

C L E A

Clinical Legal Education Association

<http://cleaweb.org>

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November 4, 2010

Honorable Christine Durham, Chair
Council on Legal Education and
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Utah Supreme Court
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P.O. Box 140210
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Donald J. Polden
Chair, Standards Review Committee
Dean, Santa Clara Law School
500 El Camino Real
Santa Clara, CA 95053

By Email and U.S. Mail

Re: Standards Review Committee's Handling of the Comprehensive Review Process

Dear Judge Durham, Mr. Askew, and Dean Polden:

The Clinical Legal Education Association (CLEA) writes to comment on the process of the current comprehensive review of the ABA Standards for Accreditation of Law Schools. This review raises momentous issues for legal education and the bar. The quality of American legal education, the future of our profession, and the careers of students and many legal educators will be significantly impacted, for better or worse, by proposals now originating in the Standards Review Committee. Taking care that these proposals are carefully conceived, after an open and inclusive process, can complicate the Committee's daunting task. But process is important both as a matter of fairness and to ensure a sound result. CLEA now feels obligated to express its concern about the Committee's shallow engagement with the wide range of stakeholders in this process and its apparent disregard of their many thoughtful, important written comments and other contributions on the pending issues.

(CLEA is the nation's largest association of law teachers, representing approximately 800 dues-paying faculty at over 160 U.S. law schools. CLEA is committed to legal education that trains law students to be competent, ethical practitioners and to promoting access to legal representation. Its membership consists of law professors who teach students in role as lawyers and who devote their energy and attention to identifying, teaching, and assessing proficiency in the skills and values essential to lawyering.)

The simplest example of the increasingly insular nature of the Committee's work is the recent announcement that end-of-session comments by observers at its meetings will no longer be permitted. The opportunity to comment at the close of recent meetings is just one small part of a pervasive process issue, but it supplies insight into the larger problem. Representatives of CLEA have attended every public session of the Committee since the comprehensive review began. Until the July, 2010, meeting, our comments and those of other Council affiliates were invited; the comments were concise, respectful, immediate, and in our view helpful. At the opening of the July meeting, the Chair stated that, as in the past, time permitting the affiliates in attendance would have an opportunity to comment at the close of the two-day session. The next day, as the meeting wound down two hours early, the Chair declared that the Committee would not take the affiliate contributions after all. Then the announcement that no feedback would ever again be permitted at Committee meetings appeared on the Committee web site. It is not clear to us whether this decision reflects the views of the Committee as a whole or was an executive decision by the Chair.

Closing off comments and putting up roadblocks to a broad and deliberative consensus-based process impedes the process of developing good accreditation standards. While we understand that there will be an opportunity for comment farther down the line (although we fear that that opportunity will come too late to affect the Committee's deliberations), we are nonetheless troubled that the Committee would choose to shut out the views of the stakeholders in legal education just as its work reaches the most difficult and contested matters on its agenda. We also note that the Committee's work is governed by the Regulations of the Department of Education, which require that the Council's constituencies be afforded a "meaningful opportunity to provide input into the review." 34 C.F.R. §601.21(b)(4).

The recent reversal in the Committee Chair's willingness to hear the brief comments of affiliates in attendance at its meetings is part of a larger and very worrisome trend toward insularity and the appearance of result-driven decision making by the Committee. This tendency is also illustrated by the Committee's too-frequent practice of posting drafts just days before it meets, depriving Committee members of the time needed to consider those drafts and interested parties of the opportunity to offer timely responsive feedback that could inform the conversation at the meetings. For example, this week, just four days before the Committee's next meeting, the longstanding requirement for a semester-long skills course has been deleted from the draft standards. This major revision comes so late as to preclude any input from interested groups. The anticipated draft on faculty standards, which contains radical changes on tenure and faculty governance, was posted last night, just three days before the meeting.

Our prior experiences lead us to question whether the Committee will explain and adequately place the significant issues before it in the larger context of the literature and thought in these areas. The Committee makes very rare reference to the substance of the many written comments it receives in its public discussions or working documents. We are dismayed, for example, that the crucial issue of faculty security of position and tenure is addressed by bare draft standards, without supporting analysis, that are issued just days before the meeting. It may well be that all Committee members are well versed in both the many comments and the outside

literature on all the many subjects that fall within its ambit, but there is little evidence that the Committee is familiar with and considers the views or concerns of many of the constituents who are not law school or university administrators. Certainly we have heard none of the informed give-and-take that is essential to sound policy decisions.

Indeed, we note with some dismay that the only commentary that seems to inform the Committee is the deregulatory agenda of the self-perpetuating Board (not the membership) of the American Law Deans Association (ALDA). That group's vision of radical deregulation appears to drive the Committee's proposals to eliminate rules that the Council previously endorsed after much deliberation and that have defined legal education for many years. In contrast, the comments and viewpoints of many other stakeholders in legal education, including the AALS, SALT, CLEA, ALWD, and many dozens of judges, non-ALDA law deans, and leaders in legal education, are rarely, if ever, mentioned. We are particularly troubled by this in light of the fact that the largest constituency among members of the Standards Review Committee itself is current or former law deans. Given that circumstance, we would hope that particular attention and respect would be paid to other views.

Based on committee work with which we are familiar in academic venues, we would expect that the Committee would place more emphasis on developing discussion drafts and other documents that weigh the rich array of comments and outside work and that its public discussions would reflect familiarity with those sources and comments. We can even imagine other processes, like those used by other professional accreditors, in which a wide group of stakeholders engages with those doing initial drafting through more participatory deliberation. It is unwise to propose radical changes to the legal education accreditation regime without involving the leading voices and key stakeholders in the conversation. A working conference on the more contentious proposals that are being considered would improve the process and ultimately validate the outcome. A written report can document the conversation. Through both planned and unplanned exchanges, participants can learn from and collaborate with each other; these exchanges can help to align the various segments of our professional community.

We acknowledge that the task the Committee faces is complex and demanding and we appreciate the efforts of its members. We understand that the Committee is drafting proposals that will continue to undergo examination and could be significantly revised. But as Justice Potter Stewart once said, "it is important to know the difference between having the right to do something and doing the right thing." We strongly urge a shift toward openness and inclusiveness in your work. Accordingly, we propose that the Committee implement the following:

- 1) post all drafts at least 3 weeks prior to a meeting so that interested persons can provide input;
- 2) forward all written comments directly to Committee members and provide a copy of those comments in the notebooks supplied to Committee members at meetings;

- 3) provide an opportunity for public comments at a meaningful point in the Committee's meetings so that those comments can inform the Committee's deliberations at that meeting;
- 4) address significant comments and opposing points of view in the drafts of standards and during the presentation of drafts to the Committee; and
- 5) convene a working conference on the most controversial proposals to solicit wider input and to seek consensus.

Only by taking steps like these will the Committee assure all stakeholders in legal education that it is not held captive. Lawyers, of all professionals, should understand the importance of process. Careful and evident consideration of the data, scholarship, and many concerned voices that inform the questions before it are essential to the quality and legitimacy of the Committee's work.

Sincerely,

A handwritten signature in black ink that reads "Robert R. Kuehn". The signature is written in a cursive style with a long horizontal stroke at the end.

Robert Kuehn, President

cc: Charlotte Stretch, Assistant Consultant (by email)