

# EVOLUTION OF ABA STANDARDS RELATING TO EXTERNSHIPS: STEPS IN THE RIGHT DIRECTION?

PETER A. JOY\*

*This article analyzes the evolution of American Bar Association (ABA) Accreditation Standards relating to clinical legal education externship programs. The article explores and evaluates the historical debate among legal educators on the issue of whether the ABA's highly structured regulation of externships has been helpful to the development of this form of clinical legal education. The article demonstrates that although the ABA regulation of externships has limitations, it has been helpful to the development of externship programs. The article concludes that ABA regulation is likely to remain highly structured unless law schools demonstrate that sufficient instructional resources will be devoted to make externships quality educational experiences without detailed externship standards and interpretations.*

## INTRODUCTION

American Bar Association (ABA) Accreditation Standards affect everyone in legal education to a greater or lesser extent. In recent years, the standards in the area of externship or field placement programs have contained a level of scrutiny that is more detailed and more exacting than the standards for any other part of the law school curriculum.<sup>1</sup> None of the eight accreditation standards to the curricu-

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\* Professor of Law and Director of the Criminal Justice Clinic, Washington University School of Law in St. Louis. A preliminary draft of this article was presented at the conference, "Externships<sup>2</sup>: Learning from Practice," sponsored by The Catholic University of America, Columbus School of Law, March 7-8, 2003. I am very grateful to Bridget McCormack and Sandy Ogilvy for comments to an earlier draft of this article. I am also grateful to Carl Brambrink, Director of Operations for the Office of the Consultant on Legal Education, Section of Legal Education and Admissions to the Bar, American Bar Association (ABA), for his assistance in retrieving non-confidential information from the ABA archives for my use in this article. I am especially thankful to Roy Stuckey, who shared his non-confidential files concerning the development of ABA standards and interpretations relating to externship programs, and to Gary Palm, who was interviewed for this article. In preparing this article, none of the persons interviewed or files I reviewed revealed any information relating to the accreditation of any law school.

<sup>1</sup> Throughout this article, the terms "externship" and "field placement" will be used interchangeably. There are two dominant forms of "live-client" or "real client" clinical courses in which students provide legal assistance to real clients with legal problems. There are "[i]nternal, or in-house, clinics . . . where law students are primarily supervised by full-time law faculty. The other dominant form of clinical programs are external, or

lum set forth general guidelines for classroom courses or in-house clinical courses defining how the courses must be structured, whether there must be stated goals for the courses, whether the faculty teaching the courses must devote sufficient time to satisfy the goals of the courses, and whether law schools must review the classroom and in-house clinical courses periodically.<sup>2</sup> In contrast, the current version of ABA Accreditation Standard 305, relating to study outside of the classroom, requires law schools to examine externship programs periodically utilizing ten factors that include reviewing the goals and methods of the courses, quality of the educational experiences, adequacy of instructional resources, and the qualifications and quality of the field supervisors.<sup>3</sup> In addition to the periodic law school review of

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externship, clinics. . . where law students are primarily supervised by practicing lawyers or judges who are not full-time faculty.” Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 403 n.8 (1994). The ABA currently refers to externship programs as “field placement programs.” See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 305 (2003) [hereinafter 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS]. In addition to these two dominant forms of real client clinical programs, there is a third type of clinical program, often referred to as “hybrid” clinics, combining features of in-house and externship programs. In a hybrid clinic “a law school creates a partnership with a legal provider, such as a civil legal service office or public defender office, and the students enrolled in the clinic are supervised by both a full-time clinician and lawyers from the outside office.” Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 28 (2000). Finally, some refer to simulation courses that usually involve students representing hypothetical clients in role as simulated lawyers as another form of clinical legal education. See, e.g., Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001) (“There are three different branches of clinical education in the United States: in house live-client clinics, externship programs, and simulation courses.”).

<sup>2</sup> The ABA standards covering the curriculum are contained under the “Program of Legal Education” in Chapter 3 of the standards. See 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at ch. 3.

<sup>3</sup> Standard 305(e) states:

A field placement program shall be approved and periodically reviewed utilizing the following factors:

- (1) the stated goals and methods of the program;
- (2) the quality of the student’s educational experience in light of the academic credit awarded;
- (3) the adequacy of instructional resources, including whether the faculty members teaching in and supervising the program devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
- (4) any classroom or tutorial component;
- (5) any prerequisites for student participation;
- (6) the number of students participating;
- (7) the evaluation of student academic achievement;
- (8) the qualifications and training of field instructors;
- (9) the evaluation of field instructors;
- (10) the visits to field placements or other comparable communication among

externship programs based on the ten factors, Standard 305 also imposes four additional requirements: 1) the student may not participate in an externship program until after completing one year of study, 2) there must be regular communication between the faculty, student, and externship field supervisor, and the field supervisor should participate with the faculty in evaluating the student, 3) periodic visits to the field placement are preferred for courses awarding six credits or less and required for courses awarding more than six credits, and 4) a contemporaneous classroom component is preferred.<sup>4</sup>

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faculty, students and field instructors.

*Id.* at Standard 305(e). Field supervisors, also called field instructors or placement supervisors, are the practicing lawyers, judges, legislators, and others who directly supervise the law student work in their placements away from the law schools.

The ABA Council of Legal Education and Admissions to the Bar (Council) has circulated for comments proposed revisions to Standard 305. *See* Memorandum from John A. Sebert, Consultant on Legal Education, & Michael J. Davis, Chair, Standards Review Committee, to Deans of ABA-Approved Law Schools et al. (Dec. 16, 2003) [hereinafter Standards Revision Memorandum] (on file with author). The proposed amendment to Standard 305(e) provides:

A field placement program shall include:

- (1) a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation;
- (2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
- (3) a clearly articulated method of evaluating each student's academic performance involving both a faculty member and field placement supervisor;
- (4) a method for selecting, training, evaluating, and communicating with field placement supervisors;
- (5) periodic on-site visits by a faculty member if the field placement program awards four or more academic credits (or equivalent) for fieldwork in any academic term or if on-site visits are otherwise necessary and appropriate;
- (6) a requirement that students have successfully completed one-third of the school's coursework required for graduation prior to participation in the field placement program;
- (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn more than four academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

*Id.*

A memorandum sent on behalf of the Council indicates that the proposed amendment to Standard 305(e) "clarifies, simplifies and states in one coherent subsection those required elements of a field placement program that are deemed essential to program quality." *Id.* The proposed amendment continues to stress the need for law schools to articulate methods for evaluating the externship program, contain a student reflection component, and provide for the monitoring of field supervisors. *See id.*

<sup>4</sup> The four requirements in their entirety are:

- (1) A student may not participate before successful completion of at least one academic year of study.
- (2) Established and regularized communication shall occur among the faculty member, the student, and the field placement supervisor. The field placement super-

Additionally, Standard 304 requires law schools to set a minimum of 56,000 minutes of instruction time for graduation, but states that 45,000 of these minutes must be in "class sessions."<sup>5</sup> Interpretation 304-9 states that only "clinical work . . . done under the direct supervision of a member of the law school faculty or instructional staff whose primary professional employment is with the law school" may count as part of the 45,000 minutes.<sup>6</sup> Thus, academic credit awarded for externships, except for the credit allocated to the classroom component, is effectively limited to less than 20% of the required minimum time of instruction necessary to earn a law degree.

For law school faculty who have entered legal education since the

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visor should participate with the faculty member in the evaluation of a student's scholastic achievement.

- (3) Periodic on-site visits by a faculty member are preferred. If the field placement program awards academic credit of more than six credits per academic term, an on-site visit by a faculty member is required each academic term the program is offered.
- (4) A contemporaneous classroom or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught by a faculty member is required; if the classroom or tutorial component is not contemporaneous, the law school shall demonstrate the educational adequacy of its alternative (which could be a pre- or post-field placement classroom component or tutorial).

2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Standard 305(f).

Proposed revisions to Standard 305(e) substantially maintain these four requirements, though the language has been modified. *See supra* note 3.

<sup>5</sup> Standard 304(b) provides:

A law school shall require, as a condition for graduation, successful completion of a course of study in residence of not fewer than 56,000 minutes of instruction time, except as otherwise provided. At least 45,000 of these minutes shall be by attendance in regularly scheduled class sessions at the law school conferring the degree, or, in the case of a student receiving credit for studies at another law school, at the law school at which credit was earned. Law schools may, however, allow credit for distance education as provided in Standard 306. Law schools may also allow credit for study outside the classroom as provided in Standard 305.

2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Standard 304(b).

<sup>6</sup> Interpretation 304-9 provides:

In calculating the 45,000 minutes of "regularly scheduled class sessions" for the purpose of Standard 304(b), the time may include:

- (a) In a seminar or other upper-level course other than an independent research course, the minutes allocated for preparation of a substantial paper or project if the time and effort required and anticipated educational benefit are commensurate with the credit awarded; and (b) In a law school clinical course, the minutes allocated for clinical work so long as (i) the clinical course includes a classroom instructional component, (ii) the clinical work is done under the direct supervision of a member of the law school faculty or instructional staff whose primary professional employment is with the law school, and (iii) the time and effort required and anticipated educational benefit are commensurate with the credit awarded.

*Id.* at Interpretation 304-9.

early 1990s, this level of scrutiny for externship programs is the only reality they have known, but it has not always been so. There was time, in the not too distant past, when the ABA either did not regulate or only minimally regulated externship programs. With more and more new faculty entering clinical teaching, a discussion of the history of the ABA standards affecting externships is overdue. This article seeks to answer two questions: First, what prompted the ABA to regulate externships so carefully? Second, have the evolutionary changes in ABA standards regulating externships been steps in the right direction for legal education? Law faculty, field placement supervisors, and law school deans interested in externship programs should find this article useful to understanding the ABA's approach to the regulation of this area of legal education.

Part I of this article sets forth an abbreviated history of the ABA's involvement in legal education and the early development of clinical programs. This historical backdrop is useful to understanding the role of ABA Accreditation Standards in general, and the standards relating to externships more specifically. Part II traces the development of and rationale for externship standards from the time when there were no specific externship standards to today. Part III explores and evaluates the historical debate among legal educators on the issue of whether the ABA regulation of externships has been helpful to the development of this form of clinical legal education. The article concludes that although that ABA regulation of externships has limitations, it has been helpful to the development of externships. The article also concludes that ABA regulation is likely to remain highly structured unless law schools demonstrate that sufficient instructional resources will be devoted to make externships quality educational experiences without detailed externship standards and interpretations.

#### I. AN ABBREVIATED HISTORY OF ABA INVOLVEMENT IN LEGAL EDUCATION AND THE EARLY DEVELOPMENT OF CLINICAL PROGRAMS

The ABA was founded in 1878, and one of the seven committees created by the ABA Constitution was the Committee on Legal Education and Admissions to the Bar (Committee).<sup>7</sup> At the first ABA Annual Meeting, the Committee was given the charge to recommend by the second Annual Meeting "some plan for assimilating throughout

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<sup>7</sup> EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* 5-7 (1953). The original ABA Constitution provided that the ABA President would annually appoint a Committee on Legal Education and Admissions to the Bar consisting of five members. *See* 1 ABA. REP. 30 (1878).

the Union, the requirements of candidates for admission to the bar.”<sup>8</sup> Thus, formal legal education and more uniform requirements for admission to practice were among the founding objectives of the ABA. Both of these objectives foreshadowed the end of admission to the practice of law based upon practice experience through apprenticeship education – the type of legal education most closely analogous to externship programs.

