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Ethical Challenges of Using Law Student Interns/Externs to Expand Services to Low-Income Older Adults

by Alaina Anderson,
Eleanor Crosby Lanier,
and Keith Morris

Editor's note: This article is reprinted from the materials of the 2015 National Law and Aging Conference. More than 160 attendees from 35 states met to learn and network, making the Conference a resounding success.

Learn more about the 2016 NALC on page 71 of this issue. And, stay in the loop by visiting its website: <http://ambar.org/NALC> or following its twitter account: [@NtlAgingLawConf](https://twitter.com/NtlAgingLawConf).

Why Consider Including Law Students in Your Elder Law Practice?

The Law School Perspective:

The ABA Section on Legal Education and Admissions to the Bar recently strengthened its rules regarding experiential learning and law school accreditation¹ and in response to these changes, many law schools will be searching for ways to provide additional practice opportunities to their students through course work or pro bono initiatives. In addition, some states are requiring additional practice or pro bono hours in order to become eligible to sit for the bar exam,² and New York recently adopted a prerequisite of 50 hours of pro bono legal work prior to taking the bar.³ As law schools strive to deliver a comprehensive educational program that will enable their graduates to be eligible to take the bar in every jurisdiction, they will be searching for additional opportunities for students to gain this valuable experience. These factors make it a great time to consider including law students in your current elder law practice, and planning for ethical dilemmas will assure that any collaboration protects your practice, your clients and your student workers.

Many of us will recall (some, not so fondly) the shock that came after law school graduation and bar licensure, upon realizing that the practice of law requires a number of skills that are not typically highlighted during a traditional law school experience. Having the opportunity to bridge theory and practice while still in school provides a way for law students to make sense of the abstract concepts taught in law school, and to see how application

¹ http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2015_2016_chapter_3_authcheckdam.pdf. See, for example, Standard 303(a)(3) and (b).

² See, for example, California's new rule requiring 15 credits of "competency training" (which includes practice based experiential learning) in order to take the bar exam <http://www.calbar.ca.gov/AboutUs/PublicComment/Archives/2014PublicComment/201411.aspx>.

³ New York Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law § 520.16(a), <http://www.nycourts.gov/ctapps/520rules10.htm#B16>.

and practice of law play out in the life of a person with pressing legal and non-legal needs and interests.

Employers are starting to notice the disconnect between law school and the practice of law, as well. Most law schools do not effectively train students to enter directly into the practice of law with competence and experience in the specific tasks required of new lawyers, specifically research and writing, transactional skills, and real-world case practice. Legal employers affiliated with small and large firms identified this “new attorney readiness gap” and estimated it costs firms an average of \$19,000 per lawyer to close the gap by providing new lawyer training immediately upon a graduate’s entry into practice.⁴

With so much unmet legal need among vulnerable populations, including low income and socially or economically needy older adults, the time seems right for increased collaboration among law schools and providers. Those who are not located in close proximity to a law school can consider exploring summer placements, Alternative Spring Break (ASB) initiatives or creative off-site collaborations.

As providers of services to older Americans, there are plenty of good reasons to consider partnering with law schools to take advantage of what is sure to be a search for placements (see provider’s section below for more specifics), but in order to protect clients, the student practitioners, and the law school partners, it is crucial that these programs thoughtfully consider and address the myriad of ethical dilemmas that can arise from these partnerships.

The Student Perspective:

We have all seen the articles that discourage individuals from attending law school because of the risk of massive student loan debt and limited job opportunities. Ten months after graduation, only 60% of the class of 2014 had found full-time long-term jobs that required them to pass the bar exam.⁵ At the same time, law schools continue

to raise tuition while producing nearly twice as many graduates needed in the job market.⁶ A student attending a private law school averages \$127,000 in student loan debt and a student attending a public law school averages \$88,000. Still, tens of thousands apply each year, get accepted, and push through those three or four years of law school with one goal: to have a job lined up before graduation.

One way to achieve that goal is through internships. Internships and externships give students credentials. Some students coming straight from undergraduate programs have limited work experience—much of it unrelated to the legal profession, such as fast food or retail experience—if any at all. Others have varied backgrounds that are unrelated to the area of law they want to practice. Securing an internship gives students a legal position to put on their resumes and show what areas of law in which they are interested.

