

GUIDING LAW STUDENTS THROUGH FOR-PROFIT FIELD PLACEMENTS

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The goal of this article is to help law school externship clinicians guide law students through for-profit field placements. First, this article discusses the outcomes sought in traditional non-profit field placements, and the methodologies that externship clinicians use to guide, enhance, and assess the students' experiences. Second, this article discusses educational benefits available in for-profit placements that may not be as readily available at non-profits. Third, using similar methodologies used for non-profit placements, the author suggests topics for reflection externship clinicians can use to help guide, enhance, and assess the for-profit experience for students.

INTRODUCTION

Over the past decade, externship clinicians have debated the benefits and drawbacks of allowing for-profit placements in for-credit law school externship programs.¹ Once for-profits are allowed in an externship program, however, this article suggests that externship clinicians should take steps to guide, enhance, and assess the benefits that students receive from for-profit placements. Part I of this article will examine educational outcomes and methodologies externship clinicians use to help achieve these outcomes in traditional non-profit placements. Part II will explore educational outcomes externship clinicians can hope to achieve with for-profit placements in externship programs. Part III will suggest assignments externship clinicians can use to help students achieve these outcomes in for-profit placements.

I. EDUCATIONAL OUTCOMES AND METHODOLOGIES FOR TRADITIONAL NON-PROFIT PLACEMENTS

Law school externship programs have grown significantly over the past few decades, and with that growth has emerged a significant body of scholarly work discussing goals for externship programs and methods for enhancing students' educational experiences. This sec-

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¹ See generally Bernadette T. Feeley, *Examining the Use of For-Profit Placements in Law School Externship Programs*, 14 CLIN. L. REV. 37 (2007).

tion first will look at educational outcomes and other benefits for traditional non-profit field placements. Second, this section discusses methods used by externship clinicians to help students achieve these outcomes.

Students, externship clinicians, other faculty, and administrators may seek to derive different benefits from traditional law school externship programs. Benefits can range from educational benefits and career development for students to broader benefits for the law school and the community. Participation in an externship program can provide very practical opportunities for student exploration of career options, networking, resume building, and jobs.² Similar to other clinical offerings, law school externship programs can assist in providing access to justice for traditionally under-represented clients.³ Some law schools view externship programs as a less expensive means of providing clinical education than in-house clinics,⁴ with the added benefit of maintaining contact with alumni and other members of the bar.

Although these practical benefits may result, the focus for externship clinicians must be the educational outcomes for students.⁵ Educational outcomes include helping students develop fundamental lawyering skills that can be transferrable to many areas of practice.⁶

² Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1708 (1993) (referring to one study in which 43 percent of students said that a legal clerkship led to a permanent offer (citing Donald N. Zillman & Vickie R. Gregory, *Law Student Employment and Legal Education*, 36 J. LEGAL EDUC. 390, 399 (1986))); see also David C. Yamada, *The Employment Rights of Student Interns*, 35 CONN. L. REV. 215, 217-18 (2002) (referring to employment benefits for students who have been interns (citing Jennifer E. Brooks & Jacqui Cook Greene, *Benchmarking Internship Practices: Employers Report on Objectives and Outcomes of Experiential Programs*, 59 J. CAREER PLAN. & EMP. 37 (1998))).

³ For a discussion of the social justice mission of clinical education, see Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLIN. L. REV. 307, 309-10 (2001); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1466-72 (1998).

⁴ See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 21-22 (2000) (discussing the cost advantage of externship programs as compared to in-house clinical courses); Lisa G. Lerman, *Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service*, 67 FORDHAM L. REV. 2295, 2298 (1999) (referring to externship programs allowing enrollment of larger numbers of students than most live-client clinics).

⁵ See generally *Standards and Rules of Procedure for Approval of Law Schools*, 2012-2013 ABA SEC. LEGAL EDUC. & ADMISSIONS TO B. 1, Standard 305 [hereinafter *ABA Standards*], available at <http://www.abanet.org/legaled/standards/standards.html>; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 198-202 (2007) [hereinafter *BEST PRACTICES*]. See also *infra* notes 26-27 and accompanying text (discussing requirements under the Fair Labor Standards Act).

⁶ For a discussion on transfer theory in the context of clinical legal education, see generally Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 CLIN. L. REV. 285, 288-94 (2010); David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLIN. L. REV. 191, 197-99 (2003).

Such fundamental lawyering skills include research, writing, factual investigation, negotiation, advocacy, problem solving, and recognizing and resolving ethical issues.⁷ Other educational outcomes include developing opportunities for institutional critique,⁸ allowing students to “learn to learn from experience,”⁹ practicing reflective lawyering,¹⁰ and developing professional identity.¹¹

Externship clinicians also may focus on educational outcomes for students that are more specific to an individual student’s interests in a particular area of practice. A field placement in a specific area of practice offers opportunities to learn substantive law, transfer theory to practice, observe how the area of law is practiced, recognize ethical issues specific to the practice area, and gain insight into other issues relating to a particular area of practice.¹²

Externship clinicians use a variety of methods to guide, enhance, and assess these educational outcomes. As part of various methodologies, externship clinicians often suggest topics for discussion and reflection. Methodologies for guided reflection include journal writing. Students are encouraged to reflect and write about their field placement experience, often with topics suggested by the faculty supervisor.¹³ The faculty supervisor may comment on the journals individually with students or in class to promote further reflection.

Although not required by ABA Standards, many externship programs include a classroom component.¹⁴ Class topics should comple-

⁷ For a discussion of fundamental lawyering skills, see AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) (1992) at 135-207 [hereinafter *MacCrate Report*].

⁸ Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLIN. L. REV. 527, 535 (1999); Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95, 103 (1987).

⁹ Smith, *supra* note 8, at 530 (citations omitted); see, e.g., Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic*, 5 CLIN. L. REV. 347, 359-60 (1999).

¹⁰ See generally J.P. OGILVY, LEAH WORTHAM, LISA G. LERMAN, ET AL., LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 145-170 (2d ed. 2007).

¹¹ For an extensive discussion of professional identity for lawyers, see WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14, 28, 126-61 (2007) [hereinafter *Carnegie Report*].

¹² Eyster, *supra* note 9, at 356 (Observation of how law in a particular field is practiced “includes a combination of substantive law, lawyering skills, legal culture and other factors that indeed are not accessible through classroom discourse.”).

¹³ *Id.* at 386 (discussing structured journal assignments). See also OGILVY ET AL., *supra* note 10, at 199-214; Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLIN. L. 7 (1997); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLIN. L. REV. 55 (1996).

¹⁴ See ABA Standards, *supra* note 5, at Standard 305(e) (7) (“A field placement pro-

ment the work at the field placement and class discussion should encourage the students to look critically at their work, their placement, and the legal profession.¹⁵ Classes often require student presentations on topics relating to their particular field placement experience.¹⁶

Focused individual guidance should be an integral part of the externship experience.¹⁷ Students should be encouraged to meet frequently with their field supervisors for guidance and feedback,¹⁸ and externship clinicians should encourage students to speak to their field supervisors on specific topics relating to those placements. Externship clinicians and students usually meet individually before and during the externship to discuss the student's goals, progress, and other topics for reflection. Site visits by externship clinicians can be a valuable part of the experience,¹⁹ with externship clinicians meeting the field supervisor, and sometimes also with the student, at the placement site, providing further opportunity for discussion and assessment.

Some externship clinicians use on-line communications, such as e-mail or blogs, with individual or groups of students to promote reflection and dialogue. As with the other methodologies, the externship clinician can suggest topics to promote discussion and reflection.

II. EDUCATIONAL OUTCOMES WITHIN FOR-PROFIT PLACEMENTS

Many law school externship programs have added for-profit placements to their externship program offerings.²⁰ Just as with non-profit placements, the reasons may vary as to why students and law schools want to participate in for-profit placements.²¹ With regard to for-profits, students may think that they will acquire a permanent job as a result of a successful externship. While that might be possible, often students do not obtain permanent jobs at their particular placement immediately after graduation. The experiences that students have at for-profit placements, however, may help them obtain a job in the for-profit world precisely because it exposes them to experiences that are similar to the work they seek after graduation. One prevalent

gram shall include opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection.”).

¹⁵ See generally Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students' Critical Reflection*, 5 CLIN. L. REV. 437 (1999).

