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AMERICAN BAR ASSOCIATION  
SECTION OF LEGAL EDUCATION AND  
ADMISSIONS TO THE BAR

PUBLIC HEARING RE:  
AMENDMENTS TO STANDARDS AND  
RULES OF PROCEDURE FOR  
APPROVAL OF LAW SCHOOLS

HELD ON  
FRIDAY, APRIL 25, 2014  
9:00 A.M.

THE RITZ CARLTON, ST. LOUIS  
100 CARONDELET PLAZA  
ST. LOUIS, MISSOURI 63105

**APPEARANCES :****APPEARING ON BEHALF OF THE STANDARDS****REVIEW COMMITTEE CHAIR:** JEFFREY LEWIS**MEMBERS PRESENT**

Craig Boise

Dr. Anthony Caprio

Catherine L. Carpenter

Honorable Robert E. Cooper, Jr.

Honorable Robert J. Cordy (Via telephone)

Thomas A. Edmonds

James J. Hanks, Jr.

Susan L. Kay

Lisa Kloppenberg (Via telephone)

Peter McDonough

Veryl Victoria Miles

Scott Pagel (Via telephone)

Kurt L. Schmoke

**AMERICAN BAR ASSOCIATION STAFF:**

J.R. Clark

Charlotte (Becky) Stretch

**APPEARANCES CONTINUED:****SPEAKERS**

Carol Chomsky, University of Minnesota Law School; SALT

Kate Kruse. Hamline University School of Law; CLEA

Mathew Kerbis, ABA Law Student Division

Robert Kuehn, Washington University

Gordon Russell, Lincoln Memorial School of Law

Alexander Scherr, University of Georgia School of Law

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8  
9 CHAIR LEWIS: Good morning, everyone. My  
10 name is Jeffrey Lewis, and I've been asked to chair  
11 this public hearing. The hearing is being  
12 transcribed and so I would ask everyone to speak up,  
13 speak clearly, and please identify yourself.

14 As we know, the Council of the Section of  
15 Legal Education and Admissions to the Bar has  
16 approved, for notice and comment, proposed revisions  
17 to the Standards and the Rules of Procedure.  
18 Specifically, this period for notice and comment  
19 deals with six items. First of all, the elimination  
20 of Interpretation 305-3; secondly, the adoption of a  
21 new Interpretation 503-3; third, the revision of  
22 Standard 505; four, the elimination of Chapter 8 and  
23 the transfer of most of its provisions to other  
24 portions of Public Rules and Standards; five, the  
25 revision of the definitions for important words in

1 the Standards and the Rules; and finally, number  
2 six, the revision of the Rules of Procedure  
3 themselves.

4 An explanation of the changes as well as a  
5 strike-out version showing all the changes has been  
6 widely published and we've received some written  
7 comments. This public hearing is part of the  
8 process that's designed to ensure that every  
9 individual and every group that has an interest will  
10 have a meaningful opportunity to have its position  
11 heard.

12 So far we have five -- five people that  
13 have asked to speak, and if there are others, we  
14 will give them the opportunity following the first  
15 five.

16 First, Kate Kruse from Hamline University.  
17 Kate, it's good to see you.

18 **MS. KRUSE:** Thank you. Hi. I'm Kate  
19 Kruse. I'm a professor of law and associate dean of  
20 experiential education at Hamline University School  
21 of Law. I'm also the immediate past president of  
22 the Clinical Legal Education Association, CLEA, and  
23 I speak on behalf of CLEA today in opposition to the  
24 elimination of Interpretation 305-3. CLEA is an  
25 organization that includes over a thousand members

1 who teach in clinical legal education, including  
2 clinics and externships.

3 And the question, I think, you're faced  
4 with in whether or not to eliminate Interpretation  
5 305-3, just to clarify at the outset, it's not  
6 whether students learn in paid employment. They do  
7 learn in paid employment. The question is whether  
8 the law schools should be able to grant academic  
9 credit and charge tuition for the learning that  
10 students do in paid employment.

11 The overwhelming majority of externship  
12 professors who have responded to your call for  
13 notice and comment are telling you basically the  
14 same thing, which is that an employer-employee  
15 relationship would significantly interfere with  
16 their ability to structure the educational  
17 experience that they provide students in their  
18 externship programs. That's because the employer-  
19 employee relationship changes the incentive  
20 structures of field supervisors that -- in that it  
21 significantly changed the incentives that they have  
22 for structuring the students' learning around the  
23 students' learning objectives rather than around  
24 their own needs.

25 And you'll hear more than that in --

1 you'll hear more about that later from Al Scherr,  
2 who's a very experienced externship professor. I'm  
3 not a very experienced externship professor, so I'm  
4 not going to speak in detail about that.

5 But I would say you should listen -- you  
6 should read the comments that have come in and you  
7 should listen to the people that are -- listen to  
8 what they're telling you. Why should you listen to  
9 them? Well, I would say they're the A list of  
10 externship directors. You're hearing from the  
11 people that are committed, experienced, thoughtful;  
12 they're part of the national community of externship  
13 educators who developed externship pedagogy over  
14 several decades and they know what they're talking  
15 about.

16 **UNIDENTIFIED FEMALE:** Hello. Is this the  
17 conference call that Justice Cordy's supposed to be  
18 in?

19 **CHAIR LEWIS:** It is.

20 **UNIDENTIFIED FEMALE:** Okay. One moment,  
21 let me put him on the phone.

22 **MS. KRUSE:** Not all externship programs --

23 **CHAIR LEWIS:** Hi, Bob. This is Jeff  
24 Lewis. Welcome.

25 **ASSOCIATE JUSTICE CORDY:** Hello, Jeff.

1 I'm so sorry. This -- I couldn't get -- make it  
2 earlier.

3 CHAIR LEWIS: That's all right. We're in  
4 the midst of the beginning of the hearing right now.

5 ASSOCIATE JUSTICE CORDY: Okay.

6 CHAIR LEWIS: Okay, Bob. Thanks.

7 MS. KRUSE: So I think of those of you  
8 who've been on a site visit know, I certainly know  
9 from site visits that I've been on, that not all  
10 externship programs are run by people on this list.  
11 They're not all as well run. They're not all as  
12 well structured. They're not all as well resourced.  
13 One of the site visits I was on had one -- one 40  
14 percent adjunct supervising 200-some externs. You  
15 need to worry about programs. You're the  
16 regulators. You need to worry about programs that  
17 are not lead by externship directors that are on the  
18 A list.

19 Why? Well, I would say to you it's  
20 because the nature of field placement presents  
21 special opportunities and new challenges for the  
22 maintenance of educational quality and that  
23 externship programs, accordingly, feel -- placements  
24 accordingly require particular attention from the  
25 law schools and from the Accreditation Committee.

1 Now, that's words from your Interpretation  
2 305-2 that you're choosing to delete along with  
3 these revisions. I don't know why you're choosing  
4 to delete it. You -- the explanation says you're  
5 deleting unnecessary interpretations and that you  
6 feel this is unnecessary, but just if it's  
7 apparently unnecessary at this point, it doesn't  
8 make it untrue. Field placements do require special  
9 attention in order to ensure educational qualities.

10 Schools should not be able to collect  
11 tuition from students by rubberstamping their paid  
12 employment. They should grant academic credit and  
13 they should collect tuition when they've taken an  
14 active role in structuring the educational quality  
15 of the experience. And that's what these A list  
16 externship directors are telling you, that paid  
17 employment interferes with their ability to do that.

18 But you should also listen to what I'm  
19 calling the A list is not telling you. Number one,  
20 they're not telling you that they're concerned with  
21 the Fair Labor Standards Act. That's not their  
22 concern. Why not? Because the FLSA requirements  
23 are actually consistent with and work together with  
24 ABA Interpretation 305-3.

25 FLSA factors include a fact that it says

1 students are -- should not receive pay for their  
2 externship and other factors stress unpaid  
3 internships must be designed as an educational  
4 experience, not employment.

5 THE FLSA and ABA regulations run together  
6 to define and reinforce the same dichotomy between  
7 paid employment on one hand and education on the  
8 other hand. Removing Interpretation 305-3 will  
9 disrupt that mutually reinforcing regulatory  
10 structure.

11 Externship directors are not concerned  
12 with the FLSA. We do -- externship directors do run  
13 into potential placement sites where people have  
14 concern and they raise concerns about the FLSA. But  
15 what they've found is that when they work with those  
16 people and explain the educational requirements of  
17 the program and explain how the FLSA factors apply  
18 to externships, that they're able to work out  
19 arrangements that comply with FLSA.

