



## **The Need to Change ABA Rules That Restrict Experiential Learning, Increase Law School Costs, and Discourage Law School Experimentation**

New York City Bar Association  
Council on the Profession

### Introduction

Applications to law school have decreased significantly over the last ten years while at the same time tuition and student debt are rising substantially more than the rate of inflation. Law school revenue is declining. Job prospects for law students have plummeted. Entry level salaries for graduating law students are also on the decline.<sup>1</sup>

As a response to this legal education and professional crisis, the New York City Bar Association created a Task Force on New Lawyers in a Changing Profession. Among its recommendations, the Task Force urged that law schools engage in a limited period of experimenting with different types of curriculum change, with the goal of training more “practice-ready” law graduates. Rather than supporting elimination of the third year of law school, as some had suggested, the Task Force urged that the third year of law school be modified to allow students to gain a more practical and meaningful experience.

As it analyzed various impediments to innovation in law school curriculum, the Task Force identified the ABA’s law school accreditation rules as an obstacle to some of the goals the Task Force had identified.<sup>2</sup> This Report continues the Task Force work by discussing specific ABA accreditation rules, particularly the prohibition on law schools giving academic credit to students

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<sup>1</sup> See “Developing Legal Careers and Delivering Justice in the 21st Century: A Report by the New York City Bar Association Task Force New Lawyers in a Changing Profession.” Fall 2013.  
<http://www2.nycbar.org/pdf/developing-legal-careers-and-delivering-justice-in-the-21st-century.pdf>

<sup>2</sup> The ABA Legal Education Section Council is the ABA body determining law school accreditation standards. Because of a unique arrangement with the United States Department of Education, the Legal Education Section is the entity recognized by the Department of Education as the accrediting agency for law schools that issue a J.D. degree. Thus, the usual governing board of the ABA, the ABA House of Delegates, cannot simply approve or disapprove a rule change to ABA accreditation rules proposed by the Council. Rather, acting on a Council recommendation, the House of Delegates may either concur with a proposed change or refer it back to the Council for reconsideration. But the House may only refer a matter back to the Council only twice, and the Council has the final say on any changes in the standards and rules.

who work for private employers that should be eliminated, or substantially changed because those rules impede the goal of increased experiential learning. These rules contribute as well to the higher cost of legal education and unnecessarily make it more difficult for law students to reduce that cost burden by working during law school.

### Background

Among its principal recommendations of actions that should be taken to train more practice-ready lawyers and to make the third year of law school more productive, the Task Force urged the development of “Bridge to Practice” programs that would provide robust practical, experience for law students in their third year. It is self-evident that employment prospects for graduating third year law students would be substantially enhanced if students, in addition to their classroom education had greater opportunities to actually work for legal employers in a supervised, academically-linked setting before graduation. The program would be designed to assist students in building real lawyering skills, becoming more marketable after graduation, creating jobs with employers who might otherwise hire only laterally, compensating students in some instances, and in any event ultimately helping to mitigate the high cost of law school.<sup>3</sup> At the same time, the programs the Task Force contemplated would have a significant pedagogical component to ensure that the third year of law school provided students with a meaningful learning experience. Law schools were encouraged to experiment with different approaches for these Bridge to Practice and other third year programs with the goal of developing new standards over time.

The Bridge to Practice initiative contemplates that a student in his or her third year of law school could have the option (which today is severely restricted by ABA rules, especially for programs with private sector employers) to spend a significant part of the third year in such a program instead of the classroom. While many third year students may find that close to full time classroom instruction is the best way to learn how to practice law, others may find more value in a well-structured real-world work setting, not just from a learning perspective but also from the perspective of enhancing their employability. For this group of students, law schools and/or the Bridge to Practice employers would also have training and educational programs in place to ensure the educational value of the experience. Of course, even if the ABA rules were amended to permit such programs more broadly than at present, each of the law schools would have the discretion of whether to implement such programs at all. In place of the ABA’s blanket effective prohibition on this type of program in the private sector, the individual law school would have the responsibility to determine whether to proceed and if so, the details of the program and to ensure that the experience is sufficiently pedagogical to merit academic credit.