¹⁶ See OGILVY ET AL., *supra* note 10, at 437-50.

¹⁷ BEST PRACTICES, *supra* note 5, at 205.

¹⁸ For a discussion on the benefits of a mentoring relationship with guidance and feedback, see Alice Alexander & Jeffrey Smith, *Law Student Supervision*, 15 LEGAL ECON., No. 4, 38, 39-42 (1989).

¹⁹ See *ABA Standards*, *supra* note 5, at Standard 305(e) (5).

²⁰ See Feeley, *supra* note 1, at 37.

²¹ See *supra* notes 2-12 and accompanying text.

reason that externship clinicians encourage these placements is the educational outcomes they offer for students since students may learn things in for-profit externships not available in traditional government, judicial, or other non-profit placements.²²

These two goals, educational outcomes and permanent job placements, converge because the private bar is increasingly calling for law school graduates with greater lawyering and professional skills.²³ In the past, a law firm associate's first year was sometimes viewed as a transition between law school and practice, an apprenticeship of sorts where law firms willingly mentored new associates in order to develop practice skills. That view, however, is changing.

During recent years, law firms have encountered increased scrutiny from clients to deliver quality legal services as efficiently as possible. Clients have repeatedly expressed frustration and unwillingness to absorb the cost of training new associates hired by their outside counsel. These pressures have ignited much debate over the curriculum and experiential learning opportunities currently being offered at law schools. Law firms are demanding better prepared and 'practice ready' new lawyers.²⁴

A recent study surveyed private law firm associates on the usefulness of experiential learning opportunities in law school in preparing them for private practice. Within the groups who participated in these activities in law school, clinics and field placements received higher ratings for usefulness than practice skills courses.²⁵

Although in this very practical way the educational and placement goals converge, the focus of the law school and externship clinicians must remain on the educational outcomes available to law students in for-profit placements. Under criteria outlined in opinion letters of the Wage and Hour Division ("WHD") of the Department of Labor, training in unpaid internships must be for the benefit of the student, otherwise it could violate the requirements of the Fair Labor Standards Act ("FLSA").²⁶ This concern is more significant with for-

²² Cf. BEST PRACTICES, *supra* note 5, at 198-202 (stating that best practices for externship courses includes using externship courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction and involve faculty enough to ensure achievement of educational objectives).

²³ NAT'L ASS'N FOR LAW PLACEMENT, 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS 1, 5 (2011) [hereinafter NALP SURVEY].

²⁴ *Id.* at 8. See also Chris Mondics, *As Clients Call Shots, Law Firms Cutting Jobs*, PHILADELPHIA INQUIRER, Mar. 22, 2009, at D01.

²⁵ Of those who participated in the activities in law school, the following percentage of associates rated the experience as "very useful": clinics (63.1%), externships/field placements (60.1%), practice skills courses (35.8%). NALP SURVEY, *supra* note 23, at 6-7.

²⁶ For a more thorough discussion of the Fair Labor Standards Act in the context of law school field placement programs, see Carl J. Circo, *An Educational Partnership Model for Establishing, Structuring, and Implementing a Successful Corporate Counsel Externship*, 17

profit placements than with government agencies or non-profit organizations.²⁷ Therefore, externship clinicians need to be explicit in recognizing, articulating, and promoting the educational outcomes they hope to achieve in for-profit placements.

In addition to the many educational outcomes available to students in non-profit externships,²⁸ allowing for-profit placements can offer education outcomes unavailable, or at least difficult to acquire, in non-profit placements. Three such educational outcomes are exposure to: (1) clients not likely encountered in non-profits; (2) different law practice settings; and (3) different areas of substantive law. A well-structured externship program does not merely expose students to the unique issues of a particular placement, but exposes them with benefit of guided reflection from the faculty and field supervisors.²⁹ These three educational outcomes are described below.

Clients not likely encountered in non-profits: The great majority of law students will work at private law firms after graduation,³⁰ and unique issues arise for clients represented by private law firms. In for-profit law firm placements, externs may have exposure to clients not likely encountered in non-profits such as institutional clients represented by private counsel,³¹ clients who are paying for their entire le-

CLIN. L. REV. 99, 121-23 (2010); Feeley, *supra* note 1, at 43-46.

²⁷ See Circo, *supra* note 26, at 122. In a fact sheet issued in 2010, the Department of Labor states, "The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency. . . . WHD also recognizes an exception for individuals who volunteer their time . . . to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors." U.S. DEPT. OF LABOR, WAGE & HOUR DIV., FACT SHEET # 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET # 71].

²⁸ See *supra* notes 2-12 and accompanying text.

²⁹ See *supra* notes 13-19 and accompanying text.

³⁰ The National Association for Law Placement ("NALP") reports that for the law school graduating class of 2010, 55.4% of men and 51.9% of women were employed in private practice, and 14.6% of men and 12.3% of women were employed in business/industry. NAT'L ASS'N FOR LAW PLACEMENT, EMPLOYMENT PATTERNS 1999-2010, available at <http://www.nalp.org/employmentpatterns1999-2010> [hereinafter NALP EMPLOYMENT PATTERNS]. See *MacCrate Report*, *supra* note 7, at 33 (reporting that in 1988, 71.9% of all lawyers in the United States were in private practice); *Carnegie Report*, *supra* note 11, at 44.

³¹ Students exposed to private law firms representing institutional or organizational clients have a unique opportunity to broaden their understanding of the complexities of this type of representation. Common challenges include: who speaks for the client; what is the structure and who are the constituents of the organization; who should attend the initial client interview; and whether it is important for an attorney to agree with the mission of the client's work. Cf. Sara B. Lewis, *Rite of Professional Passage: A Case for the Liberalization of Student Practice Rules*, 82 MARO. L. REV. 205, 236-37 (1998) (discussing how students in on-campus clinics are not likely to encounter issues relating to representation

gal bill, or clients whose bill is being paid by another individual. Faculty and field supervisors can enhance the experience for externs with supplemental work on such issues as billing practices, law firm management, and *pro bono* obligations of the bar.

Different practice settings: Most law students will eventually practice law in one of many different for-profit settings³² and would benefit from exposure to the unique issues that arise in these settings. For-profit placements may include: in-house corporate counsel offices; small, mid-sized, and large law firms; general practice or boutique law firms; and financial institutions such as banks and investment firms. Educational outcomes may include gaining insight into understanding and resolving ethical and organizational issues unique to a particular placement.

Different areas of substantive law: Areas of substantive law much more likely encountered in for-profit placements include: sports, entertainment, intellectual property, patent, real estate, financial services, and international. Different areas of the law are practiced in unique ways. Externs may learn substantive law at their placement under the guidance of their field supervisor and with the added depth of applying the law to real life issues. Additionally, with guidance from faculty and field supervisors, students learn how the area of the law is practiced,³³ ethical obligations unique to the practice area, and skills necessary to excel in that practice.

III. HELPING STUDENTS ACHIEVE EDUCATIONAL OUTCOMES WITHIN FOR-PROFIT PLACEMENTS: PROVIDING STUDENTS WITH TOPICS FOR REFLECTION

Each of the three educational outcomes identified in Part II will

of organizational clients). These issues also are encountered in certain law school clinics. Cf. Paul R. Tremblay, *Counseling Community Groups*, 17 CLIN. L. REV. 389 (2010).

³² *MacCrata Report*, *supra* note 7, at 33-34 (reporting that in 1988, 71.9% of all lawyers in the United States were in private practice and 9.8% of all lawyers in the United States worked for private industry and association); *Carnegie Report*, *supra* note 11, at 44 (“[T]oday . . . most young lawyers begin their careers in private practice Nearly 10 percent of law graduates go to work directly for businesses”). Even if a law school graduate wants to obtain a job at a non-profit, these positions are difficult to obtain. There is strong competition for these positions, and students who have prepared for a career in public interest are applying to limited positions. Although there is plenty of work to be done, public interest organizations are struggling with funding reductions from interest on IOLTA accounts, lower donations, and fewer grants. Large private law firms deferring associates and sending them temporarily to public interest jobs may be helping to fill a need, but some who have prepared for public interest work worry that these deferred associates are hurting their job prospects. See Karen Sloan, *Public-Interest Sector Getting a Little Crowded: Law Graduates who Trained for Public-Interest Jobs must Compete with Deferred Associates*, NAT’L L.J. (online) (June 1, 2009) at 1-2.