20 We have an example of that in the Twin  
21 Cities. Hamline, University of Minnesota, William  
22 Mitchell and St. Thomas have all been offered a  
23 program by Target Corporation to take one minority  
24 student a year into their program to offer them,  
25 like, a scholarship and also to offer them an

1 externship as part of their program to bring more  
2 minority law students into their legal department.  
3 We worked together -- the four externship directors  
4 of the four schools worked together on that contract  
5 to come up with money which -- that alleviated any  
6 kind of concerns under the FLSA.

7           Finally, the A list is not telling you  
8 that they're averse to, you know, students receiving  
9 support while they're in externships. They're  
10 sympathetic to the position the students are in.  
11 The problem is not compensation per se; the problem  
12 is paid employment. It's paid employment, the  
13 creation of an employer-employee relationship that  
14 disrupts their ability to structure the educational  
15 experience in a field placement. It's not living  
16 expenses. It's not reimbursement for living  
17 expenses.

18           I think people are a little surprised that  
19 the University of Michigan sent several comments in  
20 saying that students had turned down offers of  
21 compensation for housing and for transportation  
22 while they were in a program in Geneva, and in fact  
23 the externship director at Michigan submitted a  
24 letter saying, actually, I wouldn't propose  
25 abolishing the standard. I think you need to

1 clarify -- maybe you could provide some better  
2 clarification of what is allowed under the current  
3 standard because it seems to us that the current  
4 interpretation does allow that.

5 Not all externship directors are opposed  
6 to grants or stipends to students from other  
7 sources, sources that don't come directly from the  
8 employer. There was something on the LexTrain email  
9 listserv a couple of months ago saying -- you know,  
10 forwarding an email from Scott Freling, you know,  
11 where someone had asked him, what about AmeriCorps  
12 funding? You know, can a student receive AmeriCorps  
13 funding?

14 And clear back in 2010 he answered that  
15 question by saying, you know: It looks to me, based  
16 on the way you describe AmeriCorps funding, i.e.,  
17 award for work done, that this is compensation  
18 rather than reimbursement of reasonable expenses  
19 incurred. For example, in your description there's  
20 no indication AmeriCorps grants are tied to travel  
21 expenses associated getting to and from the field  
22 placement, additionally, housing costs associated  
23 with the distant field placement assignment or other  
24 reasonable out-of-pocket expenses related to the  
25 field placement. If there is some other way to

1 characterize the payments where the school uses the  
2 funds to establish a pool of funds to reimburse  
3 students for reasonable out-of-pocket expenses, such  
4 reimbursement would appear to meet 305-3.

5 Well, AmeriCorps funding -- I mean,  
6 apparently the person that asked that question  
7 characterized it in a certain way. AmeriCorps  
8 funding is provided by the federal government as a  
9 stipend to students who volunteer for non-profit  
10 organizations. It doesn't come from the employer,  
11 it doesn't establish an employer-employee  
12 relationship.

13 That should not be raising concern. The  
14 ABA needs to be a little more clear with schools  
15 that are trying to structure their programs what is  
16 and is not allowed.

17 **CHAIR LEWIS:** Kate, let me ask you to --

18 **MS. KRUSE:** Yeah.

19 **CHAIR LEWIS:** -- try and finish up. I've  
20 been trying to keep everybody's remarks to about 10  
21 minutes --

22 **MS. KRUSE:** Great. Yeah.

23 **CHAIR LEWIS:** -- so we'll have time for  
24 everyone. Thank you.

25 **MS. KRUSE:** Okay. I'm not sure what the

1 timing is and --

2 CHAIR LEWIS: I'm sorry. I should have  
3 mentioned that. I apologize.

4 MS. KRUSE: Okay. I just -- if I just  
5 could finish.

6 CHAIR LEWIS: Please. No, go ahead.

7 MS. KRUSE: Okay.

8 What externship directors really want is  
9 clarification about what counts as reasonable living  
10 expenses because they'd like to be creative in  
11 structuring financial support for students in ways  
12 that do not interfere with the educational  
13 experience.

14 However, at this point it seems unwise to  
15 be throwing the baby out with the bathwater. You  
16 have a variance process. If schools wanted to come  
17 up with a unique or different type of structured  
18 arrangement with an employer or the corporation or  
19 the law firm to provide, you know, some form of  
20 compensation that's not wages and doesn't establish  
21 an employer-employee relationship, let them ask for  
22 a variance.

23 In your new transparent variance process,  
24 they could create -- they could show you that it's  
25 not going to interfere with the educational

1 experience and they could show other schools as  
2 well. They could experiment and become a model for  
3 other schools to follow.

4 But simply abolishing this standard  
5 wholesale would be throwing the baby out with the  
6 bathwater and taking away an important structural  
7 element that makes educational experience in its  
8 place impossible.

9 **CHAIR LEWIS:** Thank you.

10 Carol Chomsky from the University of  
11 Minnesota. Carol, welcome.

12 **MS. CHOMSKY:** Thank you.

13 Thank you for this opportunity to speak.  
14 I'm going to speak only about the elimination of  
15 Interpretation 305-3. And I'm speaking primarily on  
16 behalf of the Society of American Law Teachers, but  
17 also as a long-time teach of the judicial externship  
18 program at the University of Minnesota Law School  
19 and now as associate dean helping to shape other  
20 externship programs and independent field placements  
21 as well.

22 I think externships and field placements  
23 are a terrific way for students to gain deeper  
24 understanding of law practice, to try out their  
25 lawyering skills. But as their use expands -- and I

1 think they will expand with the newly adopted six-  
2 credit requirement for experiential work,  
3 externships is part of that -- it's important that  
4 it remain quality experience. Keeping the rule,  
5 keeping them unpaid, I think is a part of doing  
6 that.

7 I want to talk about three concerns that  
8 have been expressed, three arguments that have been  
9 made for why the rule should be changed. First,  
10 that it means law firms, corporate counsel offices,  
11 and other for-profit entities cannot or will not  
12 offer internships; second, that it makes it  
13 difficult for students to have externships that are  
14 particularly expensive, especially if -- there were  
15 several mentions of the program in Geneva from the  
16 University of Michigan Law School; and that it  
17 generally prevents students from earning money to  
18 help pay for expensive legal education. So I want  
19 to address briefly each of those points.

20 First, the argument or the concern that  
21 for-profit firms and companies can't or won't post  
22 unpaid interns. As Kate Kruse has already mentioned  
23 and as the SALT submission talks about at some  
24 length, that, I think, rests on misunderstanding of  
25 the FLSA requirements.

1 Any employer is allowed to host a student  
2 unpaid intern as long as the intern is not  
3 considered an employee. And whether the student is  
4 considered an employee has been determined by  
5 application of six factors enumerated by the  
6 Department of Labor that are meant to ensure that  
7 the experience is focused on training, not on work  
8 product; that the experience is designed for the  
9 benefit of the student intern; and in the words of  
10 one of those factors, the benefits to the employer  
11 are at best minimal and, quote, on occasion its  
12 operations may actually be impeded.

13 And in fact, when I talk to possible  
14 placements, when I talk -- in fact, I recently had a  
15 discussion with one of the federal judges who hosts  
16 interns and she said, "You know, I don't take these  
17 students because they help us. I take them because  
18 it's an important part of their experience and  
19 because I enjoy having them around because we can  
20 help them learn. They're more trouble than they're  
21 worth in terms of what they contribute to the  
22 chambers."

23 And I think that's the attitude that I try  
24 to cultivate in externship field supervisors. They  
25 have to understand that they are doing this for the

1 benefit of the student and not the benefit -- not  
2 for their own benefit. And I think having the rule  
3 in place with the FLSA requirements helps externship  
4 directors set up and faculty supervisors set up  
5 externships appropriately.

6           What's particularly important about  
7 externship and field placement opportunities is that  
8 students have an opportunity to observe, to shadow  
9 lawyers, to spend probably half their time not doing  
10 work, but watching and talking, maybe attending  
11 CLEs, talking with lawyers who are doing things that  
12 are not directly related to the work that they  
13 themselves, the students, are doing for the  
14 placement. And that's not something that an  
15 employer is going to want to pay for, time spent not  
16 working, and that is what externs should be doing  
17 with a good portion of their time.

