COMMENT OF SOCIETY OF AMERICAN LAW TEACHERS
ON PROPOSED DELETION OF STANDARD 305-3

The Council has submitted for Notice and Comment a proposal to delete Interpretation 305-3, which forbids a law school from granting credit to a student for participation in a field placement program for which the student receives compensation. We write on behalf of the Society of American Law Teachers (SALT) to oppose that change. Allowing students to be paid while simultaneously getting academic externship course credit will necessarily undermine the academic focus of field placement experiences and will not likely expand the number or kind of placements available to students. Nor is such a change necessary to allow externship hosts to comply with the Fair Labor Standards Act (FLSA), as has been suggested by some proponents of the change. At a time when experiential learning is becoming an increasingly important part of legal education, it is crucial to ensure that field placement experiences are sufficiently educational and that the benefits to the student, not to the placement host, are paramount. Deleting Interpretation 305-3 will undermine those goals. We expand on these points below.

While students can learn from any work experience, an internship in which the focus is on providing a good learning environment will result in more intense, more comprehensive, and deeper learning than tends to occur when the focus is on producing work product for a paying employer. As externship site supervisors operating under the current rule, lawyers working in a wide range of fields—government agencies, nonprofit organizations, law firms, and corporations—have understood that externships are for-credit courses in which the expectation is that students have a meaningful educational experience. These lawyers have been willing to devote time and effort to helping students learn from work done in their field placements and to allow students to observe as well as perform lawyering tasks. They provide feedback on the students’ work aimed at enhancing student learning and introduce students to the full range of the work of the particular office rather than simply assigning the student to tasks where help is needed. These on-site supervisors understand that their primary obligation is to teach and mentor the student. If students are paid for work done in their placements, the externship site dynamic shifts. The students essentially become employees, and their supervisors will be justified in expecting the students to spend most or all of their time producing work product for the benefit of the employer, rather than engage in activities designed to enhance students’ educational experiences.
The impetus to make the proposed change seems driven by concern that prohibiting paid externships may subject some externship sites to potential FLSA liability for minimum wage and overtime pay and by a desire to find ways to help students manage the financial burdens of a legal education. As we explain more fully below, the concern about the FLSA is based on a misunderstanding of the implications of that law. Moreover, the proposed change may have perverse effects on availability and internship experiences, while easing only slightly the financial burdens on some students.

Concerns about FLSA applicability to unpaid internships arise only in the context of for-profit enterprises.¹ Even in that context, however, the Department of Labor (DOL) rules are entirely consistent with ABA and law school rules about which placements qualify for academic credit. The Department of Labor has specified that the determination of whether an intern is to be considered an employee for FLSA purposes “depends upon all of the facts and circumstances of each such program” and the application of six criteria:

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 the 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.²

These criteria are consistent with externship and field placement programs, which typically require the placement be designed for the benefit of the intern, that substantial opportunities be made available for observation and guidance, that the student’s work be closely supervised, and that substantial feedback on student performance be given. Placement supervisors understand that, although the student will usually contribute valuable work product to the hosting entity, there may well be no net benefit to the host, given the host’s responsibility for creating an appropriate learning environment. Recognizing the potential for for-profit employers to misuse field placements as a source of unpaid labor rather than as a way to educate students, the DOL developed their criteria as a way to ensure students get meaningful educational experiences at field placement sites and law schools have used those criteria to ensure that placements provide appropriate learning environments. As is apparent from the criteria, the FLSA is not violated when field placement sites put the students’ educational experience first.

