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CLINICAL LEGAL EDUCATION ASSOCIATION'S (CLEA) COMMENTS ON OUTCOME MEASURES TO THE ABA'S STANDARDS REVIEW COMMITTEE July 1, 2010

The Clinical Legal Education Association (CLEA) welcomes the opportunity to comment on the May 5, 2010 draft standards from the Student Learning Outcomes Subcommittee of the ABA's Standards Review Committee. In CLEA's view, the draft diminishes legal education by significantly weakening the professional skills requirement and reduces outcome assessment to an empty promise. Such a regulatory approach would sanction a shift back toward more passive learning in large classes. Graduates of American law schools will be less ready for the challenges of our changing profession if the draft standards are adopted.

The Weakening of the Professional Skills Requirement

Current Standard 302(a)(4) and Interpretation 302-3 require every school to offer each J.D. student "substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession" and interprets that requirement to be met by "one or more courses having substantial professional skills components" and "skills performances assessed by an instructor." Draft standard 303(a)(4) and draft interpretation 303-2 would only require a single "learning experience" evaluated by "a qualified assessor."

The proposal would curtail or eliminate the faculty role in skills education at some schools and reduce what is now a requirement for

(CLEA is the nation's largest association of law teachers, representing over 750 dues-paying faculty at over 150 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.)

"substantial instruction in professional skills" to a single learning "experience."¹ It is inconsistent with draft Standard 302(b)(2)(iii), which requires programs of legal education to seek "competency in . . . a depth and breadth of other professional skills sufficient for effective, responsible and ethical participation in the legal profession." The proposed language would discourage schools from offering a well-rounded educational program of professional skills development. It would permit a school to meet the professional skills requirement by offering a single low-credit ungraded simulation course taught for a single week, or even a single day, by an "assessor" with no other connection to the academic life of the law school. Some schools have already adopted this approach. It is a far cry from what law schools owe their students and the public.

The language we propose below strengthens the professional skills requirement by requiring faculty supervision of at least one upper-level semester long course in which students engage in multiple performances of lawyering tasks with appropriate feedback and self-evaluation and reflective evaluation by a faculty member.

The draft language of 303(a)(4) also equates simulation courses with live client clinics and field placements, suggesting that they are interchangeable in their educational benefits. Clinical education offers more than just opportunities for skills performance and qualitatively differs from what students receive in simulation courses. Students enrolled in live-client clinics and well-supervised field placements undoubtedly develop a range of professional skills: interviewing, counseling, factual analysis and investigation, negotiation, and persuasive advocacy. But clinical courses also place students in real practice situations, characterized by complexity, uncertainty and ethical depth. Acting in role in such situations, with opportunities for feedback and reflection, provides unique opportunities to develop professional judgment and ethical insight. The special benefits that clinical legal education provides are already recognized in Standard 303(b)(1), which requires law schools to provide substantial opportunities for students in live-client clinics and other real-life practice experiences. Whatever their benefits and their appropriateness, simulation courses cannot replicate these opportunities.

In the end, the focus should remain on what happens in the course. To that end, we would delete the language of the Committee's draft referring to simulation courses, live client clinics and field placement programs. Law schools should designate as "professional skills" courses only those that offer the experiences described in the proposed standard and its interpretation. Neither all simulation courses nor all clinical courses meet these requirements. The inquiry should focus on whether students receive faculty supervision, have multiple occasions to engage in performance of various skills over an extended time, have rich occasions for reflection, and receive effective feedback.

¹ The marginalization of the professional skills requirement stands out in stark contrast when compared with other sub-sections of draft Standard 303(b). Section 303(b)(1) requires one "course" in professional responsibility. Section 303 (b) (2) requires "one faculty supervised rigorous writing experience in the first year" and "one additional rigorous writing experience after the first year." In both cases, the standard and the interpretation requires multiple or semester-long exposure to the relevant competency. In both, the standard requires faculty supervision. By contrast, for professional skills, the standard requires solely an "appropriately supervised learning experience." The interpretation permits supervision by a "qualified assessor," a term found nowhere else in the Standards and one not specifically referencing faculty status.

Therefore, CLEA urges the following language for the relevant Standard and Interpretation:

Standard 303: CURRICULUM:

(a) A law school shall offer a curriculum that: . . .

(4) requires at least one faculty supervised, rigorous course after the first year that engages students in performances of one or more of the professional skills described in Standard 302(b)(2)(iii).

