C L E A
Clinical Legal Education Association

COMMENT ON INTERPRETATION 305-2 AND THE QUESTION OF PAID EXTERNSHIPS IN LAW SCHOOLS

JULY 10, 2015

The Clinical Legal Education Association (CLEA) submits this comment to urge rejection of a proposal before the Council for the Section of Legal Education and Admission to the Bar to eliminate the current prohibition on awarding law school credit for paid field placements (Interpretation 305-2) and to replace that prohibition with a mandate for increased recording keeping for those placements. CLEA is the nation's largest association of law professors. Among its more than 1200 dues-paying members are hundreds who teach law school field placement (commonly called externship) courses. These professors have concluded that permitting law school placements to pay law students for their coursework would seriously threaten the academic integrity of the courses they teach. A close review of the Accreditation Standards reveals that there are very few requirements of substance on field placement courses; imposing new paperwork burdens on law schools that permit paid externships will therefore not mitigate the threats to academic integrity. The Council should reject the proposal to eliminate current Interpretation 305-2. At a minimum, it should delay consideration of eliminating the current Interpretation until substantive standards regarding the teaching and content of externships have been considered and adopted.

1. *Revoking the interpretation will damage the quality and diversity of law school field placements programs.* [1]

Law schools should grant academic credit for field placement courses only when they are designed as a professional educational experience and have specified learning outcomes for the student, just like any other law school course. Effective educational practice requires that a law school require field placement supervisors to serve as teachers and mentors, not as employers. Teachers and mentors make the student the focus of the relationship. They help in developing the student's professional skills through repeat performance, feedback, and guidance on the student's career. They engage in activities that have no direct economic benefit and in fact, may create a net loss for the firm or agency. In contrast, employers are motivated to get the work done efficiently.

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[1] CLEA has consistently opposed repeal of Interpretation 305-2. In comments filed in January 2014, April 2014 and February 2015, CLEA fully discussed the reasons for retaining the existing rule. These comments remain available in the archive section of the Section's web page (for 2014 comments) and in the materials prepared for the last Council meeting (for 2015 comment.). This section summarizes those arguments.

When work is compensated, the employer is compelled to make its own interests the primary focus of the supervisor–student relationship. The supervisor of a paid employee has an obligation to justify the compensation. Mentoring and teaching burdens the supervisor's time and reduces the net benefit of the employee's work. Employers are likely to select students for pay who are the most competent, or who show promise for future employment, so that the investment in training and supervision will benefit the firm or agency. Although students learn from their experiences in paid employment, that does not, in itself, justify the school collecting tuition and granting credit for experiences that are shaped around the interests of the employer, rather than the interests of the student.

In addition, paid employment impedes the ability of the law school to exercise control over the placement. Paid employment is a contract between employer and employee, to which the law school is not a party. Students routinely ask to receive credit only after accepting an offer of paid employment. Allowing schools to grant these requests sets up a conflict between the school's obligation to educate the student and the contractual relationship between the student and the employer.

Permitting students to receive credit for field placements will also discourage them from participating in public interest and public service field placements, which will not pay them. This disincentive will extend to a wide range of existing clinical opportunities: in clinical courses; in legal services, prosecutorial, and public defender offices; in federal, state, and local government office and agencies; in other private non-profits; in smaller private firms that cannot afford to pay; and in judicial placements. Field placement courses and law clinics have been a primary means of teaching students not only about lawyering but also about access to justice and public service.

Finally, by requiring that externships are designed primarily for the educational benefit of students and should remain distinct from paid employment, the ABA's current rules are consistent with the Fair Labor Standards Act. As the Second Circuit recently stated, a central feature of modern internships is "the relationship between the internship and the intern's formal education," in which students receive "practical skill development in a real-world setting . . . while enrolled in . . . a formal course of post-secondary education." *Glatt v. Fox Searchlight Pictures*, Nos. 13-4478-cv & 13-4481-cv, slip op. at 16 (2d. Cir. July 2, 2015). If the primary benefit of the internship experience is the student's,[2] the Fair Labor Standards Act does not require payment. In fact, to qualify as a trainee program, the Fair Labor Standards Act prohibits payment. Permitting academic credit for paid employment would blur the lines between trainee programs designed for primarily educational purposes and employment.

