



**COMMENT OF THE CLINICAL LEGAL EDUCATION ASSOCIATION ON THE
PROPOSED SUBSTANTIVE CHANGES TO STANDARDS 303 AND 304
April 2, 2018**

The Clinical Legal Education Association, the nation’s largest association of law professors, with more than 1,300 dues-paying members, submits this comment to oppose the proposed substantive revisions to Standards 303 and 304. If adopted, these changes will significantly dilute the six-credit experiential requirement by removing key language and requirements. Two critical substantive changes result from what is purportedly an attempt to streamline: Standard 303(a)(3) no longer would include the requirement that experiential courses “must be primarily experiential in nature,” and the current requirement of direct supervision of student performance would be eliminated.

The Council should continue to require that law clinics, simulation courses, and field placements be “primarily experiential in nature” and should not only maintain the critical requirement of direct supervision of student performance in experiential courses but, in the case of field placements, should recognize the shared supervision responsibilities of faculty members and site supervisors by modifying the new Standard 304(d) to require direct supervision by the faculty member *and* site supervisor. In addition, CLEA urges the Council to include field placement courses that meet the requirements of Standard 304 in the category of “regularly scheduled classroom sessions or direct faculty instruction” under Standard 311(a).

The ABA’s Memorandum dated November 17, 2017 addressing these proposed changes to Standards 303 and 304 asserts that the primary purpose of the modifications is to streamline and simplify the current duplicative language in the two standards. The memorandum states that the changes are designed to make two simple revisions: move the general definition of experiential courses from 303(a)(3) to 304(a), and avoid repetitive language throughout Standard 304. Despite this stated aim, in making the revisions, important substantive requirements were deleted from Standards 303(a)(3) and 304.

During meetings of both the Council and Standards Review Committee in which these changes were discussed, no explanations were given as to why the requirements of “primarily experiential in nature” and “direct supervision” by a faculty member or site supervisor were to be omitted. Accordingly, CLEA believes the Council has not carefully considered the potential impact of the proposed changes on the requirements for law clinics, simulation courses, and field placements. At the Council meeting, all of the changes were presented together and described as merely technical edits to Standards 303 and 304. With virtually no discussion, the Council voted to send the proposed changes out for notice and comment.

Although it makes sense to move the general definition of experiential courses from Standard 303(a)(3) to Standard 304 and to delete portions of Standard 304 that are repetitive, two significant substantive changes, whether intended or not, will result. The first substantive change is the elimination of the requirement that an experiential course “be primarily experiential in nature.” This change will necessarily expand the range of courses, particularly simulation courses, that may qualify as experiential, resulting in a significant weakening of the six-credit experiential graduation requirement. In the March 2015 ABA Managing Director’s Guidance Memo on Standards 303(a)(3), 303(b), and 304 (“Managing Director’s Memo”), the importance of the “primarily experiential in nature” requirement was explained: “primarily” was intended to mean “more than simply inserting an experiential component to an existing class... The experiential nature of the course should, in this sense, be the organizing principle of the course.” (Managing Director’s Memo, p. 3.) Without the “primarily experiential” requirement, a broad range of substantive law courses with minor skills components might count toward the six-credit experiential requirement, undermining its original purpose. As clearly explained in the Managing Director’s Memo, in determining whether to designate a course as “experiential,” the defining factor must be whether the course is “primarily experiential in nature.” Despite this, the ABA is now proposing to eliminate this crucial language from the standards.

A second substantive change results from eliminating the current requirement that law clinics and simulation courses include “direct supervision of the student’s performance by the faculty member” and the requirement of direct supervision of student performance “by the faculty member or site supervisor” for field placements. The requirement of direct supervision of student performance emphasizes the centrality of the faculty member’s role and signals the need for instruction, supervision, and feedback on student performance that is more than minimal or sporadic. Direct supervision requires faculty members and site supervisors to engage individually in each student’s lawyering work. Direct supervision also aligns with the requirement of state student practice orders that similarly require close supervision by faculty or site supervisors of student work in law clinics and field placements.