³³ See Eyster, *supra* note 9, at 356.

be discussed below.³⁴ For each of the three educational outcomes, the author will use a placement example and suggest topics for reflection for each placement to model what faculty supervisors can provide to students to supplement their for-credit placement experience.

Just as topics of reflection are used in a variety of methods in traditional non-profits,³⁵ the faculty supervisor can use these topics of reflection in a variety of methods to help guide, enhance and assess the student's experience in a for-profit placement. These topics for reflection can be used as topics for narrative journals, class discussion, presentations, on-line discussion, recommended readings, or individual meetings with faculty and field supervisors.

A. Clients Not Likely Encountered in Non-Profits (Example: Clients with Fee Issues)

Of the law school graduates who enter private practice, many are employed by small firms or enter solo practice.³⁶ These graduates must learn how to address the financial pressures of private practice in a competent and ethical way. One valuable by-product of externing at a private law office is exposure to typical issues that arise with paying clients. Discussed below are suggested topics for reflection for students externing at placements with paying clients: (1) How do attorneys deal with clients that do not, or cannot, pay their legal bills? (2) What ethical issues might arise when someone other than the client is paying the legal bill? (3) How do attorneys address the economic realities of the marketplace? (4) What are private attorneys' *pro bono* obligations?

1. How Do Attorneys Deal with Clients That Do Not, or Cannot, Pay Their Legal Bills?

One certain issue that arises in private practice is that some clients do not, or cannot, pay their legal bills.³⁷ A great benefit to externs in law firms is exposure to these issues with guidance from their faculty and field supervisors. Faculty supervisors can suggest that ex-

³⁴ See *supra* notes 30-33 and accompanying text.

³⁵ See *supra* notes 13-19 and accompanying text.

³⁶ NALP EMPLOYMENT PATTERNS, *supra* note 30 (stating that for 2010 law school graduates employed full-time after graduation, 45.7% of men and 45.4% of women worked in firms of 2-25, and 6.9% of men and 4.1% of women entered solo practice). See *MacCrate Report supra* note 7, at 33, 35-36.

³⁷ Carol McKay, *When Clients Refuse to Hand It Over*, FED. LAW., Mar./Apr. 2003, at 22 ("A survey conducted by the National Federation of Independent Businesses and Wells Fargo found that nearly half of the respondents said their most significant problem was getting late payment from their clients."); Alan Rau & Karen Bonney, *Attorney-Client Fee Disputes: Survey Results Reported*, 57 TEX. B.J. 926 (1994) (discussing a survey in which 61.2 percent of respondents reported that their law firms had experienced a fee dispute).

terns in private practice familiarize themselves with the readings and rules on the issue that are discussed below. After students become familiar with the rules, a frank discussion with field supervisors about the realities of billing and collection of fees will provide externs with a unique perspective on the issue.

First, externs should learn ways to prevent billing and collection problems from occurring in the first place. Discussion with field supervisors can focus on actions that can be taken to prevent problems from arising. For example, the client intake interview is important in setting expectations, including the overall cost of the legal services, how the services will be billed, when payment is expected, and what happens if fees are not paid when they are due.³⁸ The attorney needs to evaluate whether the client has the resources and willingness to support the cost of the legal matter.³⁹ The attorney should have a clear and candid discussion with the client about the expected costs. Cautious estimates are advised. A fee deposit,⁴⁰ held in a trust account, will secure prompt payment of fees, and reluctance by the client to advance a fee deposit could be a warning sign of potential problems later in the relationship. Before commencing work, the private practice attorney should require a signed fee agreement, which should include clear language on the consequences of failing to make timely payments.⁴¹ A contingency fee agreement should also be in writing.⁴² Once the relationship has begun, attorneys should communicate effectively with clients, provide timely and itemized bills that convey a sense of accomplishment and the value provided, and continue to manage clients' expectations of cost.⁴³

Second, externs could discuss with field supervisors what actions can be taken when attorneys find themselves in situations where legal services have been delivered, yet the clients do not pay the bill. Many

³⁸ ARTHUR G. GREENE, *THE LAWYER'S GUIDE TO INCREASING REVENUE* 33 (2d ed. 2011). For a more comprehensive discussion of the intake meeting, *see id.* at 33-44. *See also* JAY G. FOONBERG, *HOW TO START & BUILD A LAW PRACTICE* 298-99, 321-22, 398 (5th ed. 2004).

³⁹ "You cannot help everyone who shows up, and although pro bono activities are important, you should be the one choosing whether or not you work for free. Don't let the client make that choice for you." Darrell G. Stewart, *How to Deal with Deadbeat Clients*, GPSOLO, July/Aug. 2010, at 55. *See also* GREENE, *supra* note 38, at 34.

⁴⁰ Although sometimes referred to as a retainer, *see* GREENE, *supra* note 38, at 77 (drawing a distinction between a fee deposit and a retainer).

⁴¹ *Id.* at 40. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (b) (2012) ("The scope of the representation and the basis or rate of the fee and expenses . . . shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation . . .").

⁴² *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (c) (2012) ("A contingent fee agreement shall be in a writing signed by the client . . .").

⁴³ *See* GREENE, *supra* note 38, at 45-57; FOONBERG, *supra* note 38, at 300-06.

commentators advise acting quickly to increase the chances of collecting the fee. The private practice attorney or law firm should have a collections policy in place which should serve two functions: 1) keep track of clients who are late with payments, and 2) set a procedure on how to contact clients when payments are late.⁴⁴ Contacting the client in the appropriate manner will increase the chances of collection.⁴⁵ Some advise calling the client and listening to the reasons for the lack of payment.⁴⁶ The attorney should evaluate why a client is not paying, whether it is an inability to pay or an unwillingness to pay. If it is an inability to pay, a determination must be made whether it is worth applying more resources to pursue the matter.⁴⁷ It is best to attempt to first resolve the matter in-house, because a collection agency or litigation may present additional problems.⁴⁸ Furthermore, attorneys must comply with any mandatory arbitration or mediation procedures of their local bar regarding fee disputes.⁴⁹

Externs also must consult their local rules of professional responsibility so that they understand which actions are appropriate.⁵⁰ For example, if an attorney wants to suspend work on a client's matter or withdraw from representation because bills are overdue, the attorney must be aware of requirements under professional responsibility rules. The Model Rules of Professional Conduct require a lawyer to carry through to conclusion all matters undertaken for a client unless the relationship is terminated.⁵¹ Reasons an attorney may withdraw from representing a client include "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been

⁴⁴ EDWARD POLL, COLLECTING YOUR FEE-GETTING PAID FROM INTAKE TO INVOICE 54-55 (2003).

⁴⁵ The appropriate manner could include calling the client and understanding why the bill has not been paid, confirmation letters once an agreement for payment has been made, and good record keeping documenting every contact with the client. *Id.* at 60-64.

⁴⁶ See Stewart, *supra* note 39, at 45, 55; McKay, *supra* note 37, at 22.

⁴⁷ Stewart, *supra* note 39, at 55; POLL, *supra* note 44, at 67-68.

⁴⁸ See Stewart, *supra* note 39, at 55; POLL, *supra* note 44, at 68-70; Rau & Bonney, *supra* note 37, at 926-27; FOONBERG, *supra* note 38, at 541.

⁴⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. 9 (2012) ("If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it.").

⁵⁰ See POLL, *supra* note 44, at 54. See generally Thomas K. Byerley, *Unpaid Client Accounts-A Matter of Interest*, 76 MICH. B.J. 986 (1997) (discussing whether a lawyer may charge interest on a client's overdue bill); Timothy J. Segers, *Control of Client Files When Fees are Unpaid*, 18 J. LEGAL PROF. 357 (1993) (discussing whether an attorney can retain a client's files); Stephanie W. Kanwit, *Attorney's Liens: When Can you Retain a Client's Files?*, 79 ILL. B.J. 274 (1991) (discussing whether an attorney can retain a client's files).