The Committee returned the following year with a report describing legal education in Europe,<sup>9</sup> recommending mandatory instruction in thirteen fields of law,<sup>10</sup> and advocating completion of a three year course of study as a qualification for examination to be admitted to the bar.<sup>11</sup> After a full debate on these and other recommendations, the ABA tabled the resolutions recommending study in at least thirteen specified fields of law and a three year course of study.<sup>12</sup>

The Committee resubmitted its proposals the following year in an amended form, and this time the resolutions called for reciprocity of admission for lawyers who had practiced at least three years in any state, state support for law schools and the requirement of a law school diploma for admission to practice law, a prescribed course of study consisting of the same thirteen fields of law recommended the previous year, and a three year course of study as a requirement for

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<sup>8</sup> 1 ABA REP., *supra* note 7, at 26. In his book on the history of the ABA, Edson Sunderland states that the Committee on Legal Education and Admissions to the Bar (Committee) was instructed to propose a plan for establishing uniform bar admission requirements. *See* SUNDERLAND, *supra* note 7, at 10.

<sup>9</sup> 1 ABA REP., *supra* note 7, at 212-23.

<sup>10</sup> The Committee recommended instruction in at least the following areas:

- I. Moral and Political Philosophy.
- II. The Elementary and Constitutional Principles of the Municipal Law of England; and herein: —
  - 1st. Of the Feudal Law.
  - 2d. The Institutes of the Municipal Law generally.
  - 3d. The origin and progress of the Common Law.
- III. The Law of Real Rights and Real Remedies.
- IV. The Law of Personal Rights and Personal Remedies.
- V. The Law of Equity.
- VI. The Lex Mercatoria.
- VII. The Law of Crimes and their Punishments.
- VIII. The Law of Nations.
- IX. The Admiralty and Maritime Law.
- X. The Civil and Roman Law.
- XI. The Constitution and Laws of the United States of America, and herein the jurisdiction and practice of the Courts of the United States.
- XII. Comparative Jurisprudence; and the Constitution and Laws of the Several States of the Union.
- XIII. Political Economy.

<sup>2</sup> ABA REP. 235-36 (1879).

<sup>11</sup> *See id.* at 236.

<sup>12</sup> *See id.* at 14-15.

admission.<sup>13</sup> Three of the resolutions were tabled,<sup>14</sup> and, after amendment, the ABA adopted a resolution recommending that states should support law schools.<sup>15</sup>

The Committee resubmitted the tabled resolutions in altered form at the fourth annual meeting of the ABA in 1881, and the ABA unanimously passed all three resolutions submitted by the Committee.<sup>16</sup> The resolutions provided for a three year course of study in law “under an adequate number of professors,”<sup>17</sup> that graduation from the three year course of study and passage of a bar examination “ought to entitle the recipient to admission to the Bar as an attorney-at-law,”<sup>18</sup> and “time spent in any chartered and properly conducted law school, ought to be counted in any state as equivalent to the same time spent in an attorney’s office in such state, in computing the period of study prescribed for applicants for admission to the Bar.”<sup>19</sup> By equating the time spent in law school classrooms with the time required in law office practice apprenticeships, the ABA advanced its goal of replacing practice experience education with law school classroom education.

The ABA’s interest in standards for entrance into the legal profession was directly related to the general attack on the legal profession that had occurred in the 1840s through 1870s, and a movement in many states “admitting every one freely irrespective of education and professional training.”<sup>20</sup> Some states, such as Maine, New Hampshire, and Wisconsin, abolished all educational requirements in the 1840s.<sup>21</sup> Michigan adopted a constitutional provision granting litigants the right to choose anyone to represent them and Indiana adopted a constitutional amendment granting any person of “good moral character” the right to practice law in 1850.<sup>22</sup> The movement to open the practice of law to anyone so desiring threatened the social and economic standing of lawyers. In response, the ABA sought to impose educational requirements that would make entrance into the legal profession more time consuming and costly, and hence shore up the status of

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<sup>13</sup> See 3 ABA REP. 13-14 (1890).

<sup>14</sup> The resolutions calling for reciprocity of admission, a prescribed course of study, and a three year course of study were tabled. See *id.* at 14-40.

<sup>15</sup> The minutes of the general proceedings do not restate the resolution as amended, though they do provide a copy of the original resolution, the amendment, and a record of the vote on the amended resolution. See *id.* at 13, 40, 44. By piecing the action together, the resulting resolution stated: That the several states and local Bar Associations be respectfully requested to recommend and further the maintenance of schools of law. See *id.*

<sup>16</sup> See 4 ABA REP. 28-30 (1891).

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 225 (1953).

<sup>21</sup> See *id.* at 231.

<sup>22</sup> *Id.* at 225-26.

the legal profession by restricting entrance.

By 1890, the ABA's project to tighten bar admission standards was gaining ground, and twenty-three of the thirty-nine jurisdictions required a formal period of student apprenticeship.<sup>23</sup> During this period, states started to adopt the committee system for examining bar applicants and written bar examinations started to become the norm.<sup>24</sup>

The ABA continued to focus on states admitting lawyers to practice law without having any formal legal education into the early 1900s.<sup>25</sup> In 1895, the ABA established its first Section, which was the Section of Legal Education (Section).<sup>26</sup> In response to the desire to require formal legal education for admission to the bar and at the behest of the Committee on Legal Education, the ABA created the Council of Legal Education in 1917, and repealed the by-law which had established the Committee on Legal Education.<sup>27</sup> In 1917, the Committee also recommended rules for admission to the bar, including the requirement of law school graduation.<sup>28</sup> The ABA deferred consideration of the recommended admission rules to the next ABA meeting,<sup>29</sup> and the Council of Legal Education presented both rules for admission to practice and the first set of standards for accreditation of law schools at the 1918 ABA Annual Meeting.<sup>30</sup> The following

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<sup>23</sup> ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980s*, at 25 (1983).

<sup>24</sup> *See id.*

<sup>25</sup> American Bar Association, *History of the Accreditation Process* 1, September, 2002 (on file with author) [hereinafter *History of the Accreditation Process*].

<sup>26</sup> SUNDERLAND, *supra* note 7, at 74.

<sup>27</sup> 42 ABA REP. 90-95 (1917). *See also* SUNDERLAND, *supra* note 7, at 143-44. At the same time the ABA created the Council of Legal Education (Council), the ABA discontinued the Committee on Legal Education because the Council took over the Committee's functions. *Id.* at 144. All of the persons who had been on the Committee were appointed to the Council. *Id.*

<sup>28</sup> The proposed standards required that only graduates of ABA-approved law schools requiring three years of successful study, or four years if part-time, should be permitted to take a bar examination. *See* 42 ABA REP., *supra* note 27, at 50. The standards also required a one year law office apprenticeship prior to admission to practice, U.S. citizenship and citizenship in the state where the person intended to practice, a character and fitness examination, various requirements for bar examiners, reciprocity for admissions to practice in other states, comity for reciprocal admissions, and other matters regulating technical aspects of bar admissions. *See id.* at 49-50.

<sup>29</sup> *Id.* at 90-95.

<sup>30</sup> *See* 43 ABA REP. 72-74 (1918). *See also* *History of the Accreditation Process*, *supra* note 25, at 1. The first accreditation standard called for law schools to require at least two years of college as a precondition for admission to law school. *See* 43 ABA REP., *supra*, at 72-73. The admission to practice rules that were adopted required states to use paid boards of bar examiners, graduates to take bar examinations thereby doing away with the diploma privilege, U.S. citizenship and citizenship of the state in which the person sought admission to practice, a character and fitness examination, and three years of practice for admission reciprocity by other states. *See id.* at 75-76 (referring to the Committee on Legal Educa-



year, the ABA Executive Committee withheld funding for the Council, and the Council did not renew its work until 1920.<sup>31</sup>

Early in the ABA's efforts to create bar admission requirements and standards for law schools, law professors "began to feel like second-class citizens" and "resented the attitude of many of the lawyers [in the ABA] who thought of law teachers either as men unwilling to face the turmoil of the bar, or as broken-down judges or practitioners who, if we must tell the truth, then frequently found refuge in the schools."<sup>32</sup> In an effort to build an alliance with law schools and law professors, the Section invited select law schools to attend a meeting in 1900. Delegates from thirty-five schools attended, and they formed the Association of American Law Schools (AALS).<sup>33</sup> To qualify as a member of the AALS, law schools had to restrict admissions to those with a high school or equivalent education, require ten hours of instruction per week for at least two years (later raised to three years in 1905), graduate students only after they passed an examination, and have a library containing the reports of the state where the school was located and reports of the U.S. Supreme Court.<sup>34</sup> The centerpiece of the alliance between the ABA and the AALS was law school education, which was then essentially classroom education.

As the ABA and the AALS combined efforts to make entrance to law school more restrictive, the new requirements had the effect of excluding immigrants and their children.<sup>35</sup> These barriers were added to those already in place at many universities that discriminated against religious and ethnic minorities,<sup>36</sup> as well as at those law schools that refused to admit persons of color or women well into the latter half of the twentieth century.<sup>37</sup> Some commentators also point

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tion Report from 1917).

<sup>31</sup> SUNDERLAND, *supra* note 7, at 144.

<sup>32</sup> Warren A. Seavey, *The Association of American Law Schools in Retrospect*, 3 J. LEGAL EDUC. 153, 157 (1950).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 157-58.

<sup>35</sup> RICHARD L. ABEL, *AMERICAN LAWYERS* 85 (1989). Indeed, there is ample evidence of anti-immigrant sentiments in the early history of the ABA, and many ABA leaders recommended college education for bar applicants as a way for immigrants to "absorb American ideals" and mix with "young American boys and girls." See George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2118 (1998) (quoting bar leaders Henry Drinker and Elihu Root) (citations omitted). See also STEVENS, *supra* note 23, at 176.

<sup>36</sup> ABEL, *supra* note 35, at 85.