18           In fact, there's a comment filed by Perry  
19 Cask (phonetic) among those filed on 305-3 that  
20 talks specifically about a circumstance where a  
21 student was an intern and then received a job offer  
22 and was going to be continuing to work, and she said  
23 to the placement supervisor, "So will they continue  
24 to shadow while they're doing this?" And the  
25 placement supervisor chuckled and said, "Well, not

1 when we're paying them."

2 It's a very different experience and it's  
3 very important to maintain the possibility of having  
4 that different experience. It's important to  
5 maintain the educational focus of the field  
6 placements and the externships and having students  
7 be paid for that work will interfere with that.

8 The second point that's been made is that  
9 students can't afford to engage in a more costly --  
10 in externships that are more costly for them and,  
11 again, particularly mentioned was the externship in  
12 Geneva. But the current rule permits reimbursement  
13 of reasonable expenses including, in my mind -- and  
14 I think there could be some clarity brought to this  
15 -- the extra expense of travel to a faraway place,  
16 the extra cost of other kinds of transportation, of  
17 meals and lodging away from home that are more than  
18 would otherwise be spent.

19 And I have told students and part of the  
20 form that they have to fill out for me if they're  
21 doing a field placement that is in a for-profit --  
22 well, in any field placement, but it's particularly  
23 important in a for-profit placement, if they're  
24 going to -- they check off a box, if they're going  
25 to receive reimbursement for expenses, where they

1 acknowledge that they should keep records and they  
2 should be able to demonstrate those expenses.

3 It is not difficult to do that and I think  
4 it does comply with the current rule, though there  
5 has been enough confusion that it would be helpful  
6 to clarify that.

7 There may be other creative ways to  
8 compensate students not directly from the employer,  
9 but from other sources that might be either in  
10 compliance with the rule or could be, as Kate Kruse  
11 has mentioned, contemplated as a variance in the  
12 short term to make sure that those would produce the  
13 same kind of educational benefits for the students.

14 Final argument that has been made on why  
15 the rule should be changed is that students would  
16 understandably like the opportunity to earn money  
17 while engaged in externships or field placements.  
18 And I understand that. I'm very sympathetic to the  
19 monetary issues of students.

20 I think it is now clear that there would  
21 be significantly more opportunities made available.  
22 There are many employers who will take unpaid  
23 interns and who would not likely pay, including the  
24 non-profits, but even for-profit enterprises are  
25 more likely to host students and host them

1 effectively if they're not -- they don't pay and  
2 don't have to pay for that.

3           Students now can actually -- and I have  
4 quite a few students who are working and doing  
5 externships. They're not precluded from earning  
6 money; it's just in two different experiences. And  
7 those experiences are, and that goes back to my  
8 first point, very different. There's the paid  
9 experience of working for a law firm or corporate  
10 office or even a non-profit if they have money for  
11 it and there's the experience of interning where  
12 much more of the time is spent in educational  
13 activities, in learning activities and not so much  
14 in producing work.

15           The other -- and two other aspects of that  
16 sort of trying things out. Students are given  
17 opportunities in unpaid placements that they  
18 probably would not have. If this was an employer  
19 who were paying -- a legal employer who were paying  
20 for an intern, they might very well want to have  
21 specified qualifications, make choices about who the  
22 intern would be, and take fewer chances on a student  
23 who can learn from the experience but may not be the  
24 person that they would choose to hire if they were  
25 doing it as an employment context.

1 By the same token, the students are more  
2 likely to have experiences as unpaid interns when  
3 they choose them focused on their educational goals  
4 rather than on earning money. They are more likely  
5 to have experiences that will expand their  
6 interests. They may work for a non-profit and  
7 decide that that kind of work is more interesting to  
8 them than they thought it would be initially because  
9 they tried it out as an unpaid intern.

10 That's true across a wide range of  
11 opportunities. I think it expands the opportunities  
12 for students as well as getting them ready and more  
13 attractive to hire as employees later.

14 So, as -- again, as Kate Kruse noted, the  
15 overwhelming number of comments filed on this issue  
16 from law school faculty and staff who run externship  
17 programs oppose this change, and with good reason.  
18 The rules help ensure and should continue to help  
19 ensure that law schools do externships the right  
20 way. Allowing pay and credit would undercut that  
21 obligation, so I would urge the retention of  
22 Interpretation 305-3.

23 **CHAIR LEWIS:** Thank you, Carol.

24 Alexander Scherr from the University of  
25 Georgia.

1 MR. HANKS: Jeff?

2 CHAIR LEWIS: Yes.

3 MR. HANKS: Are we going to have questions  
4 later?

5 CHAIR LEWIS: You can ask questions now or  
6 later. Do you have a question? Go ahead, Jim.

7 MR. HANKS: I do.

8 CHAIR LEWIS: This is Jim Hanks.

9 MR. HANKS: Hi, Carol.

10 MS. CHOMSKY: Hi.

11 MR. HANKS: A couple of your premises that  
12 I'd like to ask about. First, you and Ms. Kruse  
13 said that you think the employment relationship  
14 interferes with learning in the externships, and --  
15 did I -- I think I quoted Ms. Kruse correctly, but  
16 you seem -- do you agree with that premise?

17 MS. CHOMSKY: The reaction I had was that  
18 students do learn from their employers and it is not  
19 that learning can't happen with an employer-employee  
20 relationship, but that by having it be an employer-  
21 employee relationship, that undercuts the obligation  
22 to have it be primarily about learning and not about  
23 producing work for the employer. That's -- so it's  
24 a slightly more nuanced sense that it interferes.

25 MR. HANKS: Well, that's what I'd like to

1 ask about because if the purpose of these unpaid  
2 internships is learning and the benefit to the law  
3 firm or other legal services provider is to have the  
4 availability of a good, young, eager law student  
5 working in the office, then what sort of  
6 understanding is there typically between the school,  
7 the extern, the extern supervisor, and the legal  
8 services provider about what is expected? Because  
9 certainly I would agree with you that in an  
10 employment situation, it is unquestionably the  
11 prerogative of a legal services provider to say do  
12 this, do that, and so forth.

13 Is that always or almost always understood  
14 not to be the case in the unpaid externships?

15 **MS. CHOMSKY:** I can't speak to what every  
16 externship is like across the country in every law  
17 school, but the -- but there are -- many of them  
18 have either contracts, explicit checklists of  
19 understandings about how the externship will be run  
20 that include that there will be time for -- I mean,  
21 my judicial externship says about 50 percent of the  
22 time should be observing and talking to people and  
23 following up on things and not producing work, 50  
24 percent writing, drafting memos and -- bench memos  
25 and 50 percent observing.

1           It's not always precise because there are  
2 variations day to day in the work, but that that is  
3 an understanding. And it's usually an explicit  
4 understanding in some form, whether it's a  
5 conversation with the field supervisor or it is a  
6 written contract, as many schools have, where the  
7 employer agrees, the supervisor agrees.

8           I think that the placements that take  
9 these on are taking them on not so much because it  
10 will benefit the firm or the corporate office of the  
11 non-profit, but because the lawyer there -- and  
12 actually, it's a personal thing. The lawyer who is  
13 doing the supervising wants to be a mentor, wants to  
14 work with a student, wants to help out.

15           I mean, it's the same motivation that  
16 leads our adjuncts to teach because we don't pay  
17 them the kind of amount that would actually  
18 compensate for the time that they put in it. They  
19 do that because they like working with students,  
20 they want to have a part of that educational piece.  
21 And they view it as -- well, it's part of giving  
22 back to the profession and part of giving back often  
23 to their own law school and they want to help the  
24 students.

25           And so there's a -- there is an

1 understanding. It is not just somebody finds a job  
2 -- student finds a job and then they apply and get  
3 credit for it. There's a much more robust  
4 conversation about it.

5 **MR. HANKS:** Okay. Thanks. That was very  
6 helpful. One more question that may have been  
7 substantially answered by what you just said, but  
8 let me be sure.

9 You say that the externs should be doing  
10 non-service-providing things like talking with other  
11 lawyers, going out to lunch, observing, that sort of  
12 thing. My experience as a practicing lawyer for  
13 over 40 years is the very young associates and our  
14 summer associates do get a lot of those sorts of  
15 opportunities to interact, to observe, to be  
16 mentored in non-billable ways just by being at the  
17 firm.

18 So I don't think that, at least from my  
19 experience, it's necessary for externs to be unpaid  
20 to be getting those kinds of experiences because I  
21 see our paid associates and summer associates  
22 getting those experiences all the time.