⁵¹ MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 4 (2012). See David D. Dodge, *Law Practice with the Slow-Pay Client*, 41 ARIZ. ATT'Y 10 (2004).

given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled” and “the representation will result in an unreasonable financial burden on the lawyer”⁵² If an attorney is representing a client in a litigation matter and wants to withdraw from representation because the client has stopped paying legal bills, the attorney must seek approval of the tribunal, and may be denied depending on the nature and status of the matter.⁵³ If an attorney does withdraw from representation, the attorney has continuing ethical obligations to protect the client’s interests.⁵⁴

An extern who plans to enter private practice after graduation will benefit from readings on this subject and discussion with field supervisors on their experiences with billing and collecting legal fees.

2. *What Ethical Issues Might Arise When Someone Other Than the Client is Paying the Legal Bill?*

Another topic that externs in private practice could explore is when someone other than the client may offer to pay all or part of a client’s legal fees. This may be a common occurrence in family, juvenile, and criminal law matters. When a lawyer’s fee is paid by someone else, such as a relative or friend, the lawyer must be aware of the potential ethical concerns that may arise, and learn to deal with those concerns from the beginning of the representation. Potential ethical issues may relate to conflict of interest, confidentiality, and scope of the attorney’s employment.⁵⁵ Externs could benefit from discussing these issues with their field supervisors, and these could be topics for class discussion. A related class exercise could be an interview simulation emphasizing how to best discuss fees at an initial client interview.

Externs should understand that before compensation is accepted from third-party payers, they must be aware of the ethical rules dealing with the issue. Rule 1.8 (f) of the Model Rules of Professional Conduct requires that before a lawyer accepts such compensation, the attorney must be assured that the client gives informed consent, there is no interference with the attorney’s independence of professional judgment or with the client-lawyer relationship, and that confidential information relating to the representation is protected as required by Rule 1.6.⁵⁶ The attorney should not ask for consent if, for example,

⁵² MODEL RULES OF PROF’L CONDUCT R. 1.16 (b) (5) and (b) (6) (2012).

⁵³ See MODEL RULES OF PROF’L CONDUCT R. 1.16 (c) (2012); Dean R. Dietrich, *Withdrawing When a Client Doesn’t Pay*, 78 WIS. LAW. (Sept. 2005).

⁵⁴ MODEL RULES OF PROF’L CONDUCT R. 1.16 (d) (2012). See generally FOONBERG, *supra* note 38, at 326-32.

⁵⁵ Kenneth L. Jorgensen, *When a Friend or Relative Pays the Client’s Legal Fee*, 62 BENCH & B. MINN. 11 (2005).

⁵⁶ MODEL RULES OF PROF’L CONDUCT R. 1.8 (f) (2012). See also Rule 5.4 (c) which

the third-party payer is already a client, or a co-client, and potential conflicts would preclude zealous representation of either client.⁵⁷ With regard to criminal defense matters, attorneys must be aware of the legal implications if fees are being paid by the client's co-conspirator, whether charged or uncharged.⁵⁸

Once a lawyer accepts compensation from a third-party, the extern could explore other issues that may arise during the course of the representation. For example, what if the third-party wants status reports on the progress of the representation? Such disclosures to third parties could have a significant impact on confidentiality and the attorney-client privilege. This impact should be made clear to the client and the attorney should obtain the client's informed consent to disclosures. "[T]he lawyer should make it clear to both parties, at the outset of the representation, that disclosures will be tailored to accommodate the payor's desire for accountability without risking waiver of attorney-client privilege."⁵⁹ Other issues could arise when a third party is paying a client's bill. For example, what if a retainer is paid up-front by a relative of the client, and shortly thereafter the client terminates the lawyer and demands return of some or the entire retainer? Should the attorney return the unused portion to the client or the relative? Will the lawyer's representation be conditioned upon the third-party's willingness to pay? A lawyer must be cognizant of these potential issues, and clarify at the outset of the representation the nature of the relationship.⁶⁰ Externs will benefit from practical guidance from field supervisors on how they approach these issues.

3. *How Might Attorneys Address the Economic Pressures of the Marketplace?*

Gaining an understanding of how attorneys approach the economic pressures of the marketplace may provide guidance to externs on how to ethically and competently approach their own potential challenges after graduation. For example, in recent years clients have

prohibits interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another. MODEL RULES OF PROF'L CONDUCT R. 5.4 (c) (2012).

⁵⁷ Jorgensen, *supra* note 55, at 11. See MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 12 (2012).

⁵⁸ See David Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties: Revisiting United States v. Hodge and Zweig*, 69 FORDHAM L. REV. 1083 (2000) (discussing that the attorney-client privilege does not protect disclosure of the fee arrangement, and arguing that in certain circumstances criminal defense attorneys should decline representation when clients' fees will be paid by third-parties).

⁵⁹ Jorgensen, *supra* note 55, at 11-12. See generally MODEL RULES OF PROF'L CONDUCT R. 1.8(f) cmt. 11, 12 (2012).

⁶⁰ Jorgensen, *supra* note 55, at 11-12.

made new demands on attorneys for more efficient methods to control legal costs. One way attorneys are attempting to address these demands is by exploring alternative fee arrangements.⁶¹ There are three basic alternative billing methods to the traditional hourly billing: (1) the fixed-fee method, in which the attorney agrees to perform certain work for a stated fee; (2) the contingency method, in which the attorney's fee is based on a percentage of the amount recovered; and (3) the retainer fee, in which the attorney charges a set amount for a range of legal services over a particular period of time.⁶²

Externs can benefit from learning how to work with these alternative fee arrangements in a practical setting. First, externs need to be aware of any restrictions imposed by the local rules of their states. For example, the Model Rules of Professional Conduct prohibit contingency fees in domestic relations and criminal defense matters,⁶³ and require all contingency fee agreements to be in writing.⁶⁴ Second, externs need to understand when a certain type of fee is appropriate. For example, a fixed-fee may best be used in matters in which attorneys can project the amount of work with some degree of accuracy. Third, externs should understand that certain variations of the basic alternative billing methods may be used. Some possibilities may include: blended hourly rates, in which all work is performed at a single hourly rate regardless of who at the firm performs the work; hourly rates with a minimum or maximum charge, which may be adjusted based on the result; budgeted hourly fees, in which attorneys provide clients with budget estimates for different phases of the case; and segmented fixed fees, in which fixed fees are used for certain components of the work for which the attorney can reasonably predict the cost.⁶⁵ A discussion with field supervisors about their experience with these various methods could provide students with a helpful perspective.

Externs interested in entering private practice also could use an externship in a private firm to learn about the practices allowed and successfully used by attorneys in marketing and business development.⁶⁶ Again, they first must be aware of the local rules of their

⁶¹ See Steven T. Taylor, *Survey Shows Legal Spending Down and that Means Savvy Law Firms Must Adjust Accordingly and Creatively*, 30 OF COUNSEL, Jan. 2011, at 18-19; Dan DiPietro & Gretta Rusanow, *New Year, Old Worry*, AM. LAW., Jan. 2012, at 45; Mondics, *supra* note 24, at D01.

⁶² GREENE, *supra* note 38, at 75-78.

⁶³ MODEL RULES OF PROF'L CONDUCT R. 1.5 (d) (2012).

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.5 (c) (2012).

⁶⁵ GREENE, *supra* note 38, at 75, 78-79. See also FOONBERG, *supra* note 38, at 270-79.

⁶⁶ "[M]arketing and business development are really two different things . . . [T]hey are responsible for different outcomes and their success is measured in very different ways. . . . [T]he success of a particular marketing effort might be measured in terms of market share, client satisfaction, awareness level . . . Business development is measured by dollars in the

states relating to advertising and business development. For example, the Model Rules of Professional Conduct impose restrictions on lawyer communications, advertising, and direct contact with prospective clients.⁶⁷ Many attorneys generate business by writing and speaking on legal topics, involvement with bar organizations, and building client loyalty with the hope of obtaining future referrals. Students can benefit from readings on these subjects,⁶⁸ and discussions with field supervisors on their successes and failures in this area.