Interpretation 303-2

The courses described in 303(a)(3) should have the following characteristics: development of concepts and theories underlying the skills being taught; multiple opportunities for students to perform tasks with appropriate feedback and self-evaluation; and reflective evaluation of the students' performance by a qualified faculty member.

The Weakening of Outcome Measures

CLEA has long advocated for the use of sound outcome measures in legal education. As our recent publication, Best Practices for Legal Education: A Vision and a Roadmap,² points out, setting goals is not enough. Individuals and institutions must also attend to whether we meet our goals and improve our efforts based on what we know, not what we hope. However, the current proposed version of standard 304 ignores this reality. While schools would be required to set goals for student learning, they would not be required to engage in sound assessment of student learning. A central goal of the outcome assessment movement is being sacrificed on the altar of efficiency and ease.

As first proposed in October 2009, standard 303(a)³ reflected a sound, common sense understanding of outcome measures. It recognized that outcomes do not end with articulating goals and gave schools useful guidance to structure the development of a culture of sound assessment. Because it incorporates both common sense and sound educational practice, CLEA continues to support the approach to student assessment reflected in the October 2009 version of proposed standard 303(a). We are concerned about the current proposed standard on student learning outcomes, which has been renumbered proposed standard 304 in the drafts issued in January 2010 and after.

² ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

³ **Standard 303 ASSESSMENT OF LEARNING OUTCOMES AND INSTITUTIONAL EFFECTIVENESS (as of October 2009)**

(a) In assessing student learning outcomes, the dean and faculty of a law school shall

(1) identify, define, carry out and disseminate methods used for assessment about the attainment of its learning outcomes and determine the pedagogical effectiveness of the assessment activities;

(2) employ a variety of assessment methods and activities, consistent with effective pedagogy, systematically and sequentially throughout the curriculum to assess student attainment its learning outcomes; and

(3) provide feedback to students periodically and throughout their studies about their progress in achieving its learning outcomes.

The current draft standard profoundly undercuts the Committee's earlier approach. The language has been dramatically thinned and now only requires that "A law school shall apply a variety of formative and summative assessment methods across the curriculum to provide meaningful feedback to students." This proposed standard sets the bar so low as to be meaningless; schools already use either formative or summative assessments somewhere in their curricula. Further, the proposed standard requires no care in how law schools select methods of student assessment or implement change based on the outcomes observed. The new standard leaves schools free to propose outcomes without any mandate to determine whether they have met them or any guidance about how to do that with care or discipline.

CLEA is sensitive to the argument that moving to outcome measures could be expensive. The changes between the former and the current draft surely reflect pressure to minimize the costs of change. However, we think critics significantly overestimate the costs of these changes for strategic reasons and, moreover, we urge the central importance of encouraging improved student assessment in legal education.

Almost every law school already has experience with a range of valid qualitative assessment tools. The standard proposed last October could be met by intelligent redeployment of our current assessment resources. Faculty are well positioned to improve their practices and we will develop and improve our methods with experience. The earlier version of the standard would significantly improve legal education with modest and reasonable efforts. But the latest version, requiring no real change in assessment methods, will not improve legal education. Schools may identify inspiring goals for student learning, but no one will insist that they keep their promises. Our students will be the losers.

Some would raise the banner of experimentation, entrepreneurship and information efficiency, urging us to step away from regulation and let our students' tuition dollar preferences shape legal education. But individual preferences and market forces alone cannot drive this discussion. We must ensure that prospective students have a range of serious and responsible alternatives that prepare them for "effective, responsible and ethical participation in the legal profession". The ABA, in its accrediting role, must remain mindful of its obligations to the profession and the public to provide incentives for law schools to deliver on this promise as they balance competing demands of the market. Thoughtful and careful regulation is essential if we are to maintain the strengths that have made American legal education the envy of the world.

We are grateful for the ongoing opportunity to participate in this important discussion on Chapter 3 of the Standards for Approval of Law Schools. In addition to these comments today, we continue to urge the positions set out in our August 2008 position paper and in our October 2009 comment. For the reasons noted above, through these comments CLEA also asks that that Standards Review Committee adopt the language that CLEA has proposed above for standard 303(a)(3) and Interpretation 303-2, and that the Committee return to the formerly drafted language of Standard 303(a) found in its draft of October 2009.