23 **MS. CHOMSKY:** I think there's some paying  
24 placements that offer that and many that don't.  
25 There are. But externships should always offer

1 that, and I think you need -- or that the rule helps  
2 schools create an expectation and then understanding  
3 that they're all like the best of those.

4 I mean, I applaud you if that's what is  
5 happening with your junior lawyers, but --

6 **MR. HANKS:** Well, I don't think we're  
7 uncommon in that respect.

8 **CM:** I have one, if I could, Jeff.

9 You characterized it as a student finding  
10 a job and then getting credit for it. Isn't it the  
11 case that the same standards of 305 with respect to  
12 the faculty instruction, resources, evaluation, and  
13 so forth would apply even if the student were  
14 receiving compensation?

15 **MS. CHOMSKY:** They would, but what  
16 wouldn't apply in part of the particulars -- there's  
17 a very general notion that it be supervised, that it  
18 be faculty supervised, but the specifics of how  
19 that's done, those -- actually the factors from the  
20 FLSA are actually very helpful. Those are not part  
21 of the externship rules from the ABA. Those are  
22 part of the Fair Labor Standards Act requirements  
23 for being unpaid.

24 So the requirements that it be educational  
25 are very general, and I think the pressures on law

1 schools and on law students, and even on employers,  
2 would be to short circuit -- to circumvent to some  
3 degree, to give short shrift to those kinds of  
4 requirements.

5 I think to have the rule in place that  
6 makes it unpaid and therefore have to fit within  
7 this rubric for the benefit of the student, not for  
8 the benefit of the employer, is a really important  
9 rule to maintain to be sure that it continues to do  
10 that. The specifics come out of the externship  
11 programs, but they are strengthened by the fact that  
12 it's an unpaid position, and some of that would go  
13 away.

14 **DEAN BOISE:** The fact that the law school  
15 controls the externship, though, gives the law  
16 school control over what happens and -- I mean, as a  
17 dean, I don't have a problem telling an externship  
18 site: You can't be an externship site for credit if  
19 you don't satisfy our requirements.

20 **MS. CHOMSKY:** And I think that if -- if  
21 every dean and every externship director and every  
22 faculty supervisor did that and felt comfortable  
23 doing that, then it would be fine, but the rule is  
24 meant to ensure that everybody in fact does that.

25 And I think the pressures -- if there are

1 difficulties between the student and the placement  
2 in the midst of an externship, you know, how the  
3 pressures on schools to have their students be  
4 viewed in a favorable light towards employment, I  
5 think, put pressures on it the other way. And I  
6 fear what would happen without the rule, that it  
7 would allow a lot more slippage on that point.

8           **CHAIR LEWIS:** So what you're saying is  
9 because you think some schools would not do it  
10 right, those schools that would do it right  
11 shouldn't be prevented to do so. That's the end  
12 result of this.

13           **MS. CHOMSKY:** I think that the rule -- the  
14 accreditation standards are a minimum standard to  
15 ensure that the education of value is there for  
16 students in all instances, and I think that -- and  
17 the schools that are doing it right are not asking  
18 for a change. They think that it's better to have -  
19 - I think this supports helps them do it right. I  
20 think doing it right in the absence of that rule  
21 would become harder and not as many schools may find  
22 themselves able to maintain the same standards.

23           **CHAIR LEWIS:** Okay.

24           **MS. CHOMSKY:** Thanks.

25           **MR. SCHERR:** My name is Alex Scherr and

1 I'm a professor at the University of Georgia, School  
2 of Law. I have taught externship programs for 18  
3 years. I have designed them, both low credit and  
4 high credit and semester in practice programs. I've  
5 been a lead organizer at the last three national  
6 externship conferences eliciting proposals and  
7 listening to people talk about this and many other  
8 issues. And I'm a co-author, I'm a co-editor of a  
9 couple leading national texts on externship  
10 teaching, so while I hesitate to do this, I may be  
11 on that A Team list Kate was talking about.

12 I want to make three points. First, and  
13 to speak to some of the concerns that have already  
14 been raised, I think the negative effects in  
15 revoking the rule would far outweigh its benefits  
16 and I want to detail those negative effects.  
17 Second, I think there is no need to make this change  
18 and that the limited benefits will be far outweighed  
19 by the costs. And third, I want to assert clearly  
20 that the rule serves important benefits to the ABA  
21 and to law schools generally.

22 First, repeal would harm the quality of  
23 educational opportunities for law students. The  
24 goals of paid work and of credit work conflict.  
25 Paid work involves the creation of value, leaving --

1 leaving all participants subject to the menace of  
2 the billable hour. For-credit work allows student  
3 learning, without concern for the creation of value  
4 and without concern for the billable hour. Learning  
5 in a practice environment for the student is  
6 wasteful, unproductive, and largely of no benefit to  
7 the firm.

8           You asked what the common consensus was  
9 among externship programs and field supervisors. I  
10 can't count the number of times I've heard  
11 externship supervisors say, "These students don't  
12 give me much. In fact, they're more trouble than  
13 they're worth if I'm thinking about it exclusively  
14 in terms of economic value. But I do it because I  
15 want to teach and I do it because I want to mentor."

16           For field placement supervisors, a central  
17 concern is to make sure that the field placement --  
18 the lawyer who is at the site does the work that  
19 they need to do. All right? Talks with the  
20 student, engages them in discussions. Has a two-  
21 hour discussion, editing session about a draft.  
22 Takes them to a hearing and then talks with them  
23 about that hearing afterwards. None of that time  
24 can be billed to a client. None of it. All right?

25           Similarly, a student engaged in an

1 externship is encouraged to seek out learning  
2 opportunities within the firm, to assert themselves,  
3 to ask for the chance to sit in on a hearing, to go  
4 to a placement -- to go to a court action, to talk  
5 with a partner or a judge or non-profit lawyer, and  
6 to engage in conversations that are not directly  
7 related to the purpose of the firm. And again, in  
8 the for-profit sector, it cannot be billed.

9           These realities create a serious risk that  
10 placements that are paid will move towards a paying  
11 -- a billable relationship. With respect, it may  
12 well be true that firms who are committed to  
13 educating their lawyers permit a lot of wasted time,  
14 but it seems to me that the pressures of a billing  
15 practice push people towards employment. And  
16 employment is a value to the firm; not a primary  
17 benefit.

18           **CHAIR LEWIS:** I'm sorry to sort of  
19 interrupt, Alex --

20           **MR. SCHERR:** Sure, yeah.

21           **CHAIR LEWIS:** -- but is it really likely  
22 that a firm could bill a client for the time of a  
23 student in an externship? How likely is it that a  
24 client is actually going to pay?

25           **MR. SCHERR:** Well, there is a consensus

1 among the community at large that firms not bill for  
2 work that students produce, as it stands right now,  
3 at a for-credit program.

4 My point is that a student will be  
5 engaging in a lot of time that doesn't even  
6 contribute directly to the production of work of  
7 value to the firm. Moreover, I'd also point out  
8 that the expectation of the lawyer at the site is  
9 that they, too, engage in activity that is of not  
10 direct benefit to the firm. Talking with a student,  
11 editing a brief, editing a memo, giving them  
12 feedback about their work, discussing career  
13 opportunities and introducing them to the culture of  
14 a firm; none of those are -- none of that is  
15 billable work, so the firm has to commit to taking  
16 that lawyer out of the billable cycle for that time.

17 **MR. HANK:** But just because some of what  
18 the extern does is not billable doesn't mean that  
19 everything that the extern does is not of value to  
20 the client and therefore potentially billable, does  
21 it?

22 **MR. SCHERR:** There is a quantum of  
23 learning that can be done for work that is of value  
24 to the firm, I'd agree. But that's a minimal  
25 quantum, particularly compared to the volume and the

1 quality of the learning that comes when both  
2 supervisor and the student agree that the work is  
3 not about helping the firm; the work is about  
4 helping the student. There's more time the  
5 supervisor can spend mentoring, critiquing,  
6 assessing the student's work. There's more time the  
7 student can spend outside the parameters of value-  
8 creating work.

9 **MR. HANKS:** It seems to me that you're  
10 pursuing inconsistent lines here. On the one hand,  
11 you're saying externships are a very valuable thing  
12 because they expose the student to the practice of  
13 law. And then you're saying, well, actually, to the  
14 extent that they do what lawyers really do, which is  
15 provide valuable legal services to clients, that  
16 shouldn't be billed. That's not worthwhile. That  
17 seems to me that those themes conflict.

18 **MR. SCHERR:** You're -- with respect,  
19 you're mishearing what I'm saying.

