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Clinical Legal Education Association

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THE CLINICAL LEGAL EDUCATION ASSOCIATION'S COMMENTS ON OUTCOME MEASURES TO THE STANDARDS REVIEW COMMITTEE OF THE ABA COUNCIL OF LEGAL EDUCATION OCTOBER 1, 2009

The Clinical Legal Education Association (CLEA)¹ submits these comments to the Standards Review Committee (the Committee) of the ABA Section of Legal Education and Admission to the Bar as it considers the role of outcome measures in the Accreditation Standards for law schools.²

CLEA supports Standards requiring law schools to identify learning outcomes that foster the effective and responsible practice of law. Law schools should provide training that assures proficiency in core lawyering competencies for all law students. Students should take several professional skills classes and should be required to take a clinic or a field placement program; their work in these courses should be carefully assessed. Students should have supervised practice experience in identifying, analyzing and resolving ethical dilemmas. Finally, law schools should not rely on bar passage to measure teaching success. Instead, schools should identify their teaching goals, regularly assess their success in achieving those goals, and routinely revise their curricula in keeping with those assessments.

The comments we provide in this submission are made in connection with the September 13, 2009 report and proposed revisions to the Standards (the discussion draft) written by the Committee's Learning Outcomes Subcommittee (the Subcommittee). We set out our views on the eight excellent questions posed by the Subcommittee, propose several amendments to the proposed revisions, and note the importance of institutional outcome standards as well as student learning outcomes and the continued importance of certain input measures.

¹ The nation's largest association of law teachers, CLEA represents approximately 700 annual dues-paying faculty at approximately 140 law schools. CLEA is committed to legal education that trains law students to be competent, ethical practitioners. Its membership consists of law professors who teach law students in role as lawyers and who have devoted considerable energy and attention to identifying, teaching, and assessing proficiency in the skills and values that are essential to lawyering.

² In 2008, the Council of Legal Education directed the Standards Review Committee to make recommendations about reframing the current ABA accreditation standards to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures. On September 13, 2009, the Student Learning Outcomes Subcommittee of the Standards Review Committee issued a draft report and proposed revisions to the accreditation standards for consideration by the full Committee; this report will be discussed at the Committee's October, 2009, meeting.

Question 1: *Should the Standards specify key learning outcomes that each law school must measure or should the Standards leave it to law schools to determine which learning outcomes they seek to measure?*

Substantial consensus now exists about the core competencies for effective law practice, as reflected in the three most influential reports on legal education of the past twenty years: AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT AN EDUCATIONAL CONTINUUM REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (July 1992) (*MacCrate*); Roy Stuckey and Others, BEST PRACTICES FOR LEGAL EDUCATION (2007) (*Best Practices*); and William Sullivan et al, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (the *Carnegie Report*). More recent work offers empirical support for the consistent taxonomies that underlie and unite these visions, Marjorie Shultz & Sheldon Zedeck, *Identification, Development and Validation of Predictors for Successful Lawyering*, SSRN, (2008). Existing Standard 302 reflects that consensus, requiring several key learning outcomes and reflecting a wholly appropriate implementation of the ABA's role in regulating how law schools prepare law students for the practice of law.

Question 2: *If the Standards specify key learning outcomes, how specific should those specifications be with respect to lawyer skills? Must all law students master all lawyer skills? At what level?*

Both existing Standard 302 and the discussion draft standard describe the key learning outcomes with an appropriate level of specificity. Schools are given guidance to help all students achieve learning outcomes sufficient for "effective and responsible practice of law," while accounting for a range of curricular goals, demographics of admittees, and markets for graduates among law schools.

CLEA supports the continued inclusion of several learning outcomes that appear in existing Section 302 and the discussion draft, including: "knowledge and understanding of . . . substantive law", and "legal analysis and reasoning, legal research, problem solving, and written and oral communication in a legal context," as well as the continued usage of the term "professional skills" in Standard 302.

