

C L E A

Clinical Legal Education Association

COMMENT ON INTERPRETATION 305-3 AND THE QUESTION OF PAID EXTERNSHIPS IN LAW SCHOOLS

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The Clinical Legal Education Association (CLEA) has more than 1000 dues-paying members, including hundreds who teach law school field placement (commonly called externship) courses. CLEA is the nation's largest association of law professors and offers this comment in support of current Interpretation 305-3 of the Accreditation Standards of the Council for the Section of Legal Education and Admissions to the Bar. Interpretation 305-3 to Standard 305 prohibits law schools from granting credit "for participation in a field placement program for which the student receives compensation." Recently there have been requests -- all from people who have no experience or expertise in teaching these courses -- that the Council revoke this ban on paid externships. This suggestion is ill-advised.

In brief, the existing ban on payment for student participation in field placement courses serves important educational policies. The existing rule does not interfere with students' ability to find paid work; nor will lifting the ban increase the number of paid opportunities. By contrast, revocation would severely reduce the quality of field placement courses and would restrict the range and focus of other field placement and clinical opportunities. The overwhelming majority of externship faculty support the current rule.

The Interpretation Serves Long-Standing Goals of ABA Regulation

Interpretation 305-3 prevents law schools from granting credit "for participation in a field placement program for which a student receives compensation." To revoke this regulation would give employers in paid field placements significantly more power both to control student work and to minimize the employer's supervisory role, and would significantly reduce externship faculty control over the educational benefit of the placement.

Such an arrangement conflicts with the ABA's longstanding effort to assure the quality of field placements as education, and to require strong faculty oversight of field supervisors. Standard 305 requires schools to assure the educational quality of the course. It designates them as academic courses, subjects them to approval and review through normal curricular process, requires a demonstrated relationship between goals and methods in the course, and requires some form of in-depth seminar, tutorial or guided reflection. Standard 305 also assumes that law school faculty will play the dominant role in assuring educational quality. It requires regular oversight of the field supervisor by the faculty member and routine training and guidance of field placements supervisors by faculty. The requirements of Standard 305 place control of the student learning experience in the hands of faculty and the law school.

These provisions have increased the quality of the field placement experience at most law schools. See Peter A. Joy, *Evolution Of ABA Standards Relating To Externships: Steps In The*

Right Direction?, 10 Clinical L. Rev. 681 (2004). As Professor Joy notes, “[e]ach of these requirements has prompted more law school involvement in externship courses, whether in the form of classroom components or more faculty oversight.” *Id* at 705. Moreover, the history of ABA regulation of externships has emphasized the law school’s controlling role and has distinguished externship experiences from those that students encounter as paid employees in the workplace. “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 and assist in meeting the educational objectives and needs of the externship students.” *Id* at 713 – 714.

Some might argue that field placement pedagogy has advanced to the point where law schools can remedy the risks from paid externships through close and careful supervision. Yet despite the growing sophistication of externship pedagogy, close and careful supervision cannot correct the risks of paid externships, because the objectives of paid employment and education can and often do conflict. Moreover, as Professor Joy’s article demonstrates, law schools often do see externships as a low cost form of experiential education. Facing a demand for “practice ready” lawyers, law schools have an incentive to limit the resources they invest in externships, both by limiting faculty time and increasing enrollments. Nowhere will limited resources cut deeper than on externship faculty’s capacity to oversee the work expectations of field supervisors on a daily basis.

No Need Exists to Revoke the Existing Rule

No need to change the Interpretation exists. Nothing suggests that current ABA requirements for field placement courses interfere with the ability of law students to find paid work during law school. Indeed, the existing rule has long posed a choice for law students who seek law practice experience. They can participate in a for-credit clinical opportunity, or they can attempt to find paid work. If the current interpretation interfered with students’ ability to find paid work, we would expect to see a reduction in student enrollment in such courses and increasing numbers of students opting for paid employment.

Neither has occurred. Field placement courses constitute one of the most rapidly growing portions of the law school clinical curriculum. Nothing suggests that the growth and health of these courses has been impeded by the current rule that prohibits payment for credited work.