Internships and externships also help students determine where they fit in the legal world. For example, Elder Law is not a traditional first year course. Some students may never think about the legal issues older adults face until years or decades later when an older relative needs help. Working or interning in a practice that assists low-income, older adults can introduce students to the important and growing area of elder law.

Using newly gained skills to help others gives students a feeling of satisfaction, satisfaction that can be achieved through completing work they are passionate about. Patrick Schiltz wrote in “On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession” that “[w]ork satisfaction affects life satisfaction.”⁷ While 70% of medical students and 43% of graduate students experience extreme stress, a whopping 96% of law students experience that same level of stress.⁸ Introducing students to areas of law that allow them to help others, achieving job satisfaction, can reduce students’ stress levels. Using students in an elder law practice will encourage them to pursue an area of law in which they are passionate, ultimately allowing them



⁴ <http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1439232063685685>.

⁵ <http://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html?ref=opinion&r=1>.

⁶ <http://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html?ref=opinion&r=1>.

⁷ <http://faculty.law.miami.edu/mcoombs/Schiltz.htm>.

⁸ http://www.huffingtonpost.com/kate-mayer-mangan/law-school-quadruples-dep_b_5713337.html.

to lead less stressful lives because they enjoy the work they do.

The Provider Perspective

Elder Law of Michigan (ELM)⁹ uses law students to help staff its Legal Hotline for Michigan Seniors. In a climate where the need for our services far exceeds the supply, we had to look for alternative staffing models. With an estimated 10,000 calls expected in 2015 and a decrease of almost 25% in our hotline budget, we would be foolish not to draw from the two local law schools for additional resources.

For the past ten years or so, ELM has utilized law students and recent law graduates to provide services to clients. We initially used students to provide “brief services” for clients that needed additional help. This allowed the hotline to provide additional services to those clients without taking away from the volume of service currently being provided. The more law students who were available, the more brief services were offered. This model allowed us to utilize law students without becoming dependent on their staffing resources. It was important for us to remember that seniors still needed assistance during school breaks, so we had to make sure we were not totally dependent on the students.

The model for us to utilize law students has continued to evolve. In 2013, we switched to a model that placed the law students directly on the front lines answering calls to the legal hotline. In 2014, almost 25% of the calls handled by the hotline were done by either a law student or recent college graduate. Without this resource, almost 1,500 seniors would not have received service in 2014.

At first glance, you would wonder why we didn’t just use more law students to help more clients. After all, if 25% of the cases is great, wouldn’t 50% of the cases be better? Not really. Here are a few of the unintended consequences that resulted from our increased use of law students.

- *The amount of staff time needed to train and supervise law students increases considerably.* For each student who works on the legal hotline, we need a third of a full-time employee’s time for

supervision. There was a diminishing need for more supervision once we had three students working at the same time. So, for us to minimize the additional staff time needed, we scheduled at least three law students at the same time.

- *Client donations dropped.* After careful research, we found that clients who called and were assisted by a law student didn’t feel the need to donate to the organization because ELM was getting free help and the service provided was part of the law school experience. So clients were less likely to donate to us if they were assisted by a law student.
- *More staff wanted to be involved with the law students.* We found that as our law student program grew, more of our staff wanted to be involved with the program. They liked the energy that was created by this group each day. (We had 11 law students each semester, so there was always a lot of activity.) Not everyone can work with the law students every day. They have to share!

There are a variety of financial reasons for using law students in your program. Funders look very favorably on the use of volunteers to deliver services. By using law students, you can re-classify your project to a community-involvement project and look for other sources of funding. Time volunteered by law students is allowable match for the federal grants that have a match requirement. Also, many grants require



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⁹ Elder Law of Michigan is a 501(c)(3) located in Lansing, Michigan that serves Michigan seniors through its Legal Hotline for Michigan Seniors, one of the largest and oldest hotlines in the country.



collaboration and working with the law school to find and place law students may meet that requirement.

Another reason that most programs overlook is the development of your future donor pool. You should make every effort to keep in touch with previous law students and remind them about their experience with your organization. Some of our most loyal supporters were once our law student volunteers.

When I talk about the use of volunteers at ELM, I like to use the phrase “service-learning environment.” What this means is that we actively work with the law student to identify their goals for learning and then provide feedback on their progress towards those goals. Many of the students come solely to have something on their resume. However, I am often surprised to find out just how many of these students had never worked with a low-income person before or had any idea just how hard it was to be a senior citizen and not have enough money to live on. I will always remember what one student said to me during his exit interview:

When I came here, I had no idea what it was like for most seniors. My grandparents did very well for themselves and live the life they want to. I just assumed everyone’s grandparents and parents were that way. This has been an eye-opening, almost life changing, experience for me because I now see what I need to be doing.