<sup>37</sup> "Until 1935, no law school south of the District of Columbia was racially integrated." *Id.* at 100. The University of Oklahoma School of Law did not admit African Americans and treat them equally with white persons until the Supreme Court decided a challenge to *de jure* segregation in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950). In the same year, the University of Texas Law School lost its fight to continue to exclude African Americans. See *Sweatt v. Painter*, 339 U.S. 629 (1950). The struggle to integrate the Uni-

to evidence that the ABA and AALS lobbied state legislators and supreme courts to grant licenses only to graduates of ABA-accredited law schools in an effort to "benefit both existing lawyers and the elite AALS law schools and faculty."<sup>38</sup>

Although its first attempt at creating accreditation standards did not bear immediate success in 1918, the Council continued to press for standards. At the ABA Annual Meeting in 1921, the ABA adopted a resolution containing four standards recommended by the Council, but none of these standards focused on the content of the curriculum.<sup>39</sup> Rather, the Council's and the ABA's primary focus continued to be directed toward requiring graduation from an ABA-approved law school as a precondition for admission to the bar, and the standards for approved law schools covered such topics as requirements for entrance to law school (at least two years of college), the length of time for law school course of study (three years of full-time study or the equivalent study over a longer period if part-time study), an adequate library, and a law school faculty including "sufficient number giving their entire time to the school."<sup>40</sup> Subsequent to the adoption of these standards, the Council began inspecting law schools to determine compliance with the standards, and the ABA approved sixty-seven of eighty full-time law schools and seven of ninety-eight part-

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versity of Florida School of law started in 1949, when the school denied admission to Virgil Hawkins solely on the basis of his race, and did not end until 1958. See Lawrence A. Dubin, *Virgil Hawkins: A One-Man Civil Rights Movement*, 51 FLA. L. REV. 913, 937-43 (1999).

Some law schools discriminated against women until much later. Harvard, for example, did not admit women until 1950, Notre Dame excluded women until 1969, and Washington & Lee refused to admit women until 1972. ABEL, *supra* note 35, at 90.

<sup>38</sup> Shepherd & Shepherd, *supra* note 35, at 2116-17; see also Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 333-54 (1978). The AALS began to refuse membership to proprietary schools in 1922. Shepherd & Shepherd, *supra* note 35, at 2116.

<sup>39</sup> The ABA adopted the following resolution:

- (1) The American Bar Association is of the opinion that every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:
  - (a) It shall require as a condition of admission at least two years of study in a college.
  - (b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only a part of their working time to their studies.
  - (c) It shall provide an adequate library available for the use of the students.
  - (d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

46 ABA REP. 687-88 (1921).

<sup>40</sup> *Id.*

time schools by 1930.<sup>41</sup> The failure of so many part-time law schools to gain accreditation served to limit opportunities for lower income students to attend ABA-approved law schools.

The ABA continued a very minimalist approach toward creating standards for the first part of the 20th Century. The four standards adopted in 1921 slowly grew to twenty standards by 1969.<sup>42</sup> Two of the new standards addressed teaching methods and curriculum, and a third standard obliquely referred to clinical legal education. Standard VIII, the teaching methods standard, stated that the ABA “does not desire to require any one method of presentation of legal materials. . . [though] it may be said that teaching in approved schools is based fundamentally but not exclusively on the case method, and participation by the students in classroom discussion is a usual and desirable method of stimulating interest and work.”<sup>43</sup> The curriculum standard, Standard IX, stated that the ABA “makes no attempt to dictate the law school curriculum,” and limited its terms to requiring a three year program of full-time study or its equivalent for part-time study, the number of weeks of study, and minimum course loads.<sup>44</sup> The third new standard, Standard XIV, addressed “additional means and methods of law training,” to be considered “[i]n addition to the regular courses in the curriculum . . . as an important indication of progressiveness” and it listed the following activities:

1. Law review.
2. Legal aid clinic.
3. Law clubs.
4. Student bar association.
5. Student briefing service.
6. Part-time law clerk service to judiciary.
7. Sponsorship or apprenticeship system.
8. Tutorial system.<sup>45</sup>

The term “Legal aid clinic,” appearing as one of several “additional means and methods of law training,” was a reference to what are now considered in-house and externship clinical programs, and

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<sup>41</sup> See Sunderland, *supra* note 7, at 147. “As of August, 2003, a total of 188 institutions are approved by the American Bar Association: 187 confer the first degree in law (the J.D. degree); the other ABA approved school is the U.S. Army Judge Advocate General’s School, which offers an officer’s resident graduate course, a specialized program beyond the first degree in law.” Section of Legal Education and Admissions to the Bar, *ABA-Approved Law Schools*, <http://www.abanet.org/legaled/approvedlawschools/approved.html>, (last visited Nov. 5, 2003).

<sup>42</sup> AMERICAN BAR ASSOCIATION, STANDARDS OF THE AMERICAN BAR ASSOCIATION FOR LEGAL EDUCATION 3-4 (1969).

<sup>43</sup> *Id.* at Standard VIII.

<sup>44</sup> *Id.* at Standard IX.

<sup>45</sup> *Id.* at Standard XIV.

“Part-time law clerk service to judiciary” most likely refers to what have developed into judicial externship programs.

During the same time that the ABA was gaining stature and becoming involved in law school accreditation, law students were developing the first law school clinics as “legal dispensaries” or legal aid bureaus starting in the late 1890s and early 1900s.<sup>46</sup> These initial clinics usually involved students working with legal aid offices on a volunteer or low credit basis,<sup>47</sup> and were precursors to today’s externship programs. Despite the efforts of law students and some faculty, few law schools created clinical programs in the first half of the twentieth century.

At the start of the 1950s, one study identified twenty-eight clinics operated by law schools, legal aid societies, or public defender offices.<sup>48</sup> By the end of the 1950s, another study identified thirty-five law schools reporting “some form of legal aid clinic.”<sup>49</sup> Thirteen of the schools in this latter study reported clinics located inside the law schools, and the rest were located outside of the law schools.<sup>50</sup> Thus, much of the early development of clinical programs appears to involve clinics operating as externship programs.

Law schools defined clinical programs of this era “to include both credit-earning and non-credit-earning, real-life experiences for law students either in programs located within law schools or offsite at legal aid or public defender offices. The level of faculty involvement and supervision varied greatly, and clinical experiences existed on the fringes of the law school curriculum.”<sup>51</sup>

The relatively meager clinical offerings through the 1950s changed as “student demands for relevance” in law schools grew during the 1960s.<sup>52</sup> The increasing number of law students calling for relevance in legal education spurred an expansion of clinical programs that started in the early 1960s and has continued. Today nearly 15,000 students are enrolled in externship programs, and more than 15,000

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<sup>46</sup> Law students at several law schools, including Cincinnati, University of Denver, George Washington, Harvard, Minnesota, Northwestern, University of Pennsylvania, University of Tennessee, and Yale, started volunteer, non-credit legal aid bureaus or legal aid dispensaries in the latter part of the nineteenth and early part of the twentieth centuries. See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930); Robert MacCrate, *Educating a Changing Profession: From Clinic to Continuum*, 64 TENN. L. REV. 1099, 1102-03 (1997); William S. Rowe, *Legal Clinic and Better Trained Lawyers – A Necessity*, 11 ILL. L. REV. 591, 591 (1917).

<sup>47</sup> See *supra* note 46 for a discussion of early clinics.

<sup>48</sup> Quintin Johnstone, *Law School Clinics*, 3 J. LEGAL EDUC. 535, 535 (1951).

<sup>49</sup> AALS Proceedings 121, 121 (1959).

<sup>50</sup> *Id.* at 122.

<sup>51</sup> Barry, Dubin & Joy, *supra* note 1, at 11.

<sup>52</sup> Charles E. Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307, 310 (1965).

take in-house clinical courses each year.<sup>53</sup> In 2002, only six of the 186 ABA-approved law schools indicated that they did not have an externship program, and only twelve did not offer any in-house clinical courses.<sup>54</sup> As clinical programs expanded in the latter part of the twentieth century, the ABA developed standards focusing on externship programs starting in the 1970s.

## II. DEVELOPMENT OF AND RATIONALE FOR STANDARDS AND INTERPRETATIONS FOCUSED ON EXTERNSHIP PROGRAMS

From 1971-73, the Section of Legal Education and Admissions to the Bar prepared drafts of new proposed standards, and, after public hearings, the ABA House of Delegates adopted much more detailed standards at the 1973 ABA Mid-Year Meeting.<sup>55</sup> The ABA utilized

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<sup>53</sup> During the 2001-2002 academic year, 15,385 students took in-house clinical courses while 14,857 students took externship courses. E-Mail from David Rosenlieb, ABA Data Specialist, to Peter A. Joy (Dec. 19, 2003) (reporting the number of positions available and the number of positions filled in faculty supervised clinics and field placement courses). The most recent school-by-school enrollment data for clinical courses are available through the 2001-2002 academic year. See AMERICAN BAR ASSOCIATION & LAW SCHOOL ADMISSIONS COUNCIL, ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 2004 EDITION (2003) [hereinafter 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS].

<sup>54</sup> The six law schools reporting that they did not offer externship courses during the 2001-2001 academic year are: University of Arkansas at Little Rock, Georgetown, Georgia State, University of Kansas, University of Nebraska, and New York University. See 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 53, at 110, 298, 306, 370, 458, 478. One other law school, Case Western Reserve, reported that it did not have an externship program, but that report was in error. E-Mail from Kenneth Margolis, Co-Director of the Milton A. Kramer Law Center, Case Western Reserve University School of Law, to Peter A. Joy (Jan. 25, 2004) (stating that there is a judicial externship course in the summer and in the fall each year). The twelve law schools reporting that they did not offer any in-house clinical courses during the 2001-2002 academic year are: Ave Maria School of Law, Campbell University-Norman Adrian Wiggins School of Law, University of Cincinnati College of Law, Louis D. Brandeis School of Law at the University of Louisville, Louisiana State University, Mercer University-Walter F. George School of Law, Mississippi College School of Law, Samford University, Cumberland School of Law, University of South Dakota School of Law, Southwestern University School of Law, Thomas Jefferson School of Law, University of Utah S.J. Quinney College of Law. See 2004 OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, *supra* note 53, at 114, 170, 202, 382, 386, 418, 442, 610, 642, 662, 710, 730. The 2004 Official Guide also lists Albany Law School of Union University and University of Hawai'i at Manoa – William S. Richardson School of Law as not having any in-house clinical courses. *Id.* at 86, 326. This information is incorrect, and both law schools offer in-house clinical courses. E-Mail from Mary Lynch, Director of the Clinical Legal Studies Program, Albany Law School, to Peter A. Joy (Jan. 25, 2004) ("Since the early 1980's, we have had at least one if not several in-house clinical projects operating."); E-Mail from Calvin Pang, Associate Professor of Law at the University of Hawai'i, to Peter A. Joy (Jan. 26, 2004) (stating that the law school at the University of Hawai'i has offered in-house clinical courses for years).

<sup>55</sup> See Henry Ramsey, Jr., *The History, Organization, and Accomplishments of the American Bar Association Accreditation Process*, 30 WAKE FOREST L. REV. 267, 268 (1995). A drafting committee began working on the new standards in 1969, and the ABA distributed a first draft of the standards to deans, chief justices, bar examiners, and mem-

the numbering system still in place today for fifty-two standards, more than twice the number in place in 1969, and devoted much more attention to the educational program.<sup>56</sup>

The standards included an explicit mention of “clinical work,” in Standard 304, that suggested something perhaps more integrated into the curriculum than did the former mention of “Legal aid clinic.”<sup>57</sup> In addition, the standards for the first time explicitly referred to “studies or activities away from the law school,” in the new Standard 306.<sup>58</sup> The 1973 version of Standard 306 stated:

If the law school has a program that permits or requires student participation in studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions, the time spent in such studies or activities may be included as satisfying the residence and class hours requirements, provided the conditions of this section are satisfied.