20 Externships are valuable because they give  
21 students the opportunity to engage in carefully  
22 supervised work in a practice setting, in a way that  
23 focuses on the student learning and not on the  
24 benefit to the firm. That's the value of externship  
25 programs. It's not generally exposing them to a

1 practice context, but quite specifically engaging in  
2 a learning process that develops the student's  
3 skill, regardless of whether the work that gets done  
4 contributes to the firm.

5 Similarly --

6 **MR. HANKS:** But doesn't that have --

7 **MR. SCHERR:** Let me -- excuse me. If I  
8 might just --

9 **MR. HANKS:** Sure.

10 **MR. SCHERR:** I want to cover this.

11 Externship programs are not about  
12 providing service of value to the firm and not about  
13 providing service of value to the firms' clients.  
14 So that other premise is also not something  
15 necessary. We are about exclusively carefully  
16 structuring learning environments for students.

17 **DEAN BOISE:** Would you object, then, if a  
18 firm wanted to do that, undertook that obligation,  
19 that responsibility, and also wanted to pay the  
20 student? Because I don't think that a firm is  
21 likely to build its business model on hiring law  
22 school externs in order to create value and be able  
23 to bill clients.

24 So you're already assuming the firm is  
25 willing to acknowledge and willing to assume the

1 obligation, that it's going to have the training  
2 responsibility for this extern where there's going  
3 to be a loss in terms of not only time, but the time  
4 of the people providing the training.

5 **MR. SCHERR:** I mean, my contention is that  
6 -- and I think -- and I'm not alone in this. You  
7 see substantial comment from the vast overwhelming  
8 majority of externship professionals that allowing  
9 pay in these circumstances would seriously reduce  
10 the willingness of an employer to provide  
11 unstructured learning environments -- learning  
12 experiences for students.

13 I don't object to students learning from  
14 paid work. The existing rule permits that. There's  
15 nothing in the existing situation that prevents them  
16 from doing it. What I object to is giving course  
17 credit for work where a structured learning  
18 environment is not present.

19 **DEAN BOISE:** But by definition, that  
20 wouldn't be the case because we have standards in  
21 305 that require that kind of structure for credit.  
22 Right?

23 **MR. SCHERR:** Yeah. But my belief is that  
24 permitting pay in that situation would increase the  
25 incentive for employers to move away from those

1 requirements.

2 Remember what we're talking about here.  
3 We're talking about a situation with divided  
4 supervision. The student works at the placement.  
5 The law -- the law school clinician is away from the  
6 placement. The major effort for the law school  
7 clinician is to make sure that the placement on a  
8 routine daily basis is able to provide these  
9 learning experiences.

10 They're not present in the firm. They are  
11 not capable of being -- of shadowing each student in  
12 a 20-, 30-, 40-student placement program to make  
13 sure that the teacher at the site does what they're  
14 supposed to do.

15 Permitting pay essentially asks the firm  
16 to pay students to do wasteful work, to pay students  
17 to be supervised by supervisors who themselves can't  
18 bill for the work. So my view is, and my contention  
19 is, that pay aggravates a problem that's already  
20 central to the law school and site relationship. It  
21 makes it harder for the law school to --

22 **CHAIR LEWIS:** Well, let's --

23 **MR. SCHERR:** -- exhibit that influence --

24 **CHAIR LEWIS:** Let's assume, you know, that  
25 that is the view of the school. I would -- they

1 don't have to provide externships that pay the  
2 student. Elimination of this interpretation doesn't  
3 require a law school to do anything. It just  
4 permits a law school, if it decides it can comply  
5 with Standard 305, to structure an experience that  
6 involves pay.

7 **MR. SCHERR:** With respect, in theory you  
8 may be correct, but in practice, once the word gets  
9 out that schools can provide -- can allow students  
10 to get paid for a for-credit experience, students  
11 will demand, alumni will demand those opportunities.  
12 The balance will shift.

13 **CHAIR LEWIS:** So this interpretation is  
14 necessary to protect schools against doing something  
15 they know they shouldn't do.

16 **MR. SCHERR:** This interpretation is  
17 necessary to allow schools to do the right thing,  
18 which is to ensure the quality of the educational  
19 experiences --

20 **CHAIR LEWIS:** Okay.

21 **MR. SCHERR:** -- that they get.

22 **CHAIR LEWIS:** Okay.

23 **MR. SCHERR:** It's a minimum standard. As  
24 Carol has -- as Carol said, it's a minimum standard.  
25 It allows schools to resist the pressure to dilute

1 the quality of the externship experience by  
2 introducing payment into the relationship between a  
3 teacher and a student.

4 Students don't get paid for any other  
5 course in law school. They don't get paid to take  
6 torts. They don't get paid to do a clinic. They  
7 don't get paid to do a trial practice seminar. I  
8 think most of us would agree that allowing a student  
9 to get paid by a professor in order to engage in a  
10 course would be antithetical to the goals of  
11 learning. Externships, as the ABA has made clear  
12 for 30 years, are courses like any other. You  
13 should not introduce payment in a way that you would  
14 not introduce for any other course.

15 If I may return to my --

16 **CHAIR LEWIS:** Yeah.

17 **MR. SCHERR:** I know I'm running short on  
18 time, but --

19 **CHAIR LEWIS:** Yeah. Please.

20 **MR. SCHERR:** -- I want to make sure I get  
21 my points out.

22 **CHAIR LEWIS:** Sure. Sure.

23 **MR. SCHERR:** I don't think the benefits of  
24 this rule will outweigh against the severe costs.  
25 There is no pool of for-profit placements that are

1 clamoring to pay students. It just doesn't exist.  
2 To the contrary, and I've checked with my placement  
3 people about this as have my colleagues at other  
4 schools, the trend is for paying employers to  
5 increasingly contact law schools for free work, but  
6 for work that they don't want to have to control.  
7 And I would suspect that those employers are not  
8 looking to engage in teaching, they're looking to  
9 get value from those students.

10           The assistance that this -- that that --  
11 revoking the rule would offer to students is  
12 minimal. The rule as it stands permits earning in a  
13 traditional and well-accepted and, frankly,  
14 uncontroversial choice for students. They can  
15 either earn credit or they can work for pay. I have  
16 seen no students jumping on this at no school.

17           Carol Chomsky has mentioned the impact of  
18 the Fair Labor Standards Act. The consensus in the  
19 externship community is the Fair Labor Standards Act  
20 concerns are not a concern.

21           And finally, the rule permits innovation.  
22 The rule has been in place since 1981. Think about  
23 what's happened to the legal community in the last  
24 33 years. There've been a vast expansion of  
25 placement programs of all corners of the practice

1 community, an enormous amount of creativity and  
2 created hybrid programs, and an increasing trend  
3 over the last five years to place students for for-  
4 profit -- for credit opportunities in the for-profit  
5 world without pay. There's no need to change the  
6 rule to promote innovation. Innovation already  
7 exists and the rule is a central part of that.

8 In closing, I would assert that the rule  
9 continues to serve important purposes. It preserves  
10 law school control of the quality of the educational  
11 experience. It levels the playing field between  
12 students who a firm might want to hire and students  
13 on whom a firm might not want to take a risk;  
14 between clinics that can't offer pay and clinics  
15 where payment is made available; and between schools  
16 that employers might see as desirable places to pay  
17 students and schools that are less elite.

18 The rule encourages and has  
19 demonstratively encouraged innovation in field  
20 placement design, field placement structure. It has  
21 not been treated as something like an innovation in  
22 programs.

23 And finally, the rule encourages and  
24 preserves the ABA's long-standing commitment to  
25 encouraging interest in public service, in public

1 interest work. You have before you, comments from  
2 supervisors in these placements that express severe  
3 concern about the impact that paid placements would  
4 have on the availability of placements in the public  
5 service field.

6 For these reasons, I would ask you not to  
7 revoke the rule.

8 **MR. EDMONDS:** May I ask you a question  
9 before you sit down?

10 **MR. SCHERR:** Sure. Yeah. Absolutely.

11 **MR. EDMONDS:** Tom Edmonds, a member of the  
12 Standards Review Committee.

13 There have been references to the  
14 unevenness that exists at different schools and the  
15 way in which these experiences are structured, and I  
16 know that to be true from the inspections that I've  
17 done. So my question to you is, you refer to it as  
18 a rule. It's couched as a rule, but it is an  
19 interpretation. If we should change our mind and do  
20 something different here along the lines that maybe  
21 the comments have suggested, would you advocate  
22 moving that up into the rule itself, the standard,  
23 as opposed to leaving it an interpretation?

