The Do’s and Don’ts of Ethical & Effective Supervision under the Wyoming Rules of Professional Responsibility

UNIVERSITY OF WYOMING
COLLEGE OF LAW
Office of Career Services & Professional Development
Introduction

- My Background
  - UW Graduate
    - Private Internship
    - Clinical Experience
  - Private Practice
  - Began at UW last fall
- Collaborative Discussion, antidotes/outcomes, etc.
- Goal of presentation is a refresher with some new ideas mixed in
Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner.


The ABA has directed an increasing amount of importance to substantive legal experiential learning. UW has been at the forefront of this movement, leading the legal community with our expansive clinics and robust externship program.

Now an ABA requirement to complete 6 credits of experiential learning prior to graduation.
UW’s Experiential Opportunities

- **7 Clinics/Practicum**
  - Family and Child Advocacy, Civil Legal Services, Defender Aid, Prosecution Assistance, Energy, Environmental and Natural Resources, International Human Rights, & Estate Planning

- **Externships: Over 100 options**

- **Summer Trial Institute**
  - Wyoming & Alaska

- **Summer Field Courses**
  - Water
  - Energy
Benefits of Experience in the Legal Field prior to Graduation

- One paper, “echoes the Carnegie study’s concern about skills training in law schools today. Not surprisingly, the attorneys we surveyed often (75%) identified skills as something they wished they had learned before the end of their first year of practice. And... most employers aren’t providing that training (only 36% report some kind of formal introduction to practice).”

- Students who had a internship or field experience report gaining more than other students in several desirable areas. These areas included higher order thinking skills, speaking and writing proficiency, and competence and confidence in solving complex, real world problems.
The Impact on Legal Careers

- New lawyers report that they feel unprepared for the actual practice of law, noting a disconnect between the traditional emphasis in law schools on doctrinal courses and the skills and experiences needed to handle clients facing legal problems.

- The increased emphasis on billable hours has led many young attorneys to worry about spending time on training programs.

- Law firms indicate that they are no longer able to pass on the cost of training programs to clients, so the opportunities for new lawyers to spend time observing more experienced lawyers in practice have become more limited.

- The First 5 Years:

- The *After the JD* study reports that graduates mostly see their experiences with law-related summer employment after the first and second years of law school as having the greatest influence on their selection of career paths.

- *Koo, supra*, at 14.
Why should you care?

- Experienced attorneys will recall there was a mentor early in their own legal career, and how that involvement helped them along the way.
- Professional Responsibility to the legal community and keeping the WY bar high
- Opportunity to give back to the school, state and bar
- Exposure to young law minds creates an environment with new ideas, fresh insight and a reminder of why you chose this profession
- Produce useful work products for the office
- Perform competent legal research
- Opportunity to grow your firm’s brand, and reputation
- Succession planning
- Pro Bono Opportunity
- Possible CLE Credit
Goals for Internships

- Opportunities to develop substantive legal experience;
- Awareness and promotion of ethical legal practice and an ongoing dialogue related to professional responsibility;
- Further a student’s skills set in research, writing, legal analysis, advocacy, communication, client interactions, and advocacy;
- Meaningful reflection by the student of their developing strengths and a productive awareness of their weaknesses;
- Mentorship with supervising attorneys and staff, and a growing understanding of workplace issues such as office culture, giving and receiving feedback, work/life balance and meeting team goals.
Beginning to Supervise

- Orientation to office
  - Introductions, supplies, etc.
- Discussion of learning goals, mission of the office and culture
- Work Space, set up, appropriate space and access
Effective Supervision

- Supervision is key to the learning experience because the student's assignments are connected to actual work of the office involving legal tasks. Backman at 85.
- Careful explanation of the assignment and clarifying expectation
- Assignments should be meaningful, interesting and comparable to work attorneys do.
- Allow for observation, then action
- Menial work, routine and repetitive tasks should be avoided.
Supervising, cont.