- (a) The residence and class hours credit allowed must be commensurate with the time and effort expended by and the educational benefits to the participating student.
- (b) The studies or activities must be approved in advance, in accordance with the school’s established procedures for curriculum approval and determination.
- (c) Each such study or activity, and that participation of each student therein, must be conducted or periodically reviewed by a member of the faculty to insure that in its actual operation it is achieving its educational objectives and that the credit allowed therefore is, in fact, commensurate with the time and effort expended by, and the educational benefits to, the participating student.
- (d) At least 900 hours of the total time credited toward satisfying the “in residence” and “class hours” requirements of this Chapter shall be in actual attendance in regularly scheduled class sessions in the law school conferring the degree, or, in the case of a student receiving credit for studies at another law school, at the law school at which the

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bers of the Section in 1971. *See id.*

<sup>56</sup> *See generally* AMERICAN BAR ASSOCIATION, APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE (1973).

<sup>57</sup> The new ABA Standard stated:

(b) The scholastic achievement of students shall be evaluated from the inception of their studies. As part of the testing of scholastic achievement, a written examination of suitable length and complexity shall be required in every course for which credit is given, *except clinical work*, courses involving extensive written work such as moot court, practice court, legal writing and drafting, and seminars and individual research projects.

*Id.* at Standard 304(b) (emphasis supplied).

<sup>58</sup> *See id.* at Standard 306.

credit was earned.<sup>59</sup>

Writing about the impetus for the original externship standard, Professor William Patton observed that in 1973 the ABA “recognized that at many schools externships were merely cheap means of providing a clinical student experience; usually, professors were not given course credit, students were often neglected by both the law faculty and the field supervisors, and the school failed to properly evaluate the student’s extern experience.”<sup>60</sup> I could not find any record documenting the number of law schools that neglected clinical programs prior to the ABA adopting standards regulating them, though some surveys in the 1980s support Patton’s contentions.<sup>61</sup>

The ABA House of Delegates amended the Accreditation Standards several times from 1974-1979, but none of the amendments affected externship programs.<sup>62</sup> The ABA also started to adopt interpretations to the ABA standards in the 1970s, and, in 1977, the ABA established the first interpretation dealing with externship programs by providing that “[l]ack of substantial supervision given by a law school faculty to law students working with practicing lawyers throughout a state does not conform with Standard 306(c).”<sup>63</sup> Two years later, the ABA adopted the second interpretation for externship programs, which provided that “[s]tudent participants in a law school externship program may not receive compensation for a program for which they receive academic credit.”<sup>64</sup>

Both of the interpretations to Standard 306 adopted in the late 1970s specifically reinforced that externships were educational and not employment programs. The first interpretation emphasized the need for adequate faculty oversight of the students’ work. Professor Roy Stuckey, who served on the ABA Standards Review Committee and the Council of the Section of Legal Education and Admissions to the Bar, states that the second interpretation barring compensation sought “to remove a conflict of interest that arose with law firms looking to get their money’s worth out of students rather than spending adequate time supervising students, talking to them, and teaching

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<sup>59</sup> *Id.*

<sup>60</sup> Letter from William W. Patton, Professor Law Whittier Law School, to Standards Review Committee (Jan. 13, 1999) (copy on file with author).

<sup>61</sup> See *infra* notes 87-89, 104-16, and accompanying text.

<sup>62</sup> AMERICAN BAR ASSOCIATION, APPROVAL OF LAW SCHOOLS, AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE vi-vii, 10 (1979).

<sup>63</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Interpretation 1 of 306(a) (1988) (stating that this interpretation was adopted in November, 1977).

<sup>64</sup> *Id.* at Interpretation 1 of 306(c) (stating that this interpretation was adopted in November, December 1979).

them.”<sup>65</sup>

In 1980, a joint committee of the AALS and the ABA published guidelines for Clinical Legal Education.<sup>66</sup> Although the introduction to the guidelines expressly stated that it was “*not the purpose of this Committee to recommend accreditation standards for clinical legal education*,”<sup>67</sup> many of the guidelines later found their way into the ABA standards and interpretations for externship programs. For example, the guidelines stated that law schools should “establish a structure that requires identifying substantive educational objectives; conducting a classroom component; relating fieldwork to substantive legal issues; faculty responsibility for determining and overseeing the accomplishment of the course’s substantive objectives; and faculty responsibility for supervising cooperating attorneys in fulfilling their teaching responsibilities.”<sup>68</sup>

Reflecting on the “hot issues” in ABA accreditation during the mid-1980s, one former Chair of the Council to the Section on Legal Education and Admissions to the Bar, Dean Frank Walwer, noted that “increasing concerns over the administration of externship programs” prompted a special meeting in the Fall of 1986.<sup>69</sup> As a result of those concerns and the discussions at the meeting, the ABA adopted the initial version of Interpretation 2 of Standard 306 in 1986.<sup>70</sup> Some of the guidelines from the joint ABA/AALS report found their way into the extensive Interpretation 2 of Standard 306, which addressed specific criteria for externship programs, such as a classroom component and more faculty involvement.<sup>71</sup> Some of the new requirements in the interpretation were provisions that the educational objectives of a field placement program “shall be communicated to students and field instructors,” that “[t]he field instructor or a

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<sup>65</sup> Telephone Interview with Professor Roy Stuckey, University of South Carolina School of Law (Oct. 31, 2003). Professor Stuckey served on the Council of the Section of Legal Education and Admissions to the Bar from 1988 to 1994, and on the Standards Review Committee from 1991 to 1995. E-Mail from Roy Stuckey, Professor at the University of South Carolina School of Law, to Peter A. Joy (Jan. 27, 2004) (on file with author).

<sup>66</sup> ASSOCIATION OF AMERICAN LAW SCHOOLS-AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION, CLINICAL LEGAL EDUCATION (1980) [hereinafter “GUIDELINES”].

<sup>67</sup> *Id.* at 3 (emphasis in the original).

<sup>68</sup> *Id.* at 77. With respect to these guidelines, the Committee noted that “[t]he Committee’s majority position suggests that programs known as ‘farm-out’ clinics usually do not satisfy the Guidelines.” *Id.*

<sup>69</sup> See Frank K. Walwer, *Chairperson’s Reflections*, <http://www.abanet.org/legaled/publications/-reflectionsonline/07walwer.html> (last visited Nov. 2, 2003).

<sup>70</sup> *Id.*

<sup>71</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 2-306 (1988). See Appendix A for the full text of the interpretation.



faculty member must engage the student on a regular basis throughout the term in a critical evaluation of the student's field experience," and that field placement programs must undergo periodic evaluations internally that consider factors such as the "[q]ualifications and training of field instructors . . . [and] classroom component."<sup>72</sup> Dean Walwer notes that the interpretation "developed some notoriety" as the ABA site teams began to look at factors such as the level of faculty supervision and the class components for externships.<sup>73</sup> Thus, each time the ABA acted with regard to externship programs, it scrutinized them more closely.

The ABA did not amend Standard 306 from its adoption in 1973 through the mid-1990s, though the ABA did continue to amend the interpretations. For example, the ABA amended the very detailed Interpretation 2 of Standard 306(c) in 1993 to clean up some minor language issues in provisions (a) through (c) of the interpretation,<sup>74</sup> and to require law schools and the Accreditation Committee to conduct much more detailed reviews of externship programs listing nine factors to be considered.<sup>75</sup> For the first time, the ABA also expressed the principle that "as the number of students involved or the number of credits awarded increases, the level of instructional resources devoted to the program should also increase."<sup>76</sup> In addition, the ABA further imposed the following six requirements for externship programs in which field supervisors were responsible for the direct supervision of the students:

- (1) A student shall not participate prior to successful completion of at least one year of study in an ABA-approved law school.
- (2) The full-time faculty must review the program periodically to ensure that the law school and the faculty exercise their responsibilities in the implementation of the program and that it meets the stated educational objectives.
- (3) There shall be some established and regularized communica-

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<sup>72</sup> *Id.* See Appendix A for the full list of criteria for evaluating externship programs under the 1986 version of Interpretation 2-306.

<sup>73</sup> Walwer, *supra* note 69.

<sup>74</sup> Most of the changes to sections (a) through (c) involved minor word changes, such as changing the word "which" to "that" in several places. See AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Interpretation 2-306(a)-(c) (1995). See Appendix B for the full text of the 1993 version of Interpretation 2-306.

<sup>75</sup> "The school and the Accreditation Committee shall evaluate programs in light of the following factors: (1) adequacy of instructional resources, (2) classroom component, (3) prerequisites for student participation, (4) number of students participating, (5) amount of credit awarded to each student, (6) evaluation of student academic achievement, (7) qualifications and training of field instructors, (8) evaluation of field instructors, and (9) visits to field placements." *Id.* at Interpretation 2-306(d).

<sup>76</sup> *Id.*

tions among full-time faculty, students and field instructor during the field placement experience. An on-site visit by full-time faculty during the course of each field placement is preferred. The field instructor should participate with the full-time faculty in the evaluation of the student's academic achievement.

- (4) In conducting the review of the program and the participation of each student required by Standard 306(c), the full-time faculty member shall consider the following factors:
  - (a) the time devoted by the student to the field placement,
  - (b) the tasks assigned to the student,
  - (c) selected work products of the student,
  - (d) the field instructor's performance.
- (5) A contemporaneous classroom component is preferred.
- (6) Teaching credit shall be given commensurate with the instructional responsibilities of the full-time faculty member in relation to the number of students and the credit hours granted.<sup>77</sup>

The 1993 version of Interpretation 2 of Standard 306 also stated that the "Accreditation Committee will closely scrutinize field placement programs in which the amount of academic credit awarded is substantial, the student/faculty ratio of the placement is high, the field placement occurs at a significant distance from the school, or the field placement is initiated by the student rather than the faculty."<sup>78</sup> This provision, combined with the other requirements for each law school to monitor externship programs using specified criteria, signaled that the ABA would closely review every externship program. At the same time the ABA increased scrutiny of externship programs, it continued to keep a hands-off approach to classroom courses and in-house clinical programs.

Not only was the ABA monitoring externship programs more carefully, but the level of scrutiny and the requirements for externship programs increased significantly as the academic credits awarded increased. Interpretation 2 of Standard 306 further stated:

- (h) In those field placement programs that award academic credit in excess of six credit hours per semester, the following additional criteria apply:
  - (1) A classroom component is required. If the classroom component is not contemporaneous, the school has the burden of demonstrating that its alternative is a functionally and educationally equivalent classroom experience involving

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<sup>77</sup> *Id.* at Interpretation 2-306(e). Interpretation 2 of Standard 306 also provided that law schools could apply to the ABA for a variance from the requirement that a full-time faculty member must be involved in the program in "extraordinary circumstances" and if the substituted law school administrator or part-time faculty member had sufficient experience. *Id.* at Interpretation 2-306(f).

<sup>78</sup> *Id.* at Interpretation 2-306(g).

full-time faculty. The alternative may be a meaningful pre- or post-field placement experience involving full-time faculty. The classroom component may be satisfied by regular tutorials conducted by the full-time faculty.

