

The Chair and the Board received 30 formal written comments via email and regular mail in response to the proposed adoption of section 302-1.6 of 12 NYCRR. The public comment period remained open through July 27, 2018.

Three commenters expressed dissatisfaction with the extent of the Board's consultation with the private bar and two opined that Board underestimated the number of claimants who would be affected by this regulation. The Board has considered these comments and finds that no changes are needed to the regulation as a result. The Board can confirm that members of the bar were consulted about the proposed regulation. Additionally, the projected number of unrepresented claimants who may benefit from the proposed regulation was based upon a review of cases in which a hearing had been scheduled on a medical-only claim, only. In comparison, the statistics referenced by the commenters concerned all medical-only cases, regardless of whether a hearing had been scheduled. In any event, the statistics provided by these commenters show that there are numerous unrepresented claimants in pending medical-only claims who may need legal assistance. The Board thus believes these statistics only highlight the benefits that a law school clinic program could offer.

A number of commenters suggested that the legal work involved in workers' compensation claims is too complicated for law students to manage, and gaps in the students' knowledge will cause harm to claimants. The Board has considered this comment and finds that no changes are necessary, given that the law students will be supervised, both directly and indirectly, by an admitted attorney with two years of practice experience. As such, the admitted attorney will ensure that students fully comprehend the legal issues raised in their cases and will be professionally responsible for the students' work.

The Board received a comment from a worker advocacy group, recommending that the proposed regulation be narrowed to only allow legal interns to represent claimants in medical-only claims. Although the Board intends to assign legal interns to medical-only cases the Board believes that such a limitation would be an unnecessary abridgment of the current law clinic regulation. Section 302-1.6(b) of 12 NYCRR, currently permits certain legal interns to appear before the Board in a variety of cases, not limited to medical-only. The proposed rule does not expand the types of cases that may be handled by a legal intern, but rather expands those who may qualify as law school and legal interns to represent claimants in Board proceedings. Accordingly, no changes have been made to the proposed regulation as a result of this comment.

An attorney recommended that the regulation require law student interns to take the licensed representative test before representing claimants. As law students will be supervised, both directly and indirectly, by an admitted attorney with two years of practice experience, there is no need for them to pass an exam permitting to represent claimants on their own without supervision. As such, no changes have been made to the proposal as a result of this comment.

The Board received several comments opining that it is unethical for the Board to employ and supervise law student interns given that the Board is the adjudicatory agency and the legal intern will represent a party of interest in the Board proceeding. The Board cannot, and will not, provide any representation of injured workers in formal proceedings. The Board's role would be limited to helping clinics to get off the ground by volunteering to provide some supervision in

medical-only cases, in the context of informal proceedings. For all broader clinical models, the Board would have no role in retaining or supervising law students or recent graduates to represent injured workers. For both the informal and broader clinical models, the *only* way to establish a clinic would be for outside lawyers to volunteer to participate to provide this service. When a law school is interested in incorporating a workers' compensation component into a new or existing law school clinic, the Board's involvement will be limited to having a Board attorney (who is not an employee of counsel's office or adjudication) supervise the legal externs, where the advice and actions "are solely within the context of informal resolution." In short, the Board understands the conflict of interest concerns raised by these commenters, and trusts that this explanation establishes that the Board's conduct under the proposed regulation will be consistent with the Public Officers Law and the Judiciary Law.

Several commenters asserted that the proposed regulation is unnecessary because there are existing opportunities under the Workers' Compensation Law to allow non-attorneys to represent workers' compensation claimants, insofar as the Workers' Compensation Law allows licensed representatives to represent claimants. Licensed hearing representatives represent claimants for fees. Legal interns will work on cases pro bono. A licensed attorney with two years of practice experience will be required to supervise the law student interns; as such, the legal interns will have guidance from a practicing attorney, who will be professionally responsible for the interns' work product. Therefore, the Board finds that no changes are necessary due to this comment.