24 **MR. SCHERR:** Yes.

25 **MR. EDMONDS:** In other instances where we

1 have mandated a course of action, either to do  
2 something or to refrain from doing it, we've moved  
3 it up into the rule. This one, we've chose to go  
4 this route, I guess. But if we should change our  
5 mind, would you like to see it in the standard  
6 itself?

7           **MR. SCHERR:** I would. Quite candidly, I  
8 think it's of sufficient importance to justify  
9 having it in the standard. At the same time, I  
10 think Carol Chomsky and Kate Kruse are correct;  
11 there's a need to clarify the scope of the  
12 reimbursements that are permissible under the rule.  
13 I think there could be an interpretation that would  
14 usefully do that.

15           There's a need to clarify what to make of  
16 third-party payment situations -- fellowships,  
17 stipends -- where the money doesn't come from the  
18 employer, it comes from another source, and you  
19 don't see those creating the same set of concerns.

20           **MR. EDMONDS:** Well, let me -- let me ask  
21 about that because I was concerned about whether you  
22 might want that in the way of a clarification. I  
23 mean, it says reasonable out-of-pocket costs  
24 attributable to being in a different place, et  
25 cetera.

1 MR. SCHERR: Exactly.

2 MR. EDMONDS: I guess I don't -- I have  
3 some experience with AmeriCorps and to me, those are  
4 stipends paid directly to the volunteer, is the  
5 terminology there, and they can use that money in  
6 any way they wish. It's -- they don't have to  
7 account for it by submitting evidence that they paid  
8 their rent with it if they're in a different  
9 location or that they incurred meal expense. They  
10 don't have to do that. They use it in any way they  
11 want.

12 So I guess I wouldn't make that  
13 distinction that you seem to. If it's money that's  
14 being paid to the student, whether from the employer  
15 or a third party, and the student had unrestricted  
16 use of it, I guess I wouldn't -- I don't see much  
17 need for clarification.

18 In other words, to me, I agreed with what  
19 Carol had to say about the Switzerland experience.  
20 I mean, to me, if you have to buy a plane ticket to  
21 Switzerland to be in the program, that's clearly an  
22 out-of-pocket reimbursable expense.

23 So I don't know that I see much need to  
24 clarify what -- I was just very interested in the  
25 comment about AmeriCorps stuff and to me, that's not

1 different from payment from the employer.

2 **MR. SCHERR:** Well, here's the distinction  
3 that we see, although I recognize it may not be  
4 persuasive to you.

5 If a third party is paying the stipend,  
6 the employer-employee relationship doesn't exist  
7 with respect to routine daily work. That's where we  
8 see the problem with paid placements; that the  
9 employer has to justify payment to the student who's  
10 working in a value-creating context.

11 With AmeriCorps and with summer public  
12 interest fellowships, with grants from third  
13 parties, it's a lump sum payment that is not related  
14 to the student's performance, not related to the  
15 number of hours the student puts in, not related in  
16 any way that would reduce the law school control of  
17 the quality of educational experience.

18 **MR. EDMONDS:** You might persuade me on  
19 that. Thank you.

20 **MR. SCHERR:** Okay.

21 **CHAIR LEWIS:** Thank you. Mathew Kerbis.  
22 Mathew, welcome.

23 **MR. KERBIS:** Thank you. Thank you. Good  
24 morning. Can those calling in hear me clearly?

25 **DEAN KLOPPENBERG:** Well --

1 CHAIR LEWIS: Not sure.

2 MR. KERBIS: Okay. We're not sure. We'll  
3 keep going, then.

4 Again, good morning.

5 ASSOCIATE DEAN PAGEL: We can.

6 CHAIR LEWIS: Yes. They can hear you.

7 MR. KERBIS: Oh, that's good. Thank you.

8 ASSOCIATE DEAN PAGEL: Yes, we can hear  
9 you.

10 CHAIR LEWIS: Okay. Thank you.

11 MR. KERBIS: Good. Thanks.

12 So thank you today and good morning for  
13 hearing us. It's great that we can be here and that  
14 you guys are listening, so thank you.

15 My name is Mathew Kerbis. I am a third-  
16 year law student at DePaul University, College of  
17 Law, and I am the chair the American Bar  
18 Association's Law Student Division. We have 34,000  
19 law student members and I am here speaking on their  
20 behalf today. I am here to speak in support of  
21 these Standard Reviews Committee's recommendation to  
22 elimination Interpretation 305-3.

23 Now, all the speakers today will probably  
24 agree, I think, that externships are valuable for  
25 law students. We don't disagree on that. However,

1 there is no one-size-fits-all rule, and  
2 Interpretation 305-3 is an over-inclusive rule.

3           You have the opponents of the elimination  
4 putting forth their arguments, giving their  
5 anecdotal evidence; the proponents, such as the Law  
6 Student Division, doing the same; and then you have  
7 some people in between requesting clarity or  
8 revisions to the interpretation, so if there's  
9 anything we can glean from that it's that there is  
10 not a consensus.

11           Now, you could look at our written comment  
12 to see our arguments lead forth, but that's not what  
13 I'm going to speak about today. Getting back to  
14 this idea that there's not a consensus and that  
15 actually supports the elimination of the  
16 interpretation, you only need to look at the people  
17 that have put in comments and things that have been  
18 said today.

19           You look at Michigan's program with Geneva  
20 and they're requesting clarity. You look at Wayne  
21 State's legal aid organizations that are requesting  
22 clarity because they have paid and unpaid law  
23 students working side by side in legal aid  
24 organizations. And in certain situations you have  
25 schools such as I bring from my own experience here

1 in Chicago where there is such a dense population of  
2 law students and not enough externships that they  
3 could partake in.

4 Law students are denied participation in  
5 externships because they fill up and there's just  
6 not enough resources. So in cities like Chicago,  
7 that -- where there's not enough opportunities for  
8 law students, if more opportunities exist, which can  
9 happen if the interpretation is limited, then those  
10 students can then go out and fill those now open  
11 season.

12 And we're not assuming that all of a  
13 sudden there's going to be all of these paid  
14 externships. That's not a misconception that we  
15 have. In fact, we think that externships as they  
16 currently exist are good for the reasons that have  
17 been stated, and you don't lose that. The  
18 elimination of the interpretation doesn't  
19 necessitate all of a sudden that law students must  
20 be paid.

21 And even if they demand it and the alumni  
22 come and demand it, first of all, I think that's  
23 great. Good. Law students want that. But even if  
24 they do, that doesn't mean the law school needs to  
25 allow their externship programs to pay.

1 It doesn't necessarily change the status  
2 quo as it is. It just allows the schools that are  
3 willing to take the necessary steps and still  
4 fulfill all the requirements of the standard to  
5 allow those opportunities. And law students will  
6 seek them out where they don't exist.

7 I think that it's not a useful use of your  
8 time to have to have these conversations where  
9 people are requesting clarity in an interpretation  
10 that is over-inclusive. These are conversations  
11 that should be had at the schools. The schools  
12 should figure them out on their own. There are over  
13 200 accredited law schools. Let them among their  
14 administration and the externship opportunities that  
15 are available have these conversations there and  
16 figure it out. That way, Michigan doesn't have to  
17 have this debate along with everyone else, but they  
18 can figure it out at their school. The elimination  
19 would allow that.

20 I'd like to note Professor Jim Beckman's  
21 comment, a professional in clinical work, and he,  
22 along with others that signed on -- and I'm proud to  
23 say that the field placement director at my school  
24 also signed on to that -- that the elimination is a  
25 good thing. And so I encourage that you read that

1 comment in addition to the Law Student Division's  
2 comment because it puts forth arguments that we  
3 agree with.

4           Additionally, there have been statements  
5 that law students will take these because they want  
6 pay. No. Law students will take these because a  
7 lot of law students need the pay, and now we're  
8 forcing them to choose.

9           Also point you to Professor Jennifer  
10 Jolly-Ryan's comment talking about seeing one of her  
11 students working at a grocery store because he has  
12 to make money in order to pay for law school, in  
13 order to pay for needs that he has.

14           And we've received comments and we  
15 submitted them at the last hearing where there are a  
16 lot of students speaking up, a lot of them part-  
17 time, that simply can't afford to take on  
18 externships because they don't pay, and the  
19 elimination would allow them to.

20           So --

21           **MR. EDMONDS:** Could I ask you a question  
22 about that?

23           **MR. KERBIS:** Yes, please.