Additionally, CLEA urges the Council to revise the language of new Standard 304(d) to make clear that for field placement courses both faculty members and site supervisors must provide “direct supervision of student performance.” Specifically, the language of the first sentence of Standard 304(d) should read: “A field placement course provides direct supervision of the student’s performance by a faculty member *and* site supervisor” rather than “faculty member *or* site supervisor.” Field placement courses are unique in that students work both with law school faculty and with outside lawyers. Direct supervision by faculty members is designed to ensure that each of the requirements of Standard 304 are met. The Standard should require that faculty offer direct supervision that would focus on assuring that students receive high-quality work experience on site and on teaching the required classroom component or tutorial, offering opportunities for “faculty-guided reflection.” The change is not meant to imply that a faculty member has to supervise the off-site legal work that students do. The Standard should also require that on-site supervisors provide direct supervision that would focus on the substantive legal work that students perform at the placement. Direct supervision by site supervisors includes, among other things, assigning appropriate legal work, overseeing student performance, and providing timely and effective feedback. Requiring direct supervision by both faculty and on-site supervisors

will ensure that students receive the benefits of the shared supervisory model characteristic of field placement courses.

Moreover, by deleting all mention of direct supervision, the proposed new version of Standard 304 fails to maintain a critical distinction between a “law clinic” and “field placement.” While both provide students with real practice experience, a key difference between the two is that law clinic students perform casework under the direct supervision of faculty members only, whereas in field placements the supervision of student performance necessarily involves collaboration between faculty members and site supervisors. The proposed watered-down definition of “law clinic” in Standard 304(c), which fails to require direct faculty supervision, could permit a law school to claim that a non-compliant field placement is a “law clinic,” thereby subverting the field placement requirements of 304(d).

Our suggestions for language to be added or modified in the current proposed version of Standard 304 is offered in the addendum to this Comment.

In addition to opposing these substantive changes to Standards 303 and 304, CLEA urges that the Council add field placement courses to those that count in calculating “regularly scheduled classroom sessions or direct faculty instruction” under Standard 311(a). Currently, Interpretation 311-1 provides that “classroom” hours may include those earned through the “participation in a simulation course or law clinic in compliance with Standard 304.” CLEA urges the Council to change that language to read: “participation in a simulation course, law clinic *or field placement* in compliance with Standard 304.”

Standards 303 and 304 should be revised to ensure clarity and avoid duplicative and potentially confusing language. But technical edits are different than substantive changes, which will result if the proposed modifications to Standards 303 and 304 are approved. CLEA urges the Council to ensure that the following requirements are not eliminated: experiential courses must be “primarily experiential in nature,” student performance in law clinics and simulation courses must be directly supervised by a faculty member, and student performance in field placement courses must include direct supervision by a faculty member and site supervisor. In addition, if a field placement course satisfies the requirements of Standard 304, it should be included in the list of experiential courses that count toward the required 64 credit hours of classroom sessions or direct faculty instruction set forth in Standard 311(a).

Addendum: Proposal for Changes to Standard 304

Proposed changes to the new version of Standard 304 are in italics and underlined:

Standard 304. EXPERIENTIAL COURSES: SIMULATION COURSES, LAW CLINICS, AND FIELD PLACEMENTS

- (a) Experiential courses satisfying Standard 303(a)(3) are simulation courses, law clinics, and field placements *that must be primarily experiential in nature* and must:

- (1) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302;
 - (2) develop the concepts underlying the professional skills being taught;
 - (3) provide multiple opportunities for performance;
 - (4) provide opportunities for student performance, self - evaluation, and feedback from a faculty member, or, for a field placement, a site supervisor; and
 - (5) include a classroom instructional component; or, for a field placement, a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty - guided reflection.
- (b) A simulation course provides direct supervision of the student's performance by the faculty member and substantial experience not involving an actual client that is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.
- (c) A law clinic provides direct supervision of the student's performance by the faculty member and provides substantial lawyering experience that involves advising or representing one or more actual clients or serving as a third - party neutral.
- (d) A field placement course provides direct supervision of the student's performance by a faculty member and site supervisor and substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following...”