In contrast, however, the learning outcomes presented in the both the original and the discussion draft of Interpretation 302-2 are at once both overly specific and overly general. The proposed language equates some very general skills (e.g., "problem solving") with some very narrow skills (e.g., appellate advocacy). By its terms this interpretation would permit a school to do no more than assess a student in a single skill taught in a single course, as though proficiency in a single skill were sufficient professional proficiency for a law graduate. It would not ensure that students receive the integrative pedagogy needed to gain insight into the effective and responsible practice of law.

Using the *MacCrate* language as a template, and adopting the *Carnegie Report's* theme of integrative pedagogy, CLEA proposes the following language as a substitute for the last sentence of discussion draft Interpretation 302-2:¹

Interpretation 302-2

~~*Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).*~~ *Professional skills proficiency fulfilling Standard 302 must include legal problem-solving and legal analysis. Students must also demonstrate proficiency in some combination of other skills, including legal research, factual investigation, communication, client and other interpersonal relations, counseling and/or negotiation. In setting learning goals, and consistent with their curricular goals, schools are encouraged to offer learning opportunities relating to different practice contexts, including advocacy (in litigation and other disputing forums), transactional practice and legislative, administrative or practice in other public forums.*

This approach better identifies the set of central and broadly applicable skills needed for effective law practice, which cut across practice areas and practice settings, and better balances the need to achieve lawyering proficiency with the curricular flexibility that law schools should retain. The proposed language also adds client and other interpersonal relations to the list of specified skills. The capacity to create and sustain personal relationships in a professional context involves different capacities than communication, and represents a core lawyering competency.

Law schools obviously cannot be required to ensure that every law student achieve mastery of lawyering skills. Proficiency, a more flexible concept, is an appropriate and attainable outcome. We stress, however, the need for students to gain proficiency in a coherent set of competencies. None of the listed skills should individually be sufficient for graduation. While counseling, for example, is a distinct skill with its own theories and techniques, the proficient counselor must also analyze the law, communicate effectively, solve problems, and recognize ethical issues. A standard that requires that students demonstrate proficiency in “some combination of ... skills,” ensures that law graduates will have achieved a degree of competence in legal practice.

Question 3: Should the standards address measurements of whether students possess the “values of a good lawyer”?

In addition to knowledge and skill, good lawyering requires adherence to the profession's values. A student's ability to recognize, analyze, and manage professional ethical dilemmas, and to conform to basic norms such as integrity, honesty, and meeting obligations, should be assessed by every law school. Notably, supervised client representation in a clinical setting is uniquely suited to this task. Actual legal matters

³ Problem-solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, dispute resolution (including litigation and ADR), and law practice management have long been identified as core lawyer competencies. In line with current thinking, we add interpersonal relationships and transactional practice, including transactional problem-solving, deal negotiation, the legal dimensions of forming and managing of businesses and drafting.

present rich value questions to students and provide strong motivation to engage them. Close faculty supervision and careful reflection in this setting promote ethical development.

We therefore suggest the following revision to discussion draft Standard 302(a)(3):

(3) knowledge and understanding of a lawyer's ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice, including demonstrated ability to identify, analyze and resolve ethical dilemmas in clinical or simulated practice settings.

While other teaching methods can play an important role and a combination of methods is optimal, clinical courses have a special and powerful role in this area.

Question 4: *How much guidance should the interpretations give on assessment of student growth, etc.? How should assessments be validated? Internal and/or external?*

The discussion draft Standard 303 reflects sound pedagogy and is consistent with approaches detailed in BEST PRACTICES, which encourages internal validation of the assessment of student outcomes, along with regular curricular review by each law school. Law schools should be the primary assessors of the quality of their own work product, and be accountable for both identifying and meeting student learning outcomes.