24           **MR. EDMONDS:** Tom Edmonds.

25           I read that comment about the grocery

1 store till clerk --

2 MR. KERBIS: Yes.

3 MR. EDMONDS: -- and I didn't understand  
4 it because if a student is taking a full load of  
5 work or a part-time load of work if they're a part-  
6 time student, obviously, they -- many of them work  
7 outside the law school curriculum. They may or may  
8 not be taking a clinical course at the time,  
9 externship, or anything else. But if they are, it's  
10 part of their course load and, in addition to doing  
11 that, they can also work at a law firm in a paid  
12 capacity if they wish to do that.

13 So I guess I didn't understand. The  
14 student could have been working in a grocery store.  
15 He could have been working in a law firm while he's  
16 also taking his tuition-paid work at the law school.

17 And so I guess I don't understand that  
18 comment. I think a student who's taking law school  
19 work can work part-time if he -- part of that law  
20 school work is a clinical experience or an  
21 externship, they can still work outside of the  
22 normal load of work that they're taking.

23 So how does that work? Tell me how it  
24 works.

25 MR. KERBIS: I can't speak to that. Of

1 course, I can't speak to the specifics because you'd  
2 have to ask the professor for that.

3 **MR. EDMONDS:** But you cited it.

4 **MR. KERBIS:** I know. I know. And so what  
5 I would say -- what I would ask you in return is:  
6 When do they sleep? When do they spend time with  
7 their girlfriends or their family?

8 You're asking a lot of law students by --  
9 you're right. They have -- they're putting in time  
10 for credits. They're putting in time for all these  
11 other things. I'll tell you, as Chair of the Law  
12 Student Division, working part-time to the maximum  
13 20 hours that I'm allowed, in a dedicated  
14 relationship, having a lot of family in Chicago, I  
15 have had to make a lot of sacrifices personally.  
16 And I'll tell you, I don't sleep a lot.

17 **MR. EDMONDS:** The law is a jealous  
18 mistress, as they say and --

19 **MR. KERBIS:** I hear you.

20 **MR. EDMONDS:** -- you have to make time for  
21 all those things. So students do it. They've done  
22 it for generations. They've worked and they've gone  
23 to school.

24 **MR. KERBIS:** And we're saying we've had  
25 enough, and that's why I'm here.

1 MR. EDMONDS: All right.

2 MR. KERBIS: So I think hopefully now  
3 we're beginning to understand that there is no one-  
4 size-fits-all rule and that the elimination would  
5 allow schools to adapt as they see fit while still  
6 adhering to the other standards.

7 And that conclude my prepared remarks, but I  
8 just want to say to the A listers out there: Rise  
9 to the challenge. If this interpretation is  
10 eliminated, rise to the challenge and make sure that  
11 there is still an educational component as part of  
12 this because we're not saying there shouldn't be.  
13 And while we still think that you learn a lot about  
14 actually going out into practice and working when  
15 you're being paid to work in an educational  
16 environment where you receive credit, rise to the  
17 challenge because law students are asking for this.  
18 There's evidence supporting and people that work in  
19 your field supporting this elimination, so rise to  
20 the challenge.

21 And with that, the Law Student Division  
22 urges that the recommendation of the Standards  
23 Review Committee to eliminate Interpretation 305-3  
24 is adopted. Thank you.

25 Are there any more questions?

1 CHAIR LEWIS: Thank you, Mathew.

2 MR. KERBIS: Thank you. And thank you.

3 CHAIR LEWIS: Robert Kuehn from Washington  
4 University. Welcome.

5 MR. KUEHN: I've come a long way for this,  
6 so --

7 CHAIR LEWIS: You have. It's about a half  
8 a mile, isn't it?

9 MR. KUEHN: Yeah, but I walked, of course,  
10 and it was freezing snow and all the rest of it.

11 Anyway, it's nice to be her today. My  
12 name is Bob --

13 PROFESSOR CARPENTER: Uphill both ways.

14 MR. KUEHN: So you did both ways.

15 My name is Bob Kuehn and I'm the Associate  
16 Dean for Clinical Education at Washington University  
17 here in St. Louis. I've been teaching in law  
18 clinics and externships for 25 years and I directly  
19 oversee two externships now and am responsible for  
20 eight overall.

21 I have worked with many, many, many  
22 students over the years who, quite frankly, have  
23 done both. They have worked and they have done  
24 externships. And in fact, I take special  
25 responsibility for trying to make sure that those

1 students do get a chance to do both and I see them  
2 not just do externships, but moot court, law review  
3 and all the rest.

4           So I'm a little surprised by this  
5 exceptionalism that supposedly is happening here and  
6 now because this has always been a part of students'  
7 lives. In fact, it was part of my life. I worked  
8 every semester in law school. I worked full-time  
9 and went to school full-time. My last year, if  
10 there was a 20-hour rule there, I broke it. The  
11 statute of limitations has run.

12           I never imagined that I could buy credits,  
13 that I could turn in my summer hours or the hours in  
14 the firm and in some way get academic credit for it.  
15 And quite frankly, that firm was not giving me time  
16 to observe anything, not giving me a chance to hang  
17 out because they were billing me and charging the  
18 client, and rightfully so.

19           I want to briefly just talk about a  
20 process issue really briefly and then two  
21 substantive issues. The process issue is I'm just  
22 troubled that once again, quite frankly, we're in  
23 the middle of contested rulemaking as part of trying  
24 to figure out accreditation standards. It's all --  
25 we're back again to this all or nothing thing.

1 And I've mentioned this to Barry many  
2 times, I'm sorry he's not here, but I just think the  
3 way we're going about getting at standards is just  
4 all wrong. I think we should bring people around  
5 the table, we should see if there's a middle ground,  
6 and we should do things right.

7 In my understanding, from looking at other  
8 accreditors, this is how they do it. We've just  
9 become so freaking formalistic here, I think we've  
10 lost sight of a much better way. And I think, quite  
11 frankly, if we learn nothing else, all the work on  
12 Chapter 4, I think we learned that didn't work.  
13 Right? Because we did five years' work on Chapter  
14 4. It was a very contested setting and, quite  
15 frankly, got nothing either way.

16 It also is quite amazing to me that there  
17 are two organizations within the ABA that haven't  
18 been sought out who I would think we ought to be  
19 listening to. Within the Section itself we have a  
20 Clinical Skills Committee, and I see no effort to  
21 bring them in as experts, to ask them what they  
22 think.

23 And because there's a lot of concern about  
24 what's going on or might be going on with the Fair  
25 Labor Standards Act, I don't understand why the

1 Section of Labor and Employment wasn't brought in as  
2 well to help clarify these things.

3 So unfortunately, I think we have a  
4 process that's both less informed and more polarized  
5 and we get a result in which nobody is happy.

6 I want to talk about two particular  
7 substantive issues that I see. The first is what I  
8 think is a very troubling and perverse signal we're  
9 about to send when we allow externships, above all  
10 other sorts of students experiences, to now become a  
11 paid position.

12 I think that it's quite interesting to me,  
13 sort of, what's happened if this is the case to  
14 clinical legal education. Right? Because we  
15 started out with a goal of making the student  
16 learning coincide with the goal of using the student  
17 learning experiences to assist those who can't get  
18 access to legal representation. Those were always  
19 to dual purposes, even the dual purposes of own  
20 externship.

21 We then moved to corporate placements and  
22 externships. You know, rightfully so. I think  
23 educationally because we felt that perhaps we were  
24 missing out on some important experiences. So law  
25 schools are now at law firms, yet another step

1 removed from the goal of trying to make sure that  
2 this process is also about public interest and  
3 access to justice.

4 And now we're going even farther. Now  
5 we're allowing payment. But quite frankly, only  
6 payment for a certain kind. Right? Only payment  
7 for externships.

8 Every student practice rule that I'm aware  
9 of for law clinics says very clearly that students  
10 cannot be paid compensation for their work in a law  
11 clinic. And so why, why are we now thinking about  
12 making an exception for externships?

13 Why should it be, right, at my school,  
14 that if a student enrolls in and does a law clinic  
15 and is prohibited by the state supreme courts of  
16 every state, to my knowledge, and the federal courts  
17 from being compensated for that, why are they in  
18 that situation versus an externship? Why are we  
19 creating that perverse incentive?

20 Why are we now driving students, quite  
21 frankly, out of those public interest opportunities  
22 and into more paid positions? I think that's wrong.  
23 I think that's wrong. I think this is about  
24 education. It's not about making money.

