# C L E A

Clinical Legal Education Association

**CLEA Comments on Proposed Standard 304(c) &**
**Retention of Interpretation 305-2**
**January 22, 2016**

The Clinical Legal Education Association (CLEA) is the nation's largest association of law professors. Among its more than 1300 dues-paying members are hundreds who teach law school field placement (commonly called externship) courses. We submit this comment in response to the December 11, 2015, proposed revisions to the provisions governing field placements of the *ABA Standards and Rules of Procedure for Approval of Law Schools*. We urge that the Council:

- Adopt proposed Standard 304(c) in its entirety, as it defines field placement courses as experiential education, focuses on important educational requirements, and creates more useful criteria for schools in reporting compliance to the ABA;

- Retain the current prohibition on awarding law school credit for paid field placements, currently Interpretation 305-2,[1] because revoking the interpretation will damage the quality and diversity of law school field placement courses;

- Recognize that adoption of the new field placement standards in 304(c) will not mitigate the risks of giving credit for paid externships nor enable real oversight of compliance.

**1. Proposed Standard 304(c) will improve the quality of field placements by defining field placement courses as experiential education, focusing on important educational requirements, and creating more useful criteria for schools in reporting compliance to the ABA.**

Proposed Standard 304(c) aligns the requirements for field placement courses with those for clinics and simulation courses. It confirms that field placement courses must be educational experiences taught by faculty, carefully supervised, and focused on the student's professional development. While this new standard does not mitigate the educational risks of permitting employers to pay students for taking externship courses, it will significantly improve the quality of field placement courses for other kinds of placements.

[1] CLEA has consistently opposed repeal of Interpretation 305-2. In Comments filed in January 2014, April 2014, February 2015, and July 2015, CLEA fully discussed the reasons for retaining the existing rule. The 2014 comments remain available in the archives of the Section's web page and the 2015 comments can be found in materials prepared for Council meetings held in June and August, 2015. This section incorporates many of those Comments.

By requiring that only "faculty" teach the reflective components of field placement courses, the proposed standard encourages staffing of these courses by teachers with a significant, long-term investment in the quality of the student experience. Requiring that faculty-guided reflection be "contemporaneous" and "ongoing" will ensure that faculty and students remain in regular contact throughout the time when reflection is critical—during the experience on-site.

Proposed Standard 304(c) focuses on the interests of both the school and the placement on student education. It requires these courses to offer students a "substantial lawyering experience," including a broad range of lawyering experiences. The proposal sharpens regulation of the unique aspects of field placement courses. The requirement of a "written understanding" between the school and the placement will help to clarify the purpose of the experience on-site. The proposal properly eliminates the distinction between high-credit and low-credit externships.

The proposal also sharpens regulation of the unique aspects of field placement courses. It establishes criteria for design, maintenance, and review of these courses in ways that will be useful to the Council in determining whether a law school is in compliance with the Standards. Through written understandings and syllabi, a school will have to specify course goals, expected outcomes, and methods of evaluation in externship courses. The new criteria will also help schools relate field placement courses to the curricular goals they identify pursuant to Standards 314 and 315.

**2. Permitting payment to students taking externship courses would damage the quality and diversity of law school field placement programs, regardless of the adoption of proposed Standard 304(c).**

Law schools should grant academic credit for field placement courses only when they are designed as a professional educational experience and have specified learning outcomes for students, just as with other law school courses. To permit credit for students to work for a paying employer is fundamentally inconsistent with a law school's educational function. Compensation is the hallmark of the employer-employee relationship, not education. The employee is obligated to follow the directions of the employer. The employer justifies the employee's salary in terms of its benefit to the employer.

When paying a student for taking a course, an employer is likely to assign tasks that will benefit the employer; those tasks are not required to benefit the student's educational growth. This creates an inherent conflict between the goals of the school and the goals of the employer. Students taking a law school experiential course are entitled to certain key features: repeat performance, detailed feedback, and mentoring conversations that expand the student's understanding of the practice of law or repertoire of skills.