Opposition to revoking Interpretation 305-2 is virtually universal among externship and other clinical teachers. In addition to CLEA, the Clinical Section of the American Association of Law Schools has communicated a statement of position to its members in favor of retaining the existing Interpretation and opposed to repeal.[3] Teachers of experiential education speak with one

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[2] The Second Circuit articulated a non-exclusive list of seven considerations that enter into a decision about "primary benefit." Five of these seven considerations focus on student participation in an educational program. *Id.*, slip. op. at 14-15.

[3] https://connect.aals.org/p/ne/ar/sid=42

voice about the damage to legal education that revocation would work on the quality and range of field placements and other clinical courses.

2. *The proposed replacement Interpretation, which provides only for record keeping, does not safeguard against the risks of awarding academic credit for paid employment.*

The proposed replacement Interpretation 305-2 adds no substantive requirement for paid externships. Instead, by its terms, it requires only an additional procedural step: law schools must "maintain records" to ensure compliance with Standard 305 in the case of paid externships. The purpose of these records is to permit the ABA to review whether the school can demonstrate "sufficient control" to comply with the Standards. Nothing in Standard 305 or anywhere else in the Standards specifies what the student experience in a field placement should include, what constitutes "sufficient control," or how that "control" should be exercised. Maintaining records for review during ABA site inspections every seven years does not mitigate the risks of paid externships.

3. *The current Standards do not prescribe the educational methods or content of externships.*

The current Standards governing field placements are largely process-based and do not counteract the severe risks of paid externships. Standard 305 (field placements) and Standard 303 (experiential courses) [4] do not offer substantive guidance to a law school on how it should "control" a paid externship. By stark contrast, the definitions of clinics and externship in Standard 304, taken together with Standard 303, mandate the core educational features of those courses.

The Standards do not require that students in a field placement do work that is relevant to their development as lawyers. Standard 305 requires a field placement program to have a statement of goals and methods and a demonstrated relationship between those goals and methods and the field placement course, but does not constrain those goals and methods. By contrast, Standards 304 (a) and (b) make clear that students in clinics must engage in "advising or representing a client" and that students in simulations must have "substantial experience . . . that . . . is reasonably similar to the experience of a lawyer advising or representing a client." [5] Requiring opportunities in field placements that relate directly to the student's development as a lawyer is essential in <u>all</u> externships, not just those that quality as "experiential courses." This would be especially true in paid externships, where employers would feel free to assign tasks that increase the economic return to the employer without regard to how they contribute to the student's development.

The Standards do not require that faculty members or site supervisors give students opportunities to engage in specific kinds of lawyering performance or prompt students to engage

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[4] The Council has also asked for comment on a new proposed Interpretation 305-3, which states that to qualify as an "experiential course," a field placement course must satisfy the requirements of Standard 303(a)(3).

[5] Standard 303(a)(3) requires that all experiential courses -- including externships --"engage students in performance of one or more of the professional skills identified in Standard. 302.

in self-evaluation of that performance. Standard 305 requires only that the course provide "opportunities for reflection" and that there exists enough contact to assure "the quality of the field placement experience." By contrast, Standards 304(a) and (b) make clear that clinics and simulation courses must provide opportunities for performance and must encourage self-evaluation of that performance. Notably, paying employers have an incentive to restrict performance to tasks that benefit the employer and to minimize the time that students spend on self-evaluation.

The Standards do not require that students in field placement programs receive feedback from faculty or site supervisors. Standard 305 only requires "a clearly articulated method of evaluating each student's academic performance." It does not require that faculty or supervisors give formative feedback. By contrast, Standards 304(a) and (b) make clear that in clinics and simulations, students must receive "feedback from a faculty member." The opportunity for feedback represents a core aspect of experiential courses. In the externship context, that feedback should come from a faculty member or site supervisor. The provision of educationally valuable feedback by site supervisors represents the single most likely task to be sacrificed by a paying supervisor.

The Standards do not require that externship students receive supervision at field placements. Standard 305 requires only a method of evaluation that includes both faculty member and site supervisor. By contrast, Standards 304(a) and (b) require that both clinics and simulations offer "direct supervision of the student's performance by the faculty member." Close supervision represents a hallmark of experiential courses and especially clinical courses. In externships, supervision should come from both of two separate sources: the faculty member and the site supervisor, as appropriate to their role in the course.