- (2) A written appraisal of each program shall be conducted at least every three years by the law school to evaluate whether the program is meeting its stated educational objectives.
- (3) The school shall ensure that there is careful and persistent full-time faculty monitoring of the academic achievement of each student. This shall include an on-site visit in each field placement by full-time faculty in the course of the field placements. The school shall document this monitoring. February, 1993.<sup>79</sup>

Taken together, the additional requirements in the 1993 version of Interpretation 2 of Standard 306 required a very high level of scrutiny of externship programs, particularly those awarding substantial academic credit, involving a high student/faculty ratio, occurring a significant distance from the law school, or arising from student efforts to secure a field placement rather than from faculty efforts.<sup>80</sup> Professor Gary Palm, who served on the Accreditation Committee and later the Council, states that the ABA adopted the closer scrutiny of externship programs at this time because many involved in legal education were disappointed with those law schools that were “taking tuition money from students and not giving them anything of value in return.”<sup>81</sup> For example, Palm notes that some judges serving on the Accreditation Committee or the Council recounted unsatisfactory experiences with externship programs in which some law schools provided little or no guidance to the law students, failed to maintain contact with the judges or monitor the students’ externship work experiences, and the law students viewed the primary purpose of the judicial externship to lead to a clerkship or other employment.<sup>82</sup>

Palm’s recollection of the debate concerning externships in the late 1980s and early 1990s is supported by the Report on Placement Clinics and Related Matters from the ABA Skills Training Committee to the Council.<sup>83</sup> This report states that externships “can provide a

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<sup>79</sup> *Id.* at Interpretation 2-306(h).

<sup>80</sup> *See id.* at Interpretation 2 of Standard 306(g).

<sup>81</sup> Telephone Conversation with Gary Palm, former Professor of Law at the University of Chicago (Oct. 31, 2003). Professor Palm served on the Accreditation Committee from 1986 to 1994 and on the Council from 1994 to 2000. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Report on Placement Clinics and Related Matters from Marilyn V. Yarbrough, Chair, ABA Skills Training Committee, to Council of the Section on Legal Education and Admissions to the Bar (Dec. 14, 1985) (on file with author).

sound educational experience” but “an unacceptable number of poorly planned and supervised clinics is being offered for academic credit across the country.”<sup>84</sup> The report recommended that the Section of Legal Education and Admissions to the Bar should pay more attention to externships, develop model plans for externship programs, and closely monitor externships.<sup>85</sup>

The following passage from the report of the Skills Training Committee provides a sense of the debate over the perceived need to regulate externships more closely:

The Committee feels that special attention to placement clinics is warranted because placement clinics have a well-deserved, but unnecessary, bad name in academic circles. Law students want placement clinics because they provide real world experience and enhance job placement opportunities. The legal profession wants placement clinics because they are one sign that law schools are moving in the “right direction” and because some lawyers want to be involved in legal education and some want to have a free source of labor. Law School administrators want placement clinics because they keep their student and lawyer constituencies happy and they improve their competitiveness in the placement market.

These interests do not prevent placement clinics from being valid law school courses. However, it is a poorly kept secret that some schools have established placement clinics primarily in response to these factors and not because of any belief that they offer valuable educational experiences. This attitude even exists at some schools that have sound in-house clinics.

Before continuing, it should be noted that there are some thoughtful educators who would argue strongly that any opportunity for a law student to work in and observe an operating law office is a valid education experience – perhaps more valuable than more law school courses. As no one can objectively prove or disprove this notion, it has served for over a decade as the thin reed upon which the defenders of terrible placement clinics have leaned. The argument misses the point, and it is no more valid than to propose that Torts would be a good course if law students simply attended classes and listened to a Torts professor talk about whatever came to mind that day.

The era has passed when it was sufficient to justify any clinical program on the basis that the students would “learn something” about law practice by representing real clients under supervision. Clear, specific educational objectives should be articulated. The learning experience should be structured; supporting materials should be provided and discussed; and the students should be forced

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<sup>84</sup> *Id.*

<sup>85</sup> *See id.*

to reflect on their experiences and demonstrate their levels of comprehension and improvement.

Some law schools (probably fewer than five, possibly as many as ten) are operating placement clinics which successfully achieve these objectives. However, their efforts are over-shadowed by an undetermined number of other programs in which few, if any, of these elements exist. Some schools sponsor fairly extensive programs in which students are simply assigned to law offices and the only law school involvement is for an administrator to keep records of which students are in the program and whether they show up to do whatever the offices ask of them.<sup>86</sup>

This general condemnation of many externship programs in the 1980s is striking. Some of these concerns, however, are reflected in the findings of a study Professor Lawrence Hellman conducted of law students practicing under student-practice rules in a bar-sponsored intern program in Oklahoma in the mid-1980s.<sup>87</sup> He found that a large number of the law students “felt as if they had been ‘thrown to the wolves’ in the sense that they were simply handed files and told to handle them, being left to their own devices to determine what needed to be done and how to do it.”<sup>88</sup> Many of the supervisors in the program were not strongly committed to the educational and ethical values of the program, students were afraid to confront supervisors with ethical issues they encountered, and the students’ work experiences often produced stress that may have contributed to unprofessional performance.<sup>89</sup>

Palm also reports that in the late 1980s and early 1990s the ABA

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<sup>86</sup> *Id.*

<sup>87</sup> See Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observations, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991). Professor Hellman studied students who worked in a bar-sponsored student practice program over seven consecutive terms starting with the summer term of 1984 and ending with the summer term of 1986. *Id.* at 557-58. All of the students in the study, eighty-one, were enrolled in an experimental course entitled Professional Responsibility in the Legal Intern Experience open only to students certified as “legal interns” under the Oklahoma student practice rule, thus all eighty-one students were student-lawyers. *Id.* at 559. The course met once per week during the fall and spring semesters and twice per week in the summer for fifty minutes, and the focus of the course was on professional responsibility issues arising from the students’ work as student-lawyers. *Id.* at 568.

<sup>88</sup> *Id.* at 578. Hellman also observed that “[t]raining and regulation of lawyer-supervisors in the student practice program involved in the study seemed virtually nonexistent.” *Id.* at 613.

<sup>89</sup> *Id.* at 613-14. At the time of Hellman’s study, Oklahoma City University School of Law did not award academic credit for the externship experience, and credit was awarded only for the companion experimental course called Professional Responsibility in the Legal Intern Experience. See *id.* at 559, 561. Two other law schools in Oklahoma, University of Tulsa College of Law and University of Oklahoma College of Law, did award academic credit for their students participating in the bar-sponsored externship program. See *id.* at 561 n. 98 and accompanying text.

was requesting a large number of law schools with externship programs to report back and explain how their programs were fulfilling the educational objectives set forth in the standards and interpretations.<sup>90</sup> By adopting more explicit requirements in 1993, the ABA set forth a framework for the accreditation process to measure the efficacy of externship programs and provided law schools with the specific criteria necessary to structure and monitor externship programs meeting the ABA standards.<sup>91</sup>

In February of 1995 and August of 1996, Standard 306 was renumbered Standard 305, and the ABA renumbered the interpretations so that the interpretation regarding compensation for students in field placement programs became Interpretation 305-1,<sup>92</sup> and former Interpretation 2 of Standard 306 became Interpretation 305-2.<sup>93</sup> The content of these interpretations remained virtually unchanged. The ABA eliminated former Interpretation 1 of Standard 306(c) concerning “the lack of substantial supervision given by a law school faculty to law students working with practicing lawyers throughout a state.”<sup>94</sup>

Standard 305 and its interpretations remained unaltered from August of 1996 until August of 1999, when the ABA adopted several changes. First, the ABA amended Standard 305 to reflect “in residence” and “class hours” requirements in minutes, and the amendment provided that “[n]ot fewer than 45,000 minutes of total time credited toward satisfying the ‘in residence’ and ‘class hours’ requirements of the standards shall be in attendance in regularly scheduled class sessions.”<sup>95</sup> The ABA also amended Standard 305 to provide that, for the purposes of Standard 305 and its interpretations, the term “‘faculty member’ means a member of the full-time, part-time, or ad-

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<sup>90</sup> Telephone Conversation with Gary Palm, *supra* note 81. After a site visit, the law school receives an “action letter” from the Consultant on Legal Education and Admissions to the Bar reporting on the Accreditation Committee or Council action with respect to the site inspection. See American Bar Association, Section of Legal Education and Admissions to the Bar, Rules of Procedure for Approval of Law Schools, R. 1 (2003) (“‘Action letter’ means a letter transmitted by the Consultant to the president and the dean of a law school reporting Committee or Council action.”). If there are accreditation issues, the letter outlines the issues and provides the law school with a reasonable amount of time to respond or “report back” on the issues. See Peter A. Joy, *ABA Site Visits, Everything You Ever Wanted to Know*, <http://www.cleaweb.org/aba/index.html> (last visited Nov. 3, 2003).

<sup>91</sup> *Id.*

<sup>92</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Interpretation 305-1 (1996) (“A law school may not grant credit to a student for participation in a law school field placement program for which the student receives compensation.”).

<sup>93</sup> *Id.* at Interpretation 305-2.

<sup>94</sup> See *id.* at Interpretation 305-1, 305-2.

<sup>95</sup> AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 305(b) (1999).

junct faculty,” and “[w]hen appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.”<sup>96</sup>

Next, much of what was previously in Interpretation 2 of Standard 306 was raised into the text of Standard 305, so that the ABA made the following new sections (e) and (f) parts of an amended Standard 305:

- (e) A field placement program shall be approved and periodically reviewed utilizing the following factors:
  - (1) the stated goals and methods of the program;
  - (2) the quality of the student’s educational experience in light of the academic credit awarded;
  - (3) the adequacy of instructional resources, including whether the faculty members teaching in and supervising the program devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
  - (4) any classroom or tutorial component;
  - (5) any prerequisites for student participation;
  - (6) the number of students participating;
  - (7) the evaluation of student academic achievement;
  - (8) the qualifications and training of field instructors;
  - (9) the evaluation of field instructors;
  - (10) the visits to field placements or other comparable communication among faculty, students and field instructors.
- (f) Additional requirements shall apply to field placement programs:
  - (1) A student may not participate before successful completion of at least one academic year of study.
  - (2) Established and regularized communication shall occur among the faculty member, the student, and the field placement supervisor. The field placement supervisor should participate with the faculty member in the evaluation of a student’s scholastic achievement.
  - (3) Periodic on-site visits by a faculty member are preferred. If the field placement program awards academic credit of more than six credits per academic term, an on-site visit by a faculty member is required each academic term the program is offered.
  - (4) A contemporaneous classroom or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught by a faculty member is required; if the classroom or tutorial component is not contemporaneous, the law

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<sup>96</sup> *Id.* at Standard 305(d).

school shall demonstrate the educational adequacy of its alternative (which could be a pre- or post-field placement classroom component or tutorial).<sup>97</sup>

In addition to these changes to Standard 305, the ABA amended the interpretation concerning the prohibition against students receiving compensation for participation in a field placement program for which the student receives academic credit to make it clear that reimbursement for out-of-pocket expenses were not precluded.<sup>98</sup> Further, the ABA added the following new interpretations specifying that externship programs “require particular attention from the law school and the Accreditation Committee,”<sup>99</sup> that educational objectives had to be published and communicated to students and field supervisors, and that “as the number of students involved or the number of credits awarded increase, the level of instructional resources devoted to the program should also increase.”<sup>100</sup>

The above changes to Standard 305 and its interpretations, which the ABA adopted in 1999, remain in effect today.<sup>101</sup> The only change to this standard or its interpretations is the addition, in 2002, of a new interpretation that states, “Standard 305 by its own force does not allow credit for distance education courses.”<sup>102</sup> The ABA adopted this new interpretation at the same time it adopted a new standard for distance education, Standard 306.<sup>103</sup>

As the history of accreditation standards illustrates, the ABA has implemented an increasing number of requirements for externship or

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<sup>97</sup> *Id.* at Standard 305(f) & (g).

