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January 6, 2016

J.R. Clark
ABA Section of Legal Education and Admissions to the Bar
321 N. Clark St., 21st Floor
Chicago, IL 60654

Re: Proposed New ABA Rule With Respect to Paid Internships

Dear Mr. Clark:

On behalf of the New York City Bar Association I write to endorse the proposal of the Council of the Section of Legal Education and Admissions to the Bar with respect to paid internships. That proposal is contained within the proposed revisions to the *ABA Standards and Rules of Procedure for Approval of Law Schools* issued for comment by the Council on December 11, 2015.

As reflected in my letters of April 29, 2015 and June 24, 2015, copies of which are enclosed, this Association strongly supports eliminating Interpretation 305-2 which prohibits giving academic credit to law students who work in field placements for pay. The December 11 Council proposal does just that. The Council has correctly recognized that internships, or what it refers to as "field placements," with law firms or other private employers such as banks, whether or not the student is compensated, offer "substantial lawyering experience" to law students, as simulation courses and law clinics also do. There is no reason why the ABA rules governing academic credit for these different lawyering experiences should not be substantially the same, as the Council now proposes. We commend the Council for recognizing that whether the student participating in the internship is paid or not is irrelevant; in both situations the student has the opportunity to gain a valuable first hand lawyering experience.

As I wrote in my June letter, the prohibition currently embodied in Interpretation 305-2 makes no sense. It gives academic credit to a law student who works for a non-profit or government agency, and who receives no compensation, but denies such credit to that same law student, who may be doing essentially the same job, but who (in part because under the Fair Labor Standards Act the employer believes it is required to pay the student), receives compensation.

The Council's proposal would eliminate the artificial paid/unpaid distinction and would go far toward increasing the opportunities law students could have to gain handson experience.

We do want to note that the record keeping requirements contained in the Council's proposal should be designed so as not to be overly burdensome. Otherwise, it could have the unintended effect of discouraging law schools from promoting such externships.

Thank you for considering our comments. We appreciate the Council's continuing work on these important issues.

Respectfully,

Debra L. Raskin

Cc: Barry A. Currier
Managing Director, Accreditation and Legal Education

NEW YORK
CITY BAR

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June 24, 2015

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Re: Proposed New ABA Rule with Respect to Paid Internships

Dear Mr. Clark:

On behalf of the New York City Bar Association I write to supplement my letter to you of April 29, 2015 (a copy of which is attached). Specifically, I write to endorse the recommendation of the Council of the Section of Legal Education and Admissions to the Bar to modify Interpretation 305-2 to allow law schools to give academic credit for field placements for which a student receives compensation. At the same time, I offer below two proposed modifications that would both clarify the proposed change and help ensure it would actually allow law students to find paid experiential opportunities in the private sector.

The New York City Bar Association strongly endorses the elimination of the prohibition on giving academic credit to law students who work in field placements for pay. As noted in my April letter, the prohibition currently embodied in Interpretation 305-2 severely restricts the number of opportunities for experiential learning, prevents the student from being paid for valuable work and lacks justification. My letter noted that it makes no sense to give academic credit to a law student who works for a non-profit or government agency, and who receives no compensation, while denying such credit to that same law student, who may be doing essentially the same job, but who receives compensation, in part because under the Fair Labor Standards Act ("FLSA") the employer believes it is required to pay the student. Specifically, I wrote:

> 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 [FLSA] private employers (practically speaking) are 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 that student from receiving academic credit for the employment experience.

The proposed change in Interpretation 305-2 would eliminate this artificial paid/unpaid distinction and would go far toward increasing the opportunities law students could have in gaining hands on experience.