Similarly, nothing suggests that field placement courses are displacing a large volume of paid part-time work for law students. To the contrary, pervasive anecdotal evidence suggests that employers are unable to pay and would prefer that students work without pay. Field placement directors (and placement offices) routinely field requests from employers who seek to offer unpaid work through a field placement experience. Nothing suggests an increased demand by employers to pay students who are also getting credit.

Further, nothing suggests that allowing law schools to give credit for paid work will increase the overall market for paid work. While some might argue that permitting paid field placements means more money for law students, as already noted, employers routinely and increasingly seek law students for unpaid work. Indeed, logic suggests that any employer willing

to pay law student interns would prefer to do so unrestrained by the requirements that the law school would impose as a condition of providing academic credit.

At present the Council is considering a proposal to raise the number of required credits in experiential courses in proposed revisions to Standard 303(a) (3). At first blush, one could argue that this increased requirement will place a strain on students who want to work part-time for pay and satisfy the experiential learning requirements. However, CLEA notes that students can satisfy the requirement in courses other than externships, including law clinics and simulation based classes. Law students will have the same flexibility to balance the demands of paying work and law school after any change in Standard 303(a) (3). This proposal creates no incentive to revoke the ban on paid externships.

Employers who want to pay law students respond to different incentives than lawyers who seek a teaching and mentoring role. Changing the ABA rule will have no impact on this reality. Whatever benefits eliminating the Interpretation might have are at best slight and speculative in nature. No compelling reason for the change exists.

Revocation Will Severely Affect the Quality of Field Placement Courses

Revoking the Interpretation will cause serious and sustained harm to the quality of education afforded to law students by field placement courses. ABA regulation and common practice among field placement faculty asks that field supervisors construe their role as teachers or mentors, not as employers. This expectation exists even when the student provides less value to the field supervisor than the supervisor offers to the student. Indeed, externship faculty routinely advise field supervisors that they should expect to invest more in time and effort than they receive from a student in work product.

By contrast, the paid relationship assumes that the employee will provide value for money to the employer. The employer has the right to direct the employee to work in whatever way serves the employer's needs. In such a relationship, the employer has an incentive to minimize the amount of time spent educating the student beyond the specific demands of the tasks assigned. Any time devoted to education reduces the net benefit of the student's work to the employer.

The Department of Labor's interpretation of the Fair Labor Standards Act ("FLSA") confirms this understanding. According to the Department, for an unpaid placement not to violate FLSA it must, *inter alia*, be "similar to training . . . in an educational environment", "for the benefit of the intern", and work that provides "no immediate advantage" to the employer. DOL Wage and Hour Division Fact Sheet #71 (April 2010). Some might suggest that eliminating the Interpretation would solve a potential problem with unpaid placements under FLSA. But that argument misconstrues the force of FLSA. As interpreted by the Department, paid placements need not involve work similar to clinical training, need not be for the benefit of the intern, and may provide a direct and immediate benefit to the employer. This suggests that the employer-employee relationship is inconsistent with a closely mentored educational experience.

Compensation for credited work will negatively affect students, supervisors and faculty. For the student, compensation will become a motive independent of learning. Even assuming good faith, a student can easily find that the demands of compensation override the demands of the educational experience. Where the demands of paid work and student education conflict, students will find themselves in, at best, an ambiguous position and unsure whether to meet the demands of their employer or the requirements of the law school.

For the supervisor, the ability to pay a student provides separate and overriding control over the student experience, independent of the supervisor's role as mentor. In good faith, employers can easily justify requiring work that will produce value for the employer. Where requirements conflict with the educational goals of the field placement course, a supervisor would have strong incentives to favor a net benefit to the corporation or firm.

Finally, for the faculty member that oversees a field placement, permitting compensation would reduce his or her overall ability to require a supervisor to focus on a student's needs, rather than the firm's goal of service and profit. The task of assuring that field supervisors provide a high-quality learning environment for students already takes significant time and effort for externship faculty. Allowing field supervisors to pay students will necessarily reduce the faculty member's ability to influence the routine daily demands that the employer places on those student.