The Board received a comment from an attorney opining that the proposed regulation violates Workers' Compensation Law section 24. That statute concerns the costs and fees that may be awarded in workers' compensation cases; it does not limit to who may appear before the Board. Further, the Board notes that 12 NYCRR section 302-1.6(b) currently permits certain law student interns to represent parties of interest in Board proceedings; this proposal therefore does not add new categories of persons who may appear in Board proceedings. The Board therefore has not made any changes to the proposed regulation as a result of this comment.

Several commenters opposed the proposed rule on the ground that claimants may need representation for issues outside of their workers compensation claim, but the legal interns would not be able to represent the claimant in all related matters, which will harm claimants. As an initial matter, the Board notes that 12 NYCRR section 302-1.6(b) currently permits certain law student interns to represent parties of interest in Board proceedings. Second, legal interns will only be assigned to cases in which the claimant has been unable to retain private legal counsel. As such, although the legal intern may not be able to assist with non-workers' compensation matters, the alternative for the claimant would be lack of representation on their Board case. Third, the claimant will be informed about the limited scope of representation through the retainer agreement, and therefore will make an informed choice before agreeing to the legal intern's representation. Therefore, no changes have been made to the proposal as a result of this comment.

Several commenters opined that the Board lacks authority to promulgate this regulation because the New York State Appellate Division has authority under the Judiciary Law to control the appearance of law students before an agency. The proposed regulation acknowledges that the four Appellate Division courts have authority to regulate legal internship programs, insofar as the

proposed rule provides that law school graduates and senior law students must be “permitted to practice law pursuant to the Judiciary Law under a program of activities approved by the appellate division of the supreme court of the department within which such activities are taking place[.]” The proposed regulation thus does not detract from the Appellate Division’s authority, but rather requires that the legal interns be approved through a Board program, as well as by the appropriate Appellate Division. Therefore, no changes have been made as a result of this comment.

Several commenters suggested that the Board consider alternatives to the proposed regulation that would encourage more attorneys or licensed representatives to represent indigent claimants. Specifically, they recommended that the Board change its rules to require a carrier or medical provider to separately pay a claimant’s legal fees if the claimant succeeds on a medical-only claim, or allow the Board to draw from Workers’ Compensation Law section 151 fund to pay a claimant’s legal fees. The Board has considered these recommendations and finds that no changes are necessary to the regulation as a result. The Board provides for attorney fees pursuant the Workers’ Compensation Law section 24. Additionally, the proposed regulation will allow members of the Bar to fulfill pro-bono requirements, and provide a further means to serve the public interest. As such, the Board finds that the proposed regulation is the most expeditious method for increasing opportunities for certain unrepresented claimants to find legal representation.

The Board received several comments recommending that the proposed regulation be withdrawn because legal interns would be unable to take medical testimony, inasmuch as Workers’ Compensation Law section 121, incorporating CPLR Article 31, requires medical testimony to be taken in the form of a deposition, and only attorneys and *pro se* litigants can take depositions. While it is certainly true that an attorney would need to conduct such depositions, legal interns may assist in all aspects of the deposition and in matters where a deposition is not required. As such, no changes have been made to the regulation as a result of this comment.

In addition to the aforementioned individual comments, the Board also received form letters from a law firm, which asked that the proposed regulation be withdrawn on several grounds. First, the commenters asserted that the legal work involved in workers’ compensation claims is too complicated for law students, and gaps in the students’ knowledge will cause harm to claimants and burden others involved in the handling of workers’ compensation claims. Second, the commenters noted that legal interns are not subject to disciplinary action if they mishandle a claim, which may result in more mistakes without accountability. Third, the commenters stated that law students cannot take part in depositions, so they will be unable to take medical testimony at hearings. Fourth, they asserted that the proposed regulation presents an unethical conflict of interest, as the Board plans to supervise the law students who are representing claimants before the Board, and as a result, the students may not zealously advocate for the claimants out of concern that their employer would react negatively when Board rules and processes are challenged. These comments reflect those concerns of the individual commenters, discussed above. Generally, the Board finds these concerns to be without merit for the particular reasons detailed previously. Accordingly, no changes have been made as a result of these comments.