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.

This Comment supplements CLEA’s earlier submission to the Standards Review Committee on January 31, 2014. In that Comment, CLEA noted that the existing interpretation serves long-standing goals of ABA regulation, namely to improve the quality of externship courses by establishing close faculty oversight of the field experience. CLEA suggested that no need exists to revoke Interpretation 305-3: field placements have expanded and students remain able to choose paid work, under the current rule. Revocation would severely affect the quality of field placement programs, and alter the range of clinical opportunities available to students. We attach CLEA’s earlier Comment to this Comment.

In this Comment, CLEA argues that:

1) Revoking the interpretation will not result in quality education and pay for students;

2) Revoking the rule will encourage unequal access to field placement experiences, both within and between schools;

3) Revoking the interpretation is not necessary to promote innovation or curricular reform;

4) The Fair Labor Standards Act does not require revocation of the interpretation; and

5) Interpretation 305-3 ensures both high quality courses and fair market pay for uncredited work.
1) Revoking the Interpretation Will Not Result in Quality Education and Pay for Students

Eliminating the Interpretation will neither alleviate law students’ financial burdens nor improve their educational opportunities. Most externship placements are in the public sector – at courts, legal services organizations and government agencies. Those offices and agencies have extremely limited resources and are unlikely to offer paid employment, whether with or without credit. Moreover, as noted in CLEA’s earlier statement to the Council, the increasing trend is for private for-profit companies and firms to seek out only unpaid interns, who are often required to obtain academic credit from their law schools.

ABA Standard 305 designates field placements as courses that require strong faculty oversight of the educational value, work assignments, and overall assessment for students. The Standards necessarily impose costs on field placement offices, requiring them to invest in mentoring and education and to permit students to engage in experience solely for the sake of learning, without any expectation of benefit to the placement. Some law schools have allowed placements in law practices that might pay, principally in the private sector. In those situations, the firms are required to accept the costs of becoming a part of a course in which selection of students, work assignments, evaluations, and termination are determined by the educational objectives of the law school and the interests of the student. The driving objective is the student’s professional development.

An employer willing to pay law students would also have to accept that its role in a well-run externship program would severely restrict its freedom as an employer. This role would require the employer: to assign work and permit observation that will have no impact on its earnings; to permit partners and associates to engage in activities as educators that the firm cannot bill to clients; and to avoid terminating an employee for unsatisfactory performance, without concern for the employee’s need to complete an educational program. CLEA submits that no employer will tolerate these restrictions for long without seeking to reduce or eliminate them entirely.

To counteract this, externship faculty would need to take special care to ensure that employers do not focus on economic gain but on the educational value to the students they supervise. Faculty would need to develop more tightly regulated agreements with such placements, to perform site visits more frequently, to discuss supervisory approaches more carefully, and to be more assertive in assuring compliance. Nothing in Standard 305 requires this additional degree of intervention for specialized kinds of placements. Indeed, the proposal to revoke the rule comes with no comparable proposal to strengthen Standard 305 so as to require law schools to implement increased faculty oversight of these placements.

Employers that accept these restrictions are unlikely to compensate law students at the same rate as they would without these restrictions. To offset the loss of billable time from law firm supervisors, employers would pay students less than the fair market value of their service, and less than if hired under the current standards. This would create a bizarre situation for law students: working as employees in jobs with less educational value, and less pay, while paying tuition for the “experience.” The Council should think hard before incentivizing the dilution
both of educational standards and of the market for paid work that this arrangement would create.

Finally, CLEA is skeptical of the claim that a large, untapped market for paid, for-credit externships exists, blocked only by the existence of the Interpretation 305-3. As noted above, all of the incentives of law school supervision mitigate against employers paying law students while absorbing the costs of an educational program. Absent such a market or the likelihood of such a market, changing the rule serves no purpose whatsoever.

2) Revoking the Rule Will Encourage Unequal Access to Field Placement Experiences, Both Within and Between Schools

Revoking the rule will heighten the impact of employer hiring practices on the availability of “paid externships,” both within and between schools. CLEA expects that employers willing to pay will justify the added cost of law school oversight for its value in recruiting new and qualified students to the firm. Indeed, proponents of revocation have routinely suggested that the change will improve law student chances of finding jobs upon graduation.

But those employers that are most capable of affording the full cost of a “paid externship” are also likely to accept only externship students who they deem qualified for long-term employment. Reliance on class rank would become the norm for “paid externship” placements. Traditionally, clinical courses have provided opportunities for all students to hone their abilities and prepare for practice. Students who are not at the top of the class have benefited from a chance to develop and demonstrate abilities that do not emerge in an exam. Particularly in light of the legal market and the needs of our students, CLEA is profoundly concerned about a change in the Interpretation that would benefit only students whose rankings are at the top of the class.

Moreover, those employers able to bear the full cost of a “paid externship” would more than likely “shop” among law schools. Faced with the choice of establishing a recruitment program with a school in the top tier or with a school in the third tier, CLEA believes that employers would choose the former. We suggest that revoking Interpretation 305-3 would limit the availability of certain kinds of experience to top-ranking students at top-tier schools and severely restrict students’ opportunities to participate in clinical and experiential education.