Technology in private law practice is an area generating much discussion among the private bar today, and another area in which externs should become knowledgeable. Issues of interest for attorneys involving technology include: whether and how to use websites to promote their practice;⁶⁹ what type of client communications should be done through email;⁷⁰ should attorneys give their cell phone numbers to clients and be available on a 24/7 basis; and what is the best technology for case management and other administrative functions.⁷¹

Another issue that externs should be aware of is the potential for unethical billing inflation. Some potential billing inflation issues could involve the extern. For example, a law firm should not bill clients for the extern's time.⁷² If an extern has permission to use his or her law school password to conduct computer research on tools such as Lexis at the firm,⁷³ the firm should not bill clients for that Lexis access.⁷⁴ An extern should ensure that the field supervisor understands these rules and, at some point in the semester, discuss with the field supervisor appropriate billing practices. Other potential billing abuses include: exaggerating an attorney's time to meet the firm's billing

door." SALLY J. SCHMIDT, *BUSINESS DEVELOPMENT FOR LAWYERS-STRATEGIES FOR GETTING AND KEEPING CLIENTS*, at iii-iv (2006).

⁶⁷ See generally MODEL RULES OF PROF'L CONDUCT R. 7.1 - 7.5 (2012).

⁶⁸ See generally REID F. TRAUTZ & DAN PINNINGTON, *THE BUSY LAWYER'S GUIDE TO SUCCESS-ESSENTIAL TIPS TO POWER YOUR PRACTICE* (2009); SCHMIDT, *supra* note 66; GREENE, *supra* note 38, at 49-58, 63-65.

⁶⁹ See generally GREGORY H. SISKIND, DEBORAH McMURRAY & RICHARD P. KLAU, *THE LAWYER'S GUIDE TO MARKETING ON THE INTERNET* (2007). See also TRAUTZ & PINNINGTON, *supra* note 68, at 28-32; FOONBERG, *supra* note 38, at 155, 159-60, 490.

⁷⁰ See TRAUTZ & PINNINGTON, *supra* note 68, at 55-57, 79-82, 85-90; FOONBERG, *supra* note 38, at 280-81.

⁷¹ See GREENE, *supra* note 38, at 85-88, 113-15; POLL, *supra* note 44, at 47-52; FOONBERG, *supra* note 38, at xxi, 126-28, 443.

⁷² Feeley, *supra* note 1, at 55.

⁷³ Some organizations may allow students to use their law school password for certain work done at an externship for credit. The policy of individual organizations should be checked. See *id.* at 56.

⁷⁴ See Lerman, *supra* note 4, at 2308 ("[I]f 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.").

expectations or increase profits;⁷⁵ billing two clients for the same hour;⁷⁶ and charging inappropriately for paralegal or secretarial time.⁷⁷ The externship clinician could provide opportunities for students to identify such abuses, as well as explore opportunities for students to discuss the issues with their field supervisors.

4. *What are a Private Attorney's Obligations to do Pro Bono Work?*

One potential drawback of allowing for-profit placements in law school externship programs is that it does not further the historical social justice goals of clinical education to provide legal representation to the under-represented and encourage law students to engage in public interest work.⁷⁸ Despite billing pressures on private attorneys, however, many find the time to volunteer to assist indigent clients. One potential benefit of allowing for-profit externships in for-credit law school programs is *pro bono* modeling in the private sector.⁷⁹

The private bar dramatically outnumbers public interest attorneys, and the number of individuals qualified to receive free legal services has increased in recent years.⁸⁰ Externs working with private attorneys should be encouraged to discuss with their field supervisors access to justice issues, development of volunteer opportunities, and the *pro bono* work of the law firm. Externs could be encouraged to volunteer to work on *pro bono* projects of the firm. Journal or class discussion topics could focus on the public's need for *pro bono* services, private bar actions to help alleviate the negative public image of the legal profession, or *pro bono* work as a means to promote job satisfaction.⁸¹

Externs should educate themselves on the local rules regarding

⁷⁵ For example, estimating the number of hours needed each day to meet billing expectations, and at the end of the day inflating time spent on work to reach that number. See Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS L. REV. 2153, 2158-60, 2179-82 (1998) [hereinafter Lerman, *Scenes from a Law Firm*]. See generally Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999).

⁷⁶ For example, billing one client for travel time and a second client for work performed while traveling. See Lerman, *Scenes from a Law Firm*, *supra* note 75, at 2159-60, 2179.

⁷⁷ For example, billing paralegal time at an attorney's billing rate. See Lerman, *Scenes from a Law Firm*, *supra* note 75, at 2162-63, 2178, 2180-81.

⁷⁸ Feeley, *supra* note 1, at 47-48.

⁷⁹ *Id.* at 49, 53-54.

⁸⁰ Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415, 418 (2007). See William J. Dean, *The Role of the Private Bar*, 25 FORDHAM URB. L.J. 865, 865-66 (1998).

⁸¹ Feeley, *supra* note 1, at 58-59. See Dean, *supra* note 80, at 867.

pro bono requirements. The Model Rules of Professional Conduct state that “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year.”⁸² It has been suggested that states adopt mandatory *pro bono* service hours, but arguments against this include constitutional violations against involuntary servitude and concerns over an attorney’s ability or willingness to provide quality *pro bono* service if forced to do so.⁸³

The question of state mandatory reporting systems for *pro bono* work could be a subject for class discussion. Some states impose either voluntary or mandatory reporting systems, in which attorneys report to the state bar the number of *pro bono* hours of service they have contributed during the previous year. Florida adopted a mandatory *pro bono* reporting program and, after implementing mandatory reporting, there was an impressive increase in *pro bono* service from its attorneys.⁸⁴

Journal or class discussions also could focus on the more challenging social justice issues that arise in the context of counseling paying clients.⁸⁵ Much of the critique and failure of the legal profession lies in its role in facilitating actions that contravene social justice goals. Private firm placements provide rich opportunities to explore the challenges inherent in the interplay between social justice and client positions.

B. *Different Practice Settings (Example: In-House Corporate Counsel)*

Field placements with in-house corporate counsel offices provide a unique setting for students interested in representing business clients.⁸⁶ Externs will be exposed to the process of giving legal advice to

⁸² MODEL RULES OF PROF’L CONDUCT R. 6.1 (2012).

⁸³ Boyle, *supra* note 80, at 421-22.

⁸⁴ *Id.* at 415-16.

⁸⁵ See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (2d ed. 2009), in which the authors explore four approaches to moral issues in legal representation: the godfather; the hired gun; the guru; and the friend. For a class exercise, students could discuss a counseling scenario and how a lawyer’s counseling would differ depending on which of the four approaches the lawyer adopted. See also MODEL RULES OF PROF’L CONDUCT R. 2.1 (2012); Robert F. Cochran, Jr., Deborah L. Rhode, Paul R. Tremblay, & Thomas L. Shaffer, *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003); *MacCrate Report*, *supra* note 7, at 176-84; DAVID A. BINDER, PAUL BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, *LAWYERS AS COUNSELORS, A CLIENT-CENTERED APPROACH* 370-77 (3rd ed. 2012).

⁸⁶ For an extensive discussion of corporate counsel externships, see Circo, *supra* note 26, at 99-144. *But see* Christian C. Day, *Teaching Students How to Become In-House Counsel*, 51 J. LEGAL EDUC. 503 (2001) (discussing a law school course designed to simu-

business clients and making law related business decisions. Certain non-profit organizations may have some similar issues, “[b]ut not-for-profit organizations typically do not present all of the most significant organizational, operational, regulatory, and transactional needs for legal services that are the daily diet of corporate counsel offices.”⁸⁷ The following are some proposed topics for reflection for students in these field placements: (1) What is the role of in-house counsel? (2) Do in-house counsel face unique ethical issues? (3) What is in-house counsel’s relationship with outside counsel?

1. *What is the Role of In-House Counsel?*

Often a major goal of law externs in corporations is to gain an understanding of the role of in-house counsel. In-house corporate attorneys have been referred to as the “Swiss Army Knife” of the legal profession, expected to “perform a fusion of roles” and handle a wide range of matters.⁸⁸ They serve a single but multifaceted client which may have multiple locations across a broad geographic spectrum. The in-house counsel’s role can be a mixture of legal and business responsibilities, requiring a broad set of skills. In-house counsel may serve as an officer in the corporation and assist in making business decisions. Corporate legal compliance issues are an integral and increasingly complex part of daily operations of large companies, and the function is usually performed by in-house legal counsel, or a compliance department which works closely with in-house counsel. Although some litigation work may be referred to outside counsel and managed in-house, in-house counsel usually play an important role in preventing litigation claims from arising, or resolving them at an early stage, and often serve as “a sounding board for risk-prone ideas.”⁸⁹ Depending on the setting, in-house counsel must be knowledgeable about many areas of law including corporate governance, transactional matters, business and tax planning, intellectual property, employment and labor, and business formation,⁹⁰ and they provide support to other business units such as marketing, human resources, real estate, operations, information technology, environmental, finance and accounting, and research and development.⁹¹ An in-house attorney may be called upon to help navigate through the legal complexities of doing business in multiple jurisdictions, and that may include manufacturing facilities

late the real-life experience of corporate counsel).