The goal of ensuring pedagogical value would require coordination between the law school and the employer. For example, the employer would be responsible to ensure that the student is

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<sup>3</sup> See *supra* note 1, New York City Bar Association Task Force Report.

engaged in meaningful work and is given the appropriate level of supervision. The law school, on the other hand, would be responsible for ensuring that the employer is fulfilling its training commitment and that the external experience is integrated into the overall learning experience. Law schools would also ensure that the student's work is integrated into their course of study; for example through a research paper or seminar in which the students could share and evaluate their experiences.

Unfortunately, despite the specifically expressed willingness of some private employers to participate in Bridge to Practice programs, efforts to implement the program in the private sector have been severely constrained because of the ABA's rules governing law school accreditation.<sup>4</sup>

Under existing ABA rules, experiential learning has been primarily limited to law school clinics, where a handful of students, together with a faculty member, handle a particular case or group of cases. Clinics, while serving a constructive educational purpose, and for which students receive academic credit, are expensive and typically do not lead to permanent employment.

Externships, where students in a law school seminar often taught by an adjunct professor, do some related work in a legal setting, often in the office of the adjunct professor, are another means by which students gain experiential learning. But externships, due to their limited nature (typically only one semester, for one or two days per week), are generally insufficient to support a student who needs to be "practice ready" to compete in the legal job market. These externships are also limited in number, and their potential is stunted by various ABA rules discussed below.

Law schools themselves are stymied by certain of these rules, which hinder their ability to experiment with different curricula and to creatively and effectively respond to the changing economy and legal market. At the current time international commerce and technological innovations are changing the ways the world does business, the demands on the profession are changing rapidly and the best way to train future lawyers is under increased scrutiny. Accordingly rules that hinder law schools from experimenting on how best to teach future lawyers must be changed.<sup>5</sup> Therefore, the New York City Bar Association urges the ABA to reconsider and rescind some, and modify other, the ABA rules discussed below.

#### ABA Rules That Should be Eliminated or Modified

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<sup>4</sup> The Task Force had identified four New York City private employers who had expressed a willingness to institute on an experimental basis a Bridge to Work Program. *See supra* note 1, New York City Bar Association Task Force Report, at 55. Unfortunately, because of the ABA rules that prohibit academic credit that if those students are compensated for their work (as required by the Fair Labor Standards Act (see note 7 *infra*)), only two of those programs have been launched, and to a much more limited extent than first anticipated.

<sup>5</sup> *See supra* note 1, New York City Bar Association Task Force Report (encouraging experimentation period to advance goals of improving practical learning and job opportunities for law students and recent law graduates).

1. *ABA Rules prohibiting a student from receiving both academic credit and payment for work done outside the classroom setting severely restrict the number of opportunities for experiential learning, prevent the student from being paid for valuable work, lack justification and should be eliminated.*

ABA Standard 305: Study Outside the Classroom and Interpretation 305-2 provides as follows:

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including courses approved as part of a field placement program, moot court, law review, and directed research.

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*Interpretation 305-2*

**A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation.** This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement. (Emphasis added)

Under the rule, as interpreted, a student can receive academic credit working for a legal employer *if* that student does not receive compensation for the work. But under the Fair Labor Standards Act (“FLSA”) private employers are (practically speaking) required to pay student interns. Thus, a law student can work for a government or non-profit law office, which is not subject to the FLSA, and can gain both academic credit and valuable experience with the potential for future employment with that employer. However, that same student cannot have the same experience working for a private sector employer who, to avoid violating the FLSA, would have to pay the student, thereby preventing him or her from receiving academic credit for the employment experience.

We do not agree with the arguments advanced by those opposed to the elimination of the prohibition on academic credit for work experience if the student is paid.<sup>6</sup>

First, the opponents argue that if students are being paid for the work they do for a private employer it is more likely they will be asked to perform clerical as distinct from legal tasks. Indeed, if anything, it would seem that a public employer, with far fewer resources than its private sector counterpart, is more likely to ask the student to perform menial as distinct from

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<sup>6</sup> Most of the arguments were advanced at a hearing held by the ABA Council on Legal Education and Admissions to the Bar in June 2014 on the proposal to eliminate the prohibition. *See* [http://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment/notice\\_comment\\_archive.html](http://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive.html).

legal tasks. And of course, before academic credit is to be given the Law School will have to be satisfied that the private employer is offering a valuable learning experience.