A recent poll of law students by the Young Lawyers Section of the ABA indicates student support for revocation and an apparent difference of opinion with externship professors about whether a conflict exists between the demands of paid employment and the requirements of credited work. We assume for the moment the validity and neutrality of the poll results. However, first, even if law students see no conflict in the specific work required, externship faculty routinely do see a tension between the employer's need to get a benefit from students and the law school's effort to focus the employer on education: both in the specific work assigned and in the amount of time spent by employers on their supervisory role. Second, law students do not have the same perspective as faculty on how to teach a law school course. For this reason, ABA Standards consistently allocate discretion and control over pedagogy generally to faculty, not students. As noted below, the overwhelming majority of externship faculty support the current rule.

Imagining a system that permits both pay and credit for the same work raises a host of unanswered questions. Can a paying employer fire an underperforming student? Can a faculty member terminate a poorly supervised placement that pays many students a substantial amount of money? Can students refuse work outside of their learning contract if the employer makes clear that their compensation requires them to perform? Should law schools seek to enforce one wage for all students in the course, or should it permit different students to receive different financial benefits from different employers or perhaps even the same employer?

These risks and questions might look different if the legal profession and law schools had adopted an apprenticeship or residency approach to education comparable to that in other professions. For example, if the legal profession offered paid residencies similar to those of the medical profession, the profession as a whole would have a better basis for taking on the joint

responsibilities of employers and teachers. But the legal profession abandoned the apprenticeship model over a century ago, ceding to law schools the task of preparing students for practice. The legal profession is not acculturated to the dual role and demands of serving as both teachers and employers. Indeed, the profession has in recent years increasingly voiced dismay that law schools do not prepare students sufficiently to enter legal practice. The profession has regularly contended that it is ill-equipped to train young lawyers once it starts paying them salaries.

Revocation Would Restrict the Range of Available Clinical Opportunities

Eliminating the Interpretation proscribing paid externships will also significantly affect the range and quality of clinical opportunities that a given law school might offer, both for externships and for law clinics.

Assume a pool of employers willing both to pay students and to abide by a law school's educational requirements. These employers will still seek to get the most for the compensation that they pay, and will accept only students who meet their hiring criteria, in part to assure that those student can perform with the least possible supervision. If a school chose to create a course with only paid placements, this would limit the range of available opportunities to students above a certain rank. And if the school were to create a course that mixes both paid and unpaid placements, this would create a two-tiered system: payment for students above a certain rank, and no payment for the others. Economics may justify these distinctions, but no obvious educational goal supports them.

Further, students in law clinics operated directly by law schools would receive no pay. Abandoning the Interpretation would permit law schools to allow students compensation only in field placement courses, and in no other course, including in-house clinics. Given student debt loads, this would encourage many, if not all, students to participate in paid placements, rather than other unpaid law clinics. Weighting the scales towards paid work influences student choices about experiential courses for reasons unrelated to their educational value.

Finally, the overwhelming majority of field placement courses offer work in public interest, governmental or judicial contexts. These placements do not and typically cannot pay their students; nor would we expect funds suddenly to become available to pay students for this work. Indeed, many schools do not permit students to work in for-profit settings, in order to encourage exposure to public service lawyering. Making paid placements available as part of a field placement course would weight student choices towards private for-profit companies and law firms and away from public service. Both practically and symbolically, this would embody a preference by the ABA to promote for-profit practice over public service.

Externship Faculty Overwhelmingly Support the Existing Interpretation

In advancing these points and this position, CLEA speaks for an overwhelming majority of externship faculty. On every formal occasion on which the subject of "paid externships" has arisen, virtually all externship faculty have supported the current Interpretation and have opposed its revocation. At the last two biennial conferences for externship faculty, in Miami in 2010 and in Boston in 2012, externship faculty consistently and overwhelmingly spoke in favor of the

existing rule that prohibits compensation whenever a student is receiving academic credit for work performed at a field placement. The community of externship faculty will again address the question at its next conference, which will be attended by nearly two hundred professors, from February 28 through March 2, 2014 at the University of Denver School of Law. We urge the membership of the Council and the Standards Review Committee, and the Section's Managing Director, to attend this conference to engage in discussion on this question with the professionals who best understand the implications of a change in the rule.

For all of these reasons, the policy embodied in Interpretation 305-3 should remain in the Standards. As always, CLEA and its members with externship expertise remain available to the Committee to answer questions or provide further information.