<sup>98</sup> “A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This interpretation does not preclude reimbursement of incidental out-of-pocket expenses related to the field placement.” *Id.* at Interpretation 305-2.

<sup>99</sup> Interpretation 305-1 provided: “The nature of field placement programs presents special opportunities and unique challenges for the maintenance of educational quality. Field placement programs accordingly require particular attention from the law school and the Accreditation Committee.” *Id.* at Interpretation 305-1.

<sup>100</sup> Interpretation 305-3 provided:

- (a) A law school that has a field placement program shall develop, publish and communicate to students and field instructors a statement that describes the educational objectives of the program.
- (b) In a field placement program, as the number of students involved or the number of credits awarded increase, the level of instructional resources devoted to the program should also increase.

*Id.* at Interpretation 305-3.

<sup>101</sup> See 2003 ABA Standards for Approval of Law Schools, *supra* note 1, at Standard 305, Interpretation 305-1, 305-2, 305-3. The Council has circulated for comments proposed revisions to Standard 305. See *supra* note 3.

<sup>102</sup> *Id.* at Interpretation 305-4. See *supra* notes 3-4 for a discussion of amendments to Standard 305 proposed in 2003.

<sup>103</sup> *Id.* at Standard 306.



field placement programs. Each of these requirements has prompted more law school involvement in externship programs, whether in the form of classroom components or more faculty oversight. To some extent, each change has sought to assure educational experiences beyond those work alone provides. Prior to the increased regulation, there was wide variance in the amount of contact and structure of externship programs at many law schools, and data collected from the 1980s demonstrate the wide-range of law school practices.

A 1982 study conducted by Professor Marc Stickgold documents some of the features of externship programs of that era.<sup>104</sup> In his survey, Stickgold sent questionnaires to the then 172 ABA-accredited law schools and he received responses from 105 (61%).<sup>105</sup> Of the 105 schools responding, 79 (75%) stated that they had field placement or externship programs.<sup>106</sup> Stickgold's survey asked a number of questions concerning the structure of these externship programs. He found that 19% of the schools "never" and 24% "infrequently" completed documents describing the nature of the student's work program and supervision, and 8% "never" and 10% "infrequently" required field supervisors to complete written evaluations of the student's work.<sup>107</sup> Stickgold also found that 15% of the schools "never" and 37% "infrequently" maintained contact with field supervisors by mail throughout the term of the placement, and 4% "never" and 19% "infrequently" maintained contact with field supervisors by phone.<sup>108</sup>

In terms of in-person communication with field supervisors, Stickgold's survey found that 6% of field supervisors "never" and 40% "infrequently" met with someone from the law school during the semester to discuss the externship program and student supervision.<sup>109</sup> Presumably, this meant that nearly half of the externship programs did not conduct field placement site visits. Finally, 68% of law schools with externship programs reported that they had "some" classroom component in which full-time faculty participated, and only 57% "involved the faculty member on a frequent basis."<sup>110</sup>

In 1987 the ABA released data from its own study of law school curricula, and the study included data collected on externships offered

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<sup>104</sup> See Marc Stickgold, *Exploring the Invisible Curriculum: Clinical Field Work in American Law Schools*, 19 N.M. L. REV. 288, 297-309 (1989).

<sup>105</sup> *Id.* at 298.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 302-03, charts A & C.

<sup>108</sup> *Id.* at 302-03, charts B & C.

<sup>109</sup> *Id.* at 304, chart E.

<sup>110</sup> *Id.* at 304. Stickgold found that fifty-four of the seventy-nine responding schools offered classroom components involving full-time faculty, and faculty participated on a frequent basis at only forty-two of the responding schools. See *id.*

between the summer of 1984 through the spring of 1986.<sup>111</sup> The ABA received responses from 143 of the 175 ABA-approved law schools (80% response rate),<sup>112</sup> and these schools reported offering 143 judicial externship courses and 289 non-judicial externship courses.<sup>113</sup> The ABA survey found that over 71% of the judicial externships and nearly 65% of the non-judicial externships did not include a classroom component.<sup>114</sup> The survey also found that 34% of the judicial externship programs involved tenure-track faculty, 16% involved contract faculty, 11% involved adjunct faculty, and 39% involved “other” persons in teaching the courses.<sup>115</sup> Faculty involvement in the non-judicial externships was somewhat greater, with nearly 50% involving tenure-track faculty, 9% involving contract faculty, approximately 16% involving adjunct faculty, and 26% involving “other” persons.<sup>116</sup> Thus, the higher response rate from the ABA study was generally consistent with Stickgold’s data, though the ABA study demonstrated that a greater percentage of externship programs lacked a classroom component.

The results of the surveys by Stickgold and the ABA, as well as the comments of those familiar with externship programs in the 1970s through early 1990s, demonstrate that many law schools devoted minimal resources to their externship programs. Commenting on the results of his study, Stickgold observed that the data did “provide some grist for the mill of externship opponents,” because “there was no regular contact between the law school and the field supervisors in 50% of the programs, and the contact that does occur is not always extensive.”<sup>117</sup> Stickgold also observed that his survey “appears to substantiate worries over quality control.”<sup>118</sup>

The Stickgold and ABA studies corroborate the ABA concerns in the 1980s and early 1990s that a significant number of externship programs provided students with experiential learning opportunities but very little experiential education. Students in some externships were in work settings in which law schools exerted little or no oversight and maintained minimal contacts with the field supervisors and students. Like the best of the apprenticeship system of legal education, some students in the unstructured externships may have received close su-

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<sup>111</sup> WILLIAM P. POWERS, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA PART II: PROFESSIONAL SKILLS COURSES 5-6 (1987).

<sup>112</sup> *Id.* at 7.

<sup>113</sup> *Id.* at 16-17.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 16.

<sup>116</sup> *Id.* at 17.

<sup>117</sup> Stickgold, *supra* note 104, at 305.

<sup>118</sup> *Id.*

pervision and feedback by field supervisors. In reality, however, “few apprenticeships worked out that way”<sup>119</sup> and there is no reason to believe that most of the unstructured externships worked out that way either. Instead, too many students in unstructured externships were likely “thrown to the wolves” as those in Professor Hellman’s study.<sup>120</sup>

This concern over quality control and the educational content of externships that did not include classroom components, faculty involvement, or meaningful communications with externship field supervisors prompted the ABA to promulgate specific regulations of externship programs. As the following section discusses, this increased regulation of externships spurred debate in the legal education community.

### III. THE DEBATE OVER ABA INVOLVEMENT IN REGULATING EXTERNSHIPS

Many commentators have been critical of the ABA regulation of externships, although most agree that the ABA’s increased regulation has been in response to concerns over law students earning academic credit for externships in which they are “inadequately supervised”<sup>121</sup> or which are characterized by law school neglect of the educational content of externship experiences.<sup>122</sup> Despite the recognition that not all law schools devoted sufficient resources to their externships, commentators from the late 1980s though the 1990s expressed concern that increased ABA regulation was not the answer.

In his 1989 article, Stickgold characterized the ABA regulation as moving “to either abolish externships or convert them to what are essentially in-house programs that rely on some outside lawyers for additional help.”<sup>123</sup> In 1990, Professor Stephen Maher argued that while “clinical programs have benefitted from ABA intervention,” the increased regulation in the mid-to-late 1980s “threaten to do more harm than good.”<sup>124</sup> Maher predicted that the ABA’s push for increased faculty involvement in externship programs would “minimize opportunities for student-centered learning, and thus interfere with the program’s educational objectives.”<sup>125</sup> Maher also expressed con-

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<sup>119</sup> STEVENS, *supra* note 23, at 24.

<sup>120</sup> Hellman, *supra* note 87, at 578.

<sup>121</sup> Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 443 n. 66 (1996). (“This premise was discussed by the ABA drafters and externship directors at the CLEA Externship Conference in 1993.”).

<sup>122</sup> See *infra* notes 135-38 and accompanying text.

<sup>123</sup> Stickgold, *supra* note 104, at 319.

<sup>124</sup> Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537, 543 (1990).

<sup>125</sup> *Id.* at 639.

cern that the increased regulation of externships would “most likely . . . stifle experimentation” and “stifle creativity and innovation.”<sup>126</sup>

In the face of additional changes to the standards and interpretations in 1993, Professor Linda Morton wrote that “the ABA claimed to be concerned with law schools’ neglect of their field placement programs” and its solution “was to regulate field placements by imposing upon them more traditional frameworks of law school teaching.”<sup>127</sup> Characterizing the debate over the increased regulation of externships, Morton stated: “Clinical faculty who administer field placement programs argue that such regulations place unnecessary restrictions on their programs, show insensitivity toward program goals of self-learning, and are an ill-disguised attempt to fit field placement programs into the more traditional models of in-house and simulation clinics.”<sup>128</sup>

In 1996, Professors Morton and Robert Seibel called the ABA regulation of externships “micro-management” and said that it “impedes the flexibility and creativity so critical to externship program design.”<sup>129</sup> This claim of micro-management echoed an earlier claim of several deans in a 1992 letter opposing the criteria for evaluating externship programs, the classroom component requirement, and the requirement that the classroom component be taught by full-time faculty members as “inappropriate micro-management” that “inappropriately erode[s] the law schools’ discretion to structure faculty responsibilities.”<sup>130</sup> Another dean complained in 1992 that ABA regulation of externships “tends to lean toward inappropriate micromanagement” that “requires an increase of instructional resources based on the number of students and credits.”<sup>131</sup>

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<sup>126</sup> *Id.* at 637.

<sup>127</sup> Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19, 28-29 (1993).

<sup>128</sup> *Id.* at 20.

<sup>129</sup> Seibel & Morton, *supra* note 121, at 439-40.

<sup>130</sup> Letter from Deans E. Thomas Sullivan, University of Arizona College of Law, Richard J. Morgan, Arizona State University College of Law, Herma Hill Kay, University of California, Berkeley School of Law, Ellen Jordan, University of California at Davis, Frank T. Read, University of California, Hastings College of Law, Susan Westerberg Prager, UCLA School of Law, Pamela Brooks Gann, Duke University School of Law, Robert Clark, Harvard Law School, Richard Schmalbeck, University of Illinois College of Law, N. Willima Hines, University of Iowa College of Law, Lee C. Bollinger, University of Michigan Law School, Robert W. Bennett, University of Pennsylvania Law School, Scott Bice, University of Southern California Law Center, Paul Brest, Stanford University Law School, and Guido Calabresi, Yale Law School to James P. White, Consultant on Legal Education (Oct. 16, 1992) (copy on file with author).

