**MEMORANDUM**

To: Leo Martinez, Chair
William Adams, Managing Director
Council of the ABA Section on Legal Education and Admissions to the Bar

From: Barry Currier

Re: Comments on prosed revisions to standards, interpretations, rules of Procedure, and definitions

Date: January 21, 2022

Thank you for the opportunity to comment on proposed changes to the ABA Standards for Approval of Law Schools ("Standards") and proposed changes to Interpretations to those Standards ("Interpretations"). In general, the proposed changes involving pedagogy/distance learning and diversity/inclusion, on which I focus here, should be welcomed by the legal education community and I support them. The proposed changes to Standard 206 are an improvement on the current Standard, though I am concerned about the feasibility of moving to an outcomes rather than an efforts approach. The other changes that are proposed to Rules of Procedure 19 and 29 and Standards 311(c) and 405(b) are also appropriate and helpful.

**Proposed Changes to the Regulation of Distance Education**

1. I support the proposed change to Definition (7) and whether a course becomes a Distance Education Course subject to the cap on credits imposed by the current Standards and proposed revisions to Standard 311(e). When a course is designed to be delivered in a traditional classroom setting ("F2F") and, for a variety of reasons, one or several students are given permission to experience that course remotely, it does not make sense to consider that course a Distance Education Course for students attending the F2F class, as the proposed changes make clear.

   I wonder, however, how the Council will handle variations on this simple fact pattern. For example, what if a course is offered simultaneously at more than one law school? A course might be delivered F2F by a faculty member at her home school and remotely and synchronously to students at one or more other schools. The split between students sitting in the F2F classroom and the remote students will vary, as will whether the remote students are together in a classroom(s) elsewhere or all dispersed and accessing the course on a personal computer.

   *In general, as the number/percentage of remote students increases, at some point the course becomes a Distance Education Course for all the students, including the small number who show up to a classroom room at the professor's home school?* While the few students in a room with the professor are F2F, surely a course that is designed and operates more like a distance education course becomes a distance education experience, even for the few students sitting a few feet from the professor. How the professor teaches will certainly be different if most students are in the room, as opposed to most students being dispersed.

2. I support the reactivation of Standard 306 to put into the black letter the definitions of "regular" and "substantive" interaction. This is excellent, and I encourage its adoption.

3. I support Proposed Standard 311(e), clarifying the current limit on the amount of Distance Education Course credits that can count toward the J.D. degree. While I hope that the Council will return to a discussion of those limits, for now I encourage you to adopt this proposed change, which clearly states the current limitation on the use of distance learning in J.D. programs.

   Perhaps it would help to capitalize "Distance Education Courses" in the two places that label appears in the proposed revision, referring the reader back to Definition (7). There is a difference between "distance education," which is any learning that takes place where the professor and students are separated from each other in time or space, and a "Distance Education Course," which is a specifically defined type of course where more than one-third of the instruction happens as distance education. In fact, a student can earn more than 1/3 of the credits required for the J.D. by distance education instruction because, as you know, up to one-third of every course can be distance education without the course becoming a "Distance Education Course" that is subject to the cap on credits imposed now and by the proposed revisions to Standard 311(e).

4. I encourage the Council to return to the discussion of the current caps imposed on Distance Education Courses with an eye toward removing them, focusing instead on whether all courses meet the requirements imposed in Chapter 3 that a course is rigorous; helps prepares students to pass a bar exam and to be responsible and effective members of the legal profession; includes appropriate learning outcomes and is consistent with the law school's overall curricular plan; meets the programmatic requirements of Standards 310 and 311; and, as well, fits the requirements of Standards 314 and 315 for assessment of student learning and the ongoing evaluation of the success of the school's J.D. program. If a school's J.D. program is doing all of that, why is there a reason to go behind the school's choice of how to deliver that education, whether in the F2F classroom, online, experientially, in a problem-based format, in small or large groups, in semester/term formats, with certain kinds of examinations, and so on. The focus should be squarely on the accomplishment of the objective of the legal education program, not the mode of delivery.