Question 5: *Should law schools be required to evaluate their students' outcomes regularly so as to produce systematic improvement in the curriculum?*

Regular evaluation of student outcomes is a pedagogical best practice; we urge that the Standards require it.

Question 6: *Should bar passage standards be deleted?*

CLEA has long favored this deletion. Bar passage does not measure the full extent of a law graduate's proficiency in role and too often has a disparate impact on those traditionally excluded from the Bar.

Question 7: *Should the Standards continue any specific curricular requirements, e.g. upperclass writing; opportunities for live-client, pro bono, small group? Should these be tightened?*

The Standards should certainly mandate certain curricular requirements, and in particular should require that every law student have several significant in-role educational experiences as do all other American professional schools. All law schools should require their students to participate in clinical courses in which they represent clients or in well-supervised field placement programs.

Carefully constructed simulation courses might also appropriately be required by law schools in addition to, but not in place of, participation in a clinical program. Well-designed simulations use complex problems to train a combination of different competencies, require a mix of collaboration and competition among students, and include regular, detailed formative assessments of student performance by faculty.

The Standards should require that each student have several of these experiences during law school. Lawyering is complex and demanding. Just as proficiency in legal analysis requires multiple courses over several years of law school to attain, the achievement of proficiency in most other lawyering skills requires repeated exposure throughout a legal education.

CLEA proposes the following revision to discussion draft Standard 302(c):

Standard 302

(c) A law school shall require that every student have several learning experiences in live-client clinics, field placements or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence.

Question 8: *Given the magnitude of change contemplated by these standards, should the ABA postpone the effective date? Should there be an interim period where schools undergoing sabbatical inspections might elect to be evaluated under either the old standards or the new standards?*

These important changes should move forward without delay. We recognize that the shift to outcome measures will represent a transition in mindset and in approach, both by law schools and by the Council during accreditation. Nonetheless, the practical consequences of these changes, carefully examined, are relatively manageable.

Additional Observations on the Transition to Increased Reliance on Outcomes

A. Outcome Measures and Faculty Teaching

Accreditation standards that include a focus on the outcomes of law student learning of lawyering proficiency constitute welcome progress in the regulation of legal education. But these are not sufficient. In addition, the Committee should carefully consider a similar shift towards assessing outcomes related to faculty teaching effectiveness. As with student learning outcomes, law schools should measure its faculty's teaching outcomes, using internally validated methods of assessment, and resulting in regular reform and revision of the curriculum and faculty composition.

Such a process overlaps with but is not identical to the process for measuring student proficiency in lawyering competencies. The careful assessment of student learning should produce data that will inform the measurement of faculty teaching effectiveness, and vice versa. At the same time, the ultimate use of that shared data is quite different. Faculty teaching assessments should permit a better allocation of teaching resources within a school, more careful identification of hiring needs as related to curricular goals, and a more useful assessment of the differing demands for faculty performance, including teaching, scholarship, and service obligations. To that extent, these assessments should produce a more balanced and realistic application of resources to produce the school's chosen outcomes for student learning.

B. The Ongoing Role of "Input" Standards

The proposed transition to increased reliance on outcome measures will require and benefit from close attention to determining which "input" standards should be retained and indeed strengthened as the review of the Standards proceeds. Input and outcome measures are inevitably and usefully linked. Outcome measures move us toward a better future in which inputs and outcomes will be transparently coupled – we will insist on certain inputs because we will see how they relate to and produce desirable outcomes. Instituting these new outcome-oriented standards will open a period of exploration, in which both law schools and the ABA can assess that relationship.

In the meanwhile, and into the future, input standards will continue to play an important role in ensuring the quality of legal education. While it is useful to analogize the law school accreditation process to regulation of businesses, markets and other complex societal structures, our unique context, mission and history should not be ignored. We urge the Committee to move forward realistically and with respect for its past practices and the proper role of the Council in overseeing the complex balancing of interests in modern legal education. CLEA looks forward to continuing to be of assistance as that work proceeds.