Greetings to all who are concerned about this important issue. I run a Washington semester program for law students as a non-profit consortium of law schools. I am not solely affiliated with any one school, which for better or worse gives me perhaps an unusual perspective.

I am and remain opposed to lifting the ban on externship pay for credit even as I wince for our students' sake, as I imagine we all do, at the high and rising cost of legal education. I hold with those who cite two problems above all with payment from placement hosts for credit-bearing externships. Both involve desires and incentives for certain economic benefits. Let me try to explain these dangers succinctly, and then make a proposal that for better or worse I have not seen elsewhere.

The first difficulty is from the host's standpoint: the "if they pay you, they own you" problem. The law firm—and firms are the paradigm pay-for-credit placement in most people's minds, though law firms are not the only potential paying hosts--will believe itself entitled to decide what work the student does, and the externship faculty role in that vital equation will be reduced to the extent of that feeling, with the host’s only counter-incentive the chance that the school will turn off the faucet of future externs on hosts it finds unsatisfactory. Liz Ryan Cole puts the obverse of this scenario before us with characteristic aptness when she notes that lawyers who take on externs will be more open to the possibility of improving their own supervision and mentorship, and more receptive to the law school's standards and to working with law faculty, if they and their externs are in an academic relationship rather than one of pay for work. By the same token, students will tend to regard the experience more in terms of intellectual enrichment if its character is primarily academic, and more as a months-long job interview if its character is primarily commercial. The lifting of the ban raises the specter of increasing loss of the academic character of externships for credit, and a corresponding compromise to the core mission of law schools.

The second difficulty is the inevitably distortive effect that pay for credit would exert on placement recruitment and selection before the externship even begins. Under ABA 305 as it stands today, students have no monetary incentive to prefer one placement to another, and can choose among a range of potentially life-changing experiences on grounds other than money. In a world without the pay ban, compensation will naturally vary from placement to placement, with large law firms presumably grouped higher, and government, nonprofit public interest or legal services lower. Students will naturally tend to gravitate toward the highest-paying of available opportunities, and our profession's conventional ways of measuring quality of candidates will do the rest. The predictable overall result: placement hosts will follow narrow measures of student standing, students will follow the money, and students who are unable to get more highly-paid placements will wind up in low- or non-paying ones. I believe this pipeline dynamic will tend to reproduce, even exacerbate, the inequities in legal service provision and access to justice that our profession rightly claims to deplore.
Here is a quick thought experiment. If the ABA voted to lift the pay ban, would it also be willing to strengthen Standard 305 to require law schools to use only placements that defer to law school policies (and externship faculty discretion to enforce them) as to nature of assignments, quality of supervision and mentorship, insulation from clerical or administrative chores, protection from 50-state surveys of the law of X and the like? I suspect the ABA would prefer not to toughen Standard 305 this way, and (or because) firms would tend not to accept it. That very possibility ought to add to the burden of persuasion on those who say pay-for-credit will have no effect on the underlying educational experience. Even side agreements between individual schools and placements to protect substantive learning would probably be enforceable only prospectively, by taking non-performing placements off our lists the way we do today.

At bottom, I believe we lift the externship pay ban at peril of codifying a place for these powerful non-classroom enrichments as stepchildren of the curriculum, if they remain curricular at all. This is precisely the opposite direction from the integrationist one we should all be working to further, especially given that the profession out students seek to enter is more in need of practice-ready lawyers than ever before.

With those comments, allow me to suggest an imaginable range of possible courses of action for the ABA.

1. It could re-interpret the routine expenses exception, at least to clarify that third-party funding is acceptable.

2. It could encourage or incentivize innovations as to that third-party funding, including for example a pool of placement hosts' pay, seeded perhaps with law school funds, to spread the wealth to students choosing non- or poorly-paying externships, and to mitigate the inequalities of exposure and learning that concern many of us. It's conceivable that Standard 305 as currently written permits arrangements like this, especially with a clarification like No. 1 above. The less likely a host is to agree to share its payouts with students at other placements, or to become in effect a third-party funder, the more we should wonder about that host’s motives for taking on externs in the first place; see thought experiment above.

3. It could allow pay for credit but require students to remit their pay to the law school, which is arguably what Northeastern's wonderful co-ops indirectly do. Or it could let schools require externships for graduation and allow pay, but give them no credit, which is how Northeastern avoids Standard 305 entirely. That would tend to press Northeastern’s model on all schools, and at many would tend to discount or even obliterate the academic component of externships.

4. It could reduce school-sourced financial aid by the extent of externship pay (as lenders may do with their own loans whether paid externs or their schools like it or not), effectively zeroing out the tuition relief our students are seeking.

5. It could allow pay for credit but only at reduced tuition. Law school administrators will see any such requirement as raising the cost of these relative to all other credits. Schools might tend to reduce the number of credit-bearing externships, and even the number of externship faculty. But, putting aside for a moment the indispensable role of externship teaching in making these
programs worthy of academic credit, there is a moral dimension to insisting on full tuition from students to their schools for the teaching and mentorship that placement hosts are uncompensated for providing.

I believe alternatives 3, 4 and 5 are unworkable for various reasons, but in closing let me briefly expand on No. 2. Suppose Standard 305 were clarified to allow a law school to offer pay for credit through a school-administered externship fund. Suppose any host wishing to pay its externs were required to deposit that pay into the fund. Suppose that the fund administrator set compensation for all externs at roughly the same level regardless of type of placement. This might strike free-marketeers as dangerously socialist, but it would cure at a stroke the two problems I identified above, that of academic control in service of the law school’s mission, and that of undesirable distortions in placement recruitment and selection. It would also require no change to the language of Standard 305, but only a clarifying comment. And it would reaffirm the fundamental, salutary policy behind the existing rule, namely that to protect the extern-host relationship from becoming crassly commercial, students should not receive both compensation from their hosts and credit from their schools.

Thank you for the opportunity to offer these comments. I would be honored to participate in any further discussion these comments or this proposal might engender.

Stephen B. Pershing
Executive Director
Washington Consortium for Law Externships and Exchange