Second, opponents of the change contend the FLSA does not require that private employers pay law student interns. Evolving case law, particularly in the Second Circuit,<sup>7</sup> suggests that many unpaid internship programs may not be lawful, even if the program has training and academic value and the interns receive academic credit.<sup>8</sup> We do not opine as to whether this reading of the FLSA is correct or beneficial. Rather, we simply observe the reality that numerous New York City private employers are reported to have shut down their unpaid internship programs because of the legal risks they faced under the FLSA.<sup>9</sup>

Third, the opponents suggest that the prohibition is irrelevant because private employers would not be interested in hiring law students in any event. This is simply wrong as demonstrated by the expressed willingness of some New York City employers to participate in Bridge to Practice programs. See n. 4 *supra*. Moreover, we believe over time an intern program could be expanded to include small employers as does the program offered at Northeastern Law School.<sup>10</sup>

The problem is multi-fold. Not only does the rule restricting credit for paid work encourage for-profit employers to close down or not initiate their internship programs, leading to a shortage of opportunities, but also law students who wish to partake in paid Bridge to Practice programs are prevented from earning modest compensation in a valuable experiential setting. Because of the ABA rule, students who engage in paid internships cannot receive credit, necessarily restricting the number of hours spent working for such employers. The opportunity to spend a significant portion of one's third year of law school actually gaining practical experience with a private

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<sup>7</sup> See, e.g., *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (applying a multi-factor test and finding two individuals working on the set of the film *Black Swan* had been improperly classified as interns and that they were entitled to compensation under the FLSA, even though the interns were learning the inner-workings of the industry); *Mark v. Gawker Media LLC*, No. 13 Civ. 4347 (AJN), 2014 WL 4058417 (S.D.N.Y. Aug. 15, 2014) (finding plaintiffs met their burden at the conditional certification stage to show that Gawker Media interns had been “essentially treated as unpaid employees”; see also *Ballinger v. Advance Magazine Publishers, Inc.*, No. 13 Civ. 4036 (HBP), 2014 WL 749092, at \*2 (S.D.N.Y. Dec. 29, 2014) (“Whether interns are employees within the meaning of the FLSA and the Law is unsettled in this Circuit. Just last year, two District Judges reached conflicting results, each suggesting a different test to resolve the issue.”)

<sup>8</sup> While the FLSA does allow for-profit employers to offer unpaid internships, such programs are subject to a fact-sensitive, six-factor test that courts across the country have not applied uniformly. Furthermore, this exemption is “quite necessarily narrow.” U.S. Dep’t of Labor Website ([www.dol.gov/whd/regs/compliance/whdfs71.htm](http://www.dol.gov/whd/regs/compliance/whdfs71.htm)). As a practical matter, these internships are limited to the student performing legal work for individuals who cannot afford to pay for legal representation.

<sup>9</sup> See Megan J. Muoio, A Changing Legal Landscape for Unpaid Internship Programs in New York, Allyn & Fortuna LLP (Apr. 23, 2014).

<sup>10</sup> See *supra* note 1, New York City Bar Association Task Force Report at p. 121.

employer could dramatically increase a student's marketability post-graduation, and in addition would help mitigate the ever increasing cost of legal education.

Furthermore, it makes no sense for a student engaged in a government internship to gain practical experience that very well may lead to a job post-graduation but deny that very same opportunity to a student who wants to work for a private employer. While there are valid social reasons to encourage students to work for government and non-profit employers, there are equally valid social reasons to encourage paid work – namely, providing valuable experience, increasing job prospects, and creating some income for debt-laden law students.

Paid internships with appropriate training and supervision can be structured exactly like externships or clinical programs, for which students receive academic credit. Unfortunately, the ABA rules prevent law schools and private employers from developing these kinds of programs, and leave untapped a valuable resource for struggling law students.

We recommend that the ABA eliminate this rule completely and allow a student who works for an employer in an approved program to receive both academic credit and compensation.

2. *ABA Rules restricting the number of credits allowed for non-classroom learning hour should be modified.*

Two sections of ABA Standard 311: Academic Program and Academic Calendar provide as follows:

(b) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.

(d) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation.

