MEMORANDUM

TO: Greg Murphy, Chair
Council of the Section of Legal Education and Admissions to the Bar

FROM: Barry Currier, Managing Director
Section of Legal Education and Admissions to the Bar

DATE: October 7, 2016 (revised October 11, 2016)

RE: Review of the Standards, Interpretations, and Rules of Procedure

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As provided for in Council Internal Operating Procedure 8, at the beginning of each academic year, the Managing Director shall extend a general invitation for suggestions for revisions to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. To that end, a memorandum was circulated on August 24, 2016, to interested parties and entities, and posted on the Section's website.

As of today's deadline, the Section has received the following four comments in response to the August memorandum:

- ABA Commission on Disability Rights and ABA Commission on Sexual Orientation and Gender Identity (supported by the Commission on Women in the Profession)
- ABA Standing Committee on Professionalism
- Andrew Straw
- Antonio Garcia Padilla
- Jim Tozzi, Center for Regulatory Effectiveness (supported by Barbara Bankoff, Consultant, Washington, D.C.)

Additionally, the staff offer the following suggestions for items to be reviewed by the Standards Review Committee (SRC) during the 2016-17 academic year:

- Standards relating specifically to part-time students and programs: The SRC forwarded a recommendation to replace Standard 312 (Reasonably Comparable Opportunities) with a new interpretation to Standard 301 that would serve the purpose of directing schools' and the Accreditation Committee's attention to the way in which law schools that have part-time students assure that they have adequate access to the school's services (e.g., career services), curriculum, and co-curricular activities. The Council was not satisfied with the proposal and returned the matter to the SRC. This matter should remain an item on the SRC's agenda. Fewer and fewer schools have formal part-time programs, and more and more schools are providing flexibility to accommodate part-time students. Further full-time students often want to take

classes offered in the evenings or on the weekend–times that had usually been the preserve of the part-time programs. The Standards and Interpretations need a more contemporary approach to how, if at all, part-time attendance or support for part-time study needs to be specifically addressed by the Standards.

- Reviewing Standard 105 and related standards regarding major changes: The Standard contains a mixture of changes that might happen to a law school or law school program. Some provisions are required by the U.S. Department of Education (DOE), but not all. Standard 105 should be reviewed to make sure that it is consistent with DOE requirements, that it specifically includes any other major changes that the Council believes should require acquiescence (e.g., changing from a for-profit to a non-profit entity, or vice versa), and that matters that are not DOE-required or that may no longer need special review be removed from the Standards.

Defending Liberty
Pursuing Justice

Memorandum

Date: October 04, 2016

To: Gregory G. Murphy, Chair
Section of Legal Education and Admissions to the Bar

From: Robert T. Gonzales, Chair
ABA Commission on Disability Rights

Mark Johnson Roberts, Chair
ABA Commission on Sexual Orientation and Gender Identity

CC: Barry A. Currier, Managing Director of Accreditation and Legal Education
Section on Legal Education and Admissions to the Bar

Subject: Standard 206

The Commission on Disability Rights (CDR) and the Commission on Sexual Orientation and Gender Identity (SOGI) respectfully suggest that the Council of the Section of Legal Education and Admissions to the Bar take up again revising Standard 206 of the *ABA Standards and Rules of Procedure for Approval of Law Schools*.

In August 2014, as part of the Comprehensive Review of the Standards, the Council approved revised Standard 206. The title of the revised Standard was changed from "Equal Opportunity and Diversity" in former Standard 212 to "Diversity and Inclusion" to emphasize the purpose of the Standard. CDR and SOGI began our engagement with the Section in January 2014, when we urged that the coverage of the Standard be expanded to include "gender identity, sexual orientation, and disability"—diversity categories that are covered by the ABA's own Goal III—in the list of specifically identified underrepresented groups. The Council declined to adopt this recommendation. Two months later, CDR and SOGI wrote to Judge Solomon Oliver Jr., then the chair of the Section, requesting that the Section reconsider the matter. The Section declined to do so, and the two commissions advised the Section that they were prepared to oppose the proposed revisions to the Standards as a whole (Report 103A) when they were presented to the House of Delegates (or to move to sever Standard 206) unless the Section agreed to undertake a further review of Standard 206. At the 2014 Annual Meeting, Judge Oliver informed the House that the Section would undertake such a review, and CDR and SOGI withdrew their opposition to the Report. The Council directed the Standards Review Committee to review the concerns raised and to draft any appropriate recommendations.