   On a related point, if courses need to be sorted into categories based on the way a course is delivered, might it make sense to follow the model used for experiential learning courses[1] and have three categories: Distance Education Course, F2F course, or a mixed or hybrid course based upon the design of the course? I don't know exactly what that regulatory framework for a more contemporary distance education world might be, but the framework in the current standards seems far from adequate to provide the range of options now available to faculty and schools seeking to provide the best possible learning environment and program for their students. And, how a course is delivered should probably be a non-factor if the learning outcomes are achieved.

[1] See Standard 304(b)-(d).

**Proposed Changes to Standard 206**

1. I agree with the Council's approach to base the regulation imposed by Standard 206 on achieving the effective educational use of diversity in a sound program of legal education. The comments that follow specifically address proposed Standard 206(a)(2) and (c) and proposed Interpretation 206-2. I support and encourage the Council to adopt all other pieces of proposed Standard 206 and its Interpretations, including the collection and publication of data on faculty, staff, and student diversity in the consumer information that the Council collects and publishes.

2. Dissatisfaction with the current "efforts" standard. Current Standard 206 is an "efforts" standard. It calls on the Council to find a school out of compliance if it is not "demonstrate by concrete action" a "commitment" to diversity and inclusion. In my experience, many law schools that are sincere in their commitments to diversity and inclusion have contexts (e.g., location, budget, etc.) that make it difficult to make the progress the school wants to make; good efforts, concrete efforts, might not produce good results. For other schools, the commitment to diversity is one of several goals that a school seeks to advance; in the totality of the circumstances in particular case(s) – a hire to be made, student aid to be given – other goals or needs prevailed. Perhaps less diversity was achieved than would have happened with a different ordering of priorities, but the Council found sufficient facts to conclude that the commitment and actions that the standard requires were there. In neither case there may have been little to no increase in diversity at the school; and, overall, too little progress has been made across legal education. Proponents of changing the standard to focus more on accomplishments or outcomes urge that a more aggressive regulatory approach will yield better outcomes and more progress.

3. While sharing the frustration over the lack of diversity in legal education and the legal profession, in particular, I question whether the proposed change of approach is workable. The approach of proposed Standard 206 is much more aggressive and direct: require diversity.

   The plain meaning of the proposed standard is that a law school that does not have faculty and staff that are members of underrepresented groups,[2] particularly those related to race and ethnicity, is out of compliance with the standard.[3] Or, a school that does not have at least one member of each underrepresented group among students, faculty, and staff does not meet the requirement of proposed Interpretation 206-2 which could lead to a finding of noncompliance with proposed Standard(s) 206(a)(2) and/or (3).

   Even a delay in the effective date to give schools time to assess their current situations and makes changes to come into compliance would not likely be enough for this approach to be workable for the Council or schools, particularly schools that have smaller student bodies, faculty, and staffs.

[2] The list of groups that may be underrepresented is set out in Proposed Interpretation 206-1. There are ten groups identified and many would have subgroups that would have to be treated separately.

[3] It is not clear whether this means some members from some of the underrepresented groups or at least a member of each underrepresented group, or something between those two poles.

Any interpretive gloss that the Council might use to put some softer edges on the plain meaning of the proposed standard to make it more workable would likely take the Council right back to matters such as concrete efforts and the level of commitment that the current standard requires. Such allowances likely would require further rulemaking.

Might it be better to replace proposed 206(a)(2) with a revised and strengthened regulation about efforts and commitments, and add an interpretation, or prepare a Guidance Memorandum elaborating those requirements and giving examples? Proposed Interpretation 206-3 is a good step in this direction on the matter of the creation and maintenance of an inclusive and equitable environment at a law school. This approach would allow the Council to, through guidance, make clear how it expects schools to step to be a positive force for improving the diversity of not only law schools, but the legal profession.

4. Collection and publication of data is a good step forward, as required by proposed Standard 206(b). The annual assessment of a school's diversity, equity, and inclusion environment under proposed Standard 206(c) is also a good step forward. While law schools surely have a lot of reporting to do already, with current technology and data analytics, it should not be difficult to maintain this data and produce a report that can be made public. There will be many challenges to figuring out what this report should include and how to present it in a way that is sensitive to the individuals who are incorporated into the data presented. But this is a challenge worth taking on.

Again, thank you for your work and for this opportunity to comment.