However, the proposed interpretation still appears to make an unnecessary distinction between paid and unpaid externships. If the student is being paid, the school "must demonstrate sufficient control of the student experience to ensure that the requirements of the Standard are met." Such an obligation is not imposed on a school giving academic credit for unpaid field work.
It goes without saying that law schools should ensure that all law school externships – paid or unpaid – should offer students a valuable educational experience. We therefore suggest that the interpretation be revised to eliminate this distinction and instead simply state that law schools giving credit for field placements should maintain records, to be reviewed at their seven year accreditations, that demonstrate the school maintains appropriate control of the student's experience to ensure that the Standards are met.

We also urge that the requirement of record keeping not be overly burdensome and the required record keeping not be unduly detailed, as otherwise it might have the unintended effect of discouraging schools from promoting externships.

Thank you for considering our comments. We appreciate the Council's continuing work on this important issue.

Respectfully,

Debra L. Raskin

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April 29, 2015

Barry A. Currier
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Dear Mr. Currier:

We write to urge that the prohibition on law schools giving academic credit to students who work for private employers be eliminated, as it severely restricts the number of opportunities for experiential learning, prevents the student from being paid for valuable work and lacks justification.

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.[1]

As a response to this law school 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.

Among its principal recommendations for 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 provide robust practical, experience for law students in their third year. It is self-evident that employment prospects for graduating third

[1] *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

year law students would be substantially enhanced if students, in addition to their classroom education, had greater opportunities to 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.[2] 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 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.

Application of the Prohibition

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 Standard 305 and Interpretation 305-2:[3]

> 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.
>
> . . .
>
> *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

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[2] *See supra* note 1, New York City Bar Association Task Force Report.

[3] 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 requiring that if those students are compensated for their work (as required by the Fair Labor Standards Act (see note 7 *infra*)) they could not be granted academic credit, only two of those programs have been launched, and to a much more limited extent than first anticipated.

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 that student from receiving academic credit for the employment experience.

The inability of law students to have access to private sector placements greatly reduces the opportunities available for law students and works a particular hardship on those who need to work in order to cope with the high cost of a legal education.

Experiential learning, as restricted by the above rules, 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 for law schools to staff 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 Standard 305 and Interpretation 305-2.

Law schools themselves are stymied by the prohibition, which hinder their ability to experiment with different curricula and to respond creatively and effectively to the changing economy and legal market. At a time when international commerce and technological innovations are changing the ways the world does business, the demands on the profession are evolving rapidly and the best way to train future lawyers is under increased scrutiny, rules that hinder law schools from experimenting on how best to teach future lawyers must be changed.[4]

A properly structured program involving private employers would provide the experiential learning opportunities so needed by law students without undercutting any of the objectives of a sound legal education. Each law school would have the discretion 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 design that ensures that the experience is sufficiently pedagogical to merit academic credit.

The goal of providing pedagogical value would require coordination between the law school and the employer. For example, the employer would be responsible for ensuring that the student is engaged in meaningful work and is given the appropriate level of supervision. The law school, on the other hand, would be responsible for determining 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 students' work is integrated into their course of study, for

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[4] *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).

example through a research paper or seminar in which the students could share and evaluate their experiences.

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.[5]

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 rather than 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 this change contend the FLSA does not require that private employers pay law student interns. Evolving case law, particularly in the Second Circuit,[6] 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.[7] 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.[8]

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. 3 *supra*. Moreover, we believe over time an intern program could be expanded to include small employers similar to a program offered at Northeastern Law School.[9]

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[5] 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.

[6] *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.")

[7] 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). As a practical matter, these internships are limited to the student performing legal work for individuals who cannot afford to pay for legal representation.

[8] See Megan J. Muoio, A Changing Legal Landscape for Unpaid Internship Programs in New York, Allyn & Fortuna LLP (Apr. 23, 2014).

[9] *See supra* note 1, New York City Bar Association Task Force Report at p. 121.

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 they spend 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 employer could dramatically increase a student's marketability post-graduation, and in addition would help deflect 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 to 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, Rule 305 and Interpretation 305-2 prevent law schools and private employers from developing these kinds of programs, and leave untapped a valuable resource for struggling law students.

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

Respectfully,

Debra L. Raskin