In February 2015, the Committee invited CDR and SOGI to participate in an Informational Session in Washington to discuss potential revisions to Standard 206. CDR provided, in addition to our prepared statement, written responses to a series of questions propounded by the Committee to assist them in framing an inclusive Standard with which law schools could comply in a meaningful and measurable way. The Committee presented possible revisions to Standard 206 to the Council in June 2015. The text of proposed Standard 206 stated: "Consistent with

sound legal education policy and the Standards, a law school shall provide an environment in which diversity and inclusion are welcomed and embraced. A law school shall demonstrate this commitment to diversity and inclusion by concrete action." Interpretation 206-2 made clear that the requirements to "provide an environment in which diversity and inclusion are welcomed and embraced" and "to demonstrate this commitment to diversity and inclusion by concrete action" apply, "without limitation," to "race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability."

During the discussion of the proposed revisions at the Council Meeting, Council members expressed concern that the proposed changes would result in diluting the Standards' commitment to historically underrepresented groups. The Council discussed the possibility of separating into two different provisions the commitment to historically underrepresented groups and the requirement of having an environment in which diversity and inclusion are welcomed and embraced. Rather than send the proposal out for comment as drafted, the Council decided to ask the Committee to consider the concerns raised and draft revised recommendations.

The Committee's revised Standard would require a school to demonstrate by concrete action (1) a commitment to providing an environment in which diversity and inclusion are welcomed and embraced; (2) a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities; and (3) a commitment to having a faculty, staff, and student body that is diverse with respect to gender, race, and ethnicity.

In a January 22, 2016 letter to Section Chair, the Honorable Rebecca White Berch, CDR and SOGI stated that the draft departs substantially from the inclusive language of the Committee's prior draft and largely returns the Standard, with minor modifications, to the exclusionary language to which we had objected two years earlier:

> • Although the proposed new Standard requires law schools to provide "an environment in which diversity and inclusion are welcomed and embraced," it requires "concrete action" in support of that commitment solely with respect to the original categories of gender, race, and ethnicity. In reverting to this language, the new draft explicitly disavows the Committee's earlier efforts to require law schools to create an environment in which persons with disabilities and lesbian, gay, bisexual, or transgender (LGBT) individuals are "welcomed and embraced."
>
> • The proposed new Standard reinstates the language from the original Standard requiring law schools to commit to "providing full opportunities for the study of law and entry to the profession by members of underrepresented groups, particularly racial and ethnic minorities" and to "having a faculty, staff, and student body that is [sic] diverse with respect to gender, race, and ethnicity." In reverting to this language (with the addition of "faculty" and "staff"), the new draft explicitly disavows the Committee's earlier efforts to require law schools to provide full opportunities for the study of law and entry to the profession by persons with disabilities and LGBT individuals. We also would suggest parenthetically that the phrase "providing full opportunities for the study of law and entry to the profession by members of underrepresented groups, *particularly* racial and ethnic minorities," is incoherent. To say that there should be "full opportunities for Smith and

Jones, but *particularly* for Jones," presumably means that the opportunities to be accorded to Smith are less "full" than those provided to Jones.

• The sole reference to disability, sexual orientation, and gender identity in the proposed new Standard is found in Interpretation 206-2, tracking language from the Committee's initial proposal, observing that a "diverse and inclusive law school environment . . . enables faculty and staff to carry out the law school's program of education in a setting that invites open and constructive dialogue among individuals who are diverse with respect to characteristics that include race, color, religion, national origin, gender, gender identity, sexual orientation, age, and disability." However, this reference serves only to underscore the exclusionary nature of the new proposal. Like the new proposed black letter Standard, the Interpretation "requires that a law school demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race, and ethnicity." The Committee's original proposal included in the black letter the requirement that "a law school demonstrate this commitment to diversity and inclusion by concrete action," without limiting the scope of the requirement to those categories. For those underrepresented groups who are diverse in other ways, the new Standard would offer, in lieu of any comparable requirement, only the opportunity to engage in "open and constructive dialogue."

On January 29, 2016, SOGI staff director Skip Harsch, on behalf of CDR and SOGI, testified at the ABA Public Hearing to express the concerns stated in the letter.

Following that hearing, the Council had continuing concerns about the best approach to take with Standard 206 and tabled consideration of changes to the Standard to consider options. The Council did not refer the issue back to the Committee. No timetable was set for consideration.

CDR and SOGI request that Standard 206 be revisited, and express our interest in working with the Section in good faith.