The Standards do not require faculty and field placement site supervisors to collaborate in assuring the quality of the educational program. Field placement courses are unique in permitting separate supervision of students by faculty and site supervisors. Nothing in the standards requires that they work together to assure a valuable educational experience. Standard 305 only requires an unspecified "method" for training and evaluating site supervisors, and provides no guidance as to how faculty and site supervisors should work together during the field placement course. By contrast, Standards 304(a) and (b) assume that a faculty member will assure that students in law clinics and simulations will do meaningful lawyering work, engage in self-evaluation and receive feedback. Standard 305 gives field placement faculty little guidance as to how to control core features of the internship, including requiring the employer to retain a student believed to be performing unsatisfactory work.

Finally, the Standards do not require that a faculty member have overall responsibility for the specifics of a field placement. Standard 305 requires only that a faculty member or an administrator assure the quality of the field placement experience, with no provisions about what constitutes the essential elements of a quality experience. By contrast, Standards 304(a) and (b) make clear that clinics and simulations must be taught by faculty members, who must take an active role in all relevant areas. Requiring faculty involvement in such matters represents a core feature of other experiential courses. It would be especially critical for paid externships, where

the faculty must negotiate with site supervisors who have an incentive to minimize the educational value of the site experience.

New proposed Interpretation 305-3 states that, for a field placement course to qualify as an "experiential" course, it must satisfy the requirements of Standard 303(a)(3). This seems self-evident. But Standard 303(a)(3) does not mitigate the risks of paid externships. That Standard focuses generally on all experiential courses but takes no account of the unique difficulties of field placement courses. Moreover, Standard 303 governs only those externships that a school wants to qualify for satisfying the required six "experiential" credits. Under the standards, schools may still create credit-bearing field placements that do not comply with Standard 303. This gap effectively leaves the risks of paid externships wholly unaddressed, permitting less well-structured courses for the highest-risk placements.

4. *The Council should defer its consideration of eliminating the prohibition on paid externships until it has considered whether the Standards sufficiently regulate for-credit field placements.*

The current Standards do not require that law schools insure that students in field placements have varied and meaningful lawyering assignments, or that site supervisors provide adequate supervision and opportunities for repeat performance, give feedback, or ask students to engage in self-evaluation. These omissions are particularly worrisome in the event that paid externships are permitted. The proposed replacement for current Interpretation 305-2, which requires only enhanced record keeping in the case of paid externships, does not solve the particularly difficult problems that those externships pose.

The proposed Interpretation does not specify for site inspection teams what information or documentation to seek during sabbatical reviews. It gives law schools no guidance on how to structure their relationships with paid externship sites. Neither the proposed replacement Interpretation nor the existing Standards requires: (1) written agreements for each individual student that state specific learning outcomes and the methods of assessing achievement of those outcomes, reviewed and signed by the student, site supervisor, and faculty; or (2) general memoranda of understanding between site supervisors and schools that (a) identify the resources, including staff, that the site will devote to the educational program; (b) assure that students will not be terminated during a semester without the faculty member's assent; (c) recount the site supervisor's obligation to comply with relevant and stated law and law school policy; and (d) describe with specificity how law school faculty will oversee the site supervisor, including the nature of site visits. In addition, the proposed record keeping Interpretation does not require the formal consent to participation in the field placement course by a person at the placement with the authority to approve the devotion of staff time and firm resources to the educational but economically unproductive activity.

Finally, the proposed Interpretation lacks the detail and specificity necessary to avoid one of the most severe risks of paid externships: that faculty would have to rely on student self-reporting to assess the quality of the field placement. In the absence of specific reporting requirements, the standards should not place the burden on students to choose between honest reporting to a faculty member and loyalty to their paying employers.

Conclusion

The educational content of field placements, which are perhaps the fastest-growing component of legal education, is largely unregulated by the existing Standards. The prospect of paid externships makes this lack of regulation particularly ominous. The content and methods of legal education should not be subject to employment contracts for compensation entered into by law students and their third-party employers. The record keeping "solution" to the identified problems of paid externships provides no solution. The Council should decline to eliminate the prohibition of paid externships. Instead, it should consider whether to impose structure on externships, just as it has for law clinics and simulation courses in law schools.

As always, CLEA and its members with externship expertise remain available to the Council to answer questions or provide further information.