25 Also, I think there's an issue of the Fair

1 Labor Standards Act that I heard from someone the  
2 other day that hasn't been raised that I want to  
3 briefly mention. I was speaking to a corporate  
4 placement site in New York, and he was talking about  
5 taking a student and mentioned the importance of  
6 making sure they got academic credit.

7 And he said, you know, when I sent him the  
8 ABA Standards, he said he spoke to his HR people,  
9 including the lawyer in that office, and they noted  
10 something about these sorts of externships and law  
11 school that his HR people said was distinctive and  
12 important to them, and that is that there's a rule  
13 with our externs that they can't get paid. Right?

14 And so, therefore, if the Fair Labor Standards  
15 Act issue ever arose, unlike if they could pay these  
16 students, they felt much more comfort in telling the  
17 Labor Department or someone else: You know, not  
18 only is this student doing this for academic credit,  
19 which we believe provides some safe haven, but we're  
20 prohibited from paying that student.

21 When you remove that, to me perversely,  
22 you're exposing these organizations who are not  
23 paying students to potentially greater opportunity  
24 for someone to raise a Fair Labor Standards system  
25 and possibly, therefore, result in fewer

1 opportunities for students rather than more with  
2 what's been going on here.

3 So I want to suggest a few things here  
4 towards the end. I think that, obviously, my  
5 position would be that you should retain this, but I  
6 do believe, as others have, that any clarification  
7 of the existing interpretation be useful.

8 The debacle at Michigan is just  
9 astounding. There is no question that that student  
10 could have gotten reimbursed for that, and it is  
11 stunning to me that this happened. I know that it  
12 happened because that particular program was not run  
13 by a clinical professor, but by someone else who was  
14 uninformed. I think the consultants now know to  
15 clarify these issues, we've helped everyone, but  
16 that does not stand as an example of something  
17 that's wrong with the present rule. It stands as an  
18 example of a school failing a student to the cost of  
19 \$6,000.

20 I also believe, as has been mentioned,  
21 that third-party compensation should be allowed.  
22 But the key, as has been said before, is the  
23 employer-employee relationship and the trouble that  
24 creates.

25 I would ask that if in fact you are

1 inclined to strike the rule, you should follow the  
2 rule that students in law clinics are subject to, as  
3 I said, through the student practice rule, and that  
4 is that the employer is not allowed to bill the  
5 client for the students' time. Right? Don't call  
6 them a law clerk and bill it at 50 or a hundred  
7 dollars an hour; you will not be able to pass on  
8 that cost up to the client.

9 And finally, I would ask this, which is a  
10 little confusing to me, to the student section: Why  
11 are you not here today talking about the 20-hour  
12 rule? Right? Why are you not talking today about  
13 abolishing the limit that a student can only work 20  
14 hours?

15 **MS. STRETCH:** Because we did that.

16 **CHAIR LEWIS:** We did.

17 **MS. STRETCH:** We did already at --

18 **MR. KUEHN:** It's totally gone now?

19 **MS. STRETCH:** Yes.

20 **MR. KUEHN:** Good. Thank you. I'm glad  
21 because I couldn't understand why there would be a  
22 restriction on how many hours one could work, while  
23 on the other hand, we would want to come in and get  
24 paid.

25 So finally, I'll say this. I -- 40 years

1 ago this same issue was debated before the ABA. I'm  
2 glad I was -- I can just say, at least I was not in  
3 law school 40 years ago. But as I said, from my  
4 time in law school and the 25 years I've been  
5 teaching, I really don't see what's changed and I  
6 don't know why, you know, the situation today is  
7 different.

8 But if it is different, there's an elephant in  
9 the room that ought to be dealt with, and that's:  
10 What are students paying for and what are students  
11 getting. Right? The real issue here is not to  
12 solve the problem by having a select few students,  
13 out of all the students in the school, find the  
14 select positions that pay and preference them over  
15 students doing public interest work, government  
16 placements, or a law clinic.

17 The real issue is to try to ask what is a  
18 student's money going for and is there a way to  
19 reduce tuition overall, not just preference a few.  
20 Because it seems to me, until we get to that issue,  
21 we've not really solved the cost issue for students;  
22 we've just preferenced a few students.

23 So I therefore ask you, please, to retain  
24 Interpretation 305-3. And, to the extent that some  
25 people want to keep score, my score on the A Team is

1 159 professors expressing interest in retaining the  
2 rule and only seven supporting its abolishment.  
3 Thank you.

4 **CHAIR LEWIS:** Thank you very much.

5 We're over the time allotted for the  
6 hearing. No one else has specifically asked to  
7 speak. Is there anyone in the audience that would  
8 like to?

9 Yes. Let's try and keep our remarks to  
10 about five minutes.

11 **MR. RUSSELL:** It's very short and it's not  
12 on 305.

13 **CHAIR LEWIS:** Okay. All right.

14 **MR. RUSSELL:** Gordon Russell, Lincoln  
15 Memorial University. I'd actually like to speak on  
16 505.

17 **CHAIR LEWIS:** Okay.

18 **MR. RUSSELL:** And 505 as it relates to  
19 foreign law students, particularly Canadian law  
20 students.

21 My experience, I'm a -- I went to the  
22 University of Western Ontario Law School. Later on  
23 in my career, I took a job at University of New  
24 Mexico. This was pre-1994 when the old standard  
25 was, as you may recall, that a law school could give

1 up to two years' credit at their discretion for a  
2 foreign law degree. At that point, in 1994, the  
3 change was made going to the 30 hours for a foreign  
4 law degree, and it appears in the language that you  
5 accept now to continue that change.

6 Reflecting back, when I was at New Mexico  
7 and in 1994, New Mexico actually sent a letter on  
8 the change opposing the change at that time, and the  
9 reasoning aspect was that they'd put together a  
10 program, had had almost every year a Canadian or  
11 more than one Canadian who had come there, they'd  
12 designed a 30-hour, 31-hour program that met the  
13 needs that they felt to allow those students to be  
14 able to reach the experiences that they needed to  
15 take their Canadian law degree and then receive a  
16 U.S. law degree.

17 I would ask this Committee to think about  
18 why they're saying you need two years with a foreign  
19 law degree, particular for common law countries, and  
20 that there might be other approaches that you might  
21 look at.

22 For example, in Canada, a lot of U.S.  
23 students have need to or decide to come to Canada to  
24 take a Canadian law degree when they have an  
25 American degree. What the -- Ottawa has set up is

1 basically a council, structured through the  
2 committee -- the ABA could do the same thing --  
3 where they look at a transcript of a U.S. student.  
4 They look at that transcript and then decide what  
5 Canadian courses that that person would need. That  
6 might be courses like Canadian constitutional law,  
7 Canadian evidence.

8       They then say to that student: We looked at  
9 your transcript. You need the following X number of  
10 courses. You would then go to a law school in  
11 Canada and work out an arrangement to take those  
12 classes so that you meet the requirements.

13       Clearly, I think we should start thinking  
14 about it from a sort of common law aspect, coming  
15 from a traditional four-year undergraduate and a law  
16 degree, which is becoming more what we're seeing in  
17 Australia, you're seeing in other countries. There  
18 must be a way to look at those experiences that are  
19 very similar to an American and say what are our  
20 needs rather than saying two years, one year credit.  
21 What are the courses that they need to fill out and  
22 flesh out what they've already taken in the common  
23 law experience.

24       And I would just suggest that you might  
25 want to look at other alternatives when dealing with

1 those common law experiences.

2 **CHAIR LEWIS:** Okay. Thank you very much.

3 Does anyone else wish to speak?

4 All right. The hearing is over. Thank  
5 you all for being here. We will take a 15-minute  
6 break for the Committee, Standards Review Committee,  
7 and we'll commence our regular agenda.

8 **(Whereupon, the Public Hearing was**  
9 **concluded at 10:14 a.m.)**

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## 1 CERTIFICATE

2  
3 I, Jesse J. Brown, Notary Public, certify that the  
4 foregoing was reported by stenographic and/or mechanical  
5 means, that same was reduced to written form; that the  
6 transcript prepared by me or under my direction, is a true  
7 and accurate record of same to the best of my knowledge  
8 ability; that there is no relation nor employment by any  
9 attorney or counsel employed by the parties hereto, nor  
10 financial or otherwise interest in the action filed or  
11 outcome.

12  
13 IN WITNESS HEREOF, I have hereunto set my hand this  
14 29th day of April, 2014.

15  
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19 /S/

20 Jesse J. Brown  
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