By contrast, mentoring and teaching beyond that required by work assignments is not a part of the employer-employee bargain. Should credit for paid employment be permitted, law schools will face pressure from law students, alumni, local legal employers, and donors to approve credit for placements that have little promise of educational value, including jobs that

students have obtained on their own. In the face of this pressure, schools will have severe difficulty interfering with the employer-employee relationship, especially to terminate credit for it. This pressure will become especially strong as schools revise their curricula to meet the new requirements for experiential courses.

Proposed Standard 304(c) will not allow law schools to resist these pressures. It requires only that schools and site supervisors define what would assure "the quality of the student's educational experience" and that schools exert "sufficient control . . . to ensure that the requirements of the Standard are met." These very general mandates do not prevent schools from approving placements in which an employer provides nominal supervision, no chance for repeat performance, minimal feedback, and no opportunities for self-evaluation. In addition, school oversight of externships relies significantly on student reports. A student working for pay faces a conflict of interest in reporting supervisor non-compliance with educational requirements, especially where such a report results in the loss of a job for that student or for other students. Schools interested in tightening oversight over paid employment face severe difficulty in remotely supervising externships involving paid employment.

Revoking the rule will discourage students from participating in public interest and public service field placements, which cannot pay them. This disincentive will extend to a wide range of existing clinical opportunities: in law clinics; in legal services, prosecutorial, and public defender offices; in federal, state, and local government office and agencies; in other private non-profits; in smaller private firms that cannot afford to pay; and in judicial placements.

Preserving the rule is also consistent with the policies underlying the Fair Labor Standards Act (FLSA) and the trend of recent decisions on the FLSA. As the Second Circuit recently stated, a central feature of modern internships is "the relationship between the internship and the intern's formal education," in which students receive "practical skill development in a real-world setting . . . while enrolled in . . . a formal course of post-secondary education." *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376 (2d. Cir. 2015). Proposed Standard 304(c) goes a long way to assuring that the primary benefit of the field placement course is for the student. Permitting credit for paid employment will blur the lines between employment and an educational internship.

**3. The adoption of the new field placement standards will not mitigate the risks of giving credit for paid employment nor increase oversight of compliance where those risks are strongest.**

Faculty supervision of students and of supervisors in field placements already happens at a distance. ABA oversight of compliance with the externship standard is even more removed and occurs only every seven years. On those occasions, site inspection teams cannot visit or even talk to every workplace in a law school's field placement program, which can number in the hundreds. ABA oversight of field placement programs thus occupies the zone in which the influence of the Standards is at its weakest. As appropriate as the proposed new Standard 304(c) criteria may be, no amount of reporting can eliminate the risks associated with credit for paid employment.

The proposed Standard and the improved reporting that it may produce will be of greatest use for unpaid, educationally focused internships. But, the proposed standard will have insufficient effect on paid employment, where the employer's needs will trump the course's educational value. The regulatory structure of the standards is weakest where the Council has at best remote and infrequent access to the school's efforts to monitor student experience and supervisor activities at a paying job. The Council does not have the volunteer resources to observe the student experience at every remote site in each course at every school it inspects. The Council should avoid the risks of credit for paid employment and re-designate the current Interpretation 305-2 as an Interpretation to proposed Standard 304(c).

It would be harmful to remove the prohibition on credit for paid employment, where the pressures to reduce educational quality are the greatest and the Council's oversight ability the weakest. These pressures do not exist in unpaid educational internships, where the school, the site supervisor, and the student share a common focus on the student's education from the start. No pressure exists to alter that focus for the employer's benefit. Inspection teams can more readily rely on reports from students and supervisors at selected placements as representative of the entire course. None of this exists with paid employment, where the pressure to benefit the employer can and will override the focus on education and can undermine the reliability of reporting from both student and supervisor.

The nearly universal opinion of field placement faculty nationwide holds that the prohibition on credit for paid employment has played a vital role over several decades in assuring the quality of the field placement courses. Both CLEA and the Section on Clinical Legal Education of the American Association of Law Schools have repeatedly urged the Council to maintain the prohibition on credit for employment. Prohibiting credit for paid employment offers a simple, administratively viable way for the ABA to assure the quality of field placement courses, in an area in which the ABA faces a severe challenge to effective compliance oversight.