Regardless of all of the other benefits for using law students at our program, it is because of the changes in the students that I think we continue to do it. If just 10% of the law students that we have worked with decide to help a low-income senior pro bono because of the experiences they had here at ELM, then this program has paid for itself over and over again.

Developing the Partnership

The Law School Perspective:

First and foremost, a law school will want to assure that its students are provided with a meaningful learning experience that will supplement and enhance

the work they are doing in class. This means that law students are given the chance to interact with attorneys and gain an understanding of the type of work the attorney in the law office typically undertakes on behalf of clients. Sticking students in the basement to put years of correspondence on a case into chronological order might provide a great benefit to the office, but this task could also be done by a volunteer with far less training and background. Consider activities that will benefit the office, yet still give the law student a chance to learn (and possibly to fail) without harming the client or case. And, realize that not all students are equal. Some may be far more capable, responsible, and ready than others.

Second, the law school clinician will typically value placements that provide students with adequate supervision and opportunities for growth. Appropriate activities and supervision requirements will vary based on the student’s status and jurisdictional rules. (See below for the discussion of student practice rules.) More oversight will be required for certain types of work, and law schools and law students value placements that take time to adequately train and supervise the activities the student is engaged in on behalf of the firm/placement.

Finally, because many of these placements enable a student to earn academic credit, law schools benefit from regular, tailored feedback on each student so that they can help students through any problems that may arise, use the lessons learned to reinforce other goals for learning, fairly evaluate (*i.e.*, grade) the student’s work, and give feedback on how they might improve. Law students are ambassadors for their law schools, as well as for their placements, so it helps to know if a student is not showing up on time, is having problems with assignments, is not dressed appropriately, etc. These are all problems the law school contact should know of, to ensure that future students are better prepared for the experience of working with you or your firm/project/office.

The Student Perspective

First, the student should share his or her goals for the internship/placement. The attorneys do not know the student’s strengths and weaknesses, nor do they know the student’s ultimate goals. The best way for the student to learn the most from a placement is to share goals with the supervising attorney. One way to do this is to discuss the goals together, then formalize the goals in writing. Throughout the placement, both the

student and supervising attorney can refer to the goals to ensure the student is on track.

Second, the student should not be afraid to ask questions. Many times students spend days working on an assignment, only to learn after submitting it that it has been completed incorrectly. Sometimes this happens because the attorney is not clear about what is needed. Other times it is because the student is not sure how to complete the task. Either way, this can be resolved by the student asking questions upon receiving an assignment. For example: “Should the assignment be drafted in a memo format or in bulletpoints?” or: “If I have questions later and you are unavailable, is there another attorney you recommend me speaking with?”

Third, the student should seek out additional opportunities to learn. Although the student set goals at the beginning of the placement, as weeks pass, the student may have opportunities to learn about other topics he or she originally was unfamiliar with. For example, an attorney may have a unique assignment that requires the student to use skills he or she does not normally use for legal assignments. Or another attorney in the office may work on different assignments than the ones the student is normally assigned. Students should discuss with their supervising attorneys any additional opportunities to learn.

The Provider Perspective

A partnership between the law school, provider, and law student is essential. No one entity can make the placement a success without the support of the others. Here are some observations about how to make sure this is a success:

- One of the most important parts of this belongs to the provider—write an accurate position description. Make sure you write something that accurately reflects how much time the law student gets to spend with an attorney or working directly with clients, etc. While you want to “sell” the position, you cannot misrepresent what the student will be doing.
- The career fair has been a great way to capitalize on our partnership. For us, having law students that have interned for us, or that currently work for us, represent us at the law school fairs gives us a leg up on most of the other employers at the events.

- Have a contract between the provider and the school that lays out responsibilities regarding student behavior, liability for student actions, etc. There are a long list of things that your legal department may suggest including. While I am not the biggest fan of contracts with long laundry lists of terms, experience has proven the value of having something that spells out the responsibilities for each party.
- Have signed documents with the law student that clearly lays out the expectations and consequences.
- Invite the law school placement office to come and visit your site so they can have a better understanding of exactly what you do.
- Work through the potential ethical issues that may arise for students that also work in other law-related jobs.
- Talk on a regular basis with the field supervisor to keep them updated on the progress of the student.