<sup>131</sup> Letter from Linda Hupp, Associate Dean for Students at Franklin Pierce Law Center, to James White, Consultant on Legal Education (Oct. 16, 1992) (copy on file with author).

Many faculty teaching externships in the 1990s shared the sentiments of Morton and Seibel, as well as those of the deans, complaining of micro-management of externship programs. There was some division among externship directors concerning whether the new interpretation for Standard 305 adopted in 1993 would be beneficial or counterproductive to the educational content of externship programs.<sup>132</sup> In a survey conducted in 1993 by Morton and Seibel, thirty-seven externship directors responded to a question about the impact of the revised interpretation on the educational quality of their externship programs. Thirteen of the respondents believed the new interpretation would have a negative impact, twelve of the respondents believed the revised interpretation would have “no impact” on the educational quality of their programs, and fourteen believed that the new interpretation would have some positive impact or did not respond to the question.<sup>133</sup> Although they were critical of some aspects of ABA regulation of externships, Morton and Seibel supported “the ABA’s efforts to require more substantial experiential legal education.”<sup>134</sup>

Counterposed to some of the critiques of the externship standards by deans and faculty, there were many involved in legal education who believed ABA regulation of externships was positive. Among the comments submitted to the Standards Review Committee prior to the adoption of these changes in 1999, Dean Steven Smith supported a strong Standard 305 and stated: “This Standard [305] and its Interpretations have, in my experience, worked successfully to wring out the worst abuses of the past in externships. My school, like many others, faces conducting on-site visits and ensuring that full-time faculty are responsible for externships, but those changes have strengthened the academic quality of the programs.”<sup>135</sup>

In another set of comments to the Standards Review Committee prior to the adoption of the 1999 changes to Standard 305 and its interpretations, Professor Roy Stuckey outlined some of the abuses alluded to by Dean Smith.<sup>136</sup> Professor Stuckey wrote:

The ABA became interested in specifically regulating field place-

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<sup>132</sup> Seibel & Morton, *supra* note 121, at 439-40.

<sup>133</sup> *Id.* In their article, Seibel and Morton only report the negative and neutral and responses to the anticipated effects of the interpretation, so presumably the unaccounted fourteen respondents thought that the new interpretation would have a positive impact on the program or did not respond to the question.

<sup>134</sup> *Id.* at 446.

<sup>135</sup> E-mail from Steven R. Smith, Dean of California Western School of Law, to James White, ABA Consultant on Legal Education (Dec. 15, 1998) (copy on file with author).

<sup>136</sup> Letter from Roy T. Stuckey, Professor of Law University of South Carolina, to Standards Review Committee (Jan. 15, 1999) (copy on file with author) [hereinafter Stuckey Letter].

ment programs only after [ABA] site inspection teams discovered that some law schools gave students large number of credits for working for lawyers and judges, often at long distances from the law schools, with no more structure or oversight than having a secretary at the law school keep records of how many hours the students worked. Many of these programs were vehicles for job placement, not education.<sup>137</sup>

Stuckey continued:

There was a strong sentiment within the ABA for disallowing credit altogether for field placement programs, but the ultimate decision was to allow them to continue if it could be assured that the academic credit awarded would be commensurate with the educational benefits to students. It was a matter of consumer protection, in an arena in which traditional checks and balances did not exist. The students in the old programs did not complain because they were obtaining an advantage in competing for jobs (and because they did not have to attend their classes or take exams). The faculties had fewer students in their classes to teach or grade. The administration received tuition dollars without having to lay out any resources. Without ABA intervention, the abuses would have become more widespread. The current standard forces law schools to devote some academic resources to field placement programs.<sup>138</sup>

Despite the claims of critics of the externship standard that the ABA over-regulates or “micro-manages” externship programs, there do not appear to be reported cases describing externship programs that have been eliminated due to ABA regulation. Indeed, externship programs exist at almost every ABA-approved law school. Rather than eliminate externship programs, most law schools appear to have restructured externship programs to comply with ABA standards and interpretations,<sup>139</sup> much as Stuckey advocated. Stuckey maintained in the late 1990s that “key components for assuring academic integrity in the current [externship] rule are: 1) the requirement that a statement of educational objectives be approved by the full faculty . . . ; and 2) the insistence that there be meaningful involvement by full-time faculty in the ongoing operation of field placement programs.”<sup>140</sup> Today, the externship standards and interpretations continue to require faculty to approve educational objectives for externship programs, but the academic achievement of students in externship programs may be evaluated by part-time or adjunct faculty, a departure from the norm

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Seibel & Morton, *supra* note 121, at 443 (referring to survey results that indicate at twenty-nine of thirty-nine schools responding the 1993 ABA changes to Standard 305 and its interpretations would require “significant” or “some” changes).

<sup>140</sup> Stuckey Letter, *supra* note 136.

Stuckey advocated.<sup>141</sup>

More recently, Professor Sandy Ogilvy has proposed guidelines for law schools to use in evaluating externship programs, and Professor Ogilvy explains the underlying rationale for the guidelines:

To justify tuition charges and the award of course credit for an externship placement experience, the law school is obligated to provide value added to the student's experience at the placement. The value commonly is supplied by the reflection on the placement experience through discussion, writing, reading, and guided observation.<sup>142</sup>

Ogilvy argues that even without ABA regulations every externship should have articulated goals that are translated into measurable outcomes,<sup>143</sup> appropriate oversight of the students' experiences including faculty involvement,<sup>144</sup> clearly defined responsibilities for student externs related to learning goals,<sup>145</sup> and mechanisms for self-evaluation of the program.<sup>146</sup>

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<sup>141</sup> "Each student's academic achievement shall be evaluated by a faculty member. For purposes of Standard 305 and its Interpretations, the term 'faculty member' means a member of the full-time, part-time or adjunct faculty. When appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program." 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Standard 305(c).

<sup>142</sup> J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZAGA L. REV. 155, 163 (2002/03). Professor Ogilvy sets forth several detailed recommended guidelines for evaluating externship programs. *See id.* at 160-78.

<sup>143</sup> "The program goals selected by the institution should be translated into measurable outcomes so that the students can determine whether, and to what extent, they are making progress toward achieving the goals and so that the program can evaluate whether the program design is satisfactory." *Id.* at 160. Ogilvy provides this example of translating a goal into a measurable outcome:

For example, if one general goal for students in the program is for them to demonstrate professional responsibility, the student may be asked to identify and describe the professional expectations with the placement organization and act accordingly. The student may be asked to describe the relationship between the organizational expectations and the relevant professional standards, such as the Rules of Professional Conduct adopted by the jurisdiction in which the organization is located. The student may be asked to provide evidence that the student recognized the broader implications and meaning of the work done by the student at the externship placement.

*Id.* at 161.

<sup>144</sup> Ogilvy recommends that both the faculty supervisor and fieldwork supervisor should be involved with the student drafting an "individualized learning plan" and that both the faculty and externship supervisors take responsibility for seeing that goals and objectives are appropriate and have a reasonable opportunity of being fulfilled. *Id.* at 169-73.

<sup>145</sup> "An externship program should require of student participants certain acknowledgments of responsibility for successful completion of the fieldwork placement experience and specific evidence and documentation of learning activities and outcomes." *Id.* at 174. Ogilvy describes with some specificity how the student responsibilities at the externship placement should relate to learning goals. *See id.* at 173-76.

<sup>146</sup> "Since all learning programs can benefit from systematic evaluation, the program

In many ways, the guidelines proposed by Ogilvy are more demanding than the current ABA standards and interpretations, but in other ways they are more flexible. For example, Ogilvy maintains that the need for site visits as part of the self-evaluation of the externship program should be tied to program goals. He maintains that site visits should be mandatory in programs where students provide client representation and the program is not familiar with the quality of supervision provided by the fieldwork supervisor.<sup>147</sup> In other programs, he states that “the program should weigh the costs and benefits of conducting site visits in light of all of the other parties’ goals.”<sup>148</sup>

Ogilvy’s proposed guidelines offer a well-reasoned alternative to many of the current ABA standards and interpretations regulating externship programs, but the proposed guidelines would likely fall prey to the same criticism of “micro-management” were they adopted by the ABA. They represent, however, an alternative way of discussing externship program design that is calculated to ensure a quality learning experience for law students in which the externship provides “value added” to what might otherwise simply be a work experience for law students.

Key to both the ABA standards and Ogilvy’s proposed guidelines is the recognition that sound externship programs emphasize experiential *education* and not just experiential *learning*. We are all capable of learning from every experience, and experiential learning takes place constantly. What distinguishes unstructured experiential learning from experiential education is the active involvement of others in maximizing the learning potential from each experience. Both the ABA standards and Ogilvy’s guidelines focus on law school involvement to assure the quality of the workplace environment, oversight of students’ experiences, articulation of learning objectives, and the opportunity for students to reflect on their experiences through a classroom component, tutorial, journals, or some combination thereof.

The ABA standards regulating externships have largely been steps in the right direction to provide students with well-designed and guided experiential education. Such externships are not structured solely to meet the needs of the field placement supervisors, as are most summer and part-time law clerk experiences. Rather, modern externships are designed so that the field supervisors acknowledge

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should have a developed plan for self evaluation that includes the solicitation of evaluation from students, fieldwork supervisors, former students, and other stakeholders in the externship program.” *Id.* at 176-77. Ogilvy explains what the assessments should include and how they should take place. *See id.* at 176-78.

<sup>147</sup> *See id.* at 177-78.

<sup>148</sup> *Id.* at 178.



and assist in meeting the educational objectives and needs of the externship students. This emphasis on experiential education seeks to assist students in learning how to learn from experience.<sup>149</sup>

Effective externships and in-house clinical courses help students develop the skill of self-reflection and involve others, whether field supervisors or faculty or both, providing constructive critiques and encouraging students to engage in the process of self-critique. This process of self-critique, described by Donald Schön as “reflective practice” or “reflection in action”<sup>150</sup> occurs in every well-structured clinical program, whether it is an externship or in-house clinical program. Thus, the critical review of the students’ work featuring both the supervisor’s feedback and the student’s own reflections are what distinguishes clinical legal education from unstructured work experiences. Without such critical review, an externship course or in-house clinical course would simply offer experiential learning opportunities similar to summer and part-time work experiences and not provide experiential education – the hallmark of clinical legal education.

Although the ABA standards and interpretations for externship programs have done much to prompt law schools to focus more on the experiential education of students rather than simply offering legal experience for academic credit, the standards and interpretations have not evolved as rapidly as has externship legal education. The current standard and interpretations take a rather formulaic approach to assessing the value of externships, and limit the discretion of law schools and faculty teaching the externships more than the standards do in any other area of the curriculum. While some may argue that this is the price all law schools are paying as a result of the past deficiencies in some externship programs, both the ABA and law school faculty should seriously engage in a dialogue to consider whether such tight control over externship programs is still necessary and effective.