- Appropriate, well-defined projects
  - When are drafts due?
  - When is the final copy due?
  - How much time per project?
  - Format required; provide sample
  - Who should they come to with questions?
- Starting legal points
- Periodic review meetings
  - E.g.: Weekly to start, bi-weekly with comfort
Effective Supervision

- Evaluations of student performance
  - Supervisors shy away from ‘critiquing’ however, students report that feedback is a critical piece to enjoying their experience.
  - They understand they’re new and are not going to be perfect.

- FAST Model
  - Frequent
  - Accurate
  - Specific
  - Timely
  - Feedback is foundational to meaningful supervision for young attorneys development.
Constructive feedback

- Create an open dialogue with the intern, associate, or employee.
- Ask good questions to help guide their analysis
  - Was the project challenging?
  - Did they understand the assignment?
  - Did they get appropriate help when they hit road blocks?
    - Can identify a failure to ask for guidance or clarifying questions
  - Is the associate happy with the final product, why or why not?
- Employees will take responsibility for their work when led by effective questions
Effective Criticism while Maintaining Morale

- Mistakes and the subsequent confrontation is unavoidable. However, it should be done productively.

- “Experienced law firm partners know that if they can build their associates' self esteem, those associates will work harder and more enthusiastically, and perform better. And, of course, the converse is frequently true—if a partner degrades an associate's performance, the associate's self esteem will suffer and the performance quality will often be diminished.”

- This is not to say one should avoid tough criticism, rather it is all in the delivery of the information.

- Associate turn over is often a direct result of employee morale, rather than a dissatisfaction with pay.

  Marc S. Friedman, *Propping up an Associate Who Has Dropped the Ball*, NEW YORK LAW JOURNAL, May 2016.
Simple Rules on Critique

- Consider the Timing
  - Avoid Monday or Friday

- Physical Circumstances
  - Open body language, equal eye level

- Focus on work product, not the person

- What was your contribution to the mistake?
  - Invite the Associate’s feedback about what led to the error, empowering and opens communication with employee

- Be Specific, Remember some positive
Student Practice License

Mechanics:

- Paperwork, provided online and very straightforward
  - Affidavit of Law Student, and
  - Cert. of the Supervising Lawyer
- Documents are signed and sent to the WYSC. You receive a copy back
- Keep a copy on hand when in court
Rule 9

- (c) Duties of Supervising Attorney. Any attorney who supervises a student shall:
  - (1) assume **personal professional responsibility** for and supervision of the student's work;
  - (2) assist the student to the extent necessary to ensure that the student's participation is effective on behalf of any client represented;
  - (3) sign all pleadings, briefs, and other documents prepared for a case and delivered to any tribunal for which representation is provided pursuant to these rules;
  - (4) appear with the student in all trials and administrative hearings, but the designated supervising attorney need not be personally present in court in other matters, civil or criminal, when the client consents thereto in writing and with approval of the court in which the matter is pending;
Rule 9, cont.

- (5) appear with the student at all other proceedings unless the attorney deems his or her personal appearance unnecessary to assure proper supervision. This authorization shall be made in writing and shall be available to the judge or other official conducting the proceedings upon request; and

- (6) be present in court in any criminal matter in which the client has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court.

- (7) A supervising attorney other than a law school clinic supervising attorney shall not supervise more than three (3) students at any time.

- (e) Limited practice by law students. An eligible law student may engage, as an intern, in the limited practice of law if:
  - (1) The person to be represented consents in writing to legal assistance to be provided by the student; and
  - (2) the law student is under the general supervision of an active member of the Wyoming State Bar (when the student is an intern with any entity, the supervising lawyer shall be specified);
Rule 9 in practice

- Increase compliance with Pro Bono efforts, provides intern the opportunity to get hands on a case and client interaction while supervised and with immediate feedback from a trusted mentor.

- BEWARE: Without the proper paperwork on file with WYSC, allowing an intern to practice creates an ethical issue under the unauthorized practice of law.

- Students are held to the same standard in the eyes of the court, proper preparation is critical. Run through the hearing in the office to practice what will be said and correct prior to court.
Experience and Mentorship

- Exposure to the law and your practice is an invaluable learning experience to a new attorney, it also allows the student to learn by doing.