⁸⁷ Circo, *supra* note 26, at 103.

⁸⁸ Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 112 (2011).

⁸⁹ *Id.* at 111-26, 130-31.

⁹⁰ Circo, *supra* note 26, at 102; *see* Day, *supra* note 86, at 510.

⁹¹ *See* Simmons & Dinnage, *supra* note 88, at 96.

in Asia, sales offices in Europe, or other global legal challenges that may not be as common for outside counsel.

In addition to being knowledgeable about many different areas of the law, in-house counsel must provide their advice in the context of running a business and often in the context of running a competitive business in a difficult environment.

Business lawyers, especially those who practice in corporate legal departments, frequently comment on the importance of serving their clients without getting into the way of business. Indeed, one of the most common complaints that business clients have about legal representation is that the lawyers tend to be naysayers who continually place obstacles in the path of business progress. . . . Corporate counsel externs will see that one of the key functions of a legal department is to keep legal risks from blocking business progress.⁹²

To enhance student reflection on the role of corporate counsel, externship clinicians can suggest readings on the challenges of balancing business and legal interests.⁹³ This could be a rich topic of discussion for students and their field supervisors.

2. *Do In-House Counsel Face Unique Ethical Issues?*

Externs at in-house corporate offices should be made aware that in-house attorneys have ethical responsibilities unique to their positions. Discussion with their field supervisors and readings in this area will help the students gain an understanding of these issues.

Externs should understand that in-house counsel must be knowledgeable on a wide range of ethical responsibilities such as duties of confidentiality, working ethically with other parties, avoiding conflicts, compliance with regulations, and upholding other ethical and social justice obligations.⁹⁴ For example, Rule 1.13 of the American Bar Association Model Rules of Professional Conduct states that an attorney employed by an organization represents the organization, and the officers, directors, employees and shareholders are the constituents of the corporate client. The rule sets out attorney reporting obligations for certain violations by persons associated with the organization.⁹⁵ Additional ethical responsibilities of in-house counsel include poten-

⁹² Circo, *supra* note 26, at 106 (footnotes omitted).

⁹³ For example, *see* Simmons & Dinnage, *supra* note 88, at 145-46; Circo, *supra* note 26, at 104-07; Cliff Collins, *The Ins & Outs of In-House*, OR. ST. B. BULL. 17, 20 (Nov. 2010); Mary Mullally, *The In-House Legal Function – a Decade of Change*, 1 IN-HOUSE PERSP., issue 2 at 9-11(2005); ASS'N OF CORP. COUNS., NEW TO IN-HOUSE PRAC., (2005) at 8, 13 [hereinafter *Ass'n of Corp. Couns.*]; Day, *supra* note 86, at 515.

⁹⁴ *See* Circo, *supra* note 26, at 108-09 (discussing attorney professional responsibility as an employee of a client/business).

⁹⁵ MODEL RULE OF PROF'L CONDUCT, R. 1.13 (2012); Carole Basri, *Ethics and In-House Counsel*, N.Y. PRAC. SKILLS COURSE HANDBOOK SERIES, (Summer 2011) at 255.

tial conflict of interest issues, such as a potential conflict when representing the corporate parent and corporate subsidiaries and/or affiliates⁹⁶ and the Sarbanes-Oxley Act and rules of the Securities and Exchange Commission are triggered.⁹⁷

These externships provide students with the opportunity to explore in-house counsel's obligations and challenges regarding social justice issues in the context of counseling their corporate clients.⁹⁸ For example, the scandals of American business organizations in recent years have left some asking, "where were the lawyers?"⁹⁹

[T]oo many executives and their supporting cast of often-acquiescent in-house attorneys have pawned public trust for large salaries, big cars, supersized corner offices, and the McMansion. . . . Reforming 21st Century business organizations requires that business executives and their internal gatekeepers – particularly their in-house legal advisors – deprivatize their personal moral values, incorporating moral considerations within "Monday through Friday" corporate culture. . . . The in-house legal advisor must serve as both technical legal advisor and steward for ethical culture and governance, incorporating moral considerations – when and where relevant – in corporate legal representation.¹⁰⁰

This role of in-house counsel can be a topic for narrative journals or class discussion. The externship clinician's role is not to educate students on the intricacies of all potential ethical responsibilities of in-house counsel.¹⁰¹ For students interested in pursuing in-house counsel careers, however, supplemental readings on these issues would most likely encourage students' self-directed learning and student dialogue

⁹⁶ Basri, *supra* note 95, at 254-55; *see generally* Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanded Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998).

⁹⁷ *See* 15 U.S.C. 7245 (2002); *Ass'n of Corp. Couns.*, *supra* note 93, at 13-14; Ben G. Pender II, *Invigorating the Role of the In-House Legal Advisor as Steward in Ethical Culture and Governance at Client-Business Organizations: From 21st Century Failures to True Calling*, 12 DUQ. BUS. L.J. 91, 110-14 (2009); Mullally, *supra* note 93, at 12; Simmons & Dinnage, *supra* note 88, at 104. Of course, in-house counsel must be aware of the myriad of laws which the corporation must comply with, such as the Foreign Corrupt Practices Act. *Ass'n of Corp. Couns.*, *supra* note 93, at 16.

⁹⁸ *See supra* note 85 and accompanying text. *See also* SHAFFER & COCHRAN, *supra* note 85, at 55-61 (discussing moral challenges for corporate lawyers such as, for example, when in-house counsel learns that a corporate executive approved the sale of a defective kidney dialysis machine).

⁹⁹ Pender, *supra* note 97, at 98.

¹⁰⁰ *Id.* at 92-96.

¹⁰¹ Often, faculty supervisors oversee many students in a wide range of placements, and the goal is not to teach substantive material on all subjects, but to enhance the experience of the students with topics for reflection. *Cf.* Day, *supra* note 86, at 514 (recognizing the goal is not to make students experts in the substantive law in a course specifically designed to simulate the corporate counsel experience).

with field supervisors on these and other ethical responsibilities.

3. *What is In-House Counsel's Relationship with Outside Counsel?*

Externs in in-house corporate offices have a unique opportunity to gain perspective on the working relationship between in-house and outside counsel. This perspective will assist these students whether they eventually become in-house counsel or associates of private law firms who are retained as outside counsel. Discussion between students and field supervisors on balancing this relationship should be encouraged.¹⁰²

Externs may be able to observe firsthand that corporations often retain outside counsel to handle certain types of work. Usually this occurs when expertise is sought in areas beyond the expertise of typical in-house counsel, the matter requires so many hours that in-house counsel could not complete the work in a timely manner, or its completion would interfere with other in-house work.¹⁰³ With regard to international matters, in-house counsel may retain foreign outside counsel not just for overflow and help with areas outside their expertise, but for language skills and cultural sensitivity in order to facilitate a transaction. In the past, litigation matters often would be referred to outside counsel and, at times, in-house counsel would hand responsibility almost entirely to outside counsel, while managing the dispute from a top level view. In recent years, however, the economic recession impacted this practice. Due to an effort to reduce their legal budgets, many companies now are attempting to keep some or all of their litigation and other matters in-house. Whether outside counsel will be retained depends upon financial considerations and the capacities of the in-house legal office. When outside counsel is retained, there is often a partnering between in-house and outside counsel.¹⁰⁴

Externs should try to gain an understanding of in-house counsel's responsibilities regarding outside counsel. Often, in-house counsel's advice will be sought and relied upon as to whether there is a need for outside counsel. In-house counsel should know what policies or guidelines are in place regarding the authority to hire outside counsel. Once a decision is made to obtain outside counsel, in-house counsel will be involved in deciding which private law firm will be retained. Given the desire to minimize legal fees, corporations may seek alter-

¹⁰² See Circo, *supra* note 26, at 113, 128.

¹⁰³ *Ass'n of Corp. Couns.*, *supra* note 93, at 5, 6.