¹ “Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.” Wage and Hour Division Fact Sheet, United States Department of Labor, April 2010, available at: http://www.dol.gov/whd/regs/compliance/whdfs71.htm.
² Id.
Subsequent to providing the basic criteria, the Solicitor of Labor issued an advisory opinion that has created some unwarranted confusion regarding the ability of law firms to host unpaid interns in compliance with the FLSA. Responding to a question from Laurel Bellows, past president of the ABA, the advisory opinion sought to clarify whether student work on pro bono matters at for-profit law firms would qualify for exemption from the maximum hour and minimum pay provisions. Citing the same set of factors noted above, the letter concluded that if a student works only on pro bono matters and otherwise meets the six criteria, the student is not an employee. The letter nowhere states, and does not imply, that a student is an employee if he or she does not work solely on pro bono matters. If the student’s time is not billed to a paying client (a typical explicit requirement that law schools impose), a law firm may derive some small immediate benefit from work produced by a student assigned to a matter involving a paying client (a factor tending towards finding the existence of an employment relationship). But given the need to supervise, review, and provide feedback on the student work product, it is unlikely that on balance the law firm will obtain any significant benefit from the intern’s work, and certainly not enough to tip the balance created by consideration of the other factors. The advisory opinion does not change the fact that appropriately designed field placement and internship experiences will satisfy the Department of Labor criteria.

As already noted, the Department of Labor criteria have provided law schools with an appropriate set of tools to solicit and supervise placements in for-profit locations, including law firms and corporate offices. Removing the bar to paying interns will make it harder to ensure that such placements continue to provide the kind of learning environment appropriate for providing academic credit. Off-site faculty supervision and evaluation cannot substitute for the commitment of the on-site supervising lawyers to provide students a wide variety of meaningful tasks, to invite them to participate as observers, to spend time speaking with them about the full range of legal practice, and to provide significant feedback and evaluation of the student performance. Employers who pay for student time simply cannot be expected to take on that responsibility.

Academic rigor should not be compromised by allowing students to work for pay and obtain academic credit simultaneously. The existing Interpretation, which prohibits pay for externships, recognizes that there is an essential difference between an employer/employee relationship and a mentor-teacher/student relationship. While students will learn from performing law clerk tasks in their jobs, the learning is entirely different when the focus is on the value to the student of the assignments and experiences rather than the value to the employer. Student desire to turn summer and part-time jobs into academic courses is understandable. However, it is not advisable.

Having employers pay students also raises difficult questions about control of the assignment and crediting process. Could the employer fire a student for not performing at high enough levels? Would a faculty supervisor be able to reassign a student if the employer failed to provide adequate on-site supervision if that would have implications for other students working for that employer, with or without receiving academic credit? Could students refuse tasks assigned by their paying employer if those tasks were not consistent with the learning goals and the placement expectations? Would

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students be willing to discuss frankly with faculty supervisors any externship site supervision problems if they worried that it could mean displeasing an employer and potentially losing income. These are just some of the troubling pedagogical issues likely to arise if students earn academic credit for paid employment.

Permitting students in paid placements to earn credit will likely undermine the ability of government and non-profit agencies to attract students, as they will compete with paying employers, and the change thus undermines schools’ efforts to promote public service lawyering among their students. It may also lead students to choose internships based on who is offering the highest pay, rather than who will provide the best and most relevant experience.

In the January Council hearing on other aspects of the Standards revision, it was suggested that individual law schools could refuse academic credit for paid work, even if Interpretation 305-3 is deleted, and all schools could attempt to continue imposing robust educational obligations on internships, paid as well as unpaid. The pressures to permit paid internships will be enormous, however, and some schools will certainly allow them, to the detriment of the academic experience of their students. The accreditation standards should not permit such an erosion of educational value to any students. The standards are “minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education.” A sound program of legal education demands that work done for academic credit be sufficiently educational and appropriately supervised. Deleting Interpretation 305-3 will run counter to that objective.

With the changes adopted elsewhere in Chapter 3 of the Standards, there is a need to strengthen and deepen the value of field placement experiences. Removing Interpretation 305-3 will have exactly the opposite result. For the reasons expressed here we ask the Council to retain the provision and prohibit schools from awarding academic credit for field placements in which the student receives pay.

Submitted on behalf of the Society of American Law Teachers by

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4 Preamble to the Standards for Approval of Law Schools of the American Bar Association.