- Allow them to argue a motion in court, give them a substantial writing assignment, allow them to take lead on a client interview
  - Observation first, followed by doing is the best model for reinforcement and learning; grant them the opportunity to fail and to grow

- Give meaningful feedback after they present, write, interview

- Everyone has a mentor they recall from early in their career, provide that guidance to a young lawyer.
Requirements: Time & Desire

- Barriers to Effective Supervision:
  - Divergent goals - practice vs. pedagogy
  - Supervisor lacks time/motivation
  - Lack of Flexibility in Approach
  - Students’ Inability to Communicate
One student’s experience:

“I can remember pacing in front of my supervisor’s door in the first few weeks of my internship, afraid to disturb my supervisor, who always seemed too busy to discuss issues. When I would finally get a hold of him, I was often too nervous to formulate effective questions, to listen clearly and to respond appropriately to his explanations. . . . Much of my nervousness could be attributed to the fact that I felt under-qualified to perform the assignments I was given.”

-- Excerpt from the Blanco article on Supervision
Ethical obligations of the Supervisor

- Be cognizant that a student may not perceive ethical issues as clearly as an experienced attorney. Explain possible ethical issues, i.e., confidentiality, conflict of interest, etc.

- A discussion of your mission and structure, and of the professional, confidentiality, and ethical issues which are important to your organization, will help the student understand the “big picture” and how they fit into the office and its professional work output, as well as informing the student about their responsibilities and how they can help advance your objectives.

- Interns can and should be given tasks which further their skills in being an ethical attorney and in areas such as factual development, identification and articulation of legal issues, legal research and analysis, formulation of action alternatives, written and oral communication, and successful collaboration with others.
Supervisor’s responsibility to the intern or young associate

- Provide mentorship, guidance and experience to the extern
  - Weekly meetings and feedback to the extern on their overall performance, professionalism, and work.

- Open communication with the intern and the opportunity to correct issues and address ongoing problems early on

- Quality Feedback
Rules on Attorney liability

- Supervisory Responsibility of Lawyers is laid out in the Wyoming Rules of Professional Conduct in Rules 5.1 - 5.3
- Lawyers who fail to supervise other lawyers or non-lawyers (which includes legal interns) may become vicariously responsible for the unethical conduct of those persons

- 3 Types of Supervision under the Rules
  - Partners: A member of a partnership with managerial authority over the entire firm and its function
    - Includes solo practitioners
  - Supervisory Lawyers: Someone with direct supervisory authority over another lawyer(s) for particular matters
  - Subordinate Lawyers: One who is under the direct supervision of a lawyer
Hierarchy of Responsibility

- Managing Partner
- Supervising Attorney
- Subordinate Attorney
- Non-Law Personnel (Including legal interns)
Responsibilities under R. 5.1

- 5.1(a) a partner, “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules”

- 4 Areas:
  - Detect and Resolve Conflict of Interest
  - Identify critical dates
  - Account for Client property
  - Ensure inexperienced lawyers are properly supervised

- Rules extend to non-lawyer employees or agents of the firm.
Non-Lawyer Supervision

- Non-Lawyers include legal interns, paralegals, secretaries, etc.
- Managerial partner has an obligation to provide instruction and supervision concerning the ethical aspects of employment.
- Take into account that non-lawyers do not have legal training and are not subject to professional discipline.
- Subsequent supervision is necessary to confirm understanding and mitigate mistakes.
Specific Areas of Caution

(1) Conflict of Interest can be imputed to the whole firm, (Rule 1.10) however the rules carve out a specific exception for non-lawyers (including law students) in Comment 4.

- Comment requires that the conflicted non-lawyer be screened from any personal participation in the matter and to avoid communication with other members of the firm.
- Create/maintain database, include support personnel information
- Beware employees who have worked for other firms. Inform employee to:
  - Be alert of possible conflicts
  - If there is a conflict, not to disclose information learned in previous position.

(2) Client Confidentiality, firm must include instruction and supervision concerning the disclosure of confidential information.

- Employee should sign a confidentiality agreement at the start of employment, annually thereafter.
- Sign an additional non-disclosure agreement when they leave the firm, confirming they will not release any of the information gained under the firm’s employment.