## CONCLUSION

The evolution of the ABA’s involvement in regulating externships demonstrates that the ABA has moved toward a more detailed set of requirements for externships, particularly those that award more than six academic credits per semester,<sup>151</sup> due to a significant

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<sup>149</sup> See generally Kenneth R. Kreiling, *Clinical Education and Law Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981).

<sup>150</sup> See DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 31-36 (1987).

<sup>151</sup> For example, an “on-site visit” of the field placement and a “classroom or tutorial component” are required if the law school awards more than six academic credits per academic term. 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Standard 305(g)(3), (4).

number of law schools in the 1970s and 1980s awarding credit for programs that had little or no law school faculty involvement, little or no communication between the law school and the field placements, and no articulated goals or learning plans for the students.<sup>152</sup> During the period of minimal regulation of externships through the 1970s to the early 1990s, some law schools placed students in a variety of work environments, collected tuition, and devoted minimal, if any, instructional resources to the law students' experiences. Although students in such programs undoubtedly learned something from their experiences, there was little to distinguish some externship programs from the students' summer work experiences or part-time work during the school year. The prevalence of these very unstructured externships, which were either a significant minority or a majority of all the externship programs according to commentary and surveys of the time, spurred greater regulation.

Current Interpretation 305-3 perhaps best embodies the ABA's philosophy of regulating externships by stating that "as the number of students involved or the number of credits awarded increase, the level of instructional resources devoted to the program should also increase."<sup>153</sup> In other words, the ABA expects law schools to devote greater resources to externship programs that involve a large number of students receiving a substantial number of academic credits.

For those opposed to ABA regulation of externship programs, their challenge is to persuade the ABA that law schools will not treat de-regulation of externship programs as a step backwards in time to when some law schools abused the lack of regulation by enrolling students in externship programs where there was limited structured educational content to the experiences, and few means to assess the educational experiences of the students. The ABA is unlikely to deregulate externship programs until it is persuaded that there are alternative methods other than ABA standards and interpretations for ensuring sufficient law school oversight, quality control of field supervision, and educational content of externship programs awarding significant academic credit. Unless law schools adopt and follow guidelines such as those recommended by Ogilvy, it is unlikely that the ABA will loosen its detailed oversight of externship programs.

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<sup>152</sup> See *supra* notes 104-18 and accompanying text.

<sup>153</sup> 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Interpretation 305-3.

## APPENDIX A.

1986 VERSION OF INTERPRETATION 2 OF STANDARD 306:  
REGARDING FIELD PLACEMENT PROGRAMS\*

(a) A law school which has a program that permits or requires student participation in studies or activities away from the law school (except foreign programs) shall develop and publish a statement which defines the educational objectives of the program. Among educational objectives of such programs may be instruction in professional skills, legal writing, professional responsibilities, specific areas of the law, and legal process. The educational objectives shall be communicated to the students and field instructors.

(b) Such programs shall be approved by the same procedures established by the law school for the approval of other parts of its academic program and shall be reviewed periodically in accordance with those procedures and in light of the educational objectives of the program.

(c) The field instructor or a faculty member must engage the student on a regular basis throughout the term in a critical evaluation of the student's field experience.

(d) A member of the faculty must periodically review any program conducted by a field instructor to ensure that the program meets its educational objectives. In conducting such review, the faculty member should consider the time devoted by the student to the field placement, the tasks assigned to the student, selected work products of the student, and the field instructor's engagement of the student on a regular basis in a detailed evaluation of the student's experience.

(e) In evaluating whether such a program, in light of the educational objectives of the program, complies with the requirements of Standard 306, the Accreditation Committee shall consider the following factors:

- / Prerequisites for student participation
- / Extent of student participation
- / Method of evaluation of student performance
- / Qualifications and training of field instructors
- / Method of evaluation of field instructors
- / Classroom component
- / Student writings
- / Adequacy of instructional resources

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\* Appendix A is a reprint of the 1986 version of Interpretation 2 of ABA Standard 306. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Interpretation 2-306 (1988). Much of Interpretation 2 of Standard 306 is now found in Standard 305. See 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, Standard 305; Appendix C.

/ Involvement of full-time faculty

/ Amount of academic credit awarded. December, 1986.

APPENDIX B.  
1993 VERSION OF ABA INTERPRETATION 2 OF  
ACCREDITATION STANDARD 306: REGARDING  
FIELD PLACEMENT PROGRAMS\*

(a) A law school that has a program that permits or requires student participation in studies or activities away from the law school (except foreign programs) shall develop and publish a statement that defines the educational objectives of the program. Among educational objectives of these programs may be instruction in professional skills, legal writing, professional responsibilities, specific areas of the law, and legal process. The educational objectives shall be communicated to the students and field instructors.

(b) These programs shall be approved by the same procedures established by the law school for the approval of other parts of its academic program and shall be reviewed periodically in accordance with those procedures and in light of the educational objectives of the program.

(c) The field instructor or a full-time faculty member must engage the student on a regular basis throughout the term in a critical evaluation of the student's field experience.

(d) In field placement programs, as the number of students involved or the number of credits awarded increases, the level of instructional resources devoted to the program should also increase. The school and the Accreditation Committee shall evaluate programs in light of the following factors:

- (1) adequacy of instructional resources,
- (2) classroom component,
- (3) prerequisites for student participation,
- (4) number of students participating,
- (5) amount of credit awarded to each student,
- (6) evaluation of student academic achievement,
- (7) qualifications and training of field instructors,
- (8) evaluation of field instructors, and
- (9) visits to field placements.

(e) In all field placements in which a field instructor is responsible for the direct supervision of students, the following criteria shall apply:

- (1) A student shall not participate prior to successful completion of at least one year of study in an ABA-approved law school.
- (2) The full-time faculty must review the program periodically to ensure that the law school and the faculty exercise their respon-

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\* Appendix B is a reprint of the 1993 version of Interpretation 2 of Standard 306. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Interpretation 2 of Standard 306 (1995).

- sibilities in the implementation of the program and that it meets the stated educational objectives.
- (3) There shall be some established and regularized communications among full-time faculty, students and field instructor during the field placement experience. An on-site visit by full-time faculty during the course of each field placement is preferred. The field instructor should participate with the full-time faculty in the evaluation of the student's academic achievement.
  - (4) In conducting the review of the program and the participation of each student required by Standard 306(c), the full-time faculty member shall consider the following factors:
    - (a) the time devoted by the student to the field placement,
    - (b) the tasks assigned to the student,
    - (c) selected work products of the student,
    - (d) the field instructor's performance.
  - (5) A contemporaneous classroom component is preferred.
  - (6) Teaching credit shall be given commensurate with the instructional responsibilities of the full-time faculty member in relation to the number of students and the credit hours granted.
- (f) In extraordinary circumstances a school may apply to the Committee for a variance from this Interpretation to permit a law school administrator or part-time faculty member whose experience makes him or her qualified to serve the functions of a full-time faculty member within the meaning of Standard 306.
- (g) The Accreditation Committee will closely scrutinize field placement programs in which the amount of academic credit awarded is substantial, the student/faculty ratio of the placement is high, the field placement occurs at a significant distance from the school, or the field placement is initiated by the student rather than the faculty.
- (h) In those field placement programs that award academic credit in excess of six credit hours per semester, the following additional criteria apply:
- (1) A classroom component is required. If the classroom component is not contemporaneous, the school has the burden of demonstrating that its alternative is a functionally and educationally equivalent classroom experience involving full-time faculty. The alternative may be a meaningful pre- or post-field placement experience involving full-time faculty. The classroom component may be satisfied by regular tutorials conducted by the full-time faculty.
  - (2) A written appraisal of each program shall be conducted at least every three years by the law school to evaluate whether the program is meeting its stated educational objectives.
  - (3) The school shall ensure that there is careful and persistent full-

time faculty monitoring of the academic achievement of each student. This shall include an on-site visit in each field placement by full-time faculty in the course of the field placements. The school shall document this monitoring. February, 1993.

APPENDIX C.  
2003 VERSION OF ABA ACCREDITATION STANDARD 305  
AND INTERPRETATIONS\*

STANDARD 305. STUDY OUTSIDE THE CLASSROOM.

(a) A law school may grant credit toward the J.D. degree for courses or a program that permits or requires student participation in studies or activities away from or outside the law school or in a format that does not involve attendance at regularly scheduled class sessions.

(b) Residence and class hour credit granted shall be commensurate with the time and effort expended by and the quality of the educational experience of the student.

(c) Each student's academic achievement shall be evaluated by a faculty member. For purposes of Standard 305 and its Interpretations, the term "faculty member" means a member of the full-time, part-time or adjunct faculty. When appropriate a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program.

(d) The studies or activities shall be approved in advance and periodically reviewed following the school's established procedures for approval of the curriculum.

(e) A field placement program shall be approved and periodically reviewed utilizing the following factors:

- (1) the stated goals and methods of the program;
- (2) the quality of the student's educational experience in light of the academic credit awarded;
- (3) the adequacy of instructional resources, including whether the faculty members teaching in and supervising the program devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
- (4) any classroom or tutorial component;
- (5) any prerequisites for student participation;
- (6) the number of students participating;
- (7) the evaluation of student academic achievement;
- (8) the qualifications and training of field instructors;
- (9) the evaluation of field instructors;
- (10) the visits to field placements or other comparable communication among faculty, students and field instructors.

(f) Additional requirements shall apply to field placement programs:

- (1) A student may not participate before successful completion of at least one academic year of study.

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\* 2003 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 1, at Standard 305, Interpretations 305-1, 305-2, 305-3, 305-4.



- (2) Established and regularized communication shall occur among the faculty member, the student, and the field placement supervisor. The field placement supervisor should participate with the faculty member in the evaluation of a student's scholastic achievement.
- (3) Periodic on-site visits by a faculty member are preferred. If the field placement program awards academic credit of more than six credits per academic term, an on-site visit by a faculty member is required each academic term the program is offered.
- (4) A contemporaneous classroom or tutorial component taught by a faculty member is preferred. If the field placement program awards academic credit of more than six credits per semester, the classroom or tutorial component taught by a faculty member is required; if the classroom or tutorial component is not contemporaneous, the law school shall demonstrate the educational adequacy of its alternative (which could be a pre- or post-field placement classroom component or tutorial).

**Interpretation 305-1:**

The nature of field placement programs presents special opportunities and unique challenges for the maintenance of educational quality. Field placement programs accordingly require particular attention from the law school and the Accreditation Committee. (August 1999)

**Interpretation 305-2:**

A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This interpretation does not preclude reimbursement of incidental out-of-pocket expenses related to the field placement. (August 1996; August 1999)

**Interpretation 305-3:**

- (a) A law school that has a field placement program shall develop, publish and communicate to students and field instructors a statement that describes the educational objectives of the program.
- (b) In a field placement program, as the number of students involved or the number of credits awarded increase, the level of instructional resources devoted to the program should also increase. (August 1999)

**Interpretation 305-4:**

Standard 305 by its own force does not allow credit for distance education courses. (August 2002)