In short, CLEA strongly supports the interests of students, by seeking to assure that all students at all schools engage in high quality work, under close and careful supervision. We want more for our students than checking cites and reviewing depositions. We seek a set of standards that ensures high quality clinical legal education, in which supervisors are fully invested in teaching and mentoring students.

CLEA encourages mandates that will result in equal access to all courses and for all law students. It is in the best interests of students to preserve a separate market for paid employment in which students are compensated with the fair market value of their work. Permitting the mixture of educational and employment functions will result in the diminishment of value for each, harming both students and law schools.
3) Revoking the Interpretation Is Not Necessary to Promote Innovation or Curricular Reform

Failing to revoke the rule will not block innovative approaches to integrating practice experience into law schools. The existing rule places no restriction on innovation in curricular reform. Since its first appearance in 1981, the Interpretation has not stood in the way of creativity in course design and a host of innovations in the delivery of clinical education. In particular, the availability and diversity of externship experiences, both part-time and full-time, traditional and hybrid, have exploded during this period.

Such concerns as do exist can readily be accommodated by reform and clarification of the rule, rather than wholesale revocation. Two examples should suffice. First, Interpretation 305-3 permits employers to reimburse students for expenses related to their placement. The ABA could easily reform this rule to clarify the nature and scope of permitted reimbursement. Field placements and law schools would then have much-needed guidance as to when students may be reimbursed for costs associated with their placements, such as local travel, meals, housing while working in a location away from the law school, or air travel to a distant placement. Clarity about the reimbursement rules should counteract any minimal impact of the interpretation on innovation in course design.

Second, Interpretation 305-3 as it stands has been read by some to prohibit students from receiving grants from third-party sources (including from their own schools) if they also receive credit for their work at a particular field placement. But grant-funded work does not raise the same concerns as those that arise when an employer compensates an employee: the source of the funds is different than the source of work assignments and there is no employment contract to weaken the educational commitment of either supervisor or student. Permitting a robust system of grand-funded for-credit fieldwork would incentivize law schools to seek out additional sources of funding for law students. We view this option as a far more desirable alternative to the one now contemplated by the Council, in which compensation from employer to externship student would be allowed.

4) The Fair Labor Standards Act Does Not Require Revocation of the Interpretation

Some have also argued that revoking the “paid externship” rule is necessary to counteract the possibility that the U.S. Department of Labor (“DOL”) will find that for-credit placements in for-profit firms violate the Fair Labor Standards Act (“FLSA”). But nothing indicates the DOL is likely to make such a finding. To the contrary, the only authoritative statement from the DOL indicates that unpaid for-credit placements in for-profit firms will not violate FLSA, provided they comply with the DOL’s six-factor test that stresses the educational benefit to the student. See DOL Wage and Hour Division Fact Sheet #71 (April 2010). These six factors are clearly consistent with the requirements of a well-run externship program:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;

3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

5. The intern is not necessarily entitled to a job at the conclusion of the internship; and

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

*Id.* The Fact Sheet goes on to say: “If all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.” *Id.* Moreover, the Fact Sheet stresses the importance of a strong and well-structured educational program. For example, “the more an internship program is structured around a classroom or academic experience as opposed to the employer’s actual operations, the more likely the internship will be viewed as an extension of the individual’s educational experience.” *Id.*

This six-factor test remains the DOL’s authoritative statement of how it will review for-credit, unpaid placements in private firms. CLEA can report that many law schools run for-credit externships in for-profit settings, without any interference from the DOL. (Indeed, although it is not a for-profit employer, the DOL itself accepts externship students to work in law-school-credited programs.) CLEA submits that, as long as the benefit of the externship experience weighs in favor of the student intern, and as long as employers are prepared to absorb the costs of mentoring and supervision, the FLSA is not offended. At the very least, FLSA concerns do not mandate a revocation of the paid externship rule.

**5) Interpretation 305-3 Ensures Both High Quality Educational Programs and Fair Market Pay for Employment**

Finally, some argue that students do not even need the superstructure of an externship course in a workplace setting, and should get both credit and pay for unstructured learning without oversight by a law school or concern for the educational value of the program. But as Standard 305 both suggests and requires, externships courses offer learning of real value, above and beyond whatever a students may learn through working for pay. In these course, students must achieve specified goals and objectives to advance their professional development. They must reflect on their practice, and gain additional perspective through classes and interactions with the law school clinician. Critically, an externship course adds value to the experience of work itself, albeit at a cost to the employer. Law school clinicians are obligated to ensure that practice supervisors provide skilled, thoughtful and appropriate supervision to their students, and that students engage in work that benefits the student’s development.
Students already have opportunities to work for pay in unstructured work environments, and to learn what they can from such experiences without law school oversight or support. Revoking the current rule will not change that choice, nor will it lead to an increase in the availability of such opportunities. But eliminating the current prohibition of paid externships is likely to have a significant negative effect on the nature and quality of field placement programs, to the detriment of law students.