¹⁰⁴ See H. Ward Classen, *Recession's Impact on In-House Counsel*, Md. B.J., Jan./Feb. 2010, at 45; Simmons & Dinnage, *supra* note 88, at 126-29; Collins, *supra* note 93, at 19; *Ass'n of Corp. Couns.*, *supra* note 93, at 6. See also Day, *supra* note 86, at 505; Taylor, *supra* note 61, at 2.

native billing arrangements, such as setting a fixed price, before retaining outside counsel.¹⁰⁵ Once outside counsel is retained, in-house counsel is expected to manage and maintain a good working relationship. In-house counsel are the primary client contact for outside counsel,¹⁰⁶ and provide direction to outside counsel on how to staff and approach the legal matter,¹⁰⁷ oversee the strategic direction, manage costs, manage internal processes of digital discovery, identify witnesses, manage depositions, and manage communications and dialogue regarding the dispute. “Today, the relationships between in-house counsel and outside counsel are less adversarial, and the trend is toward viewing outside law firms more as trusted partners and extensions of the internal corporate legal function.”¹⁰⁸ Discussion with their field supervisors, along with possibly observing interaction between in-house and outside counsel, will help externs gain insight into this relationship.

C. Different Areas of the Law (Example: Sports Law)

As discussed above, for an externship in certain areas of the law, for-profit placements are the only option. It is unlikely that the faculty supervisor be an expert in the various areas of the law in which students are placed, but having expertise in the substantive law is not necessary to enhance students’ experiences. It is helpful, however, to be aware of how the area of the law is practiced and some particular ethical issues that can arise.¹⁰⁹ Collaboration with other faculty and field supervisors can help externship clinicians develop topics for reflection in areas of practice in which they do not have expertise.

For example, most externships in sports law are at for-profit placements.¹¹⁰ Some students are naturally drawn to the multi-billion dollar sports industry,¹¹¹ and may view sports law as glamorous and lucrative. That may well be the case, but exposure to the realities of sports law as students can better inform this career choice.

The externship clinician should be aware that not all work done at a sports law field placement is traditional legal work. For example, an extern working for a sports attorney may be asked to conduct sta-

¹⁰⁵ Classen, *supra* note 104, at 43; Simmons & Dinnage, *supra* note 88, at 106-07, 114.

¹⁰⁶ See Simmons & Dinnage, *supra* note 88, at 109-10; *Ass’n of Corp. Couns.*, *supra* note 93, at 7.

¹⁰⁷ *Ass’n of Corp. Couns.*, *supra* note 93, at 5; Collins, *supra* note 93, at 18.

¹⁰⁸ Simmons & Dinnage, *supra* note 88, at 148.

¹⁰⁹ See Eyster, *supra* note 9, at 356.

¹¹⁰ Cf. *MacCrate Report*, *supra* note 7, at 74 (discussing law firms practicing sports law).

¹¹¹ Stacey Colino, *Welcome to the Wide World of Sports Law-You Can Shine in the Field, But You’ve Got to be Ready to Meet the Competition*, *STUDENT LAW.*, Apr. 1996, at 23-24, 26.

tistical research on a client or other athletes in order to assist the attorney in negotiating a contract.¹¹² An intern may be asked to conduct marketing work or attend a client event. The externship clinician should discuss with both the student and the field supervisor the parameters of the student's work before the externship begins. While the extern might perform some non-traditional client work, all extern work should be for the benefit of the student and directly related to the student's and externship program's educational goals.¹¹³

Discussed below are suggested topics for reflection for externs at sports law placements: (1) In what legal settings do attorneys practice in the sports industry? (2) Do sports agents who are lawyers have ethical obligations that non-lawyer agents do not? (3) For students interested in a career in the sports industry, what classes and skills would be most helpful?

1. *In What Legal Settings do Attorneys Practice in the Sports Industry?*

Externs interested in sports law will benefit from learning about the variety of settings in which attorneys in the sports industry practice. Individual players, coaches and general managers are often represented by an attorney in a small firm specializing in sports law. Some successful sports attorneys practice exclusively in sports law, while others also practice in other areas of the law. The terms sports

¹¹² "In preparing for the negotiation, the agent should know the market value of the athlete, the market value of similarly situated athletes, and prior relevant contract values, in addition to understanding the requirements, philosophies, and spending patterns of the team." Melissa Neiman, *Fair Game: Ethical Considerations in Negotiation by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123, 127 (2007) (footnotes omitted).

¹¹³ Unpaid externships must be for the benefit of the student in order to ensure that FLSA requirements are met. See *supra* notes 26-27 and accompanying text for a discussion of FLSA. For a discussion of FLSA as it relates to sports industry externships, see Kristi L. Schoepfer & Mark Dodds, *Internships in Sports Management Curriculum: Should Legal Implications of Experiential Learning Result in the Elimination of the Sports Management Internship?*, 21 MARQ. SPORTS L. REV. 183, 193-99 (2010). See also FACT SHEET # 71, *supra* note 27 ("In general, the more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individual's educational experience (this often occurs where a college or university exercises oversight over the internship program and provides educational credit). The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation, the more likely the intern would be viewed as receiving training. Under these circumstances the intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern. On the other hand, if the interns are engaged in the operations of the employer or are performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.").

agent, player agent, and player representative are used interchangeably, and could refer to a lawyer or non-lawyer who represents an athlete.¹¹⁴ Sports agents do not have to be attorneys, but it is estimated that more than fifty percent are members of the bar.¹¹⁵ The 1980s and 90s saw a movement towards large sports management and marketing offices. Full service agencies emerged such as SFX Sports, Octagon Athlete Representation, Assante Corporation, and International Management Group (IMG).¹¹⁶ Some more recent trends in the industry include: agents leaving these larger organizations for a small practice; star athletes hiring entertainment talent firms; and athletes hiring attorneys by the hour to negotiate their contracts, rather than hiring agents who take a percentage of their contract.¹¹⁷

There are other contexts in which attorneys may be involved with sports. Professional sports teams and universities with athletic programs are often represented by in-house counsel or large outside law firms. Attorneys may be involved with sports when representing sports facilities, promoters of sports events, media, organizations that engage sports figures for commercial endorsements, and national or international federations and other bodies that govern sports.¹¹⁸

2. *Do Sports Agents Who are Lawyers Have Ethical Obligations That Non-Lawyer Agents Do Not?*

Externs should understand that all sports agents are subject to restrictions imposed by state and federal laws and league and player association requirements.¹¹⁹ In addition to these requirements, how-

¹¹⁴ William Rothstein, *The Business of Sports Representation: Agent Evolution in the "Industry"*, 9 VA. SPORTS & ENT. L.J. 19, 25-26 (2009); Dean Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contact Advisor, Family Advisor or Contract Representative?*, 1 VILL. SPORTS & ENT. L.J. 11, 30 (1994). For a history of the sports agent, see *id.* at 21-26; Brian Charles Lea, *Sports is Big Business, So Stop Playing Games: Why Federal Regulations Should Require Every Sports Agent to Possess a J.D.*, 1 J. ENT. & SPORTS L. 20, 22-25 (2009).

¹¹⁵ Rothstein, *supra* note 114, at 26; Neiman, *supra* note 112, at 126.

¹¹⁶ Rothstein, *supra* note 114, at 33-36; Comment, *Disbarring Jerry Maguire: How Broadly Defining "Unauthorized Practice of Law" Could Take the "Lawyer" out of "Lawyer-Agent" Despite the Current State of Athlete Agent Legislation*, 18 MARQ. SPORTS L. REV. 225, 230 (2007).

¹¹⁷ Rothstein, *supra* note 114, at 36-39.

¹¹⁸ See Steve Underwood & Christopher Whitson, *Symposium Transcript: Emerging Issues in Sports Law*, 4 VAND. J. ENT. L. & PRAC. 120, 121 (2002); Timothy Davis, *What is Sports Law?*, 11 MARQ. SPORTS L. REV. 211, 239-42 (2001); David S. Caudill, *The Sports Law Course as Advanced Legal Skills Training*, 1 VA. J. SPORTS & L. 246 (1999); Colino, *supra* note 111, at 23-7; Garbarino, *supra* note 114, at 13, 44.