To: Barry Currier, Managing Director
Section of Legal Education and Admissions to the Bar

From: Jayne R. Reardon, Chair
Standing Committee on Professionalism

CC: Becky Stretch, Assistant Consultant, Legal Education
JR Clark, Manager, Program Administration, Legal Education

Date: September 30, 2016

Re: Notice of Request for Section Consideration of the Standing Committee on Professionalism's Proposed Amendment to Standard 303 Regarding Experiential Education

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The Standing Committee on Professionalism (Professionalism Committee) requests that the Council of the Section of Legal Education and Admissions to the Bar call for consideration, in 2017, of the Professionalism Committee's proposal to amend Accreditation Standard 303, Curriculum, by adding language to provision (a)(3)(i) mandating that professional identity formation be among the subjects integrated into a qualifying experiential learning course.

Proposed Amendment to the Black Letter

Add "professional identity formation" to the series of experiential coursework topics mandated in Standard 303(a)(3)(i), as stated in redlined format below:

> **Standard 303. CURRICULUM**
> (a) A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: ….
>
> (3) one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement. To satisfy this requirement, a course must be primarily experiential in nature and must: (i) integrate doctrine, theory, skills~~, and~~ legal ethics, and professional identity formation, and engage students in performance of one or more of the professional skills identified in Standard 302; ....

If the Council believes that an interpretation would be helpful in delineating what the addition of "professional identity formation" is meant to accomplish, the Standing Committee on Professionalism offers the following proposed interpretation:

Proposed New Interpretation 303-5

In an experiential course, a student is guided in the development of the student's future professional identity as a lawyer through assuming the role of a lawyer in actual and/or simulated performances. These performances should be designed to expose students to the kinds of hard choices that arise in the lawyer's work. Through feedback, reflection, and self-evaluation, students should learn how the lawyer's duties as a representative of clients, as an officer of the

legal system, and as a citizen having special responsibility for the quality of justice take priority over the lawyer's self-interest.

Purpose of Proposed Amendment

Standard 302(c) requires schools to include within their learning outcomes "exercise of proper **professional and** ethical responsibilities to clients and the legal system." [Emphasis added.] Standard 303(a)(3)(i) as currently written, however, covers only the "ethical responsibilities" element of 302(c) in requiring that the experiential course or courses integrate "legal ethics" with the learning of doctrine, theory, and skills.

One of the key findings of the Carnegie Foundation Report on legal education is that in the standard law school curriculum, "legal ethics" is often understood only in terms of the rules of professional conduct and "what kinds of violations are subject to sanctions." The Report goes on to say that such "a narrow focus misses an important dimension of ethical development — the capacity and inclination to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice."[1] The Carnegie Report focused on an acute, unmet need for emphasis on the "third apprenticeship of identity," which "introduces students to the purposes and attitudes that are guided by the [profession's] values … [and] ideally taught through dramatic pedagogies of simulation and participation."[2] The Carnegie Report concludes that legal education "needs to combine the elements of legal professionalism—conceptual knowledge, skill and moral discernment—into the capacity for judgment guided by a sense of professional responsibility."[3]

Extensive empirical research has shown that integration of personal and professional values into a well formed and thoroughly internalized identity is critical to the exercise of professional judgment and professional responsibility. The same empirical research supports a variety of teaching and assessment methods for professional identity development already being implemented in many law schools.[4] Professional identity formation is a widely adopted learning outcome in other programs of professional education, including medical and dental schools and military academies.

Inclusion of "professional identity formation" in Standard 303(a)(3)(i) will provide important clarification and guidance for the use of experiential courses to develop competency in professional responsibility and not just "legal ethics" narrowly understood as rules compliance.

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[1] William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 148-49 (2007).
[2] *Id*. at 28.
[3] *Id*. at 12.
[4] *See, e.g,* Neil H. Hamilton, Verna E. Monson & Jerome Organ, *Empirical Evidence That Legal Education Can Foster Professionalism/Professional Formation to Become an Effective Lawyer*, 10 UNIV. ST. THOMAS L.J. 11 (2012); Clark D. Cunningham, *Learning Professional Responsibility*, in BUILDING ON BEST PRACTICES (Deborah Maranville et al eds. 2015), updated version available at http://www.teachinglegalethics.org/learningpr.

Sent: Monday, October 10, 2016 11:41 PM
Subject: Form 509 & Law Students with Disabilities

Dear Section of Legal Education and Admission to the Bar,

I am a disabled lawyer and ABA member. The ABA Commission on Disability Rights has honored me as its "spotlight" attorney with disabilities in 2014.