- Generally, lawyer will not be vicariously liable for another’s conduct, but will be ethically responsible for the independent failure to take “reasonable steps”
Rule 1.6 Confidentiality

- Be aware: 1L’s have not had professional responsibility, while 2L’s have completed the course and the MPRE.

- Wyoming’s rule on confidentiality is broad, it’s defined as “information not available to the public.”
  - Generally more litigation is public information vs. transactional work

- Rule create an independent obligation to train. If your employee discloses information improperly, supervising attorney must prove they provided adequate training.
  - Providing a confidentiality form with this presentation

- Rule 1.6(b) lists exceptions to confidentiality, however comments clarify that you should not disclose more than one must.
Vicarious Ethical Responsibilities

- Rule 5.2: a lawyer “shall be responsible for another lawyer’s” misconduct when
  - 1. The lawyer “orders or with specific knowledge of the specific [mis]conduct, ratifies the conduct.”; or
  - 2. the lawyer knows of the misconduct “at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

- It is misconduct to violate or attempt to violate the rules through the acts of another (Rule 8.4); Meaning this rule extends to all non-lawyer assistants or agents of the firm.

- If an experienced lawyer is found to have committed misconduct, their experience will be an aggravating factor in the Board’s consideration of a sanction. Additionally, inexperience will be considered as well.

- A managerial attorney is responsible for developing policies and procedures for the firm in its entirety and will be held accountable as such, whereas, a supervisory attorney will be held responsible for the specific attorneys they oversee.
Subordinate Lawyer Responsibility under a Supervising Attorney

- The “Nuremburg defense” of simply following order is seldom an excuse for misconduct.

- R. 5.2:
  - a) Individual responsibility to act ethically, notwithstanding orders of another person; and
    - Person to include: another attorney, client, non-client etc.
  - b) (Narrow Exception) Lawyer does not violate the rule if “that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”
    - Only works as a defense when the two conditions are met: 1. issue must be an arguable question, and 2. the supervising lawyer’s decision must be reasonable.

- Subordinate attorney is responsible for the conduct of non-lawyers under their supervision as well.
Summary

A lawyer with managerial authority or a supervisory lawyer may be, or may become, vicariously liable for the misconduct of a subordinate lawyer or non-lawyer employee or agent by directing or ratifying improper conduct or by failing to take timely remedial steps when unethical conduct has occurred. A subordinate lawyer may also become vicariously liable for the unethical conduct of a non-lawyer under the same conditions.

Burman, at 526.
Benefits to You

- **Pro Bono**
  - Rule 6.1 of Professional Conduct provides every lawyer has a responsibility of providing at least 50 hours of pro bono service.
  - Rule 6.1(a)(2)(iii) provides participation in activities for improving the law, the legal system or the legal profession.

- Wyoming lawyer may now earn up to 5 credits of CLE for mentorship; Lawyer may receive 1 hr of CLE for every 2 billable hours
  - Rule 5: (d) An attorney may receive a maximum of five hours of legal education credit each calendar year for providing pro bono public service as defined in Rule 6.1 of the Wyoming Rules of Professional Conduct. Such credit may be received at the rate of one credit hour for each two hours of pro bono public service,
    - (3) acting as a mentor for an eligible law student in accordance with Rule 9.

- Mentorship forces you to aim higher and draws forward the best version of yourself

- Input is great, but the benefits are invaluable.
Benefits to Your Firm and Business

- Reputation
- More Pro Bono cases
- Cheaper for clients
- Generally more thorough research
- Flexibility, Difference in Internships
  - Traditional vs. Grooming
- Succession Planning
- Branding
- Responsibility to the overall quality control of Wyoming State Bar
Get Involved ~ See Sign Up sheet!

- Speed Networking
- Spring Break Mentor
- Mock Interviews
- Internships (private sector) Externships (public sector)
- Judging Competitions
- Speaking at the Law School
- Practice Pamphlets
  - See Sign Up sheet; Minimal time!
- On Campus Interviews (OCI): Sept. 7-Oct. 7
- State Bar Conference, Student Donation
Questions? Comments?
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