¹¹⁹ For example see Rothstein, *supra* note 114, at 27-28; Lea, *supra* note 114, at 27-35; Neiman, *supra* note 112, at 127-29; John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, 141-42 (2006); Tamara L. Barner, *Show Me the... Ethics?: The Implications of the Model Rules on Ethics for Attorneys in the Sports Industry*, 16

ever, sports agents who are lawyers are also subject to ethical obligations imposed by their states' rules of professional conduct.¹²⁰ Most state bars have adopted the American Bar Association's Model Rules of Professional Conduct.¹²¹ Ethical obligations imposed on lawyers by the Model Rules may give athletes additional safeguards when hiring an attorney agent, yet these obligations also may present challenges for lawyers competing with non-lawyer sports agents.¹²² Such ethical obligations include: restrictions on direct solicitation of clients;¹²³ restrictions on fees;¹²⁴ and conflict of interest issues when representing multiple clients.¹²⁵ There are several resources that students can be referred to on this subject.¹²⁶ Field supervisors could provide students

GEO. J. LEGAL ETHICS 519, 530-33 (2003); Jamie E. Brown, *The Battle the Fans Never See: Conflicts of Interest for Sports Lawyers*, 7 GEO. J. LEGAL ETHICS 813, 824-26, 831-34 (1994).

¹²⁰ Lea, *supra* note 114, at 33-34; Comment, *supra* note 116, at 226-27; Barner, *supra* note 119, at 519-20; Brown, *supra* note 119, at 826-31.

¹²¹ See Neiman, *supra* note 112, at 129.

¹²² Rothstein, *supra* note 114, at 26-27; Lea, *supra* note 114, at 38-39; Mark Doman, *Attorneys as Athlete-Agents: Reconciling the ABA Rules of Professional Conduct with the Practice of Athlete Representation*, 5 TEX. REV. ENT. & SPORTS L. 37, 38 (2003).

¹²³ MODEL RULES OF PROF'L CONDUCT R. 7.1-7.5 (2012). See Comment, *supra* note 116, at 235-36 ("[U]nder Rule 7.3, attorneys are not allowed to solicit business from prospective clients when doing so for their own pecuniary gain. This prevents attorneys from aggressively recruiting athletes about to turn pro, an activity most consider to be a staple function of successful agents, vital to their success.") (footnotes omitted); see also Lea, *supra* note 114, at 38; Doman, *supra* note 122, at 48-51; Barner, *supra* note 119, at 527-30.

¹²⁴ Arguably an agent's fees, when based on a percentage of the value of a client's contract, may not be reasonable under the Model Rules of Professional Conduct. Neiman, *supra* note 112, at 125, 137-38. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2012); Comment, *supra* note 116, at 235 ("Model Rule 1.5 prevents attorneys from charging excessive fees. Because agents are paid a percentage rate of the athlete's total compensation, as athlete salaries climb, the agent's fee increases. Given the escalating salaries of professional athletes, a three to five percent commission, the industry norm for professional sports, of even a marginal salary could be considered excessive compared to what lawyers would normally make if they performed the same services at an hourly rate.") (footnotes omitted). See also Rothstein, *supra* note 114, at 30-33; Lea, *supra* note 114, at 38; Barner, *supra* note 119, at 524-25.

¹²⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7-1.10 (2012). Conflict of interest issues can arise in a variety of instances such as representing two players on the same team, representing players and coaches, representing players and players' associations, or players in the same draft class. Brown, *supra* note 119, at 816-22; Rothstein, *supra* note 114, at 28-30, 34; Lea, *supra* note 114, at 38. See Neiman, *supra* note 112, at 130-37; Doman, *supra* note 122, at 51-65; Colino, *supra* note 111, at 26.

¹²⁶ See generally Lea, *supra* note 114, at 38-39; Rothstein, *supra* note 114, at 26-33; Comment, *supra* note 116, at 235-36; Neiman, *supra* note 112, at 125, 130-38; Melissa Steedle Bogad, *Maybe Jerry Maguire Should Have Stuck with Law School: How the Sports Agent Responsibility and Trust Act Implements Lawyer-Like Rules for Sports Agents*, 27 CARDOZO L. REV. 1889 (2006); Doman, *supra* note 122, at 37; Barner, *supra* note 119, at 519; Stacey M. Nahrwold, *Are Professional Athletes Better Served by a Lawyer-Representative than an Agent? Ask Grant Hill*, 9 SETON HALL J. SPORTS L. 431, 444-51 (1999); Colino, *supra* note 111, at 26; Brown, *supra* note 119, at 816-22.

with a unique perspective on the issue, and dialogue should be encouraged.

3. *For Students Interested in a Career in the Sports Industry, What Classes and Skills Would Be Most Helpful?*

There is some debate as to whether “sports law” is actually an independent substantive area of the law.¹²⁷ Sports law is a field that includes any legal issue that involves sports.¹²⁸ Some schools offer a class in sports law.¹²⁹ Attorneys who practice sports law must be knowledgeable in many different areas of the law including contracts, labor law, antitrust, torts, intellectual property, and tax. In addition, they must educate themselves on the wide range of issues surrounding collective bargaining agreements, licensing rights, and rules and regulations of individual collegiate and professional sports.¹³⁰ The role of the lawyer representing an individual athlete can be demanding, ranging from negotiating contracts and endorsements, financial planning, marketing and public relations, to receiving late night phone calls on legal matters unrelated to sports, including criminal law matters.¹³¹

Negotiation and contract writing are important skills in the sports law field.¹³² The externship clinician could include an exercise on either of these skills in a general externship classroom component, as they also are relevant to many other areas of the law and are recognized as basic lawyering skills.¹³³ For example, externship clinicians could develop a negotiation exercise for their class with a basis in sports, such as negotiating the appearance of a sports figure at an event. The exercise could include taping students and providing individual feedback to students.

Externs should be encouraged to speak with their field supervisors about materials to keep up-to-date in this field. Students should be aware that there are current periodicals dedicated to legal issues

¹²⁷ See generally Davis, *supra* note 118, at 211.

¹²⁸ Colino, *supra* note 111, at 24.

¹²⁹ See Caudill, *supra* note 118, at 246 (discussing the author’s course in sports law at Washington and Lee University School of Law).

¹³⁰ See generally Underwood & Whitson, *supra* note 118, at 122-27; Davis, *supra* note 118, at 211; Garbarino, *supra* note 114, at 14-30; Gary Roberts, *Designing a Sports Law Curriculum*, 1 Va. J. Sports & L. 262 (1999); Colino, *supra* note 111, at 24; Caudill, *supra* note 118, at 246.

¹³¹ Garbarino, *supra* note 114, at 31-32, 42; Davis, *supra* note 118, at 240; Colino, *supra* note 111, at 24.

¹³² Rothstein, *supra* note 114, at 24-25 (“Negotiation is perhaps the most important aspect of being an agent.”); Lea, *supra* note 114, at 35 (“[T]he practice of sports representation revolves to a large degree around contractual law.”) (footnotes omitted) .

¹³³ See MacCrate Report, *supra* note 7, at 175, 185-90.

specific to sports law.¹³⁴

CONCLUSION

Externship clinicians must focus on educational outcomes when students extern at for-profit placements. Such placements can expose students to client issues distinct from those encountered in non-profits, to different law practice settings, and to different substantive areas of law. Externship clinicians can guide, enhance and assess the students' experiences by providing topics of reflection for narrative journals, class presentations or discussion, recommended readings, and dialogue among students, faculty supervisors, and field supervisors. Topics of reflection unique to students' field placements will help students relate their academic experience to their field placement experience and will contribute significantly to desired educational outcomes.

¹³⁴ For example, the following periodicals focus on sports law issues: DEPAUL JOURNAL OF SPORTS LAW AND CONTEMPORARY PROBLEMS, HARVARD JOURNAL OF SPORTS AND ENTERTAINMENT LAW, MARQUETTE SPORTS LAW REVIEW, SETON HALL JOURNAL OF SPORTS AND ENTERTAINMENT LAW, SPORTS LAWYERS JOURNAL, TEXAS REVIEW OF ENTERTAINMENT & SPORTS LAW, UNIVERSITY OF DENVER SPORTS AND ENTERTAINMENT LAW JOURNAL, VILLANOVA SPORTS AND ENTERTAINMENT LAW JOURNAL, and VIRGINIA SPORTS AND ENTERTAINMENT LAW JOURNAL.