I am concerned that this Section continues to not collect information on disability when it has collected the exact same information on race and gender for decades.

Will you please confirm to me whether this unjustified difference is going to be changed next year? People with disabilities need to know these statistics when they are considering law schools, just like women and minorities do with this information on the Form 509.

If this information is still not being collected on Form 509, I formally request that the ABA start collecting it as of next year.

There is no good reason not to collect this information. It should be voluntary and anonymous, just like for race and gender.

Thank you for considering the need for disability statistics so as to track improvements and schools that don't do as well.

Respectfully,

Andrew Straw

Andrew U. D. Straw

Attorney at Law, admitted to practice in:
U.S. District Court, Northern District of Illinois
U.S. District Court, Northern District of Indiana
U.S. District Court, Southern District of Indiana
U.S. District Court, Western District of Wisconsin
U.S. Court of Appeals for the Fourth Circuit
Indiana Supreme Court, Active in Good Standing, 2002 admission
Virginia State Bar: Member, Active in Good Standing, 1999 admission

ANTONIO GARCÍA PADILLA

September 14, 2016

Barry Currier
Executive Director
ABA Section on Legal Education and Admissions to the Bar
321 N. Clark Street
Chicago, IL 60654-7598

Antonio García Padilla

Standard 505(f)

I write in response to your Memorandum dated August 24, 2016, requesting suggestions for revisions to the Standards and Rules.

Back in 2014, I proposed to the SRC that Standard 505(f) be revised to return to the rule established under Standard 308 until 1993. Up until then, Standard 308 allowed schools to grant advanced standing for foreign study to a maximum of two thirds of the credits required for the first professional degree. I include my memorandum of 2014 to the SRC.

I raise the issue again in light of the Council's efforts with the several bar authorities aimed at limiting admission to lawyers holding an ABA approved law degree. The recent resolution of the Conference of Chief Judges along those lines is a significant step towards such end. In my view, however, an obstacle for achieving the objective is the actual rule that prevents schools from granting a JD to foreign graduates upon pursuing less than two years of studies, even if the schools are convinced that the studies undertaken abroad would make a second year of studies repetitive.

When Standard 308 was changed in 1993, Bob Walsh clearly anticipated the way the state of affairs evolved: "*Dean Walsh suggested*" – the Council minutes state – "*that an informational meeting be held to stress that the LL.M. alone should not enable foreign lawyers to sit for the bar examination.*" Council Minutes 5 (December, 1992).

I commend the Council's efforts to close the possibility of accessing the bar with any degree other than the ABA regulated JD, including the non-ABA-regulated LLM. But we should address the reason why some states might have turned to the LLM as a bar credential.

I suggest that Standard 505(f) be revised.

Warm regards.

Attachment

29 March 2014

Dean Jeffrey Lewis
Chair
Standards Review Committee
Section on Legal Education and Admissions to the Bar
American Bar Association

Antonio García Padilla

Standard 505 (f)

I write to propose an amendment of Standard 505(f) as now drafted by the Standards Review Committee. I suggest that Standard 505(f) return to the more flexible approach that the standards once held towards the granting of advance standing and credits towards the JD for law studies undertaken abroad. I consider this to be one critical issue that the current standards review process faces. I hereunder explain my view.

As we know, Standard 308 provided that:

> **Advanced standing and credit allowed for foreign study shall not exceed one-third of the total required by the Standards for the first professional degree unless the foreign study related chiefly to a system of law basically followed in the jurisdiction in which the admitting school is located; and in no evet shall the maximum advanced standing and credit allowed exceed two-thirds of the total required by the Standards for the first professional degree.**

As such, Standard 308 allowed schools to assess the profile of applicants coming from abroad and, upon such evaluation, tailor the course of study appropriate for completion of the ABA-regulated JD, provided that advance standing did not exceed two thirds of the requirements for such JD and that the studies undertaken abroad “related chiefly” to the system of law in which the

admitting school operates. In my view, the more restrictive stance of current Standard 507(b), and proposed Standard 505(f), runs against the trends and demands of the times and leads to the growth and consolidation of the current inconsistencies in the ways to access the profession in the United States. In my view, it is time to put this matter back on the right track.

