer clerk positions or post graduation employment at firms while they are currently externing with a judge; Attorneys in the firm regularly appear before the judge.*

Model Code of Judicial Conduct

Are we teaching students the ethical rules in the judicial code and how those rules are imputed upon externs in a judicial setting? Below are judicial codes that may apply in a judicial extern setting:

- Judicial Code 2.4 - External Influences on Judicial Conduct
 - *An extern pursues a part-time paid position*
- Judicial Code 3.10 - Practice of Law Dealings with Prospective Employers
 - *An extern applies for summer clerk positions or post graduation employment at firms while they are currently externing with a judge; Attorneys in the firm regularly appear before the judge*
- Judicial Code 3.13 -Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value
 - *At the end of the externship, an extern buys a present for the judge and also the chamber staff.*
- Judicial Code 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

⁶ Mickens, Helen Pratt, The Column of the Legal Education, Committee Professional Responsibility: Bridging the Gap Between Law School and the Practice of Law, Mich. Bar J'nl. 2015; For Judicial Extern resources see: Sobel, Sylvan A., Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges, 2nd Ed., 2007; Thurgood Marshall Federal Judiciary Building, Maintaining the Public Trust "Ethics for Federal Judicial Law Clerks,"2002.; Zito, Catherine, The Rules of Professional Conduct: A Judicial Externship Perspective How Do the Rules of Professional Conduct Apply to a Law Student?, November, 2013.

- *A judicial extern attends a political fundraiser endorsing a specific candidate.*

Best Practices for Legal Education⁷

(presented by Cindy Batt, Stetson College of Law)

- The intersect between *Building on Best Practices* and the ABA Standards.
- Establishing the dual supervisory relationship: Faculty /Site supervisor / Student
 - Objectives necessary for dual supervision: (1) hold field supervisor accountable as teachers in the field; (2) provide academic rigor and structure for the student to digest and integrate what was learned, (3) insure that students have opportunities for reflection (self-evaluation).
 - Objectives necessary for site supervision (1) assign work; (2) assess performance; (3) provide feedback; (4) evaluate professional develop; and (5) provide opportunities for student growth;
 - Objectives necessary for student supervision: (1) proactivity, (2) self-reliance, (3) reflection
- Implementing the supervisory goals - understanding multiple purposes, establishing a three-way partnership.
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PART II. SUPERVISION OF SITE SUPERVISORS

(presented by Natalie Wolfe, DePaul University College of Law)

Part of supervision is educating and training the site supervisors to better understand the academic mission, as opposed to simply thinking of students as a free labor resource. Another aspect is training supervisors to work with faculty and directors to provide or facilitate learning.

- Best practices for screening and selecting site supervisors
- The importance of a Memorandum of Understanding “MOU”
- Periodic Training: What should it include? (possible examples of training: workshops, site visits, regular communications, MOUs, Supervisor's' Manual., etc. Every contact is an opportunity to teach.)
 - Learning goals
 - Assignment
 - Strategies for giving feedback and assessment
 - CLE credit
- Problem Solving

⁷ Roy Stuckey, *Best Practices for Legal Education*, p. 279 (Clinical Legal Education Association (2007); D.Maranville,L.Bliss,C.Kaas, & A.Lopez. *Building on Best Practices: Transforming Legal Education in a Changing World*. LexisNexis (2015)

- How to handle placements where the school does not have control over who is assigned the site supervisor, like the Attorney General's Office, the State's Attorney's Office, or the Public Defender?
- How to handle "bad" site supervisors? Correcting behavior, encouraging student proactivity, and/or viewing interaction as a learning opportunity

Part III. Supervision of Students - (1 minute description and then discussion)

The counterpart to supervision of site supervisors is the supervision of students. Students are receiving supervision from both the faculty member and site supervisor but through different modalities. When we discuss "appropriate supervision" what exactly does this mean in the context of large externship programs. [add objectives both programmatic and individual and how clinical pedagogy applies and the clinical method; add graphic]

- Syllabus
- Reflective journal
- Timesheets
- Classroom
- Individual meetings
- Learning Goal Plan with individual goals

Discussion: What are your objectives? Programmatic objectives?

Part IV. How does status impact supervision? (1 minute presentation on our program/status)

For those without faculty status or untenured status, how do such status issues impact supervision. Specifically, do students or site supervisors hold an implicit bias in favor of faculty status and disregard administrators or directors without such status. Does a non-faculty member hold back on advising or instructing a faculty member on best practices because of status?

- Impact upon students
- Impact upon faculty, academic deans and with the administration
- Impact upon site supervisors

Bibliography Section

(Prepared by Monica Strady, Research Assistant for Professor Batt, Stetson University College of Law)

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- <http://lexternweb.law.edu>

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III. Supervision of Supervisors

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- Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 *Clin. L. Rev.* 505 (2012).
- Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *Clin. L. Rev.* 333 (2009).

- Karen Tokarz, Nancy L. Cook, Susan Brooks, Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 *Wash. U. J.L. & Policy* 359, 382 (2008).