Rules that limit the amount of non-classroom time for which a student can receive academic credit directly impede the success of a Bridge to Work program. Absent these ABA imposed restrictions a student could work close to full time in her third year with a legal employer. Forcing law schools to require that close to 80% of a students' time be spent *in the classroom* discounts the value of out-of-classroom educational experiences and restricts law schools both from exposing their students to more robust experiential learning and experimenting with different types of programs. We emphasize that it would still be up to the law school to make the judgment that the experience the student gained in the non-classroom setting would be educational, and would add to his or her knowledge as a future lawyer.

That said, employers typically value applicants with experience. Severely restricting credit hours for out-of-classroom experiences limits opportunities for students who do not find jobs through the traditional on-campus-interview process and who want to obtain that practical experience.

An employer for whom a student works for a very limited time each week will not be able to provide the kinds of substantive assignments and legal training it would otherwise provide to a student who is available for a more significant block of time. The continuity of the student's work is frequently critical, especially for smaller legal employers.

Also, in combination with the restriction on payment, this rule hinders lower-income and self-funded students from working and earning income while also gaining critical practical experience. It is undisputed that many students graduate with huge debt, with the average graduating law student having debt in excess of \$100,000.<sup>11</sup> By allowing students to be paid and gain credit for that work that is simultaneously valuable to their legal education, the ABA would be helping to reduce the economic burden placed on the law student by law school tuition. Not only would this change help students in the short term; paid, and full-time internship experiences would likely lead to better job outcomes, which would better position students with debt to pay off their loans in a reasonable timeframe.

This hour restriction rule also results in law students having to spend more time in law school than may be needed to acquire the knowledge necessary to be a lawyer. Some students learn better by doing. For students who opt to take an apprentice-style position in their third year, law school should be less expensive because those students are not using school resources on a daily basis. Law schools, over time, should be able to moderate tuition to reflect hours not spent in instruction law school professors.

Additionally, Rule 311(d), which limits the percentage of credit offered for one law school course, effectively shuts down a critical component of the Bridge to Practice program design, which contemplates full or close to full-time engagement with a private sector legal employer. It does this by limiting the number of credit hours that can be allotted to one course. If the student is participating in such a program on a full or close to full-time basis, it seems logical that the course would have to count for enough academic credit for the student to qualify as full-time and to stay on track for graduation.

## Conclusion

The debate over the best way to run a law school is legitimate and has been going on for centuries.<sup>12</sup> There is no single right way to train a lawyer. The disagreement spans debate over classroom instruction styles, whether learning must take place in a classroom, which courses should be mandatory, etc. The ABA should embrace this debate by giving law schools the

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<sup>11</sup> See Rhonda McMillion, *ABA opposes limiting how much student loan debt may be discharged under federal program* (Jul. 1, 2014), [http://www.abajournal.com/magazine/article/aba\\_opposes\\_limiting\\_how\\_much\\_student\\_loan\\_debt\\_may\\_be\\_discharged\\_under\\_fed](http://www.abajournal.com/magazine/article/aba_opposes_limiting_how_much_student_loan_debt_may_be_discharged_under_fed). (“In 2012, the average amount borrowed by graduates of private law schools exceeded \$122,000, and many law school grads have a combined undergraduate and law school debt of \$150,000 or more.”)

<sup>12</sup> See *supra* note 1, New York City Bar Association Task Force Report.

opportunity to experiment and adapt to the changing legal market. While the ABA rules provide for “variances,”<sup>13</sup> anecdotal evidence suggests that the process is onerous and time consuming and discourages schools from experimenting.<sup>14</sup> Without the practical option to forego ABA approval, law schools are forced to conform with the mode, even as the world is changing.

Respectfully Submitted,

New York City Bar Association Council on the Profession

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<sup>13</sup> The provision for variances can be found at ABA Standard 107 and interpretations. The interpretations include a guideline for whether to grant a variance; in situations where extreme hardship for the law school and/or its students is not at issue, the standard places the burden on the school to demonstrate that a variance is warranted; give the ABA authority to require the school to report to the Managing Director, the Accreditation Committee, or the Counsel “regularly as specified in the decision”; and note that the variance are granted at a school-specific level.

<sup>14</sup> At the very least, the ABA should grant temporary waivers of the rules to facilitate some experiments if it feels that at this time there is insufficient evidence to support an immediate rule change. *See supra* note 1, New York City Bar Association Task Force Report.



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