Anticipating the Ethical Issues

Below is a list of some of the most common areas of concern when introducing student practitioners into your elder law practice. At the outset, it is important to understand the student practice rules in your jurisdiction.

For example:

- Does your bar allow students supervised by a licensed bar member to represent parties in court during their third year?
- Do they have a general student practice rule that applies to more broad types of work (transactional work, interviewing, etc.)?¹⁰

¹⁰ See, for example, Georgia’s rule on student practice, a broad rule enabling supervised student practice with application and certification with the State Bar and the applicable law school <http://www.gasupreme.us/rules/#XV8-15-15>.

- Is registration with the bar or swearing in by the court required?
- Are there other requirements that govern the use of law students in your state? If so, find out what they are and work to assure that you are solidly working within the rules.

In order to avoid problems, it is also important and valuable to have a solid understanding of applicable rules, laws and opinions governing the unauthorized practice of law in your jurisdiction. Conversely, you may find it helpful to seek guidance from either your state bar, your Access to Justice Commission or Committee, or your court clerks' association to get an understanding of how your state views the difference between legal advice and legal information.

Provision of legal information is never a problem, but a non-licensed person giving legal advice can pose big problems. Avoid problems by having and conveying a solid understanding of the difference.¹¹

Given the national audience of this article, the discussion below will center on some of the most relevant of the ABA's Model Rules on Professional Conduct and will include situations where law school clinicians, externship placement supervisors, and law student practitioners should be cognizant of and alert to potential ethical issues.

1.1 Competence¹²

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

¹¹ For information on court-connected projects promoting Access to Justice, see <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Access-to-Justice-Commissions.aspx>. For information on the difference between legal advice and legal information see John Graecen's seminal work <http://isc.idaho.gov/judicialedu/clerks/Graecen%20Article%20on%20Legal%20Advice.pdf>.

¹² http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.

What is good for the lawyer in practice holds especially true for a lawyer in training. Placements should provide adequate training and supervision to law student workers to assure that they are not stepping outside of their role and that they are competent to handle (with supervision) whatever task is assigned.

1.2 Scope of Representation¹³

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Here, it is critical for a client to understand and assent to the role that the law student may play in the representation. An effective practice might be to clarify in the representation agreement the role of the student worker, what s/he is authorized to do (and not able to do), and to assure that the client understands and agrees to this arrangement. The representation agreement could include an understanding of confidentiality, another potential quandary that is discussed in more depth below.

¹³ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_2_scope_of_representation_allocation_of_authority_between_client_lawyer.html.



1.6 Confidentiality of Information¹⁴

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (See footnote link for full text of this rule.)

This rule seems fraught with potential danger for clients, providers, students and schools, so a little preparation and communication can go a long way to prevent problems. A best practice might be for students who are privy to client information to sign a confidentiality contract at the outset of their placement, and each client should explicitly agree to student participation in the representation (see above.) Students should be reminded of the obligation to keep all protected aspects of their work confidential, and this extends to sharing protected client information with their law school instructor in journals, case rounds or final learning appraisals. Likewise, providers/placements should develop rules to protect files containing client information and should take time to train students on the need to safeguard the confidentiality of all client information. If students work off site, extra care is warranted to assure an effective policy is in place to secure, encrypt, or password-protect all data that is stored in the cloud, in a Dropbox account, and on a thumb drive or other portable device. Students should be mindful of the type of information that they may share with the law school supervisor and never include client identifying information that is not public in documents provided to the law school instructor or clinician.

1.7 Conflict of Interest Current Clients¹⁵

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

1.8 Conflict of Interest Current Clients Specifics Rules (excerpts)¹⁶

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

¹⁴ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.

¹⁵ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html.

¹⁶ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules.html.



(3) information relating to representation of a client is protected as required by Rule 1.6.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Conflicts of Interest Duties to Former Clients¹⁷

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Law students have the opportunity to participate in a number of experiential learning activities and thus must take extra care to guard

¹⁷ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients.html.

against conflicts that may arise during the course of their work. It is conceivable that students could be privy to information in one clinic that could result in a conflict at a second placement. Many law schools prohibit students from participating in more than one placement at a time, but such procedures are not enough to safeguard clients and placements from potential problems. And students and placements should retain information to help identify potential conflicts, since the rules protect both current and former clients from harm caused by an unidentified conflict.

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