In its current form, Standard 507 establishes that:

> **Advanced standing and credit hours granted for foreign study may not exceed one-third of the total required by an admitting school for its J.D. program.**

As anticipated, the adoption of the actual language of Standard 507(b) has led to the creation of an alternate entrance to the American legal profession: the non-ABA-regulated LL.M. Since under Standard 507(b) schools are not allowed to grant advanced standing beyond one third of the credits required for graduation, a student with a foreign degree would be forced to spend two years in an ABA – approved school in order to get a bar-qualifying JD degree. But that same student could sit for the bar by spending only one year in an American law school if he or she chooses, instead, to register in a non-ABA- regulated LL.M. program. Not surprisingly, the LL.M. is today the academic credential used by many attorneys trained abroad to gain access to the profession in the United States. I do not think the actual structure is internally consistent and, consistencies aside, right.

Under Standard 507(b), an ABA-approved school would be precluded from granting advanced standing to foreign graduates, beyond one third of its program, even if the school is convinced that the program taken abroad towards the foreign degree would make more than one third of the domestic program repetitive. For this, the rationale that comes to mind is the legal socialization value of a long in-residence experience – the cultural benefits of spending two years in an ABA-approved school. But then again, the system, as a matter of fact, negates such theory inasmuch as it now recognizes that one year in residence is satisfactory in terms of the professional socialization of the attorney-to-be if the student is pursuing an LL.M. rather than a JD. Hence, I see no value in making twice as difficult for each and every foreign-trained attorney to access the profession in an American jurisdiction through a JD than through an LL.M.

The ABA accreditation system has the capacity to scrutinize the way in which approved schools exercise their discretion in granting advanced standing to

foreign graduates. Schools should be compelled to show that they have acted rigorously in assessing the overall quality of the foreign institution granting the applicant's foreign law degree, the significance of the courses taken, the way the foreign program relates to the program offered by the receiving school, and the like. The system does not have the same tools – and should not look for developing them – regarding the LL.M. Actually, I think that the ABA stance should be that there is no need to recognize the LL.M. as a bar qualifying degree, so far as the JD, properly regulated, provides enough flexibility to cover the needs of good attorneys trained abroad.

In my view, not only has Standard 507(b) led to the continuous growth of the LL.M. as a bar-oriented degree in prominent U.S. jurisdictions, but it has likewise led the ABA to explore ways to accredit schools abroad in order to make itself sensitive to the dynamics of a more integrated world: another alternative to the JD unnecessary if enough flexibility is given to schools in assessing the profile of attorneys trained abroad.

Under the two-thirds-maximum rule that Standard 308 once maintained, several interesting experiments were undertaken, under the realm of the JD, to meet the legal demands of markets coming closer every day. The stricter norm adopted under current Standard 507(b) forced some of these initiatives to operate as "exceptions". Further experimentation with the JD, in this context, was sadly cut short. I think it is time to reopen the space we then closed.

Best regards.

Memorandum To: Standards and Accreditation Committee
American Bar association

From: Jim Tozzi [1]
Center for Regulatory Effectiveness

Subject: Increasing Attorney Expertise in the Regulatory State.

The purpose of this memorandum is to request that the Committee on Standards and Accreditation address the increasingly greater subject matter deficit in law school curricula which makes it difficult for graduates to cope with the broad reach of the regulatory state.

The size of the regulatory state expands with each new statute, regulation, guidance document, permit, license or payment to a beneficiary of a government program administered by a governmental body be it at the federal, state or local level. It appears that irrespective of an attorney's practice area that the quality of the work product delivered by an attorney is increased with a knowledge of the inner workings of the regulatory state.

Notwithstanding the attention accorded to the regulatory state by all branches of government, law schools seldom approach or even come close to matching the expectations of the aforementioned governmental bodies. Not only is administrative law not a required course but even when it is taught its curriculum dwells on teaching students how to practice before a court not before a federal agency. We at the Center for Regulatory Effectiveness are requesting that this committee address this issue.

In particular we believe the Committee should be instrumental in establishing a group to study and report on the aforementioned issue. The group should be multidisciplinary, including representatives from the legal, economics, public policy, and public administration professions. We understand that the task is a

[1] http://thecre.com/pdf/20160228_tozzi.pdf

difficult one because of opaqueness of the regulatory process. It is for this reason that our center has developed the OIRA Teaching Module[2].

The views presented herein have been vetted[3] not only within the CRE but within leading educational institutions over a considerable period of time.

We look forward to any action the committee might take to implement the recommendations set forth herein.

Washington, DC
October 2, 2016

[2] http://www.thecre.com/oira_forum/?p=5363
[3] http://www.thecre.com/forum8/?p=271